



Background Note

The Tensions between Counterterrorism Approaches and International Humanitarian Law/Principled Humanitarian Action

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This discussion note was drafted by Alice Debarre, Policy Analyst on Humanitarian Affairs at the International Peace Institute. It is intended to lay out some of the key issues and to provoke thoughts and discussions in anticipation of and during IPI's thematic workshop, "**The UN Counterterrorism Framework and Its Impact on Impartial Medical Care and Humanitarian Action**," on April 26, 2018. It does not necessarily represent the views of the International Peace Institute. IPI welcomes consideration of a wide range of perspectives in the pursuit of a well-informed debate on critical policies and issues in international affairs.

Introduction

In response to an increase in the scope and scale of acts characterized as terrorism, states and multilateral organizations have tightened existing and developed new counterterrorism measures. These measures are aimed not only at deterring and punishing those who commit such acts but also at suppressing diverse forms of support to groups designated as terrorist. The international counterterrorism regime is built on a framework of specialized anti-terrorism conventions and supplemented by an increasing number of UN Security Council and General Assembly resolutions. The UN counterterrorism entities have also contributed a plethora of counterterrorism-related policies, standards, and programming initiatives.

Relevant UN General Assembly and Security Council resolutions generally refer to the need for counterterrorism measures to be in line with states' international obligations, including, where applicable, international humanitarian law (IHL). While these references usually take the form of general statements in the preamble, they have become more substantial in recent years, with the Security Council recognizing that the failure by states to comply with these and certain other international obligations contributes to increased radicalization and fosters a sense of impunity.¹

Depending on the approach adopted, counterterrorism efforts are not necessarily at odds with the rules of IHL. Certain counterterrorism frameworks, however, have blurred the line between armed conflict and terrorism and, in doing so, come into conflict with some of those rules. As such, counterterrorism frameworks can and have negatively impacted people whom IHL seeks to protect, such as wounded and sick fighters and the civilian population in armed conflicts. This discussion note seeks to highlight some of the tensions between counterterrorism approaches and IHL and the potential impact on principled humanitarian action and impartial medical care.

¹ UN Security Council Resolution 2178 (September 24, 2014), UN Doc. S/RES/2178.

Counterterrorism and International Humanitarian Law

Today, many contexts in which states engage in counterterrorism efforts are recognized as situations of armed conflict, where IHL applies. Questions therefore arise as to how counterterrorism frameworks and IHL interact. The development of the legal regime governing terrorism, particularly post-9/11, has given rise to normative tensions that may dilute protections provided under IHL. This section is intended to provide a brief overview of rules under IHL that relate to the status of terrorists, the nature of a terrorist act, and how to treat those designated as terrorists, as well as how those rules may come into tension with contemporary counterterrorism laws and practices.

Who is a terrorist? Several anti-terrorism conventions on specific issues prohibit certain acts of terrorism, such as aircraft hijacking. Yet to date, consensus on the international legal regime's definitions of "terrorist," of "terrorism"/"act of terrorism," and of prohibited forms of support to terrorism remains elusive. That lack of consensus is reflected, for instance, in ongoing debates on certain definitional aspects of the draft Comprehensive Convention on International Terrorism.

Nonetheless, states and certain UN entities can and have designated individuals and groups as terrorist. These designations trigger the applicability of counterterrorism laws and policies, with a whole host of consequences, such as sanctions, for designated individuals and groups and those who are associated with or act to support them. Under IHL, there is no expressly recognized "terrorist" status in relation to either international or non-international armed conflicts. This does not preclude non-state actors who are party to an armed conflict from being listed as terrorists through a political decision at the international, regional, or domestic level. However, contrary to certain contemporary counterterrorism laws and practices and the way they have been applied, such a listing does not preclude the application of the rules of IHL—including protective norms—in relation to those individuals and groups.

It is important to note that Common Article 3 in the 1949 Geneva Conventions states that the application of IHL "shall not affect the legal status of the Parties to the conflict." This means that applying the rules concerning offers of impartial humanitarian services to all parties to a non-international armed conflict, for example, does not constitute a recognition of the legitimacy of the group to which those services are offered.

What is a terrorist act? IHL regulates both lawful and unlawful acts of violence in armed conflict. Under IHL, attacks directed against legitimate military targets, including by organized armed groups party to the armed conflict, are permitted—or at least are not prohibited—so long as they conform to the rules on the conduct of hostilities (e.g., they distinguish between civilian and military objectives, and the civilian harm caused is proportionate to the military advantage of the attack). Attacks directed against protected persons and objects—such as civilians not directly taking part in hostilities, medical personnel, the wounded and sick, and those (otherwise) recognized as *hors de combat*, as well as civilian objects, medical facilities, and medical transports—are prohibited.

Indeed, IHL proscribes most acts that domestic legislation and international terrorism conventions criminalize as terrorist if committed in peacetime, such as attacks on places of worship,² the taking of hostages,³ or indiscriminate and disproportionate attacks.⁴ In addition, IHL contains specific rules on terrorism, including prohibitions on acts or threats of violence the primary purpose of which is to spread terror among the civilian population.⁵ In international armed conflicts, at least some of those acts constitute grave breaches of the 1949 Geneva Conventions and its Additional Protocol I of 1977.

There is a growing tendency at the UN and in member states' internal legislative or policy frameworks to consider any act of violence threatened or carried out by a designated terrorist group in an armed conflict as being terrorist and therefore necessarily unlawful, even when such acts are not prohibited under IHL.⁶ This has been described as a blurring of the line between armed conflict and terrorism and may give rise to conflicting international obligations for states.⁷ It is important to reiterate that even certain international conventions on terrorism make clear that all attacks committed in an armed conflict continue to be governed by IHL.⁸

In line with that approach, IHL remains the *lex specialis* in armed conflict. As such, states should not, through their counterterrorism laws, criminalize acts that are not unlawful under IHL. Of concern is the fact that criminalizing such acts is contrary to IHL's underlying rationale. Furthermore, it may weaken compliance with IHL by non-state armed groups in conflict, whose incentive to abide by IHL rules will be significantly diminished if their acts will be penalized under counterterrorism laws irrespective of their conformity with IHL.

How do we treat designated terrorists? Under IHL, all who directly participate in hostilities may be subject to direct attack so long as the rules on conduct of hostilities are complied with; they may be lawfully deprived of liberty in conformity with certain conditions and may—indeed must—be prosecuted if they have committed war crimes. In international armed conflicts, combatants may not be prosecuted merely for conducting lawful hostilities. Yet IHL does not prohibit the prosecution of civilians who directly participate in hostilities under domestic law for any act of violence committed during the conflict, including acts that are lawful under IHL. In non-international armed conflicts, although IHL encourages states to grant the widest possible amnesty for acts under domestic law at the end of the conflict,⁹ individuals may be prosecuted under

² Additional Protocol I to the Geneva Conventions (1977) [hereafter AP I], Art. 53.

³ Fourth Geneva Convention (1949) [hereafter GC IV], Art. 34; AP I, Art. 75(2)(c); Additional Protocol II to the Geneva Conventions (1977) [hereafter AP II], Art. 4(2)(c); Geneva Conventions (1949), Common Article 3(1)(b).

⁴ AP I, Art. 51(4) and (5).

⁵ AP I, Art. 51(2); AP II, Art. 13(2); GC IV, Art. 33; AP II, Art. 4(2)(d).

⁶ International Committee of the Red Cross (ICRC), "International Humanitarian Law and the Challenges of Contemporary Armed Conflict," 32nd International Conference of the Red Cross and Red Crescent, October 2015, p. 17, available at <http://rcrcconference.org/wp-content/uploads/2015/10/32IC-Report-on-IHL-and-challenges-of-armed-conflicts.pdf>.

⁷ Jelena Pejic, "Armed Conflict and Terrorism: There Is a (Big) Difference," in *Counter-terrorism: International Law and Practice*, Ana Maria Salinas De Frias, Katja L.H. Samuel, and Nigel D. White, eds. (Oxford: Oxford University Press, 2012), p. 171.

⁸ See, for example, International Convention for the Suppression of Terrorist Bombings (1997), Art. 19; International Convention for the Suppression of Acts of Nuclear Terrorism (2005), Art. 4; International Convention for the Suppression of the Financing of Terrorism (1999), Art. 21.

⁹ AP II, Art. 6(5). Amnesties cannot relate to war crimes or other crimes under international law, which states are required to investigate and prosecute.

domestic law for their participation in hostilities. IHL therefore provides a strong legal framework to deal with non-state actors who may also be designated as terrorists. In these ways, when interpreted and applied in light of its object and purpose, IHL provides a powerful framework for suppressing terrorism.¹⁰

IHL also provides protections (inter alia) to all those in an armed conflict who are wounded or sick.¹¹ Designating enemies as terrorist does not weaken the protections they are entitled to under IHL. Indeed, IHL provides for protection of medical care, which apply regardless of the person's involvement in terrorist acts or designation as a terrorist. However, under some counterterrorism laws, medically treating a designated terrorist may be criminally prohibited.¹² Such approaches go against the principle of impartiality and the protection of medical care for all wounded and sick fighters, which are among the foundational safeguards laid down in IHL. Indeed, the growing trend of treating all individuals and groups designated as terrorist as criminals, and therefore as undeserving of applicable IHL protections, threatens to erode fundamental normative commitments in IHL.¹³

Counterterrorism and Impartial Medical Care/Humanitarian Action

The blurring of the line between armed conflict and terrorism impacts medical actors and humanitarian organizations carrying out assistance and protection activities in war zones. IHL provides that impartial humanitarian organizations may offer their services to all parties to an armed conflict.¹⁴ Furthermore, the civilian population and aid societies shall be permitted, even on their own initiative, to collect and care for the wounded, sick, and shipwrecked, even in invaded or occupied areas.¹⁵ IHL also establishes obligations on the parties to an armed conflict to collect and care for all wounded and sick persons, irrespective of whether those persons previously engaged in hostilities. It further requires that such medical care be provided to all such persons on an impartial basis—that is, with no distinction on any grounds other than medical ones.

In spite of these extensive IHL obligations, tensions with counterterrorism efforts may arise in contexts where designated terrorist groups operate, including in and around civilians in need. These tensions may adversely affect the ability and willingness of medical actors—including medical personnel, impartial humanitarian organizations, and individual caregivers—to provide due assistance and protection.

¹⁰ Stéphane Ojeda, “Out of Balance: Global Counter-terrorism & the Laws of War,” ICRC Humanitarian Law and Policy Blog, September 15, 2017, available at <http://blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/>.

¹¹ Under AP I, Art 8(a), “‘wounded’ and ‘sick’ mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.”

¹² Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, “Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism,” Harvard Law School Program on International Law and Armed Conflict, September 2015, available at <https://ssrn.com/abstract=2657036>.

¹³ See Ojeda, “Out of Balance”; Lewis, Modirzadeh, and Blum, “Medical Care in Armed Conflict,” p. 144.

¹⁴ GCs I–IV, Common Article 3; ICRC Customary IHL Database, “Rule 55: Access for Humanitarian Relief to Civilians in Need.”

¹⁵ AP I, Art. 17(1); AP II, Art. 18(1).

Counterterrorism laws and measures may come into conflict with principled humanitarian action (i.e. neutral, impartial, and independent) and medical ethics. For example, some laws penalizing support to designated terrorist groups may criminalize various forms of humanitarian engagement with those groups, including the provision of medical care to their wounded or sick members. In such circumstances, principled humanitarian actors are faced with a dilemma: forego medical activities protected under IHL (and mandated by medical ethics) or conduct such activities but risk criminal prosecution or other forms of sanction. Aligning with in-state or donor counterterrorism frameworks may require organizations to operate in ways that are at variance with the humanitarian principles of impartiality and neutrality and may also have an impact on the perception of a humanitarian organization's neutrality. This can give rise to serious security concerns for humanitarian actors and might risk their long-term access to civilian populations in need.

In addition to what some have described as this “structural” impact,¹⁶ **counterterrorism laws and regulations have an impact within and among humanitarian organizations.** Such laws and regulations often place increased administrative burdens on organizations to meet legal and contractual requirements, which can result in slower operations and increased costs. Indeed, donors have regularly attached more stringent conditions to funding, such as the screening or vetting of staff, of partner organizations, and, more rarely, of beneficiaries.¹⁷ This may also increase tensions between local and international organizations, with international organizations including counterterrorism agreements in agreements with sub-grantees that may not have the capacity or resources to put in place the measures necessary to ensure compliance. Counterterrorism laws and regulations can also impede transparency and coordination among humanitarian organizations. Uncertainty and concerns over legal liability may lead to reluctance to share information with other organizations.¹⁸

Counterterrorism laws and policies can also have an impact on humanitarian operations and the provision of medical care. First, regulatory frameworks and donor contracts may impose counterterrorism measures. This can cause adverse changes or restrictions to funding and other forms of support for humanitarian operations, given the above-mentioned burdens that counterterrorism clauses place on humanitarian organizations.

Second, humanitarian actors and other medical staff may face civil or criminal liability or other forms of sanctions. As outlined above, international and domestic legal regimes governing

¹⁶ Kate Mackintosh and Patrick Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action,” July 2013, p. 71, available at www.humansecuritynetwork.net/docview/-/asset_publisher/faM5/content/study-of-the-impact-of-donor-counter-terrorism-measures-on-principled-humanitarian-action/.

¹⁷ See Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Counterterrorism-Related Clauses in Humanitarian Grant and Partnership Agreement Contracts,” Harvard Law School and Brookings Institution, May 2014, available at http://blogs.harvard.edu/cheproject/files/2013/10/CHE_Project_-_Counterterrorism-related_Humanitarian_Grant_Clauses_May_2014.pdf.

¹⁸ See Jessica S. Burniske and Naz K. Modirzadeh, “Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action,” Harvard Law School Program on International Law and Armed Conflict, March 2017, available at <http://blogs.harvard.edu/pilac/files/2017/03/Pilot-Empirical-Survey-Study-2017.pdf>.

counterterrorism may prohibit and criminalize the provision of impartial medical care and other core forms of humanitarian action. Such activities may include engaging with designated terrorist groups to negotiate humanitarian access, engaging in transactions and logistical arrangements with designated terrorist groups that are necessary for the provision of humanitarian assistance and protection to civilian populations, or providing other forms of humanitarian assistance or protection that are protected under IHL to a member of a designated terrorist group or an individual considered to be associated with that group. Individuals engaged in such forms of humanitarian action—as well as their affiliated organizations—may face liability under the laws of a number of states, including those party to an armed conflict, the state of registration, donor states, or states whose laws apply extraterritorially. Humanitarian actors and other medical staff may fall under counterterrorism sanctions regimes, which often do not require any intent to benefit or knowledge of any benefit to designated terrorist groups.

Third, the perceived and actual reputational and legal risks related to the concerns raised above may cause individuals and organizations to self-regulate and self-censor, sometimes beyond what is legally or contractually required. This has been described as the “chilling effect” of counterterrorism measures. It has arisen, in part, due to confusion as to the types of action that may constitute prohibited forms of support to terrorism under counterterrorism legislation and as to whether individual aid or other medical staff are at risk of prosecution or other forms of sanction.¹⁹

These factors, in turn, can lead to changes to or restrictions on the provision of medical care or humanitarian programming more broadly. For example, organizations have modified and even terminated humanitarian operations to avoid violating agreements or reduced needs-based assistance to avoid responding to certain beneficiaries who may be linked with or residing in areas controlled by designated terrorist groups.

Conclusion

Given the increasing scale and scope of counterterrorism laws and regulations, there is a need to better understand and prevent their potential and actual adverse effects on the legal framework governing armed conflict. This includes IHL’s elaborate system of protections for the provision of impartial medical care and humanitarian action in situations of armed conflict.

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¹⁹ See Mackintosh and Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action,” pp. 68, 84; Burniske and Modirzadeh, “Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action,” pp. 6–7.

