

Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework

ALICE DEBARRE



Cover Photo: A Syrian child fleeing clashes is wounded on the Turkish-Syrian border, September 24, 2014. Orhan Cicek/Anadolu Agency/Getty Images.

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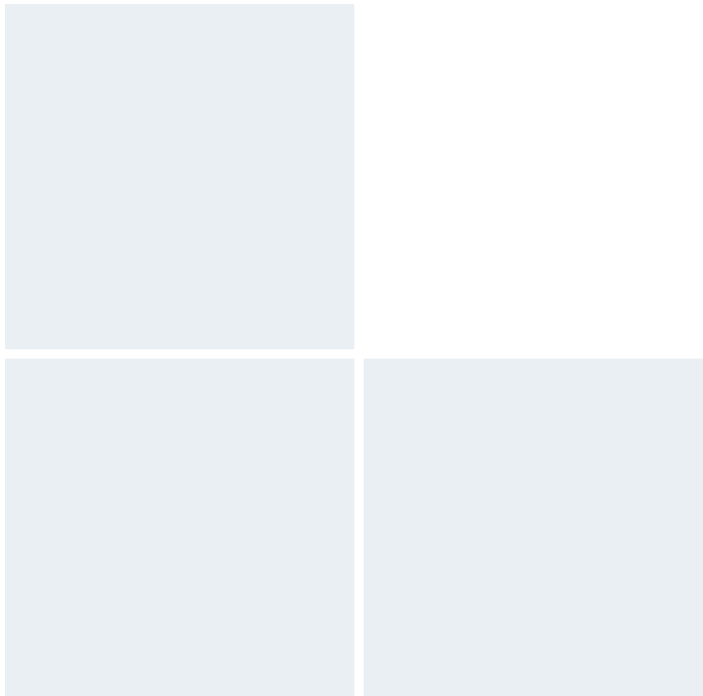
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CONTENTS

Abbreviations	iii
Executive Summary	1
Tensions between Counterterrorism and International Humanitarian Law	4
WHAT IS “TERRORISM”?	
WHAT IS A “TERRORIST ACT”?	
HOW DO WE TREAT DESIGNATED TERRORISTS?	
WHAT CONSTITUTES SUPPORT TO TERRORISM?	
HOW DOES COUNTERTERRORISM IMPACT MEDICAL CARE AND PRINCIPLED HUMANITARIAN ACTION?	
International Humanitarian Law in the UN Counterterrorism Framework	10
SECURITY COUNCIL SANCTIONS REGIMES	
UN COUNTER-TERRORISM COMMITTEE AND ITS EXECUTIVE DIRECTORATE	
UN GLOBAL COUNTER-TERRORISM STRATEGY AND OTHER GENERAL ASSEMBLY RESOLUTIONS	
UN OFFICE OF COUNTER-TERRORISM	
OTHER UN GENERAL ASSEMBLY-MANDATED ENTITIES	
Conclusion and Recommendations	26
Annex: Case Studies on National-Level Implementation and Impact on Principled Humanitarian Action	30
AFGHANISTAN	
IRAQ	
MALI	
NIGERIA	
SYRIA	

Abbreviations

1267 Monitoring Team	Analytical Support and Sanctions Monitoring Team
CCT	UN Counter-Terrorism Centre
CTC	Counter-Terrorism Committee
CTED	Counter-Terrorism Executive Directorate
CTITF	Counter-Terrorism Implementation Task Force
FATF	Financial Action Task Force
GCTS	UN Global Counter-Terrorism Strategy
I-ACT	Integrated Assistance on Countering Terrorism Initiative
ICRC	International Community of the Red Cross
IHL	International humanitarian law
IS	Islamic State
NPO	Nonprofit organization
OCHA	UN Office for the Coordination of Humanitarian Affairs
OCT	UN Office of Counter-Terrorism
OHCHR	Office of the UN High Commission for Human Rights
UNICRI	UN Interregional Crime and Justice Research Institute
UNODC	UN Office on Drugs and Crime

Executive Summary

In the past decade, counterterrorism measures have had an increasingly adverse impact on the provision of medical care and the conduct of principled humanitarian action in armed conflict settings. Whether inadvertently or not, they have impeded, and at times prevented, the provision of essential and lifesaving aid, often in violation of international humanitarian law (IHL).

Counterterrorism efforts are not necessarily at odds with the rules of IHL, which apply only in situations of armed conflict. However, existing counterterrorism frameworks, including those developed at the UN, have arguably blurred the line between armed conflict and terrorism, thereby challenging the application of IHL. Moreover, counterterrorism policy often defines terrorism, terrorist acts, support to terrorism, and financing of terrorism too broadly. This can restrict humanitarian access to areas controlled by non-state armed groups, criminalize medical and humanitarian support to groups and individuals designated as “terrorist,” and lead to the harassment, arrest, and prosecution of medical and humanitarian workers.

To prevent the adverse impact of counterterrorism measures on humanitarian assistance in situations of armed conflict, the UN and its member states need to incorporate IHL into the complex counterterrorism architecture they have created. The Security Council’s cornerstone Resolution 1373 (2001) does not even mention IHL. While IHL has made it into subsequent counterterrorism resolutions, they remain vague on when it is applicable, they lack specific action points, and only one Security Council Resolution includes an exemption for humanitarian activities. Some UN counterterrorism entities have taken steps in the right direction, but there is still a lack of a systemic understanding of the issues and of concrete policies and guidance protecting medical care and principled humanitarian action.

A number of concrete measures could help reduce the impact tensions between counter-

terrorism efforts and obligations under IHL have had on medical care and impartial humanitarian action:

- All UN resolutions and other UN policies that pertain to counterterrorism should contain an exemption for humanitarian activities, including the provision of medical care, and states should adopt such exemptions domestically.
- Every relevant UN counterterrorism measure should continue to reiterate that counterterrorism efforts need to comply with international law, including international human rights law and IHL, and acknowledge and reaffirm obligations under IHL related to relief operations and medical care.
- Humanitarian actors should engage with UN counterterrorism structures more actively, strategically, and systematically.
- UN bodies that engage in counterterrorism should systematically include humanitarian actors in relevant conversations.
- The UN Counter-Terrorism Committee’s Executive Directorate (CTED) and Office of Counter-Terrorism (OCT) should better integrate IHL considerations into their work.
- Member states, UN entities, humanitarian actors, counterterrorism and sanctions experts, and other stakeholders should step up efforts to start a wider political discussion, particularly in New York, on the tensions between counterterrorism and humanitarian action, including medical activities.

Introduction

“There can be no excuse and no exceptions to the applicability of [international humanitarian] law. No matter how complex, protracted or fragmented an armed conflict may be. No matter what labels or designations are given to the parties.”¹

On May 3, 2016, the UN Security Council adopted a landmark resolution on the protection of medical care in situations of armed conflict. Security Council Resolution 2286 “strongly condemns acts

1 Yves Daccord, Director-General of the International Committee of the Red Cross (ICRC), “ICRC Statement to UN Security Council Open Debate on Protection of Civilians in Armed Conflict,” May 22, 2018, available at www.icrc.org/en/document/icrc-statement-un-security-council-open-debate-protection-civilians-armed-conflict.

of violence, attacks and threats against the wounded and sick, medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities.”²

While such attacks on healthcare providers and facilities continue unabated in many countries around the world,³ a more insidious threat to healthcare and humanitarian assistance, and to protection more broadly, is on the rise.⁴ In the past decade, there has been a noticeable increase in counterterrorism measures whose design and implementation can adversely impact the provision of medical care and the conduct of principled humanitarian action in armed conflict settings.⁵ Whether inadvertently or not, these measures have impeded, and at times prevented, the provision of essential and lifesaving aid, including by restricting humanitarian access to populations in areas controlled by non-state armed groups, criminalizing any kind of support (including medical and humanitarian) to groups and individuals designated as “terrorist,” and resulting in the harassment, arrest, and prosecution of medical and humanitarian workers.

As a result, counterterrorism measures can violate the rules of international humanitarian law (IHL), which apply in the armed conflict settings where such measures are increasingly implemented due to the presence of groups designated as “terrorist”—a problem the UN secretary-general

has recently recognized.⁶ The rules of IHL require providing and granting access to medical assistance, and impartial humanitarian aid more broadly, in both international and non-international armed conflicts; entitle all wounded and sick to medical care; and protect all humanitarian and medical personnel. They apply to state and non-state armed groups alike, regardless of whether they are labeled “terrorist” by states or the UN Security Council.⁷

Security Council Resolution 2286 reaffirmed these obligations, demanding “that all parties to armed conflicts comply fully with their obligations under international law...to ensure the respect and protection of all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities.”⁸ The Security Council noted “the applicable rules of international humanitarian law relating to the non-punishment of any person for carrying out medical activities compatible with medical ethics” and strongly urged “states and all parties to armed conflict...[to develop] domestic legal frameworks to ensure respect for their relevant international legal obligations.”⁹ To help implement Resolution 2286, the secretary-general recommended that:

Member States should adopt specific legal and practical measures to guarantee the ability of personnel exclusively engaged in medical duties to treat patients without any distinction other than on

2 UN Security Council Resolution 2286 (May 3, 2016), UN Doc. S/RES/2286, paras. 1–2.

3 See, for example, Safeguarding Health in Conflict, “Violence on the Front Line: Attacks on Healthcare in 2017,” May 2018, available at www.safeguardinghealth.org/sites/shcc/files/SHCC2018final.pdf; “Syria War: Air Strike on Deraa Shelter Kills 17 Civilians,” BBC, June 28, 2018, available at www.bbc.com/news/world-middle-east-44641431.

4 Kate Mackintosh and Patrick Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action,” July 2013, available at www.unocha.org/sites/unocha/files/CounterTerrorism_Study_Full_Report.pdf; 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-and-Comment-2017.pdf>; Norwegian Refugee Council, “Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violence Extremism on Principled Humanitarian Action,” 2018, available at www.nrc.no/globalassets/pdf/reports/a-guide-to-protection-and-promotion-of-womens-hlp-rights-in-the-gaza-strip/nrc-principles_under_pressure-report-screen.pdf; Marine Buissonnière, Sarah Woznick, and Leonard Rubenstein, “The Criminalization of Healthcare,” Safeguarding Health in Conflict, Center for Public Health and Human Rights, and University of Essex, June 2018, available at www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf.

5 Prior to 9/11, the international legal framework governing acts of terrorism consisted primarily of a series of international treaties developed over several decades, a number of which excluded from their scope of application acts committed in the course of armed conflicts or military aircraft, airports, and ships. Since 9/11 and the adoption of UN Security Council Resolution 1373 (2001)—which did not mention international humanitarian law (IHL)—the UN Security Council has actively and rapidly created norms requiring states to design and implement counterterrorism measures, including to criminalize support for terrorism. See Jelena Pejic, “Armed Conflict and Terrorism: There Is a (Big) Difference,” in *Counter-terrorism: International Law and Practice*, Ana María Salinas De Frías, Katja Samuel, and Nigel White, eds. (Oxford: Oxford University Press, 2012), pp. 186–190; and International Peace Institute, “Safeguarding the Space for Principled Humanitarian Action in Counterterrorism Contexts,” policy forum, May 23, 2018, available at www.ipinst.org/2018/05/poc-counterterrorism-contexts#6.

6 See UN Security Council, *Protection of Civilians in Armed Conflict—Report of the Secretary-General*, UN Doc. S/2018/462, May 14, 2018, para. 22; UN Security Council, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2017/414, May 10, 2017, para. 43; and UN General Assembly and Economic and Social Council, *Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations—Report of the Secretary-General*, UN Doc. A/72/76–E/2017/58, April 13, 2017, para. 57.

7 See below for definitions of these designations.

8 UN Security Council Resolution 2286 (May 3, 2016), UN Doc. S/RES/2286, para. 2.

9 Ibid., para. 4.

medical grounds, in line with their ethical obligations, in all circumstances, without incurring any form of harassment, sanctions or punishment.¹⁰

This policy paper focuses on the mandate and actions of UN counterterrorism entities and how they take into account and translate obligations under IHL. This focus stems from the lack of clarity as to whether and to what extent UN entities engaged in counterterrorism initiatives encourage states to take into account and ensure respect for IHL—in particular those obligations outlined in Security Council Resolution 2286—while countering terrorism. In this paper's Annex, five case studies look at how Afghanistan, Iraq, Mali, Nigeria, and Syria—all countries that face armed conflict and in which groups designated as “terrorist” operate—are developing and implementing counterterrorism frameworks at the national level.

This paper aims to assist the Security Council, relevant UN organs, UN member states, and other stakeholders in upholding their obligations under IHL and in operationalizing Resolution 2286 and the secretary-general's Recommendation 3.1, quoted above. It maps the UN counterterrorism framework and looks into the extent to which it guides states in complying with their obligations under IHL, including those reaffirmed in Resolution 2286. By doing so, it seeks to identify potential ways forward to ensure that counterterrorism measures do not negatively impact those whom IHL seeks to protect, such as civilian popula-

tions in armed conflict settings. This policy report is based on a combination of desk research, key informant interviews, and an expert meeting bringing together key stakeholders and experts on counterterrorism and humanitarian affairs.¹¹ Field research was conducted in Mali in May 2018.

It is important to note that the UN counterterrorism framework is just one component of a larger problem that the overbroad application of counterterrorism measures poses for humanitarian action. Issues related to national counterterrorism laws, counterterrorism clauses in donor contracts and funding agreements, and bank de-risking procedures are not covered in this report.¹² Furthermore, this report focuses on the relationship between counterterrorism and IHL, and specifically on its provisions on the protection of medical activities and principled humanitarian assistance. Tensions between counterterrorism and IHL extend far beyond these provisions; they are also playing out around issues such as the detention of suspected terrorists and how best to deal with the return of individuals designated as “foreign fighters.”¹³ The expansive counterterrorism agenda also causes grave concerns in terms of the respect for and application of international human rights law.¹⁴ Finally, this report does not address the countering violent extremism and preventing violent extremism agendas, which form part of the UN counterterrorism strategy and also present challenges for principled humanitarian action.¹⁵

10 Recommendation 3.1 in UN Security Council, *Letter Dated 18 August 2016 from the Secretary-General Addressed to the President of the Security Council*, UN Doc. S/2016/722, August 18, 2016, Annex, para. 10.

11 IPI convened an expert workshop on the UN counterterrorism framework and its impact on medical care and humanitarian action in New York City on April 26, 2018.

12 For a discussion of these issues, see, for example, Mackintosh and Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action”; Jessica Burniske, Naz Modirzadeh, and Dustin Lewis, “Counter-terrorism Laws and Regulations: What Aid Agencies Need to Know,” Humanitarian Practice Network, November 2014, available at https://odihpn.org/wp-content/uploads/2014/11/NP_79_crc_string_FINAL.pdf; Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Counterterrorism-Related Clauses in Humanitarian Grant and Partnership Agreement Contracts,” May 2014, available at <http://blogs.law.harvard.edu/cheproject/>; Andrea Hall, “Do Counterterrorism Grant Clauses Contradict Humanitarian Principles?,” Aid Watch Palestine, available at www.aidwatch.ps/blog/do-counterterrorism-grant-clauses-contradict-humanitarian-principles; Sherine El Taraboulsi-McCarthy and Camilla Cimatti, “Counter-terrorism, De-risking and the Humanitarian Response in Yemen: A Call for Action,” Humanitarian Policy Group, February 2018, available at www.odi.org/sites/odi.org.uk/files/resource-documents/12047.pdf; and Tracey Durner and Liat Shetret, “Understanding Bank De-risking and Its Effects on Financial Inclusion: An Exploratory Study,” Global Center on Cooperative Security, November 2015, available at www.oxfam.org/sites/www.oxfam.org/files/file_attachments/rr-bank-de-risking-181115-en_0.pdf.

13 Daccord, “ICRC Statement to UN Security Council Open Debate on Protection of Civilians in Armed Conflict.”

14 See for example, UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/72/43280, September 27, 2017; UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-state Actors: The Protection of the Right to Life*, UN Doc. A/HRC/38/44, June 5, 2018; International Federation for Human Rights (FIDH), “The United Nations Counter-terrorism Complex: Bureaucracy, Political Influence, Civil Liberties,” September 2017, available at www.fidh.org/en/international-advocacy/united-nations/united-nations-the-global-fight-against-terrorism-hampered-by.

15 See for example, Norwegian Refugee Council, “Principles under Pressure”; ICRC, “Background Note and Guidance for National Red Cross and Red Crescent Societies on ‘Preventing and Countering Violent Extremism,’” June 2017, available at www.icrc.org/en/document/guidance-note-national-societies-preventing-and-countering-violent-extremism-approach.

Tensions between Counterterrorism Efforts and International Humanitarian Law

International humanitarian law (IHL) applies only in times of armed conflict. It is treaty-based and customary and has been developing for over a century. All parties to an armed conflict—both state and non-state actors—have a legal obligation to respect IHL. It regulates the means and methods of warfare and provides for the protection of persons who are not or are no longer participating in the conduct of hostilities. It thereby seeks to limit the effects of armed conflict and to preserve a space for humanity even in the most challenging and violent times. It strikes a balance between the principle of humanity and that of military necessity. IHL distinguishes international armed conflicts, between states, from non-international armed conflicts, where at least one party to the conflict is an organized armed group. Today, organized armed groups party to a non-international armed conflict are often also designated as “terrorist.”

IHL outlines rules for and limits on the engagement of parties in armed conflict. 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 (i.e., they distinguish between civilian and military objectives, and the expected civilian harm caused is not excessive compared with the anticipated military advantage).¹⁶ For both

international and non-international armed conflicts, IHL also provides rules to protect medical activities and respect the principles of medical ethics and to protect and allow for humanitarian action in accordance with the humanitarian principles of neutrality, independence, humanity, and impartiality.

Particularly relevant for this report is the principle of impartiality, according to which aid must be provided based on needs alone. IHL requires that the wounded and sick be respected and protected by state and non-state actors and be provided the medical assistance they require without distinction on the basis of any non-medical grounds.¹⁷ Indeed, the entitlement of all wounded and sick, including combatants, to medical care is one of the foundational principles of IHL. It is clearly embedded in the first Geneva Convention of 1864, which specifically dealt with wounded and sick combatants. IHL also requires parties to a conflict, both state and non-state, to take all possible measures to search for, collect, and ensure adequate care for the wounded and sick.¹⁸ IHL further provides for the protection of medical workers and personnel, as reiterated in UN Security Council Resolution 2286.¹⁹ In particular, it protects those who provide medical care that is “compatible with medical ethics” from harassment or punishment for their actions, “regardless of the person benefiting therefrom.”²⁰

Under IHL, parties to the armed conflict bear the primary obligation to provide for the basic needs of the population under their control. However, humanitarian organizations may offer to carry out impartial humanitarian activities.²¹ Importantly, offers of impartial humanitarian relief are not to be

16 ICRC, “Conduct of Hostilities: How Does Law Protect in War?,” available at <https://casebook.icrc.org/law/conduct-hostilities>.

17 First Geneva Convention, 1949 (hereafter GC I), Art. 12; Second Geneva Convention, 1949 (hereafter GC II), Art. 12; Fourth Geneva Convention, 1949 (hereafter GC IV), Art. 16(1); Additional Protocol I to the Geneva Conventions, 1977 (hereafter AP I), Art. 10; Additional Protocol II to the Geneva Conventions, 1977 (hereafter AP II), Art. 7. For a more extension description of IHL rules on the protection of the wounded and sick and of access to healthcare, see Annysa Bellal and Geneva Call, “Health and International Humanitarian Law,” in *Research Handbook on Global Health Law*, Gian Luca Burci and Brigit Toebe, eds. (Cheltenham, UK: Edward Elgar Publishing, 2018); ICRC, “The Implementation of Rules Protecting the Provision of Health Care in Armed Conflicts and Other Emergencies: A Guidance Tool,” February 2015, available at www.icrc.org/en/document/implementation-rules-protecting-provision-health-care-armed-conflicts-and-other-emergencies; and FIDH, “The United Nations Counter-terrorism Complex.”

18 GC I, Art. 15; GC IV, Art. 16(2); AP II, Art. 8; ICRC, Customary International Humanitarian Law Database, Rule 109, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

19 GC I, Arts. 19, 21, 24; GC IV, Art. 18; GC I.

20 GC I, Art. 18: “No one may ever be molested or convicted for having nursed the wounded or sick”; AP I, Art. 16(1): “Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom”; AP II, Art. 10: “Under no circumstance shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom”; ICRC, Customary International Humanitarian Law Database, Rule 26: “Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited.” For more detail, see Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare,” pp. 9–13.

21 Geneva Conventions, 1949, Common Article 3(2). For more detail on humanitarian access, see ICRC, “Q&A and Lexicon on Humanitarian Access,” *International Review of the Red Cross* 96, no. 893 (2015).

regarded as “interference in the armed conflict or as unfriendly acts.”²² While the consent of affected states is generally required, they cannot unlawfully withhold it. Once consent is obtained, parties to the conflict and other states concerned must allow and facilitate the rapid and unimpeded passage of this assistance, subject to their right of control,²³ as well as that of medical relief supplies, equipment, and personnel.²⁴

Over the past three decades, counterterrorism laws have dramatically evolved, with states adopting a series of international treaties.²⁵ Following the terrorist attacks of 9/11 in particular, and in response to UN Security Council resolutions,²⁶ a flurry of laws were passed and policies developed to prevent and prohibit terrorist acts, prohibit associating with terrorist organizations, prohibit providing financial and other forms of support to such organizations, and prosecute and punish those who commit terrorist acts.²⁷ For example, the public listing of individuals and entities alleged to be involved in terrorist activity, who then become subject to sanctions, is a key component of counterterrorism laws at both the international and national level. The response to terrorism in the twenty-first century has generally been robust, with some powerful governments pushing the need to be “tough on terrorism.”²⁸ In the absence of agreed-on global definitions of terrorism or support for terrorism, some states have adopted broad definitions (see Annex).²⁹

Furthermore, states have increasingly applied the

counterterrorism framework to acts of violence committed during situations of armed conflict, where IHL applies. Counterterrorism efforts are not necessarily at odds with the rules of IHL. However, existing counterterrorism frameworks, including those developed at the UN, have arguably blurred the line between armed conflict and terrorism and, in doing so, challenged the application of IHL.³⁰ Beyond this, in many cases states have sidestepped the issues and challenges of conducting counterterrorism efforts in situations of armed conflict by failing to acknowledge the applicability of IHL and working solely within a counterterrorism framework.

There are several key areas in which contemporary counterterrorism laws and practices may come into tension with the rules of IHL.³¹ To the questions of what is “terrorism,” what is a “terrorist act,” how do we treat a designated terrorist, and what constitutes support to terrorism, IHL and contemporary counterterrorism laws and practices often have very different answers.

WHAT IS “TERRORISM”?

What constitutes “terrorism” is a heavily contested and highly controversial question, the answer to which is rarely articulated solely in legal terms. Several antiterrorism conventions prohibit specific acts of terrorism, such as hijacking aircraft.³² Yet to date, there is no consensus on the international legal definitions of “terrorist” and “terrorism” or on what constitute prohibited forms of support to terrorism. This lack of consensus is reflected, for

22 AP I, Art. 70.

23 GC IV, Arts. 23, 59; AP I, Art. 70; AP II, Art. 18; ICRC, Customary International Humanitarian Law Database, Rule 55.

24 GC IV, Art. 23; AP I, Art. 70; AP II, Art. 18(2).

25 States have adopted nineteen specialized international conventions related to terrorism, including the International Convention for the Suppression of Terrorist Bombings (1997), International Convention for the Suppression of the Financing of Terrorism (1999), and International Convention for the Suppression of Acts of Nuclear Terrorism (2005). A Comprehensive Convention on International Terrorism has been in negotiation for over fifteen years.

26 In particular, UN Security Council Resolution 1373 (September 28, 2001), UN Doc. S/RES/1373.

27 Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare,” p. 17; Burniske, Modirzadeh, and Lewis, “Counter-terrorism Laws and Regulations,” p. 3.

28 See, for example, Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare”; “Trump Defends CIA Nominee, Says She Is ‘Tough on Terror,’” AP, May 7, 2018, available at www.cnbc.com/2018/05/07/trump-defends-cia-pick-gina-haspel-as-tough-on-terror.html.

29 See, for example, Australia, Criminal Code, Division 102.6 and 102.7; and Denmark, Criminal Code, Section 114, discussed in Mackintosh and Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action,” pp. 23–25, 28. See also United States, US Code Title 18, paras. 2339A–2339B (subsequent legislative amendments developed the list of prohibited forms of support), discussed in Charles Doyle, “Terrorist Material Support: An Overview of 18 U.S.C. §2339A and §2339B,” Congressional Research Service, December 2016, available at www.fas.org/sgp/crs/natsec/R41333.pdf; and Burniske, Modirzadeh, and Lewis, “Counter-terrorism Laws and Regulations,” p. 4.

30 Stéphane Ojeda, “Out of Balance: Global Counter-terrorism & the Laws of War,” ICRC Humanitarian Law & Policy blog, September 15, 2017; Pejic, “Armed Conflict and Terrorism,” p. 203; ICRC, “The Applicability of IHL to Terrorism and Counterterrorism,” October 1, 2015; Bellal, “Health and International Humanitarian Law.”

31 Pejic, “Armed Conflict and Terrorism”; Emanuela-Chiara Gillard, “Humanitarian Action and Non-state Armed Groups: The International Legal Framework,” Chatham House, February 2017, available at www.chathamhouse.org/sites/default/files/publications/research/2017-02-02-humanitarian-action-non-state-armed-groups-gillard.pdf.

32 Convention for the Suppression of Unlawful Seizure of Aircraft, 1970.

instance, in ongoing debates at the General Assembly on certain definitional aspects of the draft Comprehensive Convention on International Terrorism, first proposed in 1996.³³

Nonetheless, states and the UN Security Council can and have designated individuals and groups as “terrorist.” These individuals and groups, as well as those who are associated with or support them, fall under counterterrorism laws and policies, including sanctions. This designation, however, is made through political decisions at the international, regional, or national level; there is no legal definition of terrorist status in relation to either international or non-international armed conflicts.³⁴

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—to those individuals and groups. Indeed, IHL serves to protect those who do not or no longer directly participate in hostilities, and to restrict the use of violence to the amount necessary to achieve the aim of the conflict. IHL thereby provides a space for humanity even in the most extreme contexts.

Common Article 3 of 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 protective IHL rules to all parties does not constitute a recognition of the legitimacy of any party or give it any kind of status or authority. It also does not affect a state’s

right to prosecute, try, and sentence its adversaries for crimes committed, in accordance with its own laws, though subject to any international legal obligations that may apply.³⁵

Nonetheless, states tend to consider that designated terrorist groups cannot be parties to an armed conflict.³⁶ As a result, they do not recognize the rules allowing lawful military operations against an enemy party to an armed conflict or the associated IHL safeguards. This may also disincentivize such a group from complying with its obligations under IHL. Even when states accept that IHL applies in their fight against terrorism, some have recently argued for a different and more relaxed application of IHL given the nature of the groups they are fighting.³⁷

WHAT IS A “TERRORIST ACT”?

In situations of armed conflict, 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,³⁸ the taking of hostages,³⁹ direct attacks on civilians,⁴⁰ or indiscriminate attacks.⁴¹ In international armed conflicts, some of those acts constitute grave breaches of the 1949 Geneva Conventions and its Additional Protocol I of 1977. In non-international armed conflicts, such acts can also constitute war crimes.⁴² This means they can be prosecuted as international or domestic crimes in national courts. In addition, IHL contains specific rules on terrorism, including prohibitions against acts or threats of violence whose primary purpose is to spread terror among the civilian

33 Notably, there is a lack of consensus on what constitutes a “terrorist organization” versus a “liberation movement.” See, for example, Thalif Deen, “Politics: U.N. Member States Struggle to Define Terrorism,” IPS, July 25, 2005, available at www.ipsnews.net/2005/07/politics-un-member-states-struggle-to-define-terrorism/.

34 Ojeda, “Out of Balance.”

35 ICRC, “Commentary of 2016, Article 3: Conflicts Not of An International Character,” para. 864, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>.

36 See, for example, Russia’s intervention during the 102nd Plenary Meeting of the UN General Assembly 72nd Session, June 26, 2018 (1:57:15–2:01:42), available at www.unmultimedia.org/avlibrary/asset/2187/2187000/. The Russian representative mentions the risk that criminals (i.e., terrorists) may be unfairly re-categorized as insurgents or as those fighting tyranny.

37 For example, the UK defense secretary called for British citizens and others who have fought with the Islamic State to be directly targeted, and the French minister of the armies called for the direct targeting of “jihadists” in Raqqa, Syria. Jessica Elgot, “British Isis Fighters Should Be Hunted Down and Killed, Says Defence Secretary,” *The Guardian*, December 7, 2017, available at www.theguardian.com/politics/2017/dec/07/british-isis-fighters-should-be-hunted-down-and-killed-says-defence-secretary-gavin-williamson; “Si des djihadistes sont tués à Raqqa, ‘c’est tant mieux,’ estime la ministre Florence Parly,” AFP, December 15, 2017, available at www.20minutes.fr/politique/2151363-20171015-video-si-djihadistes-tues-raqqa-tant-mieux-estime-ministre-florence-parly.

38 AP I, Art. 53.

39 GC IV, Art. 34; AP I, Art. 75(2)(c); AP II, Art. 4(2)(c); Geneva Conventions, 1949, Common Article 3(1)(b).

40 AP I, Arts. 48, 51(2), 52(2); AP II, Art. 13(2).

41 AP I, Arts. 51(4), (5).

42 E.g., Rome Statute of the International Criminal Court (ICC), 1998, Art. 8; Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), 1993, Art. 3; ICTY, *Prosecutor v. Stanislav Galic* (Appeals Chamber), Case No. IT-98-29-A, November 30, 2006; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (Trial Chamber III), Case No. ICC-01/05-01/08, March 21, 2016; ICC, *Prosecutor v. Ongwen* (Pretrial Chamber II), Case No. ICC-02/04-01/15, March 23, 2016.

population.⁴³ IHL therefore provides a strong legal framework for dealing with non-state actors that may also be designated as terrorists.⁴⁴

In line with the interests of certain member states for whom it may be more expedient, UN counter-terrorism measures and policies increasingly consider any act of violence threatened or carried out by a designated terrorist group in an armed conflict as a terrorist act and therefore necessarily unlawful, even when such acts are not prohibited under IHL.⁴⁵ This may give rise to conflicting international obligations for states.⁴⁶ Indeed, proportionate attacks on lawful targets are the essence of armed conflict and, as such, are allowed under IHL. Counterterrorism measures, however, may require states to criminalize an attack by a designated terrorist group. It is therefore important to reiterate that even certain international conventions on terrorism make clear that IHL continues to govern all attacks committed in an armed conflict.⁴⁷

HOW DO WE TREAT DESIGNATED TERRORISTS?

Under IHL, all who directly participate in hostilities, whether designated as terrorists or not, may be subject to direct attack during such participation so long as the attack complies with rules on the conduct of hostilities;⁴⁸ they may be lawfully deprived of liberty in conformity with certain conditions and must be prosecuted if they have committed war crimes. In international armed conflicts, combatants may not be prosecuted

merely for engaging in lawful hostilities. In non-international armed conflicts, however, although IHL encourages states to grant the widest possible amnesty at the end of the conflict, individuals may be prosecuted under domestic law for their participation in hostilities—even if they have not violated IHL.⁴⁹ Nonetheless, in such non-international armed conflicts, the full scope of obligations under Common Article 3 of the 1949 Geneva Conventions, as well as its Second Additional Protocol of 1977, apply throughout. Various rules of IHL also apply to armed groups that use terrorist acts as a means and method of warfare, and to armed groups with rogue elements that employ terrorist tactics.

As outlined above, IHL also protects (inter alia) all those in an armed conflict who are wounded or sick, whether combatants or civilians. Designating persons as “terrorist” does not weaken this protection. However, under some counterterrorism laws, medically treating a designated terrorist may be criminally prohibited as a form of support to terrorism.⁵⁰ Such approaches go against both the principle of impartiality in humanitarian action, which requires assistance to be given solely on the basis of need, and the entitlement of all wounded and sick, including fighters, to medical care, which are among the foundational safeguards laid down in IHL. Indeed, the growing trend to treat all individuals and groups designated as “terrorist” as criminals, without regard for internationally accepted legal protections and the codes of medical

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

44 Ojeda, “Out of Balance”; Nigel White, “The United Nations and Counter-terrorism: Multilateral and Executive Law-Making,” in *Counter-terrorism: International Law and Practice*, Salinas De Frias, Samuel, and White, eds., p. 56.

45 ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflict,” report for the 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>. See, for example, recent UK sentencing guidelines, which consider the crime of preparing to commit a terrorist act more serious if it “was with a view to engage in combat with UK armed forces.” UK Sentencing Council, *Terrorism Offences Definitive Guideline*, April 27, 2018, p. 8, available at www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-Offences_Definitive-guideline_WEB.pdf. These guidelines were updated following a judgment in *R v. Kahar & Ors* in which the lord chief justice of the Court of Appeals stated that “it will aggravate the offence if the preparatory conduct was carried out with a view to fighting UK armed forces; that it may do so if the intention is to fight forces closely allied to UK forces (but that it will not mitigate the offence that there was no prospect of ending up fighting allied forces); and that any assertion that the intention was to engage only with armed forces, rather than to direct activity against civilians, must be judged in the common sense light of the likely extent of collateral damage being caused to civilians” (emphasis added). As such, it seems that not only is it considered illegal to go abroad to fight, if only against armed forces, but it is also considered an aggravating factor, due to the possibility of collateral damage. UK Court of Appeals (Criminal Division), *R. v. Kahar & Ors*, Case No. 2016 EWCA Crim 568, May 17, 2016, para. 20.

46 Pejic, “Armed Conflict and Terrorism,” p. 171.

47 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.

48 AP I, Art. 51(3); AP II, Art. 13(3).

49 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.

50 Dustin Lewis, Naz 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://pilac.law.harvard.edu/medical-care-in-armed-conflict-international-humanitarian-law-and-state-responses-to-terrorism/>; Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare.”

ethics, threatens to erode fundamental normative commitments in IHL.⁵¹

WHAT CONSTITUTES SUPPORT TO TERRORISM?

IHL provides for and foresees a number of humanitarian acts and activities, including medical ones, that counterterrorism laws could criminalize through overbroad and unqualified prohibitions of “material support to,” “services for,” “assistance to,” or “association with” terrorist organizations. Indeed, there is a risk under some counterterrorism laws and policies that goods or activities entering the control of a designated terrorist group will be perceived as resources that can be used for or contribute to committing a terrorist act.⁵²

According to IHL, impartial humanitarian organizations can offer their services to all parties to armed conflict, including those designated as “terrorist.” This could be construed as support to the group in question. So far, however, no national or international counterterrorism law explicitly precludes merely offering services.⁵³

Once the affected state consents to the provision of impartial humanitarian relief, IHL requires the parties to armed conflict to allow and facilitate rapid and unimpeded passage of supplies, equipment, and personnel.⁵⁴ There is a risk that this may violate some counterterrorism laws, particularly in contexts where designated terrorist groups control territory in which civilians are in need. In contexts where humanitarian activities fall under the scope of a “support to terrorism” law, this risk has materialized.⁵⁵ This can happen when relief goods are delivered to civilians in an area controlled by a designated terrorist group, when these goods inadvertently fall into the hands of such a group, when medical services are provided to wounded and sick fighters for such a group, or

when incidental payments are made to a designated group to access certain civilian populations.⁵⁶

Finally, IHL rules that protect those providing medical care from being harmed, prosecuted, or punished for providing medical care can also conflict with counterterrorism laws that could be interpreted to consider the provision of medical assistance to members of designated groups as unlawful support to terrorism (see case studies in Annex). While no existing counterterrorism law directly criminalizes medical care as such, provisions in many domestic counterterrorism laws—mainly relating to support for or financing of terrorism—can be broadly interpreted and used to prosecute or otherwise sanction professionals who provide healthcare (see, for example, the Iraq and Syria case studies in the Annex).⁵⁷

As illustrated above, armed conflict situations in which designated terrorist groups operate create a host of legal questions. The misperception that IHL does not adequately tackle the threat these groups pose, as well as that counterterrorism frameworks impose fewer obligations on states and invite less scrutiny, has led to an overreliance on these frameworks in armed conflict situations. This undermines IHL and, consequently, medical care and impartial humanitarian action. To mitigate this adverse impact, the tensions between these two bodies of law must be understood and addressed.

HOW DOES COUNTERTERRORISM IMPACT MEDICAL CARE AND PRINCIPLED HUMANITARIAN ACTION?

There are several ways in which counterterrorism laws and measures may come into tension with principled humanitarian action (i.e., that which is neutral, impartial, and independent) and medical ethics.⁵⁸ As described above, some laws penalizing support to designated terrorist groups may

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

52 See, for example, the United States federal antiterrorism statute, which outlaws the provision of “material support” to certain designated terrorist organizations, which covers “any property, tangible or intangible, or service,” US Code Title 18, 1994, Section 2339B(g)(4). It excludes medicine and religious materials but includes, among other things, lodging, training, expert advice or assistance, safe houses, and transportation. US Code Title 18, 1994, Section 2339A(b).

53 Gillard, “Humanitarian Action and Non-state Armed Groups,” p. 12.

54 See Dapo Akande and Emanuela-Chiara Gillard, eds., “Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict,” University of Oxford and UN Office for the Coordination of Humanitarian Affairs, October 2016, available at www.unocha.org/publication/oxford-guidance-law-relating-humanitarian-relief-operations-situations-armed-conflict.

55 Mackintosh and Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action”; Norwegian Refugee Council, “Principles under Pressure”; Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare.”

56 Gillard, “Humanitarian Action and Non-state Armed Groups,” p. 13.

57 See, for example, Australian Criminal Code Act, 1995, Section 102.6; Egyptian Criminal Code, 1992, Art. 78; and Nigerian Terrorism (Prevention) (Amendment) Act, 2013, Section 5. For more examples, see Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare.”

58 See, for example, Norwegian Refugee Council, “Principles under Pressure,” p. 20; Mackintosh and Duplat, “Study of the Impact of Donor Counter terrorism

criminalize various forms of humanitarian engagement with those groups, including negotiating access and security guarantees to deliver needs-based assistance to the civilian population and to provide medical care to the wounded or sick.⁵⁹ In such circumstances, principled humanitarian actors are faced with a dilemma: forego medical activities foreseen by IHL (and mandated by medical ethics), or conduct such activities but risk criminal prosecution or other forms of sanction. Indeed, counterterrorism measures have adversely affected the ability and willingness of medical and humanitarian actors to deliver humanitarian assistance such as medical assistance to wounded and sick fighters, visits and material assistance to detainees, first-aid training, and IHL training for fighters. Aligning with host-state or donor counterterrorism frameworks may require organizations to violate the humanitarian principles of impartiality, neutrality, humanity, and independence and could undermine the perception that they are apolitical.⁶⁰ This might put at risk humanitarian actors' long-term access to civilian populations in need and undermine their security, both in that specific context and in other contexts.

In addition to what some have described as this "structural" impact, counterterrorism laws and regulations have an impact within and among humanitarian organizations.⁶¹ They often place increased administrative burdens on organizations to meet legal and contractual requirements, which can slow operations and increase costs. Indeed, donors have regularly attached more stringent conditions to funding, such as screening or vetting staff, partner organizations, and, more rarely, beneficiaries.⁶² This may also increase tensions

between local and international organizations, with international organizations including counterterrorism clauses 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, as uncertainty and concerns over legal liability may make them reluctant to share information with other organizations.⁶³

Humanitarian organizations may modify or even terminate their operations to avoid violating counterterrorism laws and policies or related provisions in funding agreements. They may also reduce needs-based assistance to avoid responding to beneficiaries who may be linked to or residing in areas controlled by designated terrorist groups (see, for example, the Nigeria case study in the Annex). Humanitarian organizations may do this for three reasons. First, regulatory frameworks and donor contracts may impose counterterrorism measures on them. This can adversely change or restrict funding and other forms of support for humanitarian operations.

Second, humanitarian actors and medical staff may face civil or criminal liability or other forms of sanctions. Activities that risk being criminalized include providing medical care to individuals belonging to designated terrorist groups, engaging with such groups in transactions and logistical arrangements necessary to access civilian populations, or engaging in other humanitarian activities foreseen by IHL with a member of a designated terrorist group or an individual considered to be

Measures on Principled Humanitarian Action," p. 102; Gillard, "Humanitarian Action and Non-state Armed Groups," p. 15; Sara Pantuliano, Kate Mackintosh, and Samir Elhawary, with Victoria Metcalfe, "Counter-terrorism and Humanitarian Action: Tensions, Impact and Ways Forward," Humanitarian Policy Group, October 2011, available at www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7347.pdf; Naz Modirzadeh, Dustin Lewis, and Claude Bruderlein, "Humanitarian Engagement Under Counter-terrorism: A Conflict of Norms and the Emerging Policy Landscape," *International Review of the Red Cross* 93, no. 883 (September 2011); Kay Guinane, Karen Siciliano Lucas, and Elizabeth Holland, "Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States," Charity & Security Network, June 2012, available at www.charityandsecurity.org/SafeguardingHumanitarianism.

59 Katie King, Naz Modirzadeh, and Dustin Lewis, "Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action," Harvard Law School Program on International Law and Armed Conflict, April 2016, p. 7, available at <https://dash.harvard.edu/handle/1/29998395>; Burniske, Modirzadeh, and Lewis, "Counter-terrorism Laws and Regulations," p. 10.

60 Burniske, Modirzadeh, and Lewis, "Counter-terrorism Laws and Regulations," p. 6; Ben Hayes, "The Impact of International Counter-terrorism on Civil Society Organisations: Understanding the Role of the Financial Action Task Force," Bread for the World, April 2017, p. 32, available at www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis_68_The_impact_of_international_counterterrorism_on_CSOs.pdf.

61 Norwegian Refugee Council, "Principles under Pressure"; Mackintosh and Duplat, "Study of the Impact of Donor Counter terrorism Measures on Principled Humanitarian Action," p. 71.

62 See Counterterrorism and Humanitarian Engagement Project, "An Analysis of Contemporary Counterterrorism-Related Clauses in Humanitarian Grant and Partnership Agreement Contracts."

63 See Burniske and Modirzadeh, "Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action."

associated with that group.⁶⁴ Individuals engaged in such forms of humanitarian action—as well as the organizations with which they are affiliated—may face liability under the laws of a number of states, including those party to an armed conflict, the state where the organization is registered, donor states, or states whose laws apply extraterritorially. As highlighted above, humanitarian actors and medical staff may fall under counterterrorism sanctions regimes, which often do not require 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, sometimes beyond what is legally or contractually required. This has been described as the “chilling effect” of counterterrorism measures.⁶⁵ 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 staff members are at risk of prosecution or other forms of sanction.⁶⁶

The next section of this report will examine the counterterrorism framework developed by the UN, a key norm-producing actor in the counterterrorism realm. It will look at the extent to which it UN counterterrorism has engaged with or had an impact on IHL issues, in particular the protection of humanitarian action and medical care, and steps that could be taken to better protect the provision of medical care and impartial humanitarian action.

International Humanitarian Law in the UN Counterterrorism Framework

The UN and its member states have created a complex counterterrorism architecture. In addition, member states, as well as the entities that

compose the UN counterterrorism architecture, have developed what can be described as an international counterterrorism regime composed of laws, standards, rules, policies, and practices. Given the complex institutional framework and challenges described above, the lack of clarity on this international counterterrorism regime—and in particular on how it interacts with other international legal regimes such as IHL—is unsurprising.⁶⁷ This section looks at whether and how UN counterterrorism entities have attempted to explain and guide states in navigating the interaction between counterterrorism and IHL.

UN Security Council 1373 (2001), often considered the cornerstone resolution of the UN’s counterterrorism efforts, makes no mention of IHL. For example, it does not mention how implementation of the measures it requires states to adopt, such as the criminalization of financing for terrorism or of assistance to terrorism, will interact with states’ obligations under IHL. However, starting in 2004, UN Security Council and General Assembly resolutions relating to terrorism began to mention that states need to ensure that “any measures taken to combat terrorism comply with all their obligations under international law” and that they “should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”⁶⁸ This reflects the idea that, in theory, counterterrorism efforts and IHL can coexist: counterterrorism efforts can be conducted without undermining the provision of impartial humanitarian aid foreseen under IHL, and states can implement their obligations under both counterterrorism law and IHL.

In recent years, resolutions have started to include language to the effect that “effective counterterrorism measures and respect for...the rule of law are complementary and mutually reinforcing” and are “an essential part of a

64 ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” report for the 31st International Conference of the Red Cross and Red Crescent, October 2011, p. 52, available at www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

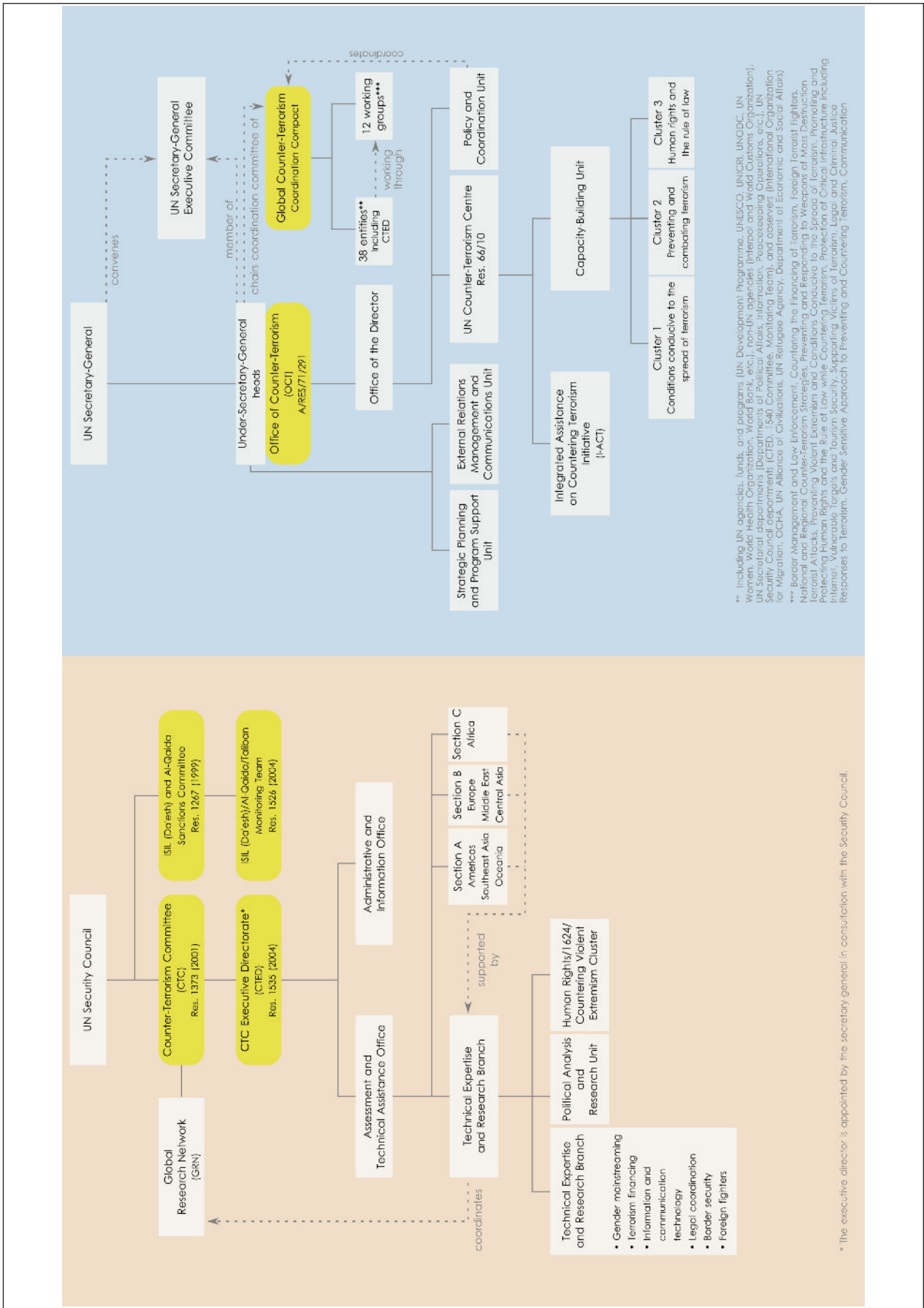
65 King, Modirzadeh, and Lewis, “Understanding Humanitarian Exemptions,” p. 6; Mackintosh and Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action”; Burniske, Modirzadeh, and Lewis, “Counter-terrorism Laws and Regulations,” p. 7.

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

67 UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/72/43280, September 27, 2017, p. 9.

68 UN Security Council Resolution 1535 (March 26, 2004), UN Doc. S/RES/1535.

Figure 1. UN counterterrorism architecture



successful counter-terrorism effort.”⁶⁹ As outlined below, some have even included more specific language on medical and humanitarian activities.⁷⁰

These resolutions seem to clearly indicate that counterterrorism efforts must not be undertaken at the expense of states’ obligations under IHL. However, they remain general and vague on the interaction between counterterrorism measures and IHL and on when IHL is applicable. They also fail to include specific action points to ensure that UN counterterrorism entities adhere to their obligations under IHL. Indeed, except for the General Assembly’s reviews of the UN Global Counter-Terrorism Strategy (GCTS) in 2016 and 2018, which highlighted that IHL protects humanitarian and medical activities as well as the engagement of humanitarian actors with all relevant actors, none of these resolutions detail what IHL rules may be relevant when conducting counterterrorism.⁷¹ Nor do they provide any guidance on what it means for counterterrorism measures to adhere to those rules.

Recognizing that this may not be a straightforward endeavor, beginning in 2008, the General Assembly has, on several occasions, tasked UN bodies and entities, particularly those participating in the Counter-Terrorism Implementation Task Force (CTITF), to enhance their efforts to ensure counterterrorism measures respect international human rights, refugee, and humanitarian law.⁷² Still, neither Security Council nor General Assembly resolutions outline how to respond to the call for counterterrorism measures to ensure the protection of medical care and impartial humani-

tarian action provided for by IHL. Therefore, this report will now look to the guidance and assistance provided by the CTITF and other relevant UN entities to member states. In particular, the following sections focus on guidance on IHL rules that protect principled humanitarian action and medical care.

SECURITY COUNCIL SANCTIONS REGIMES

UN Security Council Resolution 1267 (1999) created the first counterterrorism entity, the Taliban Sanctions Committee. It was later expanded to include sanctions against al-Qaida.⁷³ In 2011, the Taliban and al-Qaida sanctions regimes were split, resulting in two Security Council committees: the ISIL (Da’esh) and Al-Qaida Sanctions Committee⁷⁴ and the Taliban Sanctions Committee.⁷⁵ These committees are tasked with overseeing the sanctions imposed by the UN Security Council, with support from the Analytical Support and Sanctions Monitoring Team (1267 Monitoring Team). The 1267 Monitoring Team conducts threat assessments regarding the Islamic State (IS, also known as ISIL), al-Qaida, and the Taliban, manages and reviews the sanctions list, and provides the committees with a technical and legal understanding of the evolving threat environment and what this means for the sanctions regimes.⁷⁶

Under the powers afforded by Article 41 of the UN Charter, the Security Council has also put in place a series of country-specific sanctions regimes that states are expected to implement.⁷⁷ These are not specifically framed in terms of counter-

69 UN Security Council Resolution 2129 (December 17, 2013), UN Doc. S/RES/2129; UN Security Council Resolution 2170 (August 15, 2014), UN Doc. S/RES/2170; UN Security Council Resolution 2178 (September 24, 2014), UN Doc. S/RES/2178; UN Security Council Resolution 2395 (December 21, 2017), UN Doc. S/RES/2395; UN Security Council Resolution 2396 (December 21, 2017), UN Doc. S/RES/2396.

70 UN General Assembly Resolution 70/148 (December 17, 2015), UN Doc. A/RES/70/148, February 25, 2016; UN General Assembly Resolution 70/291 (July 19, 2016), UN Doc. A/RES/70/291, July 1, 2016; UN General Assembly Resolution 72/284 (June 28, 2018), UN Doc. A/RES/72/284, July 2, 2018.

71 UN General Assembly Resolution 70/291 (July 19, 2016), UN Doc. A/RES/70/291, July 1, 2016; UN General Assembly Resolution 72/284 (June 28, 2018), UN Doc. A/RES/72/284, July 2, 2018.

72 UN General Assembly Resolution 63/185 (December 18, 2008), UN Doc. A/RES/63/185, March 3, 2009. This request was reiterated in UN General Assembly Resolutions 64/168 (2009), 66/171 (2011), 68/178 (2013), and 70/148 (2015).

73 UN Security Council Resolution 1333 (December 19, 2000), UN Doc. S/RES/1333; UN Security Council Resolution 1390 (January 16, 2002), UN Doc. S/RES/1390, January 28, 2002.

74 UN Security Council Resolution 1989 (June 17, 2011), UN Doc. S/RES/1989; UN Security Council Resolution 2253 (December 17, 2015), UN Doc. S/RES/2253.

75 UN Security Council Resolution 1988 (June 17, 2011), UN Doc. S/RES/1988.

76 The 1267 Monitoring Team was created by UN Security Council Resolution 1267 (October 15, 1999), UN Doc. S/RES/1267. Its mandate is laid out in UN Security Council Resolution 2255 (2015), UN Doc. S/RES/2255 (December 21, 2015), UN Doc. S/RES/2255, December 22, 2015, paras. 51–52; and in UN Security Council Resolution 2368 (July 20, 2017), UN Doc. S/RES/2368, Annex I.

77 There are currently thirteen ongoing country-specific sanctions regimes established by UN Security Council Resolutions 751 (1992) for Somalia; 1483 (2003) for Iraq; 1533 (2004) for the Democratic Republic of the Congo; 1556 (2004) for Sudan; 1636 (2005) for Lebanon; 1718 (2006) for North Korea; 1696 (2006) for Iran; 1907 (2009) for Eritrea; 1970 (2011) for Libya; 2048 (2012) for Guinea-Bissau; 2127 (2013) for the Central African Republic; 2140 (2014) for Yemen; and 2206 (2015) for South Sudan.

terrorism, but several of them apply to countries in which designated terrorist groups that could potentially be listed operate.

Sanctions regimes are a key instrument in the UN Security Council's counterterrorism arsenal that can impact impartial humanitarian action. According to Chapter VII of the UN Charter, all member states are legally bound to adopt national laws that give effect to these sanctions.⁷⁸ In particular, the work of the ISIL (Da'esh) and Al-Qaida Sanctions Committee and the ISIL, Al-Qaida and Taliban Monitoring Team illustrates how the Security Council's use of sanctions for counterterrorism purposes intersects with and can impact states' obligations under IHL.

Through Resolution 2368 (2017) and its predecessor resolutions dating back to 1999, the Security Council has imposed targeted sanctions on individuals, groups, undertakings, and entities on the ISIL (Da'esh) and Al-Qaida Sanctions List.⁷⁹ Any individual, group, undertaking, or entity supporting IS or al-Qaida is eligible for listing, and the acts or activities that lead to such listing are broadly defined; for example, they include not only supplying, selling, or transferring arms but also "otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof."⁸⁰ There is a risk that such a broad definition could be interpreted as encompassing medical care or impartial humanitarian assistance. The preambles of relevant resolutions mention the need to combat threats to international peace and security from terrorist acts in accordance with IHL, but again, there is no guidance on how this would concretely play out in the context of sanctions.

While it has never listed an individual or entity solely on that basis, the sanctions committee has referenced medical activities as part of the basis for listing two individuals and two entities.⁸¹ Experts have suggested this may indicate that the sanctions committee, and by extension the Security Council, views the provision of medical care and medical supplies as a form of impermissible support to designated terrorist groups.⁸² In situations of armed conflict, this would directly conflict with the entitlement of the wounded and sick to medical care and the protection afforded to those providing such medical care under IHL. Experts from the 1267 Monitoring Team have indicated that this would not happen again, but these references remain on the Narrative Summaries of Reasons for Listing and set a regrettable precedent.⁸³ Any member state could consider submitting in writing a proposal to modify the text to the ISIL and Al-Qaida Sanctions Committee.⁸⁴

Nonetheless, there are encouraging signs that the 1267 Monitoring Team is addressing the possible tension between its work and obligations under IHL. In 2015, Security Council Resolution 2199 requested the team to brief the Security Council every three months on every unintended consequence of the sanctions regime. Reportedly, these confidential briefings regularly touch upon humanitarian concerns, including issues related to delivery of humanitarian assistance and Recommendation 8 of the Financial Action Task Force (FATF) on abuse of nonprofits and terrorist financing. Since 2015, member states, international organizations, researchers, and academics have made progress in briefing the monitoring team on the specific impact the sanctions regime may have

78 There are currently over 400 national lists worldwide.

79 The list of relevant resolutions is available at www.un.org/sc/suborg/en/sanctions/1267/resolutions. The current list of sanctioned individuals, groups, undertakings, and entities is available at www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list.

80 UN Security Council Resolution 2368 (July 20, 2017), UN Doc. S/RES/2368.

81 Entities and individuals listed include: Zafar Iqbal, who was listed in 2012 for, among other reasons, being "president of the [Lashkar-e-Tayyiba/Jamaat-ud-Dawa] medical wing"; Redendo Cain Dellosa, listed in 2009 for, among other reasons, having "provided medical supplies to [Abu Sayyaf Group] members"; Al Akhtar Trust International, listed in 2009, for, among other reasons, having "secretly treating wounded members of Al-Qaida...at the medical centers it was operating in Afghanistan and Pakistan"; and the Global Relief Foundation, listed in 2010, for, among other reasons, having a "medical-relief coordinator" travel to Afghanistan and have "dealings with Taliban officials until the collapse of the Taliban regime." UN Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee, "Narrative Summaries of Reasons for Listing," available at www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list/summaries.

82 Lewis, Modirzadeh, and Blum, "Medical Care in Armed Conflict," pp. 110–111.

83 Interviews with experts in March 2018 and contributions of experts at IPI workshop on April 26, 2018.

84 A member state can submit a written proposal for an amendment, after which the monitoring team produces a draft with the proposed changed language and submits it to the chair of the Counter-Terrorism Committee (CTC). The chair circulates the changes within the CTC, and there is a ten-day no-objection period, after which it is approved if no member of the CTC reacts. If a member of the CTC puts the text on hold, the monitoring team and the member state making the proposal work with the member of the committee until they find a compromise formulation. As soon as the compromise formulation is presented, and if no other committee member objects, the changed amendment is approved. Any member of the committee can object to the change, causing the proposed amendment to be rejected. For more, see UN Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Guidelines of the Committee for the Conduct of Its Work*, December 23, 2016, available at www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/guidelines_of_the_committee_for_the_conduct_of_its_work.pdf.

on humanitarian activities. This engagement should be maintained, as in the absence of any official policy or guidance on how to safeguard humanitarian protection and assistance activities, the team needs to understand the potential tension between sanctions and medical care and impartial humanitarian action. However, the 1267 Monitoring Team can only directly act on these issues when they directly result from the sanctions regime.⁸⁵ Moreover, due to concern that close ties to the UN's political counterterrorism agenda may affect the perception of their neutrality, humanitarian actors have been reluctant to engage with the monitoring team.

As mentioned above, the UN Security Council has also created a series of country-specific sanctions regimes. These are not specifically framed in terms of counterterrorism but cover countries experiencing severe humanitarian crises and in which designated terrorist groups are active.⁸⁶ Like the IS and al-Qaida sanctions regime, these regimes are far-reaching and define sanctioned activities broadly, which can put medical care and impartial humanitarian action at risk.⁸⁷

A well-known example of a context in which this risk played out is Somalia. In 2008, the United States listed al-Shabab as a terrorist organization, and Security Council Resolution 1844 added targeted sanctions to the Somalia sanctions regime. In 2010, the UN Somalia sanctions committee listed al-Shabab as an entity subject to the 1844 sanctions. These actions impeded humanitarian programs in al-Shabab-controlled areas, as some organizations suspended their operations due to concerns about potentially violating the US and UN sanctions regime. Al-Shabab later expelled

some humanitarian organizations from the areas under its control, citing concerns about the organizations' neutrality.⁸⁸

Following a concerted push by humanitarian organizations, the UN Security Council adopted Resolution 1916 (2010), which contained a humanitarian exemption: "The obligations imposed on Member States...shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance." Although a critically important step, the exemption only applies to UN agencies, their partners, and organizations with UN-observer status, not to all humanitarian actors. Crucially, it is also not mandatory for states to include the exemption in domestic law.⁸⁹ Furthermore, it seems the chilling effect of the sanctions regimes triggered in 2008 is still pervasive, despite the exemption. Humanitarian organizations continue to engage in excessive self-regulation in al-Shabab-controlled areas. Even organizations covered by the exemption reportedly have concerns about using it due to the reputational risks of even an isolated incident of aid being diverted to al-Shabab.⁹⁰

While the UN sanctions regime in Somalia remains the only one with an exemption for humanitarian actors, and despite the clear benefits such an exemption could have elsewhere, there have not yet been similar efforts to persuade the UN Security Council to adopt an exemption in another context.⁹¹ Nonetheless, in the past several years, the idea of humanitarian exemptions to UN sanctions regimes has received some support within the UN. In 2015, the High-Level Review of UN Sanctions recommended that "if concerns exist that sanctions could impact humanitarian action,

85 Interview with expert, March 2018.

86 For further discussion of the impact of UN Security Council sanctions regimes on principled humanitarian action, see King, Modirzadeh, and Lewis, "Understanding Humanitarian Exemptions."

87 For example, UN Security Council Resolution 2140 created a sanctions regime for Yemen that can apply to individuals or entities for "obstructing or undermining the successful completion of the political transition." Resolution 2140 (February 26, 2014), UN Doc. S/RES/2140, para. 18.

88 For a more detailed discussion, see Mackintosh and Duplat, "Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action," pp. 73–87.

89 In fact, the United States has not included the exemption in its domestic law. Norwegian Refugee Council, "Principles under Pressure," p. 15.

90 Ibid., p. 23.

91 The Libya sanctions regime contains an exemption for "supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training" and for "funds, other financial assets or economic resources of the Central Bank of Libya, the [Libyan Arab Foreign Bank], the [Libyan Investment Authority] and the [Libyan African Investment Portfolio] provided that...a Member State has provided notice to the Committee of its intent to authorize access to funds, other financial assets, or economic resources" for purposes including humanitarian needs. UN Security Council Resolution 2095 (March 14, 2013), UN Doc. S/RES/2095, para. 9; and UN Security Council Resolution 2009 (September 16, 2011), UN Doc. S/RES/2009, para. 16. It does not, however, protect humanitarian actors as such. Emanuela-Chiara Gillard, "Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action," Chatham House, August 2017, p. 7 available at www.chathamhouse.org/publication/recommendations-reducing-tensions-interplay-between-sanctions-counterterrorism-measures.

the Council should consider standing exemptions for humanitarian actors and implementing partners in that situation.”⁹²

For many humanitarian actors and experts, humanitarian exemptions in UN Security Council Resolutions (and other counterterrorism laws) are now clearly identified as one of the key ways forward.⁹³ Indeed, the Norwegian Refugee Council argued in a 2018 report that “if written and used effectively, humanitarian exemptions could prove one of the most efficient methods of protecting humanitarian organisations and staff from sanctions regimes and counterterrorism measures.”⁹⁴ Different types of exemptions can be envisaged, from exemptions for all humanitarian action to more limited exemptions for a particular type of good or activity, particular actors, or actors who fit particular criteria.⁹⁵

UN COUNTER-TERRORISM COMMITTEE AND ITS EXECUTIVE DIRECTORATE

After 9/11, the Security Council went beyond sanctions regimes, passing what is considered to be the foundational UN resolution on counterterrorism. Resolution 1373 (2001) laid out a series of measures to enhance states’ legal and institutional capabilities to counter terrorism. It also created the Counter-Terrorism Committee (CTC) to monitor implementation of the resolution.⁹⁶

The work of the CTC is supported by the Counter-Terrorism Executive Directorate (CTED), established by Security Council Resolution 1535 (2004). The CTED is mandated to provide “neutral, expert assessments” of the implementation of Security Council counterterrorism resolutions by member states and to identify trends in terrorism and counterterrorism.⁹⁷ CTED undertakes a wide

array of activities, including conducting country visits and producing country reports with recommendations for the implementation of resolutions; facilitating the delivery of capacity-building assistance to member states; publishing technical guidance; identifying trends, challenges, developments, and good practices; cooperating with a wide range of international organizations; and organizing special meetings, events, and open briefings.

The CTC and CTED have engaged with IHL to some extent, but this engagement needs to be strengthened. In the early days of the CTC, it made clear to member states that any measures they take to combat terrorism must comply with their obligations under international law, “particularly with norms related to human rights, to refugees and to humanitarian law.”⁹⁸ In its 2005 comprehensive review of the CTED, the CTC reiterated that counterterrorism efforts need to comply with IHL.⁹⁹ In 2006, it adopted its Conclusions for Policy Guidance Regarding Human Rights and the CTC, which directed CTED to:

- “provide advice to the CTC, including for its ongoing dialogue with States on their implementation on resolution 1373 (2001), on international human rights, refugee and humanitarian law, in connection with identification and implementation of effective measures to implement resolution 1373 (2001); and to
- “advise the CTC on how to ensure that any measures States take to implement the provisions of resolution 1624 (2005) comply with their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.”¹⁰⁰

92 United Nations, *High-Level Review of United Nations Sanctions*, November 2015, p. 56, available at www.hlr-unsanctions.org/HLR_Compendium_2015.pdf.

93 For examples of humanitarian exemptions in national and regional laws, see, for example, New Zealand’s Terrorism Suppression Act, 2002, Section 10(3); Canada’s Criminal Code RSC, 1985, Section 83.01(1); and the European Commission’s Directive 2017/541, Art. 38. For a discussion of these examples, see Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare,” pp. 26–27. For identification of these exemptions as the way forward, see Gillard, “Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action,” p. 6; Mackintosh and Duplat, “Study of the Impact of Donor Counter terrorism Measures on Principled Humanitarian Action,” pp. 117–118; and King, Modirzadeh, and Lewis, “Understanding Humanitarian Exemptions.”

94 Norwegian Refugee Council, “Principles under Pressure,” p. 29.

95 Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare,” p. 26.

96 The CTC is now also tasked with monitoring the implementation of Resolution 1624 (2005) on incitement to commit acts of terrorism, identifying gaps and good practices that might hinder states’ ability to stem the flow of foreign terrorist fighters. UN Security Council Resolution 2178 (September 24, 2014), UN Doc. S/RES/2178.

97 UN Security Council Resolution 2395 (December 21, 2017), UN Doc. S/RES/2395.

98 UN Security Council, 4792nd meeting, July 23, 2003, UN Doc. S/PV/4792.

99 UN Security Council, *Report of the Counter-Terrorism Committee to the Security Council for Its Consideration as Part of Its Comprehensive Review of the Counter-Terrorism Committee Executive Directorate*, UN Doc. S/2005/800, December 16, 2005, p. 4.

100 UN Security Council Counter-Terrorism Committee, *Conclusions for Policy Guidance Regarding Human Rights and the CTC*, UN Doc. S/AC.40/2006/PG.2, May 25, 2006.

What has this meant in terms of tackling the issues that may arise from tensions between counterterrorism and IHL, such as impediments to the provision of medical care or impartial humanitarian assistance? One of the challenges in responding to this question is that a number of CTED documents and reports are not public, including the reports on implementation by states.¹⁰¹ This lack of transparency makes it difficult to assess the extent to which CTED is engaging on this issue and how states are responding.

It appears that it is only in more recent years that CTED has started to concretely engage on the specific issue of how counterterrorism efforts can impact principled humanitarian assistance. In 2014, CTED and the UN Office for the Coordination of Humanitarian Affairs (OCHA) jointly briefed the CTC in a closed-door briefing on the unwanted structural, operational, and internal impact of national counterterrorism laws and policies on the provision of principled humanitarian assistance.

In 2015, CTED took part in an Inter-Agency Standing Committee meeting and outlined what it perceived to be the challenges in addressing these issues.¹⁰² It emphasized that the CTC and CTED have a clear mandate to take IHL into account in their work. It also acknowledged that although both counterterrorism and humanitarian actors are working toward the goal of protecting civilians, counterterrorism obligations can create complications for humanitarian actors. As a way forward, CTED called for more policy dialogue between the humanitarian community, donor states, and other

relevant actors on how to better reconcile counterterrorism laws and policies with humanitarian concerns.¹⁰³ It also suggested member states should continue to review and revise their laws as necessary to create exceptions for humanitarian action. Unfortunately, nothing concrete came out of this meeting, no process was formalized, and this issue was dropped from the Inter-Agency Standing Committee's agenda.

Nonetheless, various humanitarian organizations have engaged with CTED in a bilateral and ad hoc manner, including in a 2016 closed-door briefing to the CTC by the legal director of Médecins Sans Frontières on the challenges they face. However, both sides need to reinforce their efforts, as it is clear that CTED is largely unfamiliar with these issues and humanitarian concerns and has so far only marginally integrated them into its work.

CTED's 2014–2015 report to the CTC on its activities and achievements contained only a vague commitment "to encourage member states to continue to work with the UN human rights mechanisms to ensure that their counter-terrorism measures comply with all their obligations under international law, in particular international human rights, refugee and international humanitarian law."¹⁰⁴ However, its 2016 Global Survey on the Implementation of Security Council Resolution 1373 (2001) by member states mentioned the impact of the resolution's implementation both on the collection and distribution of funds to nonprofit organizations and on the delivery of humanitarian assistance.¹⁰⁵ CTED again called for a sustained and open dialogue on this issue and, for

101 Note that CTED's latest mandate renewal "directs CTED to make country assessments, recommendations, surveys, and analytical products available throughout the UN system, especially to UNOCT and United Nations counterterrorism-relevant agencies, funds, and programs..., except when requested by the assessed Member States to keep selected information confidential, and further directs CTED to enhance sharing of its findings with Member States and relevant counterterrorism partners, as appropriate and in consultation with the CTC, in international, regional, and subregional organizations, the GCTF, academia, think tanks, civil society, and the private sector, including through improved web access, outreach, workshops, open briefings, and utilization of the CTED Global Research Network (GRN), noting the importance of its geographic diversity." CTED is reportedly working to find ways in which to implement this provision of its mandate. UN Security Council Resolution 2395 (December 21, 2017), UN Doc. S/RES/2395, para. 13.

102 CTED highlighted three challenges: (1) the prevention and suppression of terrorist financing can have an impact on humanitarian actors; (2) insufficiently clearly defined prohibitions of "material support to terrorism" can be applied against humanitarian actors; and (3) the designation and listing of terrorists can indirectly limit the freedom of humanitarian actors to work. According to CTED, these challenges are compounded by the lack of a definition of "terrorism" and by national laws that potentially apply to acts beyond those envisaged by international counterterrorism instruments. CTED, presentation to the Inter-Agency Standing Committee, internal document.

103 This call was reiterated in CTED's press release following the meeting. UN Security Council Counter-Terrorism Committee, "CTED Calls for Enhanced Dialogue on Counter-terrorism and Humanitarian Action," March 16, 2015, available at www.un.org/sc/ctc/news/2015/03/16/cted-calls-for-enhanced-dialogue-on-counter-terrorism-and-humanitarian-action/.

104 UN Security Council, *Report of the Counter-Terrorism Committee Executive Directorate on Its Activities and Achievements during the Period from 2014 to 2015*, UN Doc. S/2015/984, December 18, 2015, p. 8, available at www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/984.

105 CTED highlighted "the issue of the resolution's impact on the delivery of humanitarian assistance. Observers have noted that, in interpreting and implementing resolution 1373 (2001), some States may effectively qualify the provision of humanitarian assistance, such as shelter, food, education, and medical assistance, as a form of financial support to terrorism, if delivered in areas under the control of terrorist organizations. This raises a serious question of compliance with [IHL]. In a 2013 study, [OCHA] outlined the impact of counter-financing measures on access to assistance by vulnerable populations around the globe, noting that

the first time in a public report, recommended including exceptions for humanitarian action in counterterrorism laws and policies.

In a 2016 report on foreign terrorist fighters, CTED highlighted “unusual” legislation adopted in a state in the Americas/Oceania region that designated two regions in the Middle East as “no-go zones,” thereby making travel to those regions without legitimate purposes a crime, regardless of intent. This legislation, however, contained an exception for people “entering the zone for the purpose of providing humanitarian aid.”¹⁰⁶ The report, therefore, highlights a positive example of counterterrorism legislation and encourages member states to adopt a holistic approach to counterterrorism and to build partnerships with a broad range of entities, including humanitarian actors.¹⁰⁷

The CTC Madrid Guiding Principles on Foreign Terrorist Fighters highlight that some member states find it difficult to determine how to respond to individuals who have committed “less serious acts” deemed illegal under rigid counterterrorism laws, including “providers of medical services and other humanitarian needs.”¹⁰⁸ They suggest developing and implementing strategies to deal with such individuals and considering administrative measures as alternatives to prosecution when appropriate.¹⁰⁹ The guiding principles are currently being updated.

In its 2017 Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions, CTED does not tackle the challenges that counterterrorism poses to humanitarian action. However,

it does put forward for consideration the question of whether a state’s definition of terrorist acts is clear and precise enough not to apply to acts beyond those envisaged by the international counterterrorism instruments, though it does not define these acts.¹¹⁰ It also asks how a state can ensure that its initiatives to counter terrorists’ narratives comply with its obligations under international law, including IHL.¹¹¹ Finally, CTED’s guide has a section on compliance with international human rights law, refugee law, and IHL, which asks for examples of challenges states have encountered to ensuring their counterterrorism measures comply with their obligations under IHL.¹¹² Although the technical guide could be a useful tool to at least alert states to the impact counterterrorism measures can have on medical care and impartial humanitarian action, none of the guidance documents it points to are specifically related to IHL or humanitarian action.

In its dialogue with member states, one of CTED’s main tools is the Detailed Implementation Survey it uses during country visits.¹¹³ The survey entails a set of questions relating to the state of counterterrorism laws, policies, capacities, and strategies. It aims to assess states’ implementation of UN Security Council Resolutions 1373 and 1624 and to engage in dialogue with them on further action that may be required. There is only one broad question on the challenges states may encounter in ensuring the measures they take comply with all their obligations under international law, including IHL.¹¹⁴ CTED completes the survey on the basis of information provided by the concerned state and international organizations and gathered from other public sources. The results

humanitarian action and counter-terrorism share similar objectives: to protect civilians from harm and to do so without discrimination. Nonetheless, the report concluded that counter-terrorism measures have had a negative impact on humanitarian action. It recommended that the humanitarian community and donor States engage in sustained and open dialogue on how to better reconcile counter-terrorism measures and humanitarian action and urged that counter-terrorism laws and measures adopted by States and intergovernmental organizations include exceptions for humanitarian action.” UN Security Council, *Global Survey of the Implementation by Member States of Security Council Resolution 1373 (2001)*, UN Doc. S/2016/49, January 20, 2016, para. 440.

106 CTED, *Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters: A Compilation of Three Reports (S/2015/338; S/2015/683; S/2015/975)*, December 2015, p. 68, available at www.un.org/sc/ctc/news/document/a-compilation-of-three-reports-s2015338-s2015683-s2015975-implementation-of-security-council-resolution-2178-2014-by-states-affected-by-foreign-terrorist-fighters/.

107 Ibid., p. 98.

108 CTED, *Madrid Guiding Principles: A Practical Tool for Member States to Stem the Flow of Foreign Terrorist Fighters*, October 2016, p. 18, available at www.un.org/sc/ctc/news/document/madrid-guiding-principles-2015/.

109 Ibid., p. 19.

110 CTED, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*, 2017, p. 34, available at www.un.org/sc/ctc/wp-content/uploads/2017/08/CTED-Technical-Guide-2017.pdf.

111 Ibid., p. 94.

112 Ibid., pp. 96–97.

113 The Detailed Implementation Survey is in the process of being updated.

114 Interviews with experts, March 2018.

are shared only with the concerned state, and even the template is an internal document.¹¹⁵

The Detailed Implementation Survey could contain more specific questions aimed at clarifying how a country's counterterrorism laws could impact medical care or impartial humanitarian action. Of course, CTED is not a humanitarian actor, and some might argue it is not the appropriate UN entity to discuss with states how they should implement their obligations under IHL. However, CTED could at least play a role in raising awareness of the issue and helping promote and reinforce the notion that states should ensure that their counterterrorism laws do not adversely affect humanitarian assistance. One way CTED could evaluate a state's implementation of counterterrorism measures in the survey would be to look at its success preventing these measures' negative effects on humanitarian assistance. It could also more systematically reach out to civil society, particularly national humanitarian organizations, in conducting the survey.

A closely related issue that CTED has tackled more concretely is the criminalization of terrorism financing and the risk this poses for nonprofit organizations.¹¹⁶ The definition of nonprofit organizations (NPOs) is broad and can encompass a whole host of organizations, unlike principled humanitarian organizations, which are defined by clear criteria.¹¹⁷ The most recent UN Security Council resolutions setting out CTED's mandate specifically refer to the risk of terrorists abusing nongovernmental, nonprofit, and charitable organizations.¹¹⁸ CTED has organized workshops

on preventing terrorist abuse of the charity sector.¹¹⁹ Its Detailed Implementation Survey contains a section on financing of terrorism and NPOs, with a question on whether a state's laws ensure respect for the legitimate role they play in collecting and distributing funds.

The 2017 CTED Technical Guide also has a section devoted to NPOs in the context of the criminalization of terrorism financing.¹²⁰ It points to the risk of violating laws against financing terrorism for NPOs operating within or near areas exposed to terrorist activity. It recommends that states adopt a risk-based approach to ensure they implement tailored measures to protect these organizations. It also encourages states to work closely with the nonprofit sector to "develop and define best practices to address terrorist financing risks and vulnerabilities" and to raise and deepen awareness of these risks among the donor community. It makes clear, however, that

where NPOs suspected of, or implicated in, terrorist financing or other forms of terrorist support are identified, the first priority of countries must be to investigate and halt such terrorist financing or support. Actions taken for this purpose should, to the extent reasonably possible, minimise negative impact on innocent and legitimate beneficiaries of charitable activity. However, this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs.¹²¹

The language in CTED's guide closely mirrors that of Recommendation 8 of the Financial Action Task Force's (FATF) recommendations on terrorist

115 UN Security Council Resolution 2395 asks CTED to make most of its documents, including country assessments, more available. Resolution 2395 (December 21, 2017), UN Doc. S/RES/2395, para. 13. There is reportedly an ongoing discussion as to how to go about this. Identified concerns include the fact that states may not want to make public CTED assessments that offer suggestions for and critiques of states' counterterrorism policies, laws, and practices and that states may be less forthcoming as to their processes and the challenges they encounter if they know this could be made public.

116 The FATF defines a nonprofit organization as "a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of 'good works.'" FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, 2012, p. 57, available at www.fatf-gafi.org/publications/fatfrecommendations/documents/internationalstandardscombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html.

117 See ICRC, "Commentary of 2016, Article 3: Conflicts Not of An International Character," paras. 788–799.

118 UN Security Council Resolution 2129 (December 27, 2013), UN Doc. S/RES/2129. Note that this resolution refers to FATF guidance prior to its revision in 2015 following consultations with nonprofit organizations. The approach of this earlier guidance was to treat all nonprofits as equally susceptible to the risk of terrorist financing. UN Security Council Resolution 2395 recalls the importance of fully respecting the rights to freedom of expression and association of individuals in civil society and freedom of religion or belief, but it does not emphasize the need to prevent the disruption or discouragement of legitimate humanitarian activities. It does, however, note the revised FATF guidance, which tackles this issue. UN Security Council Resolution 2395 (December 21, 2017), UN Doc. S/RES/2395.

119 See, for example, "Regional Workshop on Preventing Terrorist Abuse of Nonprofit Organizations," June 1–3, 2015, Dakar, Senegal, available at www.global-center.org/events/regional-workshop-on-preventing-terrorist-abuse-of-non-profit-organizations/; and "Expert Working Group Meeting on Preventing Abuse of the Non-profit Sector for the Purposes of Terrorist Financing," January 18–20, 2011, London, UK, available at www.files.ethz.ch/isn/126820/18_20Jan11_Keyobservations.pdf.

120 CTED, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*, 2017, pp. 19–21.

121 Ibid.

financing and its interpretive note.¹²² Indeed, CTED has worked closely with FATF and regularly refers to its recommendations and guidance.¹²³ The FATF's assumption has been that terrorists hide behind NPOs or use them to funnel money and that states need to enact a range of measures to prevent these interactions.

Many have contested this assumption, arguing that it has damaged the reputation of the nonprofit sector, particularly Muslim nonprofits. Furthermore, some have argued that the FATF's recommendations have been used as a vehicle for imposing legislation that restricts civil society action. For example, in complying with the FATF's recommendations, states have adopted broad counterterrorism statutes and inhibited the capacity of NPOs to move money and fund particular activities and organizations in some regions.¹²⁴

In 2014, the FATF produced a report on the risk of terrorist abuse of nonprofits, which highlighted the tensions between humanitarian action and counterterrorism measures, described as “a tension created by equally necessary imperatives.”¹²⁵ On this issue, however, the report does little more than relay both concerns expressed by humanitarian actors and arguments that “some existing humanitarian exceptions in [counterterrorism] measures are inconsistent with other efforts to halt support to terrorist movements.”¹²⁶

In 2015, following consultations with nonprofits,

the FATF revised its Best Practices on Combating the Abuse of Non-Profit Organisations. In particular, it stressed that financial institutions should not view NPOs as high-risk simply because they may “operate in cash-intensive environments or in countries of great humanitarian need.”¹²⁷ It also recognized that it is important that any measures taken to protect NPOs from terrorist abuse “do not disrupt or discourage legitimate charitable activities and should not unduly or inadvertently restrict [NPOs'] ability to access resources.”¹²⁸ The updated Recommendation 8 and its interpretive note also responded to some concerns of the nonprofit sector, including by clarifying that not all NPOs are considered particularly vulnerable to terrorist financing.¹²⁹ The creation of the Global NPO Coalition on FATF in 2014 has helped ensure that NPOs are engaged in debates and policy development and that their concerns are taken into account.¹³⁰ The four core members of the coalition now also sit in the FATF's private sector consultative forum and can therefore engage directly on these issues.

Concerns remain, however, about how states will apply the new “risk-based” approach in practice;¹³¹ reportedly, governments have not issued new regulatory guidance following the FATF's revision of Recommendation 8.¹³² There are also concerns about whether the FATF is the appropriate body to regulate the nonprofit sector and about the impact of counterterrorism financing on gender equality

122 The Financial Action Task Force is an independent intergovernmental organization founded in 1989 at a summit of the G7 to develop and promote policies to protect the global financial system against money laundering, terrorist financing, and the financing of proliferation of weapons of mass destruction. Its counterterrorism mandate was introduced after 9/11. In 2012, it published the *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*. Recommendation 8: “Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse, including: (a) by terrorist organisations posing as legitimate entities; (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.” FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, 2012, p. 11.

123 In the early days of the CTC, the only public documents it would publish were FATF documents. CTED documents also regularly refer to FATF guidance, such as in the 2017 *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*.

124 Hayes, “The Impact of International Counter-terrorism on Civil Society Organisations,” pp. 15, 18, 30–31.

125 FATF, *Risk of Terrorist Abuse in Non-profit Organisations*, June 2014, pp. 3, 9, 32–33, available at www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf.

126 Notably, the FATF report refers to Mackintosh and Duplat, “Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action.” *Ibid.*, p. 33.

127 FATF, *Best Practices: Combating the Abuse of Non-profit Organisations (Recommendation 8)*, June 2015, p. 28, available at www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf.

128 *Ibid.*, p. 15.

129 For a more detailed discussion of these issues, see, for example, Hayes, “The Impact of International Counter-terrorism on Civil Society Organisations.”

130 For more information on the Global NPO Coalition on FATF, see <http://fatfplatform.org/about/>.

131 Hayes, “The Impact of International Counter-terrorism on Civil Society Organisations,” p. 26.

132 Norwegian Refugee Council, “Principles under Pressure,” p. 25.

and security, which deserves more attention.¹³³

In its latest renewal of CTED's mandate, the Security Council encourages it to work with member states to develop strategies to counter terrorism in accordance with their obligations under international law.¹³⁴ Although this paragraph does not specifically mention IHL, there is an opportunity for CTED to engage with member states more concretely. This could include working with them, in consultation with humanitarians, to develop specific strategies for not foregoing their obligations under IHL in implementing their counterterrorism obligations. The next mandate renewal could more clearly require such engagement.

UN GLOBAL COUNTER-TERRORISM STRATEGY AND OTHER GENERAL ASSEMBLY RESOLUTIONS

In the first several years after the UN Security Council first began to build the UN counterterrorism framework, the UN General Assembly did not take an active part. It was only in 2006 that the General Assembly adopted the first UN Global Counter-Terrorism Strategy (GCTS), a nonbinding resolution aimed at enhancing national, regional, and international efforts to counter terrorism.¹³⁵ It is meant to guide the counterterrorism efforts of the UN and all its member states. According to the then UN secretary-general, counterterrorism efforts need to be part of a "global, comprehensive approach that supports the balanced implementation of the Strategy."¹³⁶ The GCTS contains a plan of action composed of four pillars:

1. Addressing the conditions conducive to the spread of terrorism;
2. Preventing and combating terrorism;
3. Building states' capacity to prevent and combat

terrorism and strengthening the role of the UN system in that regard; and

4. Ensuring respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.¹³⁷

The UN General Assembly reviews the strategy every two years, and member states are expected to report on their implementation.¹³⁸ The first several iterations of the strategy contained the usual statement that counterterrorism efforts must fully comply with IHL.¹³⁹ It was only in 2016 that the language on IHL went beyond the introductory paragraphs, with member states recognizing that when counterterrorism efforts violate IHL (and other international obligations), "they not only betray the values they seek to uphold, they may also further fuel violent extremism that can be conducive to terrorism."¹⁴⁰ Importantly, the resolution also urged states to ensure that "counterterrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law."¹⁴¹

The 2018 review of the GCTS kept this language and added an additional paragraph calling for all parties to armed conflict to "comply fully with the obligations applicable to them under international humanitarian law related to the protection of civilians in armed conflict and medical personnel."¹⁴² Although this did not affect the final language of the resolution, the United States made clear its position that "Member States were obligated to prohibit their nationals to provide assets to terrorist organizations for any purpose," which certain member states could interpret as encompassing both humanitarian assistance and medical activities.¹⁴³ This recognition that counter-

133 See Duke Law International Human Rights Clinic and Women Peacemakers Program, "Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security," March 2017, available at <https://law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf>.

134 UN Security Council Resolution 2395 (December 21, 2017), UN Doc. S/RES/2395.

135 UN General Assembly Resolution 60/288 (September 8, 2006), UN Doc. A/RES/60/288, September 20, 2006.

136 UN General Assembly, *Capability of the United Nations System to Assist Member States in Implementing the United Nations Global Counter-terrorism Strategy—Report of the Secretary-General*, UN Doc. A/71/858, April 3, 2017, p. 2.

137 UN General Assembly Resolution 60/288 (September 8, 2006), UN Doc. A/RES/60/288, September 20, 2006, Annex.

138 These reports are not public, but the CTITF makes them available to all member states upon request.

139 UN General Assembly Resolution 60/288 (2006), Annex, Section II, para. 3, and Section IV, para. 2. See also UN General Assembly Resolutions 62/272 (2008), 64/297 (2010), 66/282 (2012), and 68/276 (2014).

140 UN General Assembly Resolution 70/291 (June 15, 2017), UN Doc. A/RES/70/291, June 19, 2017, para. 13.

141 Ibid., para. 22.

142 UN General Assembly Resolution 72/284 (June 28, 2018), UN Doc. A/RES/72/284, July 2, 2018, paras. 79–80.

143 United Nations, "General Assembly Unanimously Adopts Resolution Calling for Strong Coordinated Action by Member States to Tackle Terrorism, Violent Extremism Worldwide," June 26, 2018, available at www.un.org/press/en/2018/ga12035.doc.htm.

terrorism can impede principled humanitarian action and medical activities is an important step.

Other General Assembly resolutions have also urged states, “while undertaking counter-terrorism activities, to respect their international obligations regarding humanitarian actors and to recognize the key role played by humanitarian organizations in areas where terrorist groups are active.” In addition, they have requested the Counter-Terrorism Implementation Task Force (CTITF) “to continue its efforts to ensure that the United Nations can better coordinate and enhance its support to Member States in their efforts to comply with their obligations under international law, including...humanitarian law, while countering terrorism” (see below for more details on the CTITF). Finally, they have encouraged

relevant United Nations bodies and entities and international, regional and subregional organizations, in particular those participating in the [CTITF], which provide technical assistance, upon request, consistent with their mandates, related to the prevention and suppression of terrorism, to step up their efforts to ensure respect for international...humanitarian law, as well as the rule of law, as an element of technical assistance, including in the adoption and implementation of legislative and other measures by States.¹⁴⁴

However, guidance from counterterrorism entities mandated by the UN General Assembly and other relevant entities remains extremely limited. The General Assembly resolutions creating and mandating the UN Counter-Terrorism Centre (CCT) and Office of Counter-Terrorism (OCT) do not mention IHL.¹⁴⁵

UN OFFICE OF COUNTER-TERRORISM

Alongside the above-mentioned counterterrorism initiatives taken by the Security Council and General Assembly, since 2006, UN secretaries-general have also been working to create a series of counterterrorism bodies, which were initially

under the purview of the UN Department of Political Affairs. In 2006, former Secretary-General Kofi Annan created the Counter-Terrorism Implementation Task Force (CTITF), which was then endorsed by the General Assembly.¹⁴⁶ The CTITF is a sprawling body composed of thirty-six UN entities, including the Counter-Terrorism Executive Directorate (CTED), Interpol, the World Customs Organization, the UN Office on Drugs and Crime (UNODC), and the Office of the UN High Commissioner for Human Rights (OHCHR). UNODC and OHCHR are particularly active in developing and implementing counterterrorism-related initiatives. The CTITF is organized into twelve thematic working groups and intends to strengthen the coordination and coherence of the UN’s counterterrorism efforts.¹⁴⁷

In 2011, with funding from a voluntary contribution from Saudi Arabia, the UN Secretariat established the UN Counter-Terrorism Centre (CCT) to build the capacity of member states and UN entities engaged in counterterrorism. It organizes its work in three clusters: the conditions conducive to the spread of terrorism, preventing and combating terrorism, and human rights and the rule of law. The CCT works closely with the CTITF to support the implementation of projects through the Integrated Assistance on Countering Terrorism Initiative (I-ACT) aimed at implementing the UN Global Counter-Terrorism Strategy (GCTS) at the national level in countries that have requested assistance.¹⁴⁸

Most recently, in response to member states’ frustration with the state of counterterrorism work at the UN, the UN General Assembly created the Office of Counter-Terrorism (OCT) in 2017. Headed by a new under-secretary general, it was established to bring visibility and a more strategic vision to the counterterrorism agenda and to assist member states in the implementation of the

¹⁴⁴ UN General Assembly Resolution 70/148 (December 17, 2015), UN Doc. A/RES/70/148, February 25, 2016.

¹⁴⁵ UN General Assembly Resolution 66/10 (November 18, 2011), UN Doc. A/RES/66/10, December 7, 2011; UN Security Council Resolution 2395 (December 21, 2017), UN Doc. S/RES/2395.

¹⁴⁶ UN General Assembly Resolution 60/288 (September 8, 2006), UN Doc. A/RES/60/288, September 20, 2006.

¹⁴⁷ The twelve CTITF working groups are: Border Management and Law Enforcement relating to Counter-Terrorism; Countering the Financing of Terrorism; Foreign Terrorist Fighters; National and Regional Counter-Terrorism Strategies; Preventing and Responding to [Weapons of Mass Destruction] Terrorist Attacks; Preventing Violent Extremism and Conditions Conducive to the Spread of Terrorism; Promoting and Protecting Human Rights and the Rule of Law While Countering Terrorism; Protection of Critical Infrastructure Including Internet, Vulnerable Targets and Tourism Security; Supporting and Highlighting Victims of Terrorism; Legal and Criminal Justice Responses to Terrorism; Gender Sensitive Approach to Preventing and Countering Terrorism; and Working Group on Communications.

¹⁴⁸ For more on CCT’s work, see www.un.org/counterterrorism/ctitf/en/uncct/programme-project-management.

GCTS.¹⁴⁹ Both the CTITF and the CCT were transferred unaltered from the Department of Political Affairs to the new OCT. This reform, albeit still underway, was not the major overhaul of the UN counterterrorism framework that some believe was necessary.¹⁵⁰

Indeed, with the proliferation of UN counterterrorism entities, there are concerns that they do not sufficiently coordinate and cooperate with each other or with other UN entities engaged in counterterrorism. In theory, the mandates of the counterterrorism entities created by the UN Security Council and of the OCT are complementary, with the former focusing on expertise, analysis, and assessment and the latter on technical assistance and capacity building. As such, close collaboration could ensure comprehensive and coherent UN counterterrorism efforts, with the OCT and other stakeholders using CTED's expert assessments and analysis to shape their counterterrorism programs. However, they have not been complementary in practice. For one, the CCT and CTITF have not had regular access to CTED's assessments, policy documents, and analytical reports.¹⁵¹ Furthermore, although OCT states it will aim to have a "close relationship" with UN Security Council bodies, its terms of reference provide no detail regarding this relationship.¹⁵²

In an effort to fill this gap, member states included language in CTED's latest mandate renewal that clearly emphasizes the importance of strong coordination and collaboration with relevant UN bodies, particularly between CTED and OCT. UN Security Council Resolution 2395 even directs OCT and CTED to draft a joint report

on practical steps to be taken toward that end.¹⁵³ In the past months, there have been visible efforts to strengthen relations, including through a joint field mission by CTED and OCT leadership to Iraq.¹⁵⁴ CTED and OCT leadership also reportedly have weekly meetings and released their first joint report in May 2018.¹⁵⁵

The establishment of OCT evidently did little to alleviate the concerns of member states regarding the need for a coordinated UN counterterrorism effort. Therefore, in February 2018, the UN secretary-general and the thirty-eight entities of the CTITF (including CTED) signed the Global Counter-Terrorism Coordination Compact, which aims to formalize the way these entities work together and to replace the CTITF.¹⁵⁶ The Global Compact Coordination Committee will be chaired by the under-secretary-general for counterterrorism and will include a seat for CTED. Progress on the implementation of the compact will be reviewed every two years. The General Assembly's 2018 resolution on the GCTS also called on the OCT to use CTED expert assessments and recommendations in designing technical assistance and capacity-building efforts to implement the GCTS.¹⁵⁷

Although these developments may point toward more concrete collaboration on the UN's counterterrorism efforts, IHL has been absent from discussions. Furthermore, none of these counterterrorism entities were formally structured to include staff with IHL expertise, even though they work in situations of armed conflict which require them to regularly engage with IHL.

It is clear that there is a gap between humani-

149 UN General Assembly Resolution 70/291 (June 15, 2017), UN Doc. A/RES/70/291, June 19, 2017. OCT's five main functions are outlined in *UN General Assembly, Capability of the United Nations System to Assist Member States in Implementing the United Nations Global Counter-terrorism Strategy—Report of the Secretary-General*, UN Doc. A/71/858, April 3, 2017, p. 17.

150 See, for example, FIDH, "UN Counter-terrorism Reform: A Hasty Process Will Favor Authoritarian States Rather Than Effective Restructuring," April 28, 2017, available at www.fidh.org/en/issues/terrorism-surveillance-and-human-rights/un-counter-terrorism-reform-a-hasty-process-will-favor-authoritarian; and Eric Rosand, "UN Counterterrorism Reform: Now It's the Security Council's Turn," *IPI Global Observatory*, September 25, 2017, available at <https://theglobalobservatory.org/2017/09/terrorism-countering-violent-extremism-guterres/>.

151 UN General Assembly, *Capability of the United Nations System to Assist Member States in Implementing the United Nations Global Counter-terrorism Strategy—Report of the Secretary-General*, UN Doc. A/71/858, April 3, 2017, p. 7.

152 UN Office of Counter-Terrorism website, available at www.un.org/en/counterterrorism/; FIDH, "The United Nations Counter-terrorism Complex," p. 6.

153 UN Security Council Resolution 2395 (December 21, 2017), UN Doc. S/RES/2395.

154 UN Security Council Counter-Terrorism Committee, "Heads of United Nations Counter-terrorism Bodies Conclude Joint Visit to Iraq," press release, March 8, 2018, available at www.un.org/sc/ctc/news/2018/03/08/press-release-heads-united-nations-counter-terrorism-bodies-conclude-joint-visit-iraq/.

155 UN Security Council, *Joint Report of the Counter-Terrorism Committee Executive Directorate and the Office of Counter-Terrorism Pursuant to Paragraph 18 of Security Council Resolution 2395 (2017)*, UN Doc. S/2018/435, May 8, 2018.

156 UN Security Council Counter-Terrorism Committee, "Global Counter-Terrorism Coordination Compact Signed—Highlights Importance of CTED Assessments," February 23, 2018, available at www.un.org/sc/ctc/news/2018/02/23/global-counter-terrorism-coordination-compact-signed-highlights-importance-cted-assessments/. The Global Counter-Terrorism Coordination Compact is an internal document.

157 UN General Assembly Resolution 72/284 (June 28, 2018), UN Doc. A/RES/72/284, July 2, 2018.

tarian actors and the OCT and a need for better engagement. IHL was reportedly not part of the conversations on setting up and developing the OCT. Prior to the OCT's creation, only Switzerland directly expressed the need for the under-secretary-general heading it to have "either individually or by virtue of his/her team, expertise in matters relating to...international humanitarian law" and for this expertise to "fully be taken into account when organizing this new office."¹⁵⁸

From what little information is publicly available on the work of CCT and I-ACT, it appears they have not extensively engaged with the impact of counterterrorism measures on principled humanitarian action and medical care.¹⁵⁹ The same can be said of the OCT's Policy and Coordination Unit, whose role is to provide policy and political advice to the under-secretary-general (including by drafting the review of the GCTS) and to coordinate the CTITF. It is clear that there is no concrete guidance or policy on these issues and a lack of humanitarian expertise, which may reflect a lack of agreement at the policy level between the humanitarian and counterterrorism perspectives. Reportedly, however, CTITF working groups are engaging in an ongoing dialogue with humanitarian actors, and OCHA, the International Organization for Migration (IOM), and the UN Refugee Agency (UNHCR) provide inputs as observers to the CTITF.¹⁶⁰

The CTITF is such a vast and sprawling entity that its work and impact are difficult to capture. Moreover, there is little public information on the

work of its working groups, with some providing no public documents or reports on their websites.¹⁶¹ Only a few of the CTITF working groups seem, to some extent, to have addressed the relationship between counterterrorism efforts and medical care and impartial humanitarian action. However, a number of humanitarian organizations participate as observers in the working groups, and it can therefore be assumed that humanitarian concerns are at the very least raised.

The Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism has published a series of Basic Human Rights Reference Guides. Two of them specifically state that they do not deal with IHL, although they stress the importance of respecting IHL in counterterrorism efforts.¹⁶² The guide on the *Right to a Fair Trial and Due Process in the Context of Counter-Terrorism* contains a section on IHL and criminal law, and the guide on *Detention in the Context of Counter-Terrorism* briefly tackles the issue of IHL in regards to the detention of suspected terrorists.¹⁶³ Principle 4 of the guide on *Conformity of National Counter-Terrorism Legislation with International Human Rights Law* stresses that "States must ensure consistency between national counter-terrorism legislation and international human rights and refugee law, as well as, when applicable, international humanitarian law." Importantly, it also highlights the types of impact counterterrorism measures have had on the operations of humanitarian actors.¹⁶⁴

Recently, the working group published a

158 Australia also stated that "United Nations standards of human rights and respect for international law must continue to guide its counter-terrorism efforts and must be applied to the mandate of the new office." UN General Assembly, *Capability of the United Nations System to Assist Member States in Implementing the United Nations Global Counter-terrorism Strategy—Report of the Secretary-General*, UN Doc. A/71/858, April 3, 2017, pp. 21, 41.

159 Interviews with experts, February–March 2018.

160 These organizations decided to be observers rather than members of the CTITF to avoid being perceived as associated with its highly politicized agenda. The signing of the Global Counter-Terrorism Compact, which will replace the CTITF, reportedly does not change their status, as some have indicated they remain observers. UNICEF refused to be part of the CTITF or the Global Counter-Terrorism Compact.

161 See, for example, the websites of the CTITF Working Group on Legal and Criminal Justice Responses to Terrorism, available at www.un.org/counterterrorism/ctitf/en/legal-and-criminal-justice-responses-terrorism; CTITF Working Group on Preventing Violent Extremism, available at www.un.org/counterterrorism/ctitf/en/preventing-violent-extremism; and CTITF Working Group on the Protection of Critical Infrastructure Including Vulnerable Targets, Internet, and Tourism Security, available at www.un.org/counterterrorism/ctitf/en/protection-critical-infrastructure-including-vulnerable-targets-internet-and-tourism-security.

162 CTITF Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Basic Human Rights Reference Guide: The Stopping and Searching of Persons in the Context of Countering Terrorism*, March 2014, pp. 4, 7, available at www.un.org/en/terrorism/ctitf/pdfs/Basic%20Human%20Rights%20Reference%20Guide%20-%20The%20Stopping%20and%20Searching%20of%20Persons2014.pdf; *Basic Human Rights Reference Guide: Security Infrastructure*, March 2014, p. 4, available at www.un.org/en/terrorism/ctitf/pdfs/Basic%20Human%20Rights%20Reference%20-%20Security%20Infrastructure2014.pdf.

163 Ibid., *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, October 2014, p. 8, available at www.ohchr.org/EN/newyork/Documents/FairTrial.pdf; *Basic Human Rights Reference Guide: Detention in the Context of Countering Terrorism*, October 2014, p. 7, available at www.ohchr.org/EN/newyork/Documents/DetentionCounteringTerrorism.pdf.

164 Ibid., *Basic Human Rights Reference Guide: Conformity of National Counter-terrorism Legislation with International Human Rights Law*, October 2014, p. 8, available at www.ohchr.org/EN/newyork/Documents/CounterTerrorismLegislation.pdf.

guidance document for states on *Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters*, which highlights IHL's applicability to a range of issues. The document recommends that states adopt "clear and precise and not overly broad" definitions of terrorism or acts of terrorism and that any definition should be "fully consistent with international human rights law and [IHL]."¹⁶⁵ This working group also trains and builds the capacity of law enforcement and other officials on human rights in counterterrorism in Cameroon, Iraq, Jordan, Mali, and Tunisia. There was a proposal at some stage to include a module on IHL in the training curriculum, but this did not materialize. This proposal could be taken up again in future training projects. The Working Group on Countering the Financing for Terrorism has in the past worked on issues relating to abuse of the nonprofit sector but does not seem to have been particularly active on these issues in recent years.¹⁶⁶

An important challenge to mainstreaming IHL and humanitarian concerns into the UN counterterrorism architecture has been the lack of open decision making, which makes it difficult for civil society and nonprofit organizations to engage with counterterrorism actors and in counterterrorism policy discussions.¹⁶⁷ In response to concerns expressed by a number of civil society actors,¹⁶⁸ the UN secretary-general recently announced he is considering establishing a new unit in OCT to ensure that the views of civil society are fully reflected in counterterrorism policies and programs.¹⁶⁹ This would be a significant step forward in ensuring that UN counterterrorism efforts better take into account humanitarian concerns, among other issues.

OTHER UN GENERAL ASSEMBLY-MANDATED ENTITIES

As clearly indicated by the UN Global Counter-Terrorism Strategy (GCTS) and the large membership of the CTITF, a number of other organizations mandated by the UN General Assembly contribute to the UN's counterterrorism efforts. Key among these are OHCHR, the UN Interregional Crime and Justice Research Institute (UNICRI), and UNODC. Few of the other General Assembly-mandated entities that contribute to the UN's counterterrorism work have engaged on the impact of counterterrorism on medical care and impartial humanitarian action.

While OHCHR does not have an official counterterrorism mandate, it is tasked with leading efforts to integrate a human rights approach into all work carried out by UN agencies. Given that the fourth pillar of the GCTS is about ensuring human rights and the rule of law, OHCHR has a key role to play in the UN's counterterrorism efforts. OHCHR is a member of several CTITF working groups and co-chairs the Promoting and Protecting Human Rights and the Rule of Law Working Group with OCT. The special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism is also mandated to regularly report to the Human Rights Council and the UN General Assembly.¹⁷⁰

OHCHR is very active in the Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism. Former and current special rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism have reiterated the need for counterterrorism efforts to be in

¹⁶⁵ Ibid., *Guidance: Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters*, 2018, available at www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf.

¹⁶⁶ The only available report of the Working Group on Countering the Financing of Terrorism is from 2009. It contains a short chapter on nonprofit organizations that principally flags the risk of abuse. CTITF Working Group on Countering the Financing of Terrorism, *Tackling the Financing of Terrorism*, 2009, pp. 16–18 available at www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf. The working group also completed its Charities Project in 2013. For more information, see www.un.org/counterterrorism/ctitf/en/charities-project.

¹⁶⁷ See, for example, FIDH, "The United Nations Counter-terrorism Complex"; Eric Rosand, "Where Is Civil Society in the U.N.'s Counterterrorism Efforts?," Brookings Institution, May 15, 2018, available at www.brookings.edu/blog/order-from-chaos/2018/05/15/where-is-civil-society-in-the-u-n-s-counterterrorism-efforts/.

¹⁶⁸ See, for example, "Coalition Letter on Civil Society Engagement with the UN Office of Counter-Terrorism," Human Rights Watch, January 24, 2018, available at www.hrw.org/news/2018/01/26/coalition-letter-civil-society-engagement-un-office-counter-terrorism.

¹⁶⁹ UN Secretary-General, "Closing Remarks at High-Level Conference on Counter-Terrorism," June 29, 2018, available at www.un.org/sg/en/content/sg/statement/2018-06-29/secretary-generals-closing-remarks-high-level-conference-counter.

¹⁷⁰ OHCHR, "Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism," available at www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx.

line with IHL obligations,¹⁷¹ most recently highlighting the tensions between the UN counterterrorism framework and IHL.¹⁷² Back in 2008, OHCHR also published a fact sheet on human rights, terrorism, and counterterrorism in which it explained that “IHL prohibits many acts committed in armed conflict which would be considered terrorist acts if they were committed in times of peace.”¹⁷³ It also highlighted that “the effective use of humanitarian exemptions may be one important means for limiting the negative impact of targeted sanctions on the enjoyment of economic, social and cultural rights.”¹⁷⁴ However, there is a lack of support for OHCHR within the UN counterterrorism architecture, with the fourth pillar of the GCTS, on human rights, widely reported to be the least implemented.¹⁷⁵ This points to the need to better balance future reviews and implementation of the GCTS and to mainstream OHCHR’s work within the UN counterterrorism architecture.¹⁷⁶

UNICRI focuses mainly on designing and programming counterterrorism training projects and is a member of several CTITF working groups. In 2010, it launched a Centre on Policies to Counter the Appeal of Terrorism. This center is run in close cooperation with CTITF and builds on the results of the work of the CTITF Working Group on Addressing Radicalization and Extremism That Lead to Terrorism.¹⁷⁷ UNICRI is

also a member of the Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, albeit a less active one than OHCHR. In 2016, its report on children and counterterrorism contained a chapter on IHL standards, looking at the protection afforded to children under IHL and the use of administrative detention.¹⁷⁸

UNODC is likely the most active General Assembly-mandated entity working on terrorism-related issues. Created in 2002, its Terrorism Prevention Branch is mandated to provide, upon request, technical assistance to member states in ratifying and implementing international legal instruments related to the prevention and suppression of terrorism.¹⁷⁹ As a field-based agency, it is able to conduct capacity-building activities in a wide variety of contexts. UNODC participates in most CTITF working groups and chairs the Working Groups on Countering the Financing of Terrorism and on Legal and Criminal Justice Responses to Terrorism. It also participates in and provides legal expertise to I-ACT projects and CTED country visits. In its country visit reports, CTED regularly suggests that member states work with UNODC to respond to capacity-building needs.

While IHL has come into play in UNODC’s work, and many of its reports and publications reference IHL,¹⁸⁰ including when and where it

171 See, for example, UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/HRC/34/61, February 21, 2017; *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin—*Ten Areas of Best Practices in Countering Terrorism*, UN Doc. A/HRC/16/51, December 22, 2010; *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin—*Addendum: Communications with Governments*, UN Doc. A/HRC/10/3/Add.1, February 24, 2009.

172 UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/72/43280, September 27, 2017.

173 OHCHR, *Human Rights, Terrorism and Counter-terrorism: Factsheet No. 32*, 2008, pp. 11–12, available at www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.

174 *Ibid.*, p. 47.

175 FIDH, “The United Nations Counter-terrorism Complex”; Fionnuala Ní Aoláin and Martin Scheinin, “Centralizing Human Rights in the Global Counter-terrorism Strategy,” *Just Security*, March 16, 2018, www.justsecurity.org/53583/centralizing-human-rights-global-counter-terrorism-strategy/.

176 “Global Group of NGOs Deplore Lack of Attention to Human Rights in Latest Review of UN’s Global Counterterrorism Strategy by UN Member States,” *Human Rights Watch*, July 10, 2018, available at www.hrw.org/news/2018/07/10/global-group-ngos-deplore-lack-attention-human-rights-latest-review-uns-global.

177 UNICRI, “Preventing and Countering Violent Extremism,” available at www.unicri.it/topics/counter_terrorism/.

178 UNICRI, *Children and Counter-terrorism*, 2016, pp. 22–27, available at www.unicri.it/in_focus/files/Children_counter_terrorism.pdf.

179 UNODC, “Mandate of the Terrorism Prevention Branch,” available at www.unodc.org/unodc/en/terrorism/mandate-of-the-terrorism-prevention-branch.html.

180 See, for example, UNODC, *Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework*, 2015, available at www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf; *The Criminal Justice Response to Support Victims of Acts of Terrorism*, 2012, available at www.unodc.org/documents/terrorism/Publications/Support_to_victims_of_terrorism/revise_d_edition_21_May_2012_12-53652_Ebook.pdf; and *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017, available at www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf.

applies,¹⁸¹ it has not specifically focused on humanitarian action. However, UNODC is reportedly developing a training module on the international legal context of counterterrorism that will touch on counterterrorism and humanitarian action. Furthermore, its human rights trainings reportedly touch on questions around humanitarian assistance. UNODC has also been involved in questions of terrorist financing and the nonprofit sector, including through UNODC's Global Program against Money Laundering, Proceeds of Crime, and the Financing of Terrorism.¹⁸² This program provides technical assistance in countries that strongly rely on humanitarian aid, using its *Financial Disruption Workbook*.¹⁸³ The underlying assumption is that terrorists will try to profit from nonprofit organizations, but states must take into account the negative effects of their attempts to disrupt terrorist financing, including the impact on human rights and humanitarian assistance.

Finally, UNODC faces similar tensions as humanitarian and medical actors. For example, in its demobilization, disarmament, and reintegration (DDR) programs, UNODC is facing questions around whether to treat a member of a designated terrorist group as it would a member of a more traditional non-state armed group. Similarly, in its criminal justice work, tensions arise between counterterrorism and the criminal justice system for those associated with a designated terrorist group, with states using counterterrorism courts and laws rather than criminal ones.

Although not the focus of this report, the UN counterterrorism architecture also regularly interacts with non-UN counterterrorism bodies such as the FATF (described above) and the Global Counterterrorism Forum.¹⁸⁴ These bodies have had little engagement on humanitarian issues and IHL and, despite reforms, continue to operate with

limited engagement from civil society or other actors.

Conclusions and Recommendations

The adverse impact of counterterrorism measures on the provision of medical care and impartial humanitarian action is clear. Broad definitions of terrorism, support to terrorism, and financing of terrorism, as well as the expansive application of counterterrorism frameworks, can affect medical and humanitarian actors in a variety of ways, depriving those in need of critical assistance and protection. To prevent the adverse impact of counterterrorism measures and enable the delivery of adequate healthcare and humanitarian assistance and protection in situations of armed conflict, the international community as a whole must take action to uphold IHL and the strong commitments made in Security Council Resolution 2286.

Member states were quick to establish a complex UN counterterrorism architecture to respond to the threat of terrorist attacks; indeed, they have clear and legitimate security concerns. However, in their haste to create new structures, laws, and policies, they did not reflect on how this emerging counterterrorism regime would interact with and affect existing international law, including IHL. The Security Council's cornerstone Resolution 1373 of 2001 does not even mention IHL. There has been progress over the years, with IHL making it into subsequent Security Council counterterrorism resolutions and, more recently, growing recognition that respect for the rule of law mutually reinforces and is an essential part of counterterrorism efforts.

However, only one Security Council resolution

181 See, for example, UNODC, *Human Rights and Criminal Justice Responses to Terrorism: Counter-terrorism Legal Training Curriculum*, 2014, Module 4, available at www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf; *Frequently Asked Questions on International Law Aspects of Countering Terrorism*, 2009, available at www.refworld.org/docid/4a79419c2.html; and *Handbook on Criminal Justice Responses to Terrorism*, 2009, available at www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf.

182 See, for example, UNODC, "Human Rights and Criminal Justice Responses to Terrorism: Counter-terrorism Legal Training Curriculum," 2014, Module 4; *The Use of the Internet for Terrorist Purposes*, 2012, available at www.unodc.org/documents/terrorism/Publications/Use_of_Internet_for_Terrorist_Purposes/ebook_use_of_the_internet_for_terrorist_purposes.pdf; Kenya: *Human Rights and Criminal Justice Responses to Terrorism*, 2004, available at www.unodc.org/documents/terrorism/Publications/Kenya%20HR%20manual/Kenya_Manual_e-book.pdf.

183 This workbook is currently being revised.

184 The Global Counterterrorism Forum is an international forum of twenty-nine countries and the European Union that brings together experts and practitioners from countries around the world to share experiences and develop tools and strategies on how to counter the evolving terrorist threat. The forum is co-chaired by Morocco and the Netherlands.

contains an exemption for humanitarian activities. Furthermore, member states have created a tentacular counterterrorism architecture that does not sufficiently take into account the tensions its work and guidance creates with IHL obligations, and in particular with the provision of medical care and impartial humanitarian action. Some UN counterterrorism entities, or entities involved in UN counterterrorism efforts, have taken steps to begin to address these issues. However, the lack of a systemic understanding of the issues and of concrete policies and guidance protecting medical care and principled humanitarian action needs to be urgently addressed.

While this list is not exhaustive, a number of concrete measures could help reduce the impact tensions between counterterrorism efforts and obligations under IHL have had on medical care and impartial humanitarian action:

- **All UN resolutions and other UN policies that pertain to counterterrorism should contain an exemption for humanitarian activities, including the provision of medical care, and states should adopt such exemptions domestically.** Member states, UN entities, humanitarian actors, counterterrorism and sanctions experts, and other stakeholders should work together to craft exemptions with clearly defined parameters, that are adapted to the situation at hand, and that adequately protect actors engaged in humanitarian operations. This will ensure that counterterrorism measures do not run counter to principles states have supported and endorsed through IHL treaties and that they do not challenge principled humanitarian action. These exemption clauses should also cover local actors that are not necessarily identified as humanitarian actors but are the most impacted by counterterrorism measures. The exemption in the Somalia sanctions regime has set an important precedent that should be built upon and expanded. At the regional level, the exemption in the EU Directive on Combating Terrorism also represents an important good practice.¹⁸⁵

To encourage this, and building on paragraph 79

of the 2018 UN Global Counter-Terrorism Strategy (GCTS), the next review of the GCTS should clearly stress that counterterrorism measures need to contain exemptions for humanitarian actors. Member states should also submit a proposal to the Counter-Terrorism Committee (CTC) to amend the reasons related to medical care for listing individuals and entities on the ISIL (Da'esh) and Al-Qaida Sanctions List.

- **Every relevant UN counterterrorism measure should continue to reiterate that counterterrorism efforts need to comply with international law, including international human rights law and IHL, and acknowledge and reaffirm obligations under IHL related to relief operations and medical care.** These measures should clearly outline how member states can comply with their obligations under IHL while conducting counterterrorism efforts. For example, measures aimed at criminally repressing “material support to,” “services for,” “assistance to,” or “association with” persons or entities involved in terrorism should exclude activities that are exclusively humanitarian and impartial in character.

Member states should include clear and carefully drafted language in all relevant instruments: Security Council resolutions, including country-specific sanctions regimes; the General Assembly's resolutions on the protection of human rights and fundamental freedoms while countering terrorism; the GCTS; and Human Rights Council resolutions. Member states should also include such language in the Security Council and General Assembly resolutions renewing the mandates of UN counterterrorism entities. For example, the Counter-Terrorism Executive Directorate's (CTED) next mandate renewal could require it to engage with member states more concretely and, in consultation with humanitarians, work out specific strategies to ensure it is complying with IHL when implementing counterterrorism measures.

- **Humanitarian actors should engage with UN counterterrorism structures more actively, strategically, and systematically.** They need to

¹⁸⁵ “The provision of humanitarian activities by impartial humanitarian organizations recognized by international law, including international humanitarian law, do not fall within the scope of this Directive.” Directive 2017/541 of the European Parliament and of the Council on Combating Terrorism, March 15, 2017, para. 38.

adopt a strong common narrative to raise awareness within these structures on the impact counterterrorism measures can have on medical care and principled humanitarian action. Humanitarian actors could consider re-engaging on these issues in the Inter-Agency Standing Committee. In its overviews of humanitarian needs for specific countries, for example, OCHA could consistently monitor and report on the impact of counterterrorism measures on humanitarian action in these contexts. OCHA could also support other efforts to gather evidence of the impact of counterterrorism measures on humanitarian action. Finally, it could assume a stronger role providing technical assistance on these issues to other entities involved in capacity-building programs.

- **UN bodies that engage in counterterrorism should systematically include humanitarian actors in relevant conversations.** The Office of Counter-Terrorism (OCT), CTED, and other bodies can help ensure that UN counterterrorism entities and humanitarian actors are providing a coherent narrative on member states' obligations under the counterterrorism framework and IHL and how these interact. UNODC's forthcoming training module on the international legal context of counterterrorism will be an important tool to ensure its counterterrorism programs and activities do not negatively impact medical care or impartial humanitarian action. Sanctions committees should systematically and continuously consult with and be briefed by humanitarian actors to understand the impact of sanctions on humanitarian action in the countries in question. Member states also have a role to play in encouraging such dialogue and can include language to this effect in mandate renewals. Member states should also ensure systematic dialogue between the humanitarian and counterterrorism communities at the national level.
- **CTED should better integrate IHL considerations into its work.** In its reporting on state practices, CTED should more systematically

highlight positive examples of states developing counterterrorism laws and policies that protect medical care and principled humanitarian action. CTED's next Technical Guide on the Implementation of Security Council Resolution 1373 (2001) and other relevant guidance should include language on IHL and the protection it affords to humanitarian action and medical care. It could contain a more detailed breakdown of how counterterrorism measures and IHL can come into conflict and ways to avoid this conflict, such as by integrating an exemption clause for impartial humanitarian activities in domestic criminal legislation. At the very least, the guide could point to existing documents or reports on these issues as guidance.¹⁸⁶

- **CTED could also consider including questions related to IHL in its Detailed Implementation Survey to at least raise awareness of the potential of counterterrorism efforts to impact medical care and impartial humanitarian action.** It could also include IHL considerations in its review of the Madrid Guiding Principles to be adopted in November 2018. Finally, CTED's next mandate renewal could more clearly require more concrete engagement with member states to develop, in consultation with humanitarians, specific strategies for not foregoing their obligations under IHL in implementing their counterterrorism obligations.
- **OCT should better integrate IHL considerations into its work.** OCT should work with member states to ensure a productive relationship that does not harm principled humanitarian action and should provide them guidance on implementing the GCTS. Member states also have a role to play in facilitating this engagement. OCT should formally engage with humanitarian actors and others through its planned Civil Society Unit. This could be a valuable entry point for humanitarian actors to make their concerns better understood and integrated into the various UN counterterrorism work streams. This engagement should be transparent and systematized, with set meeting times and formats. With

186 Mackintosh and Duplat, "Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action"; Gillard, "Recommendations for Reducing Tensions in the Interplay between Sanctions, Counterterrorism Measures and Humanitarian Action"; Gillard, "Humanitarian Action and Non-state Armed Groups"; ICRC, "Counterterrorism, IHL and Humanitarian Action," June 19, 2018, available at www.icrc.org/en/document/counterterrorism-ihl-and-humanitarian-action; Christine Beerli, "Terrorism, Counter-terrorism and International Humanitarian Law," ICRC, October 17, 2016, available at www.icrc.org/en/document/terrorism-counter-terrorism-and-international-humanitarian-law.

the new Global Counter-Terrorism Coordination Compact, it may also be useful to establish a formal process for those holding observer status to provide input.

Staff with specific IHL and humanitarian expertise could be appointed within OCT and other relevant entities, and training on IHL should be organized for other staff. Relevant CTITF working groups, in particular the Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism could more forcefully address IHL-related issues, such as by including

IHL modules in their training curricula or addressing IHL considerations in their guidance, in consultation with humanitarian actors.

- **Member states, UN entities, humanitarian actors, counterterrorism and sanctions experts, and other stakeholders should step up efforts to start a wider political discussion, particularly in New York, on the tensions between counterterrorism and humanitarian action, including medical activities.** These efforts should be led by member states, and the resulting discussions should include all relevant stakeholders.

Annex:

Case Studies on National-Level Implementation and Impact on Principled Humanitarian Action

AFGHANISTAN

Since February 2018, Afghanistan's counter-terrorism laws have been part of its new Penal Code. An act of terrorism is defined as any of the acts outlined in the code if directed against the government of Afghanistan, a foreign state, or a national or international organization to influence their political affairs or to destabilize the government of Afghanistan or a foreign government.¹⁸⁷ Acts that may be considered terrorist acts therefore include suicide attacks, destruction of infrastructure, or crimes against aviation safety.¹⁸⁸

According to the Penal Code, a person will have committed the crime of financing terrorism if he or she "directly or indirectly and intentionally prepares, provides or collects funds, property, or financial services or attempts to provide or collect funds, property or financial services having the knowledge or information that they are used, in full or in part, to carry out" acts defined as terrorism.¹⁸⁹ This provision covers "any kind of movable or immovable property, and tangible and intangible property" which could encompass medical supplies or relief aid. However, it also requires the provider to know that this property will be used for "terrorism" purposes. The Penal Code does not contain any provision specifically on support to terrorism, but the definition of financing of terrorism is broad enough to encompass support to terrorism as well.

Importantly, the new Penal Code contains protections for medical activities. It provides that "surgical operations or other necessary medical procedures" are not to be considered a crime if

exercised "in accordance with the technical principles of the medical profession" and if consent has been given.¹⁹⁰ It also exempts the performance of "surgical operations in emergency cases carried out according to principles of medicine."¹⁹¹ While these provisions apply to all crimes outlined in the Penal Code, not specifically those related to terrorism, they should, at least in theory, prevent counterterrorism laws from criminalizing healthcare. However, the Penal Code makes no reference to IHL and contains no exemption clause for humanitarian activities that are not medical. Given that it only recently came into force, it remains to be seen what impact the new Afghan counterterrorism framework will have on medical care and impartial humanitarian action on the ground.¹⁹²

IRAQ

Iraq's Anti-Terrorism Law of 2005, which applies to all of Iraq except its Kurdistan Region, defines terrorism as

every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals.¹⁹³

This provision has the potential to be broadly interpreted to encompass a wide array of activities. Notably, it deems it sufficient to have had the "aim to" disturb the peace and does not explain what constitutes a "terrorist goal." The crime of terrorism extends to "anyone who organized, chaired or participated in an armed terrorist gang

187 Afghan Penal Code, 2017, Arts. 263–264.

188 *Ibid.*, Arts. 265–278. Other crimes include: "Offences related to the Use of Explosive or Lethal Devices"; "Crimes against Persons"; "Offences Related to Nuclear Material"; "Crime of Hostage Taking"; "Offences against Internationally Protected Persons"; "Crimes against Airport Safety"; "Seizure of or Exercise Control over an Aircraft, Ship, and Fixed Platform"; "Crimes against Persons on a Ship or Fixed Platform"; "Crimes against Ship or Fixed Platform Safety"; "Establishment of Terrorism Organization and Obtaining its Membership and Cooperating with it"; and "Punishment of Accomplice, Accessory, Conspirator and Attempt".

189 *Ibid.*, Art. 279.

190 *Ibid.*, Art. 119.

191 *Ibid.*

192 Norwegian Refugee Council, "Principles under Pressure," pp. 23–24. This report indicates that humanitarian actors do not understand the domestic legal landscape well.

193 Iraqi Law Number 13, 2005, Art. 1.

that practices and plans for terrorism and also contributes and participates in this act.”¹⁹⁴ This provision requires both (1) participation in a terrorist group and (2) participation in the practice and planning of a terrorist act.

On the face of it, if terrorism and participation in a terrorist group are not interpreted too broadly, the provision could be rather restrictive. In practice, however, there are reports that this law has been used to arrest and charge a wide range of suspects who were not implicated in specific violent acts but considered to have assisted IS.¹⁹⁵ Judges and prosecutors have made no distinction between individuals who joined IS voluntarily, and those who were coerced.¹⁹⁶ Those arrested and charged have included doctors working in IS-held territories.¹⁹⁷ Furthermore, the law does not contain an exemption for medical or humanitarian activities.¹⁹⁸ Iraq is in the process of revising its 2005 Counter-Terrorism Law, and a draft was reviewed by UNODC in 2016, but no further public information is available.¹⁹⁹

At the governorate level In Salah ad-Din, the governorate council reportedly passed a decree in August 2016 permanently banning anyone proven to have been affiliated with IS from the governorate. Because it is unclear what evidentiary standards are being used to determine who was affiliated with IS, this could have included medical personnel who continued to work under IS.²⁰⁰

The Anti-Terrorism Law passed by the parlia-

ment of Iraq’s Kurdistan Region in 2006 expired in 2016 but was reportedly still being used by courts in some trials of alleged IS members.²⁰¹ Notably, prosecutors were using the expired law to seek harsher sentences than the Iraqi penal code allowed and to prosecute suspects for crimes committed outside of their jurisdiction, which should have been transferred to federal Iraqi authorities.²⁰² It also defines terrorism broadly and defines support to terrorism as including “facilitating the entry or exit of terrorists to and from the region, or harboring or assisting them.”²⁰³ This could be applied to providers of medical care or humanitarian aid, although so far none of the known arrests of medical workers have occurred in the Kurdish region.²⁰⁴ Reportedly, however, in the face of strong criticism, the Kurdish parliament has provided guarantees that it would review and amend the law. The law was renewed on July 1, 2018.²⁰⁵

MALI

Mali’s 2005 Law Concerning Acts of Terrorism defines terrorism through a detailed list of specific acts. It is rather restrictive, notably in comparison with the laws in Afghanistan and Iraq.²⁰⁶ Helping a person or group commit one of the acts defined as terrorism is considered an act of terrorism under the law, but only with knowledge of their intent.²⁰⁷ According to this law, financing terrorism also requires specific knowledge that the funds or goods will be used to commit an act of terrorism.²⁰⁸ Mali’s

194 Ibid., Art. 2(3).

195 Human Rights Watch, “Flawed Justice: Accountability for ISIS Crimes in Iraq,” December 5, 2017, available at www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq; Mara Revkin, “Iraq Case Study,” in *The Limits of Punishment: Transitional Justice and Violent Extremism*, UN University Centre for Policy Research and Institute for Integrated Transitions, May 2018, p. 54, available at <https://i.unu.edu/media/cpr.unu.edu/attachment/2766/FINAL-The-Limits-of-Punishment-01062018.pdf>.

196 Ibid., p. 47.

197 Ibid.; Maya Alleruzzo and Salar Salim, “Iraq’s IS Trials Bring Swift Verdicts, Almost All Guilty,” AP, April 29, 2018, available at www.apnews.com/25a655d5b3cb47c5a0251f596855c98f/Iraqs-IS-trials-bring-swift-verdicts-almost-all-guilty.

198 Article 5 of Law Number 13 is on waiver of punishment, legal excuses, and extenuating legal circumstances but does not include medical and humanitarian activities.

199 UNODC, “Final Review of the Iraqi Counter-Terrorism Draft Law,” October 2016, available at www.unodc.org/unodc/en/terrorism/latest-news/2016-issiii_ws-leg-iraq-vienna-oct.html.

200 Revkin, “Iraq Case Study,” p. 48.

201 Ibid., p. 54; Human Rights Watch, “Flawed Justice.”

202 Belkis Wille, “Why Children Are Stuck in Prison in Erbil without Trial,” Human Rights Watch, March 27, 2017, available at www.hrw.org/news/2017/03/27/why-children-are-stuck-prison-erbil-without-trial.

203 Human Rights Watch, “Caught in the Whirlwind: Torture and Denial of Due Process by the Kurdish Security,” July 2007, available at www.hrw.org/sites/default/files/reports/kurdistan0707webwcover.pdf.

204 Buissonnière, Woznick, and Rubenstein, “The Criminalization of Healthcare.”

205 Fazel Hawramy, “Renewal of Anti-terror Law Threatens Human Rights in Iraqi Kurdistan,” *Al-Monitor*, July 19, 2018, available at www.al-monitor.com/pulse/originals/2018/07/iraq-kurdistan-counter-terrorism-human-rights.html#ixzz5Nh645Zw4.

206 Malian Law Number 08.025, July 23, 2008, Arts. 1–6.

207 Ibid., Art. 5.

208 Ibid., Art. 8.

2016 Law on Combating Money Laundering and the Financing of Terrorism restricts its definition of financing terrorism to providing financial resources, and also requires knowledge of intent.²⁰⁹

In theory, therefore, Mali's counterterrorism legal framework does not appear to be problematic for medical humanitarian actors. This was confirmed by medical humanitarian actors operating in the country.²¹⁰ Unfortunately, this does not necessarily prevent other counterterrorism measures from impacting medical and humanitarian activities. In Timbuktu, the chief of staff of the Malian armed forces reportedly banned the use of motorcycles and pick-up trucks. While this was not explicitly a counterterrorism law, it was well understood that these are the modes of transport used by groups considered to be terrorists operating in the area. This ban restricted access to health services, as the local population had few means of transport left. Some wounded and sick resorted to traveling on camelback, and home deliveries of babies increased. It also made it more difficult for health service providers to access populations in need.

NIGERIA

As in Mali, Nigeria's Terrorism (Prevention) Act of 2011 and Terrorism (Prevention) (Amendment) Act of 2013 contain a list of specific acts that qualify as terrorism. Nigerian legal experts have criticized its expansive definition of terrorism and of material and nonviolent support.²¹¹ Although not necessarily of direct concern to medical and humanitarian actors, this list worryingly includes "an act which disrupts a service but is committed in pursuance of a protest."²¹² Furthermore, anyone who "knowingly" and "directly or indirectly

willingly...omits to do anything that is reasonably necessary to prevent an act of terrorism" or "assists or facilitates the activities of persons engaged in an act of terrorism" is also liable under this law.²¹³

Of concern to medical and humanitarian actors, support to terrorism includes the provision of "material assistance," "transportation," "information or moral assistance," and "entering or remaining in a country for the benefit of...a terrorist group."²¹⁴ This could encompass a number of activities conducted by both medical and humanitarian actors. The law also criminalizes the act of meeting with a terrorist group, which is problematic for humanitarian actors that may need to meet with a designated terrorist group to negotiate access to areas where people are in need of assistance and protection.²¹⁵ Financing of terrorism is also criminalized and includes making "funds, property or other services" available "by any means" to individuals or groups designated as "terrorist."²¹⁶ The law is therefore extremely broad and contains no exemption for medical care or humanitarian action.

In 2012, a doctor was arrested and, although not formally charged, was held in detention for having carried medical equipment used to provide medical services to members of Boko Haram.²¹⁷ He sued the federal government in 2016, and a court ordered the government to produce him. The government reported the doctor missing, and the status of his trial and release is unclear.²¹⁸ There are also reports that individuals paying taxes to Boko Haram while living under the group's control are being considered members of a terrorist organization.²¹⁹ This could potentially extend to humanitarian organizations made to pay taxes to Boko Haram to access

209 Malian Law Number 2016-008, March 17, 2016, Art. 8.

210 Interviews with representatives of humanitarian organizations, Bamako, Mali, May 2018.

211 Isaac Terwase Sampson, "Legal Framework for the Punishment of Terrorism in Nigeria: A Critique of the EFCC Establishment Act," *Nigerian Army Quarterly Journal* 4, no. 3 (2008), p. 314; Isaac Terwase Sampson and Freedom Onuoha, "Forcing the Horse to Drink or Making It Realise Its Thirst? Understanding the Enactment of Anti-terrorism Legislation (ATL) in Nigeria," *Perspectives on Terrorism* 5, nos. 3-4 (2011), pp. 34-35.

212 Nigerian Terrorism (Prevention) Act, 2011; Nigerian Terrorism (Prevention) (Amendment) Act, 2013, Section 1(2-3).

213 Ibid., Section 1(2)(c-d).

214 Ibid., Section 5.

215 Ibid., Section 4.

216 Ibid., Section 13.

217 Kingsley Omonobi, "WHO, Boko Haram's Doctor Arrested," *Vanguard*, August 9, 2013, available at www.vanguardngr.com/2013/08/who-boko-harams-doctor-arrested/.

218 Unini Chioma, "Medical Doctor Detained since 2012 Drags FG to Court, Demands N500m Damages," *Nigeria Lawyer*, May 16, 2016, available at <http://thenigeria-lawyer.com/medical-doctor-detained-since-2012-drags-fg-to-court-demands-n500m-damages/>; Clement A. Oloyede, "B/Haram: Court Orders AGF, Army, IGP to Produce WHO Consultant," *Daily Trust*, June 5, 2017, available at www.dailytrust.com.ng/news/general/b-haram-court-orders-agf-army-igp-to-produce-who-consultant/200516.html; Buissonnière, Woznick, and Rubenstein, "The Criminalization of Healthcare," p. 27.

219 Vanda Felbab-Brown, "Nigeria Case Study," in *The Limits of Punishment*, p. 88.

certain populations in need.

The Nigerian government has prevented humanitarians from engaging with Boko Haram and restricted humanitarian access to areas under the group's control.²²⁰ It has reportedly accused organizations attempting to access those areas of diverting aid and supporting terrorism and has put in place a burdensome registration process for NGOs, requiring background checks for all their staff. These restrictions have deeply damaged principled humanitarian action, with few organizations seeking to access areas Boko Haram controls. In conjunction with security and logistics challenges, this excludes large populations in need from humanitarian programming.²²¹

SYRIA

Syria's counterterrorism framework is based on Laws No. 19, 20, and 22, issued in July of 2012. Counter-Terrorism Law No. 19 broadly defines terrorist acts as those designed to "cause panic among people, disturb public security or harm the state's infrastructure." These acts can be committed "by means of any tool" that serves those purposes.²²² The financing of terrorism is defined as "any direct or indirect raising or supplying of money, arms, munitions, explosives, telecommunications means, information or any other object to be used in a terrorist act perpetrated by a terrorist individual or terrorist organization" (emphasis added).²²³ The law does not contain a specific clause on support to terrorism, but the definition of financing of terrorism is so broad that it could be considered a support clause. Law No. 19 applies to

"foreign diplomatic and consular missions, international agencies and organizations operating on the Syrian territory" and does not contain a humanitarian exemption clause.²²⁴

The definitions contained in this law are extremely broad and vague and could capture any number of activities. In fact, the law has been described as effectively criminalizing medical aid to those opposing the government,²²⁵ and there are reports of healthcare workers being arrested and imprisoned for treating the injured.²²⁶ President Bashar al Assad has even called for the killing of the White Helmets, an organization that conducts medical evacuations and search-and-rescue missions in opposition-controlled areas, which he describes as a terrorist organization.²²⁷ This contravenes Syria's obligations under IHL, reaffirmed in Security Council Resolution 2286. Law No. 22 established Syria's Counter-Terrorism Court, in which all civilians and military personnel can be tried.²²⁸ Reportedly, most of the charges filed in the Counter-Terrorism Court relate to financing, promoting, or supporting terrorism, which has included providing medicine or medical care and delivering relief.²²⁹

The Syrian counterterrorism framework and reports on the way it is being implemented raise serious concerns. Of course, one of the main concerns of health and humanitarian actors in Syria is the constant targeting of health personnel and facilities and the systematic removal of medical items from relief consignments—issues that go well beyond the criminalization of healthcare.²³⁰

219 Vanda Felbab-Brown, "Nigeria Case Study," in *The Limits of Punishment*, p. 88.

220 The Norwegian Refugee Council has reported that a counterterrorism narrative was used to justify these restrictions. "Principles under Pressure," p. 21. However, actors interviewed have stated that these restrictions are not necessarily framed in terms of counterterrorism and that the language of counterinsurgency is more commonly used.

221 Ibid.

222 Violations Documentation Center in Syria, "Special Report on Counter-Terrorism Law No. 19 and the Counter-Terrorism Court in Syria," April 2015, available at www.vdc-sy.info/pdf/reports/1430186775-English.pdf.

223 Ibid.

224 Ibid.

225 UN General Assembly, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, February 12, 2014, para. 111 and Annex VII, para. 21; Aryn Baker, "Syria's Health Crisis Spirals As Doctors Flee," *Time*, February 4, 2014, available at <http://time.com/3968/syrias-health-crisis-spirals-as-doctors-flee/>.

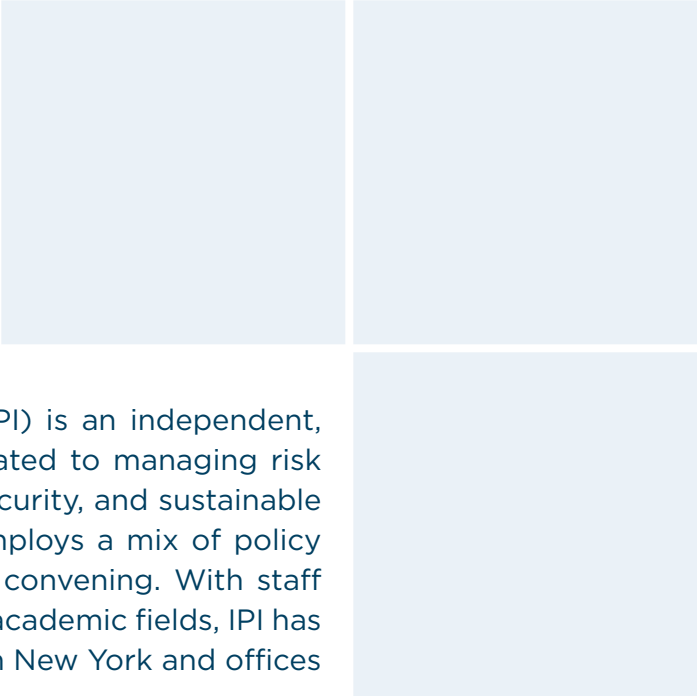
226 See, for example, Médecins Sans Frontières, "Syria Two Years on: The Failure of International Aid So Far," March 2013, available at www.msf.org.za/about-us/publications/reports/syria-two-years-failure-international-aid-so-far; Barbara Sibbald, "Physicians, Health Facilities Targeted in War-Torn Syria," *Canadian Medical Association Journal* 185, no. 9 (June 2013).

227 "White Helmets Are Terrorists, Can Choose Surrender or Death—Assad," RT, July 26, 2018, available at www.rt.com/news/434368-white-helmets-surrender-death-assad/.

228 Violations Documentation Center in Syria, "Special Report on Counter-Terrorism Law No. 19 and the Counter-Terrorism Court in Syria."

229 Ibid., pp. 12, 17, 34.

230 Ibid., p. 27; Safeguarding Health in Conflict, "Violence on the Front Line"; World Health Organization, "Attacks on Health Care," available at www.who.int/emergencies/attacks-on-health-care/en/.



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