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INTERNATIONAL HUMANITARIAN LAW AND COUNTER-TERRORISM: FUNDAMENTAL VALUES, CONFLICTING OBLIGATIONS

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Abstract The interaction of international counter-terrorism laws with IHL is an area of renewed focus, amid widespread concern that the former are being (mis)applied to criminalise the provision of humanitarian assistance envisaged under the latter. The Security Council has begun to consider this issue in resolutions adopted in March and July 2019, but difficult questions of law and fact remain. These questions have significant practical consequences—for humanitarian agencies and those they seek to assist, as well as for States that must weigh different, and possibly conflicting, legal obligations. Much of the analysis to date and the solutions proposed, pay insufficient attention to the specifics of each legal regime.

Keywords: public international law, IHL, counter-terrorism, Security Council, humanitarian assistance, conflicting obligations.

INTRODUCTION

The interaction of counter-terrorism law with international humanitarian law (IHL) has long created tensions. In the 1970s the modification of the IHL criteria for combatant status, itself a reflection of the changing nature of armed conflict, was rejected by certain States on the basis that this would encourage terrorism.[1] As regards counter-terrorism, for more than 20 years one of the persistent obstacles to the adoption of a comprehensive convention on terrorism has been the issue of whether such an instrument should also apply to the activities of non-State actors in an armed conflict.[2]

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[1] The modified criteria are reflected in art 44(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 ('AP I'); see J Pejic, 'Armed Conflict and Terrorism: There Is a (Big) Difference' in AM Salinas de Frías, K Samuel and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012) 178–9.

[2] See, for example, A/68/37, Annex II, and Annex III, paras 10–18; A/C.6/72/SR.28, paras 13–18; *R v Gul* [2013] UKSC 64, at 46–7.

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More recently, focus has shifted to another question: whether the laws which prohibit the financing of and, more generally, support for terrorist organisations are being (mis)applied to criminalise those who are in fact providing humanitarian assistance in situations of armed conflict, as envisaged by IHL. According to humanitarian agencies, counter-terrorism laws have the effect of limiting their ability to implement programmes according to needs alone, obliging them to avoid certain groups and areas, and so delaying or preventing humanitarian assistance from reaching the most vulnerable communities.[3] From the counter-terrorism perspective, the concern is that terrorist organisations will, and indeed do, abuse the 'humanitarian' status of certain non-profit organisations (NPOs) to channel finances or other forms of support: either claiming humanitarian purposes for entities established to support terrorism, and/or abusing genuine humanitarian entities that are less well managed or regulated.

As illustrated by the Security Council's adoption of resolutions 2462 and 2482 in March and July 2019 respectively, this is a question of contemporary interest. It is also a question with significant practical consequences: for the many impartial humanitarian agencies operating in situations of armed conflict where terrorist organisations are also active; for all those such agencies seek to assist; for States, legally obliged to prevent the financing of and support to terrorists and terrorist organisations; and indeed for financial institutions, requested to provide financial services to humanitarian organisations which may be at risk of abuse by terrorist organisations. The interaction of counter-terrorism law with IHL poses some complex questions of law, and when those questions are considered in terms of their practical impact—potentially impeding implementation of two areas of law which, ultimately, seek to prevent or mitigate harm to civilians —the need for clear answers is all the more apparent.

The counter-terrorism rules, though relatively new, are often widely drawn, whereas some of the relevant IHL rules, though longer-established, are of a more limited scope than is often claimed. To date, much of the commentary on this issue has paid insufficient attention to the specifics of each legal regime, the rules which exist and the gaps which remain. Moreover, while many have spoken of 'tensions' between the legal regimes, few commentators have addressed, in detail, the fact and consequences of conflicting international legal obligations in this area. In view of the Security Council's continued reluctance to include in its global counter-terrorism resolutions exemption clauses for humanitarian assistance, the question of conflicting legal obligations cannot be ignored. This article addresses these important dimensions of the topic, and proposes solutions which more closely reflect the particularities of each legal regime.

[3] See, for example, Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action* (2018) 9, 12.

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Section I provides some context concerning the main features of the two legal regimes and on the evolving nature of the terrorism threat in recent years. Section II will outline the main elements of IHL which are relevant to counter-terrorism: that is, the rules of IHL pertaining to both organisations which may be designated as terrorist while (also) being party to an armed conflict, and to the conduct commonly associated with such organisations. Section III describes in more detail the protections which IHL extends to humanitarian, and in particular medical, activities and examines how counter-terrorism instruments (both treaties and Security Council resolutions) may have the effect of criminalising some of these. Section IV looks at State practice in implementing these rules and highlights some of the legal and practical difficulties which exist. Section V considers whether there is, therefore, a conflict between some elements of the two legal regimes and, if so, how international law can resolve this. Finally, Section VI considers proposals to introduce exemption clauses in order to provide the necessary clarity regarding the interaction between these two areas of international law. This article will argue that while there is more that the UN Security Council can do, the nature of the two legal regimes is such that the specificity required of such exemption clauses can best be attained through action at the national level.

I. TWO LEGAL REGIMES AND AN EVOLVING THREAT

A. Two Regimes: Different Structures, Related Objectives

Commentaries often highlight the different structures of IHL and counter-terrorism, and it is true that these legal regimes have developed in different ways. The first IHL treaty was adopted in 1864,[4] with further developments in 1899[5] and 1907,[6] and then, of particular importance, the adoption in 1949 of the four Geneva Conventions[7] (all of which have been universally ratified), followed by the Additional Protocols to those Conventions in 1977,[8] clarifying and in some cases developing the rules applicable in both

[4] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.

[5] The 1899 Hague Convention on the Laws and Customs of War on Land, as well as two declarations adopted on the use of asphyxiating gases and expanding bullets.

[6] The nine conventions adopted in 1907 included the Convention relative to the Opening of Hostilities, the Convention on War on Land and its Annexed Regulations, and on Restrictions of the Right of Capture.

[7] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 ('GC I'); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 ('GC II'); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 ('GC III'); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 ('GC IV').

[8] AP I (n 1); 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 ('AP II').

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international and non-international armed conflicts (IACs and NIACs). Many of these rules are also embodied in customary international law, as addressed at length in a seminal 2005 study by the International Committee of the Red Cross (ICRC).[9] Since the 1990s, elements of both conventional and customary IHL have been further elucidated by international criminal tribunals.[10]

For its part, while the history of international counter-terrorism law is not as rich as that of IHL, it was not 'developed yesterday'.[11] It has evolved over the course of six decades, through multiple universal and regional treaties. At present, it includes 19 universal instruments which criminalise a range of conduct commonly associated with terrorism (hijacking, bombing, hostage-taking, etc), establish jurisdictional regimes (both mandatory and permissive), and mechanisms for international legal cooperation. The first of these treaties was adopted in 1963, the most recent in 2014; of the 18 which are in force, 12 have over 150 States parties, eight have over 170.[12] Alongside these international instruments, regional counter-terrorism instruments have been adopted by the European Union;[13] the African Union;[14] the Commonwealth of Independent States;[15] the Organization of the Islamic Conference (OIC);[16] the Association of Southeast Asian Nations (ASEAN);[17] the South Asian Association for Regional Cooperation (SAARC);[18] and the Council of Europe.[19]

In recent years, and particularly since 9/11, Security Council resolutions have become more prominent as a source of counter-terrorism law. There are two distinct, but related, components to the counter-terrorism legal framework developed by the Security Council. First, the Security Council has imposed on all States obligations to criminalise certain conduct, irrespective of the

[9] ICRC, *Customary International Humanitarian Law – Vol. I: Rules*, J-M Henckaerts and L Doswald-Beck (eds) (2005).

[10] See, for example, on the requirements for a non-international armed conflict, *Haradinaj and others* (Retrial Judgment), IT-04-84bis-T (29 November 2012) para 393.

[11] B Saul, 'Terrorism and International Humanitarian Law' in B Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 231.

[12] The latter category includes the 1979 Convention against the Taking of Hostages, 1316 UNTS 205 and the 1999 Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197.

[13] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

[14] 1999 OAU Convention on the Prevention and Combating of Terrorism.

[15] 1999 Treaty of Cooperation among States members of the Commonwealth of Independent States in Combatting Terrorism.

[16] 1999 Convention of the Organisation of the Islamic Conference on Combatting International Terrorism.

[17] 2007 ASEAN Convention on Counter-Terrorism.

[18] 1987 SAARC Regional Convention on Suppression of Terrorism; 2004 Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism.

[19] 2005 Council of Europe Convention on the Prevention of Terrorism, CETS No. 196 ('2005 CoE Convention'); 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, CETS No. 217 ('2015 CoE Protocol').

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affiliation of the perpetrator to any particular organisation: participation in, support to, and financing of terrorist acts (resolution 1373, adopted in September 2001),[20] and travel for the purpose of committing terrorist acts or providing or receiving terrorist training (resolution 2178, adopted in September 2014).[21] Second, the Security Council has continued to refine and expand the reach of its counter-terrorism sanctions regime, under which States are obliged to impose an asset freeze, travel ban, and arms embargo with respect to certain individuals and entities designated, by the Security Council's '1267 Committee', as being associated with Al-Qaida and, since 2014, ISIL.[22] The legal issues raised by these Security Council resolutions have been widely discussed,[23] though more so with respect to resolution 1373 than the more numerous and considerably wider resolutions that have been adopted since the emergence of ISIL in mid-2014.

When considering the interaction of the two regimes the difference in structure is more significant than their respective 'age', particularly the fact that the treaty-based elements of each are complemented by different types of rules: customary law for IHL, and Security Council resolutions (SCRs) for counter-terrorism. SCRs derive from a treaty (the UN Charter), but the manner in which they are negotiated and adopted, their structure, and their legal effects raise particular issues which will be noted in the discussions which follow.

The two bodies of law also seek to attain their objectives through different means: as Pejic notes, IHL regulates both lawful and unlawful violence, whereas *any* act of violence designated as terrorist is unlawful under that legal regime.[24] And while those underlying objectives are related - 'at the most basic level, both seek to prevent civilians from harm'[25]—that is not to say that the *extent* of the threat which terrorism poses to human life worldwide is equal to that posed by armed conflict; indeed, there is ample evidence that the reverse is true.[26]

B. An Evolving Threat

The consequences—legal and practical—of the interaction of these two regimes have been heightened by recent developments in the type, and reach, of the

[20] S/RES/1373 (2001).

[21] S/RES/2178 (2014).

[22] See S/RES/1267 (1999); S/RES/2253 (2015).

[23] S Talmon, 'The Security Council as World Legislature' (2005) 99(1) AJIL 175; M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 LJIL 593.

[24] Pejic (n 1) 172.

[25] K Mackintosh and P Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (UN Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council 2013) 12.

[26] For 2017 figures, see Institute for Economics and Peace, *Global Terrorism Index 2018: Measuring the Impact of Terrorism* and Peace Research Institute Oslo, *Trends in Armed Conflict, 1946–2017* (May 2018).

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threat posed by certain terrorist organisations. In January 2016, the UN Secretary-General reported that in less than two years ISIL had captured large swathes of territory in both Iraq and Syria, which it was administering through 'a sophisticated, quasi-bureaucratic revenue-generating structure that [was] sufficiently flexible and diversified to compensate for declines in income from single revenue streams'. With this financial base, ISIL was conducting military campaigns, administering territory, and implementing a communications strategy to broaden its support. The Secretary-General noted that the expansion of its influence across West and North Africa, the Middle East and South and South-East Asia, demonstrated 'the speed and scale at which the gravity of the threat has evolved in just 18 months'.[27] The same report noted that more than 30,000 individuals had already travelled from over 100 countries to join ISIL and its affiliates in Iraq and Syria: this phenomenon of 'foreign terrorist fighters' (FTFs) demanded 'not only global and national solutions, but also urgent action at the local level'.[28]

The threat posed by ISIL has since evolved—the organisation has lost territory, decentralised, and (as seen with the April 2019 attacks in Sri Lanka) perhaps become more effective at 'inspiring' attacks than planning them directly. Concerns have shifted from the travel of FTFs to Syria and Iraq, to the challenges posed by the return of such persons (and their family members) to their States of nationality or previous residence. Nevertheless, at time of writing, the assessment of the UN (echoed by that of individual Member States)[29] is that ISIL 'remains by far the most ambitious international terrorist group, and the one most likely to conduct a large-scale, complex attack in the near future'.[30]

Of particular significance for present purposes is that ISIL, its affiliates, and many other terrorist organisations, continue to operate in situations of armed conflict, with varying and fluid structures and capacities. This increases the likelihood that two legal regimes—international counter-terrorism law and IHL—will be applicable to the same facts. It also makes the application of that law to the facts more difficult. That such entities are simultaneously active and continue to plan terrorist attacks outside of situations of armed conflict (including on the territory of States not party to that armed conflict), raises additional questions, including questions concerning the geographic reach of IHL.

II. TERRORIST ORGANISATIONS, TERRORIST CRIMES, AND IHL

Depending on the circumstances, much of the conduct that is criminalised in treaties and Security Council resolutions on terrorism might already be

[27] S/2016/92, paras 4–17; S/RES/2199 (2015), preamble. [28] S/2016/92, para 25.
[29] See for example *National Strategy for Counterterrorism of the United States of America* (October 2018) 8; *Plan d'action contre le terrorisme* (13 July 2018) 7 (France); *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (June 2018) 7.
[30] S/2018/80, paras 5–11; S/2019/103, paras 4–10.

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criminal under IHL. The starting point for the application of IHL is that the conduct in question must take place in a situation of armed conflict, be it international (IAC; between States)[31] or non-international (NIAC; involving at least one non-State entity).[32] Regarding the second category, which is of greater relevance for present purposes,[33] a number of cumulative factors determine the applicability of the rules governing NIACs to acts of terrorism and to those responsible for such acts.[34] First, IHL requires a certain level of intensity of violence before a NIAC can be said to exist: 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence' do not suffice.[35] Second, there must be a nexus between the conduct in question and the armed conflict.[36] Third, the parties involved must demonstrate a certain level of organisation.[37]

In addition, for an entity (including one designated as terrorist) to constitute one of the 'other organized armed groups' envisaged as parties to an NIAC under Additional Protocol II, there are further requirements:[38] it must 'exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. This criterion will probably *not* be satisfied in many cases involving entities characterised as terrorist, though there are some obvious exceptions,[39] including as noted above. In any event, even if this criterion is not satisfied and Additional Protocol II is inapplicable, common Article 3[40] will still apply to the armed conflict.

Whether or not an entity can be considered a belligerent party to an armed conflict, does not affect the status (as 'terrorist' or otherwise) of that group under international law.[41] The reverse is also true, and designation—under national or international law—as 'terrorist' does not preclude an entity from

[31] As defined in art 2 common to the four Geneva Conventions. [32] See AP II, art 1(1).

[33] DA Lewis, NK Modirzadeh and G Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism – Legal Briefing and Compendium* (Harvard Law School Program on International Law and Armed Conflict 2015) 25. There are exceptions: an IAC can also exist where one State deploys irregular forces (including, potentially, a group designated as terrorist) against another State, so long as the first State exercises the requisite 'overall control' (see GC III, art 4(A)(2)). In addition, AP I includes within its scope of application 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination …' (art 1(4))— again, groups in this category could include those designated as terrorist. See further Saul (n 11) 209–12. [34] Pejic (n 1) 181–3. [35] See AP II, art 1(2).

[36] Saul (n 11) 214.

[37] Indicators include: a command structure and disciplinary rules within the group; a headquarters; the ability to plan and carry out military operations, and the ability to negotiate and conclude agreements such as ceasefire (Pejic (n 1) 182–3). [38] As laid out in AP II, art 1(1).

[39] Saul (n 11) 213.

[40] One of the core provisions of IHL, this lays down minimum standards binding on each party to (any) non-international armed conflict. It constitutes a 'minimum yardstick' and reflects 'elementary considerations of humanity' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America). Merits, Judgment. ICJ Reports 1986*, 14, paras 218–219) [41] See art 3(2) common to the four Geneva Conventions.

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being a party to a NIAC, and consequently having rights and obligations under IHL, if the above requirements are satisfied.

Turning to those IHL obligations, two basic requirements on the conduct of hostilities, applicable in both IAC and NIAC, dictate that many attacks proscribed under international counter-terrorism law, would, if conducted in a situation of armed conflict (and if the above conditions are satisfied), also constitute violations of IHL.[42] These are, first, the prohibition of attacks directed at civilians.[43] Second, the prohibition of attacks that are disproportionate, ie that are expected to cause incidental death or injury to civilians that would be excessive in relation to the military advantage anticipated.[44]

Other IHL rules proscribing the types of weapons which may be used (notably, those likely to cause superfluous injury or unnecessary suffering),[45] prohibiting attacks on cultural property and places of worship,[46] and prohibiting hostage-taking,[47] may also be relevant to the acts of groups designated as terrorist. Whereas in counter-terrorism law the underlying motive (ideological, religious, etc) is often a material element of the offence, these IHL proscriptions apply irrespective of the goals which the perpetrator seeks to attain: in IHL, what matters are the *methods* used in conducting attacks.

Two more IHL rules are relevant. Additional Protocol I proscribes 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'; again, this is a crime irrespective of any underlying political, religious etc motives, and irrespective of the designation, as 'terrorist' or otherwise, of the perpetrator.[48] IHL also prohibits acts of terrorism against those not participating directly in hostilities who find themselves in the hands of an adversary during an armed conflict, both IAC and NIAC.[49]

A. Benefits of Using IHL for Prosecuting Terrorist Crimes

The question thus arises as to whether IHL could serve as an adequate framework for prosecuting those acts of ISIL, Al-Qaida and affiliated groups which are criminalised under the international counter-terrorism treaties and the Security Council resolutions adopted since 9/11. From what we know of the activities of groups designated as terrorist which are also engaged in armed conflict— in particular ISIL and affiliated entities—their methods are such that there have been, and will be, few such attacks which do *not* violate the rules of IHL. Their activities will, in the vast majority of cases, attract

[42] See Pejic (n 1) 175–7.
[43] AP I, arts 48, 51(2); AP II, art 13(2).
[44] AP I, art 51(5)(b).
[45] AP I, art 3.
[46] AP I, art 53; AP II, art 16.
[47] AP I, art 75(2)(c); AP II, art 4(2)(c).
[48] See *Prosecutor v Galic,* IT-98-29-T, Trial Judgment, 5 December 2003, at paras 65–66.
[49] GC IV, art 33, and AP II, art 4(2)(d), respectively.

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individual criminal responsibility under IHL as war crimes. In some cases, if committed in IACs, these may amount to 'grave breaches'.[50]

International counter-terrorism law still lacks a single, accepted definition of 'terrorism'[51] (a situation likely to persist for some time)[52], while the jurisdictional provisions in the UNSC resolutions on counter-terrorism are quite limited[53] and the Council itself has noted persistent challenges in international legal cooperation in terrorism cases.[54] IHL, on the other hand (and particularly the grave breaches regime) has well-established rules concerning the definitions of crimes, modes of liability,[55] jurisdiction,[56] and on international legal cooperation.[57] The prosecution of war crimes has a long jurisprudence to draw on, both domestically and internationally, and a court with jurisdiction over such conduct in at least 123 States that are party to the Rome Statute.[58]

True, prosecuting the acts of terrorist entities under these IHL rules would mean that resulting convictions would not come with the 'terrorist' characterisation. But is that necessarily a problem? Indeed, could this reduce some of the political obstacles in bringing to justice those responsible for violent criminal acts? After all, of the 19 international 'counter-terrorism' instruments, 13 do not even mention the word 'terrorism'[59] and, while the relevant Security Council resolutions oblige States to ensure that those responsible for terrorist acts are brought to justice and that punishments reflect the seriousness of the acts, they do not require that the offences of

[50] See GC I, arts 49–50; GC II, arts 50–51; GC III, arts 129–130; GC IV, arts 146–147; and AP I art 85(3)(a)–(c). The grave breaches regime does not apply with respect to NIACs.

[51] cf. *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging,* STL-11-01/I (16 February 2011) paras 83–113), discussed in B Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 LJIL 677.

[52] Firstly, because agreement on the comprehensive convention remains elusive. And secondly, because even that instrument would not preclude States from adopting or maintaining broader definitions of terrorism in domestic law: a comprehensive convention will set a minimum standard for what the parties define as terrorism for the purposes of that instrument, not a maximum threshold applicable in all contexts (see A/68/37, Annex I, art 2; *R v Gul* (n 2) paras 53–58).

[53] The criminalisation requirements are imposed with respect to conduct by a Member State's nationals, or taking place on its territory; that is, the resolutions rely on the two traditional, and most widely accepted, bases for criminal jurisdiction (see S/RES/1373 (2001) para 1(b), (d)) and S/RES/2178 (2014) para 6(a)–(c)).

[54] S/RES/2322 (2016).

[55] See, for example, AP I, art 86(2).

[56] Including, with respect to the grave breaches regime, a form of universal jurisdiction (see R O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 JICJ 735).

[57] See AP I, art 88(1).

[58] See Statute of the International Criminal Court, 2187 UNTS 3, art 8. Under art 13(b) of the Statute, the Security Council can refer a situation to the Court, irrespective of whether the territorial State is itself a party to the Statute.

[59] The exceptions are: the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1678 UNTS 201); the 1991 Convention on the Marking of Plastic Explosives (2122 UNTS 359); the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material (all three of which use the word in their preambles, only); the Terrorist Bombing Convention, the Financing Convention, and the 2005 Nuclear Terrorism Convention.

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which such persons are convicted are necessarily designated as 'terrorist' crimes.[60]

There is one further point to make on criminalisation. It is true that while IHL draws a clear distinction between attacks on combatants and attacks on civilians, the proscriptions in counter-terrorism law are not limited to violent acts which target civilians. But this consideration does not overly complicate the interaction of counter-terrorism law with IHL. In an IAC, IHL prohibits the punishment of combatants for violent acts against military objectives so long as these acts were conducted within the parameters set by IHL as outlined above (such persons are entitled to POW status if captured).[61] IHL does *not* provide for 'combatant' status (or POW status) in a NIAC, however.[62] That is, in a NIAC IHL neither expressly proscribes, nor precludes punishment for, violent acts of non-State parties to an armed conflict against military targets. If those attacks violate the principles of distinction or of proportionality, they are criminalised under IHL. If not, they are regulated solely by domestic law,[63] and rather than precluding punishment of those responsible, IHL instead merely provides that States 'shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict'. This would include non-State armed groups, but it does not legalise, *ab initio*, the acts of violence they have committed.[64] For present purposes, the significance is that, at least in NIACs, even if the conduct of an entity designated as terrorist does *not* violate the fundamental principles of IHL such that it falls to be characterised as a war crime, IHL does not preclude punishment of that conduct under domestic (counter-terrorism) law.

To conclude on these framework issues, there is much to suggest that the rules and processes of IHL could greatly aid, and should certainly not impede, efforts to repress acts of terrorism which occur within situations of armed conflict. This is relevant not only for prosecutions in domestic courts but also, perhaps, to ongoing discussions around the proposed establishment of an international or hybrid criminal tribunal to prosecute ISIL crimes.[65] And while the consideration that IHL can be used to prosecute certain acts of terrorism may not always have been given prominence by the Security Council, the September 2017 establishment of UNITAD, an Investigative Team to support

[60] See S/RES/1373 (2001), para 2(e) and S/RES/2178 (2014), para 6.

[61] See AP I, art 43(2).

[62] See *R v Gul* (n 2) para 50.

[63] T Ferraro, 'Interaction and Overlap between Counter-Terrorism Legislation and International Humanitarian Law' in *Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium (20–21 December 2016)* 25, 29.

[64] See Lewis *et al.* (n 33) 31–2. Those authors note art 3(1) of AP II, according to which 'Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.'

[65] On which, see A Dworkin, 'A Tribunal for ISIL fighters?' European Council on Foreign Relations (31 May 2019).

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the efforts of Iraq to hold ISIL accountable for war crimes, crimes against humanity, and genocide (rather than terrorism *per se*), may prove to be a positive development in this regard.[66]

As the next section will discuss, however, there are also some important areas of tension, if not conflict, between these two legal regimes.

III. COUNTER-TERRORISM AND THE DELIVERY OF ASSISTANCE UNDER IHL: THE RELEVANT LAWS

Humanitarian agencies have identified multiple ways in which counter-terrorism laws impede the delivery of impartial humanitarian assistance, limiting their ability to implement programmes according to needs alone, obliging them to avoid certain groups and areas (or crowding their programming into areas under government control), thereby delaying or preventing humanitarian assistance from reaching the most vulnerable communities. To resolve this situation, many agencies have therefore contended that 'activities that are exclusively humanitarian and impartial in character, and are conducted without adverse distinction' should be expressly excluded from the application of counter-terrorism legislation, both international and domestic.[67]

Looking at the issue from the counter-terrorism perspective, the UNSC has stressed the need for 'robust implementation' of counter-terrorism sanctions, recognised the need for Member States 'to prevent the abuse of non-governmental, non-profit and charitable organizations by and for terrorists',[68] and noted 'individual cases in which terrorists and terrorist organizations exploit some non-profit organizations in the sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organizations and operations'.[69] In June 2015, the Financial Action Task Force (FATF) elaborated as follows:

> [M]ore than a decade after the abuse of NPOs by terrorists and terrorist organisations was formally recognised as a concern, some NPOs in the sector continue to be misused and exploited by terrorists through a variety of means.

[66] S/RES/2379 (2017).

[67] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* Doc 32IC/15/11 (October 2015) 21. See generally: Lewis *et al.* (n 33) 147–8; E-C Gillard, *Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action* (Chatham House 2017); A Debarre, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework* (International Peace Institute 2018); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,* Doc 31IC/11/5/1/2 (October 2011); Norwegian Refugee Council (n 3) 20–7.

[68] S/RES/2253 (2015), preamble; S/RES/2462 (2019), preamble, paras 12, 23.

[69] S/RES/2368, preamble. The putatively humanitarian objectives of some entities listed by the Security Council's 1267 Committee are often illustrated by their titles, including: Global Relief Foundation (QDe. 091); Al-Haramain & Al Masjed Al-Aqsa Charity Foundation (QDe. 109); Benevolence International Foundation (QDe. 093); and Wafa Humanitarian Organisation (QDe. 015).

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> In fact, terrorist actors will often employ deception to mask their activities, particularly those in conflict regions. Well-planned deceptions by terrorists abusing the NPO sector are difficult to penetrate with the resources available to non-governmental actors, making state-based oversight and its capabilities a necessary element to detecting the most sophisticated terrorist threats to the NPO sector.[70]

This section will outline the relevant rules from each legal regime and will highlight some fault lines and potential areas of conflict. The ways in which these international rules are applied by States will be the subject of section IV.

A. Relevant Elements of IHL: Protection of Medical and Non-Medical Assistance

1. Medical assistance

The provision of medical care to the wounded from any party to the conflict, and to the civilian population is one of the foremost, and foundational, objectives of IHL.[71] As it emphasises through its commentaries on the Geneva Conventions and their Protocols,[72] the ICRC has highlighted 'the specific protection of medical personnel and objects', and the 'stringent' nature of the obligation to respect and protect military medical personnel and objects.[73]

Common Article 3 stipulates that the wounded and sick '*shall* be collected and cared for',[74] and the importance of medical assistance is reflected throughout the Geneva Conventions, with respect to both IACs and NIACs, in provisions relating to: protection of the medical personnel of a party to the conflict;[75] medical attention for POWs,[76] civilians in occupied territories[77] and internees;[78] the protection of medical units,[79] medical facilities[80] and medical vehicles;[81] the characterisation as 'grave breaches' of certain acts against medical personnel, medical units or medical transports;[82] as well as the emphasis given to the distinctive emblem of Red Cross, to be used by those engaged in medical services.[83] Medical care is to be provided on an impartial basis, and is *not* to be treated as a hostile act: in its Commentary on

[70] FATF, *Best Practices: Combating the Abuse of Non-Profit Organisations (Recommendation 8)* (June 2015) 4–5.
[71] ICRC notes that ensuring care for wounded and sick combatants, and protecting those devoted to that task, was 'the main reason for the drafting of the very first Geneva Convention of 1864' (ICRC 2015 (n 67) 30). See on protection of medical care in IHL generally, Lewis *et al.* (n 33) 38–66.
[72] ICRC, *Commentary on the Geneva Conventions of 12 August 1949, Vol. I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Pictet ed. (1952).
[73] ICRC 2015 (n 67) 30–1.
[74] Common article 3(2) (emphasis added).
[75] GC I, art 25.
[76] GC III, arts 30–33.
[77] GC IV, arts 55(1), 56(1).
[78] GC IV, arts 91–92.
[79] AP I, art 12.
[80] GC IV, art 18ff, 57.
[81] AP I, arts 21–31.
[82] AP I, art 85(2).
[83] GC II, art 41; AP I, 18(4), 38(1).

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the 1949 Conventions, the ICRC noted that 'medical treatment, even where given to enemies, is always legitimate, and does not constitute a hostile act. Medical personnel are placed above the conflict.'[84]

In addition to the protections for 'medical personnel' (ie those assigned to and authorised by a party to the conflict), the First Geneva Convention also extends protection to unassigned providers of medical care, when it stipulates that:

> The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality. The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence. No one may ever be molested *or convicted* for having nursed the wounded or sick.[85]

This non-punishment principle is articulated most clearly in the 1977 Additional Protocols. Identical provisions in the First and Second Additional Protocol (applicable to IACs and certain NIACs, respectively) state that 'under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefitting therefrom'.[86] The language used here, it will be noted, is clear and, on its face, permits of no exceptions: the protection from prosecution of those carrying out medical activities appears absolute.[87]

The ICRC's 2005 study of customary IHL concluded that the non-punishment rule is also embodied in customary international law.[88] Commentators dispute this however,[89] and indeed the evidence cited in the ICRC study does not suffice to meet the requirements for a rule of customary international law: the State practice cited by the study is that of States which are party to the Additional Protocols;[90] the cited resolutions of UN bodies expressly relied on the *treaty* rule;[91] and while a statement of the World Medical Association may be evidence of the consistent view of medical practitioners, it does not

[84] ICRC Commentary (1952) (n 72) 192.

[85] GC I, art 18 (emphasis added).

[86] AP I, art 16(1); AP II, art 10(1); see also ICRC, *Commentary on the Additional Protocols of 8 June 1977, to the Geneva Conventions of 12 August 1949*, Y Sandoz, C Swinarski and B Zimmermann (eds) (1987) 199–202 at 646–662 (on the former provision) and 1425–1426, at 4685–4691 (on the latter).

[87] Unlike provisions on the right of those engaged in medical activities not to disclose information on persons being treated (AP I, art 16(3) and AP II, art 10(3)–(4)), the non-punishment clauses are not made subject to the provisions of domestic law.

[88] ICRC, *Customary IHL* (n 9) 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') 86–8.

[89] Lewis *et al.* (n 33), 61–2, 89–90, and additional sources cited therein.

[90] On the distinction between State practice in implementation of treaty obligations, and State practice as evidence of a rule of customary international law, see *North Sea Continental Shelf, Judgment* [1969] ICJ Rep 3, at para 76; ILC, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, 2018, UN Doc A/73/10, 139.

[91] A/44/165, preamble and para 5. The resolution addressed the situation in El Salvador, which had been a party to AP II since 1978. The same was true of the cited resolution of the UN Commission of Human Rights, res. 1990/77.

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constitute evidence of State practice, let alone *opinio juris*. As will be seen, the fact that the important non-punishment rule is treaty-based and not (yet)[92] embodied in customary international law is significant with respect to a number of States in or through which humanitarian agencies operate.

2. *Other forms of humanitarian assistance*

But what of other, non-medical, forms of humanitarian assistance? The ICRC has noted a range of activities which it and other humanitarian actors engage in and which could potentially engage counter-terrorism laws:

> [V]isits and material assistance to detainees suspected of, or condemned for, being members of a terrorist organization; facilitation of family visits to such detainees; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; aid to meet the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities for IDPs, where individuals associated with terrorism may be among the beneficiaries.[93]

Much of this would seem to fall outside of 'medical activities',[94] meaning that the strong non-punishment provisions, cited above, would not apply to protect those involved.

IHL does, however, also seek to protect humanitarian assistance more generally, both that which is directed at the wounded and sick *hors de combat*, and that which is directed at civilians. The Geneva Conventions are said to 'constitute no obstacle' to 'the humanitarian activities which the [ICRC] or any other impartial humanitarian organisation may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of [the wounded and sick, shipwrecked, medical personnel and chaplains, POWs], and for their relief.'[95] The decision of a State party on whether to consent to relief operations is not entirely discretionary though, as ICRC explains, an offer of humanitarian services 'may be declined when there are no needs to be met and/or when the activities proposed in the offer of services are not humanitarian in nature or the offer does not emanate from an organization that is impartial and humanitarian in character'.[96] Further,

[92] As of November 2019, no additional evidence of this rule was cited in the ICRC's updated customary international law database.

[93] ICRC 2015 (n 67) 20.

[94] In arguing that this term should be interpreted 'very broadly', ICRC in its commentary on art 10(1) of AP II, stated that 'the concept is broader than that of medical care and treatment. A doctor not only treats patients, he may also be called upon to issue death certificates, vaccinate people, make diagnoses, give advice' (ICRC Commentary 1987 (n 86) 1426 at 4687). Much of the activity referred to by ICRC in the context of counter-terrorism laws, above, would likely fall outside of even this broader definition (and, indeed, outside the category of those who 'nursed the wounded and sick', the conviction of whom is prohibited under GC I, art 18).

[95] GC I, GC II, GC III and GC IV, art 9.

[96] This applies with respect to both the State parties to an IAC and the State in whose territory an NIAC is taking place (ICRC 2015 (n 67) 29).

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> [U]nder IHL, the obligation to allow and facilitate relief schemes is without prejudice to the entitlement of the relevant actors to control them through measures such as: verifying the humanitarian and impartial nature of the assistance provided, prescribing technical arrangements for its delivery or … limiting/restricting the activities of relief personnel in case of imperative military necessity.[97]

In terms of the potential punishment of those who provide non-medical assistance in IACs, Additional Protocol I states that:

> The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross […] Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. *No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts*.[98]

In its Commentary, ICRC notes that the drafters deliberately chose the word 'care' here rather than 'medical assistance' so as not to restrict the scope of this provision.[99]

As for NIACs, Additional Protocol II states that

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.[100]

There is no express provision stipulating that persons engaged in non-medical relief actions in NIACs are protected from punishment.

B. Relevant Elements of Counter-Terrorism Law

This section considers three questions concerning international counter-terrorism law: first, do the rules apply to situations of armed conflict (if they do not, IHL is not engaged); second, if they do apply, do they potentially criminalise activities protected under IHL; and third, do they include any exemptions for such activities?

1. Treaties

The 19 universal counter-terrorism treaties take a varied approach to applicability in situations of armed conflict.[101] One makes no mention of the

[97] ibid 30.
[98] AP I, art 17(1) – emphasis added.
[99] ICRC Commentary 1987 (n 86) at 711 (on art 17(1)); see also at 649 on art 16(1), which is limited to persons engaged in medical activities.
[100] AP II, art 18(2) – emphasis added.
[101] See Pejic (n 1) 186–9.

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issue.[102] The 1979 Hostages Convention states that it does not apply to acts committed in the course of an armed conflict, so long as the act in question is proscribed by the Geneva Conventions and their Protocols, *and* the parties to the Hostages Convention are bound by the Geneva Conventions to prosecute or hand over the persons responsible.[103] The multiple treaties criminalising acts against the safety of civil aviation and maritime navigation are stated not to apply to, respectively, aircraft used in military services,[104] or warships.[105] However this is not quite the same as excluding their application in armed conflict *per se*: on the one hand, military aircraft may also be used outside of situations that would qualify as IAC or NIAC; on the other hand, these clauses would not exclude situations where a party to an armed conflict carries out an act against a civilian aircraft, airport, or ship.[106] Separately, some of the international counter-terrorism treaties are stated not to apply to 'the activities of armed forces during an armed conflict, as those terms are understood under [IHL], which are governed by that law' or to 'the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law'.[107] The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection includes differentiated obligations with respect to explosives that are held by

[102] 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UNTS 167.

[103] Hostages Convention, art 12.

[104] 1963 Convention on Offences and Certain other Acts Committed on board Aircraft, 704 UNTS 220, art 1(4) (the 2014 Protocol to this Convention does not amend this provision); 1970 Convention for the Suppression of the Unlawful Seizure of Aircraft, 860 UNTS 105, art 3(2); 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 UNTS 178 ('Montreal Convention'), art 4(1); 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation (1589 UNTS 474, which supplements the 1971 Convention, and addresses acts in airports serving *civil* aviation).

[105] 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 221, art 2(1)(a) and (b). The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf is stated to apply to installations permanently attached to the sea-bed 'for the purpose of exploration or exploitation of resources *or for other economic purposes*' (1678 UNTS 201, art 1(3), emphasis added; the 2005 Protocol to the 1988 Protocol, 1678 UNTS 304 does not alter this provision). The 1980 Convention for the Protection of Nuclear Material is stated to apply to 'nuclear material used for peaceful purposes while in international nuclear transport', or in certain cases domestic transport (1456 UNTS 125, art 2(1)–(2)), and criminalises a range of acts of interference with such material, which as Pejic notes could encompass the use of such material against military objectives (Pejic (n 1) 187–8).

[106] Such acts, as violating the principle of distinction, would amount to war crimes, but this consideration does not change the nature of the vessel attacked. In such cases, this act would be criminalised under *both* IHL and the counter-terrorism treaty in question.

[107] Terrorist Bombings Convention, art 19(2); Nuclear Terrorism Convention, art 4(2); 2010 Convention for the Suppression of Unlawful Acts relating to International Civil Aviation, ICAO Doc. 9960, art 6(2). Also, art VI of the 2010 Protocol Supplementary to the Convention for the Suppression of the Unlawful Seizure of Aircraft (ICAO Doc. 9959) inserts an art 3bis(2) into the 1970 Hague Convention, using this formula, and the 2005 Protocol does the same with respect to the 1988 Maritime Safety Convention (see art 3 of the Protocol), as does the 2005 Amendment to the 1980 Convention for the Protection of Nuclear Material (art 5 of the Amendment).

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authorities performing military functions,[108] but no carve-out for situations of armed conflict. Notably, the 1999 Terrorism Financing Convention *does* apply with respect to situations of armed conflict: it criminalises the financing of any act 'intended to cause death or serious bodily injury to a civilian, *or to any other person not taking an active part in the hostilities in a situation of armed conflict* […]', with the caveat that it shall not alter the rights and obligations of States or individuals under IHL.[109] Overall, as observed by the UK Supreme Court in 2013, 'it is quite impossible to suggest that there is a plain or consistent approach in UN Conventions on this issue'.[110]

Turning to the regional counter-terrorism instruments, the 1999 OIC Convention on Combatting International Terrorism does not mention IHL but does stipulate that 'peoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime',[111] thereby excluding acts committed within some, but not all, categories of armed conflict; the 1999 OAU Convention on the Prevention and Combating of Terrorism has a provision to similar effect.[112] The 1999 Treaty of Cooperation among States members of the Commonwealth of Independent States in Combatting Terrorism does not mention IHL, includes no carve-out for acts committed within armed conflict, and indeed includes among the issues on which the parties are to exchange information, 'Illegal armed formations employing methods of terrorist activity, their structure, members, aims and objectives'.[113] The 2007 ASEAN Convention on Counter-Terrorism makes no mention of IHL and includes no carve-out for acts occurring within a situation of armed conflict. Neither the 1987 SAARC Regional Convention on Suppression of Terrorism, nor its Protocol (which focuses on countering the financing of terrorism) include a carve-out for acts committed within an armed conflict, though the Protocol does reaffirm that it does not affect other rights and obligations under international law, including IHL.[114] Regarding the European Union, both the 2002 Framework Decision on the Prevention of Terrorism,[115] and the 2017 Directive which replaced the 2002 instrument, are stated not to govern the activities of armed forces during arming conflict,[116] while the 2017 Directive also expressly excludes from its scope 'the provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including [IHL]' (this clause is discussed further below).[117]

The Council of Europe 2005 Convention on the Prevention of Terrorism expressly excludes from its scope of application the actions of (any) armed forces during periods of armed conflict, and the official acts of military forces

[108] 2122 UNTS 359, see arts III, IV (2)–(4).
[109] Financing Convention, arts 2(1)(b) (emphasis added) and 21.
[110] *R v Gul* (n 2) para 47. [111] Art 2(a). [112] Art 3(1). [113] Art 11(e). [114] Art 18.
[115] Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), recital 11. [116] 2017 Directive (n 13), recital 37. [117] ibid, recital 38.

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of a State party so long as these are governed by other areas of international law (Article 26(5)).[118] The 2015 Protocol to this Convention is directly aimed at the FTF phenomenon and was adopted 'having regard' to resolution 2178 (2014).[119] It makes no mention of armed conflict or IHL, but is expressly stated to supplement the 2005 Convention and, indeed, is to be interpreted 'within the meaning of the Convention'.[120] In the absence of express wording to the contrary, this must include provisions on the material scope of the Convention, including the exclusion clause in Article 26(5). It is therefore difficult to see how the Protocol, including its provisions on FTF-related offences, can apply to the actions of armed forces of a party to an armed conflict. Logically, then, if a group that is also characterised as terrorist meets the IHL requirements outlined above, this would exclude the acts of such group from the scope of the Convention and, thus, the Protocol.[121]

In short, the approaches taken to IHL and situations of armed conflict in the regional counter-terrorism instruments are no less varied than in the universal conventions.

2. *Security Council resolutions*

As noted above, Security Council action in this area includes resolutions imposing on all States specific criminalisation obligations with respect to terrorist acts, and a separate counter-terrorism sanctions regime pertaining to those individuals and entities determined to be associated with ISIL, Al-Qaida and affiliated groups.

The main plank of the former is resolution 1373 (2001), in which the Security Council decided that all States shall:

- [C]riminalize the willful provision or collection, by any means, *directly or indirectly*, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- [P]rohibit their nationals or any persons and entities within their territories from making any funds … available, *directly or indirectly*, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts […]; and
- [E]nsure that any person who, inter alia, '*participates* [...] *in supporting terrorist acts* is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and

[118] 2005 CoE Convention, art 26(5) – emphasis added. Notably, the stipulation in the italicised text does not apply to the first clause of the exclusion. [119] 2015 CoE Protocol, Preamble.
[120] ibid, art 9.
[121] See also J Vestergaard, 'Foreign Terrorist Fighters: De-Radicalisation and Inclusion v Law Enforcement and Corrections in Denmark' in C Brière and A Weyembergh (eds), *The Needed Balances in EU Criminal Law: Past, Present and Future* (Hart 2018) 275.

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> regulations and that the punishment duly reflects the seriousness of such terrorist acts[122]

The resolution makes no mention of IHL or of armed conflict, and the text gives no reason to assume that its provisions do not apply in such situations. Plainly, the resolution does not *expressly* criminalise humanitarian activities, but a number of elements increase the possibility that States' application of this resolution could have that very effect: the widely-noted absence in this resolution of a definition of 'terrorism'; the italicised phrases and the wide range of conduct which they could plausibly encompass; and the consideration that this resolution has been increasingly interpreted (by the Security Council itself, reflecting the work of FATF)[123] to require criminalisation of the financing of terrorists and terrorist organisations, for any purpose, and even in the absence of a link to a specific terrorist act.[124]

From resolution 1624 (2005) onwards, the Security Council's resolutions on terrorism have included, without elaboration, the formula that Member States must ensure that counter-terrorism measures 'comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law'.[125] Until recently, these statements were typically included in the preambles of resolutions rather than in operative paragraphs.

Resolution 2178 (2014) expressly applies with respect to conduct within situations of armed conflict. In it, the Security Council expressed grave concern 'over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, *including in connection with armed conflict*' and resolved to address that threat. It then obliged Member States to criminalise those who travel 'for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training', as well as those who finance or organise such travel.[126] The nexus with an armed conflict is not a material element of the FTF offences—the criminalisation obligation is not contingent upon this—but the Security Council's definition of FTFs plainly envisages that many would be travelling for the purpose of committing terrorist acts in situations of armed conflict. The resolution does not include any exemption for activities carried out in a situation of armed conflict that may be

[122] S/RES/1373 (2001), paras 1(b), 1(d), 2(e) (emphasis added).

[123] FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* 11, 35.

[124] See S/RES/2253 (2015), preamble, paras 16–17; S/RES/2322 (2016), preamble; S/RES/2368 (2017), para 10; and, more recently, S/RES/2462 (2019), para 5. On the underlying rationale, see FATF, *Criminalising Terrorist Financing: Recommendation 5* (October 2016) paras 18–20.

[125] S/RES/1624 (2005), para 4, see also preamble; S/RES/2178 (2014), preamble; S/RES/2253 (2015), preamble; S/RES/2368 (2017), preamble.

[126] S/RES/2178 (2014), para 6.

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protected under IHL (the issue of an individual who travels to a conflict zone for the express purpose of providing medical care will be returned to below).

With respect to the counter-terrorism sanctions regime, in Resolution 2253 (2015) the Security Council decided 'that acts or activities indicating that an individual, group, undertaking or entity is associated with ISIL or Al-Qaida and therefore eligible for inclusion in the ISIL (Da'esh) and Al-Qaida Sanctions List include […] (c) Recruiting for; *or otherwise supporting* acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof.'[127] This wording was maintained in resolution 2368 (2017).[128] Again, the italicised text is broad in scope. Moreover, many of the terrorist entities listed by this Security Council Committee[129] (including ISIL,[130] Boko Haram,[131] Hay'at Tahrir al-Sham,[132] AQAP,[133] and other affiliates of Al Qaeda) are or have been active in situations of armed conflict. The latter consideration is crucial: absent a nexus to a NIAC or IAC, IHL simply does not apply and so cannot serve as the legal basis for regulating the provision of assistance, financial or otherwise, which may benefit such entities.

More recently, in March 2019, the Security Council adopted resolution 2462 (2019), on countering the financing of terrorism. This resolution reaffirmed, and indeed extended, existing obligations imposed on Member States, notably in paragraph 5, in which it:

> *Decides* that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalise in a manner duly reflecting the seriousness of the offense the wilful provision or collection of funds, financial assets or economic resources or financial or other related services, *directly or indirectly*, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organisations or individual terrorists *for any purpose*, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;[134]

Once more, the italicised text illustrates the breadth of conduct which Member States are to criminalise. The paragraph does include a reference to IHL obligations, however, and indeed in the very next paragraph the Council:

> *Demands* that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including

[127] S/RES/2253 (2015), para 3(c) – emphasis added.
[128] S/RES/2368 (2017), para 2(c).
[129] List accessible at <https://scsanctions.un.org/fop/fop?xml=htdocs/resources/xml/en/consolidated.xml&xslt=htdocs/resources/xsl/en/al-qaida.xsl>.
[130] Listed as Al-Qaida in Iraq, Designated Entity (QDe. 115).
[131] QDe. 138.
[132] Previously known as Al-Nusrah Front, QDe. 137.
[133] QDe. 129.
[134] S/RES/2462 (2019), para 5 – emphasis added.

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> international humanitarian law, international human rights law and international refugee law[135]

Finally, and of particular interest for present purposes, in paragraph 24 of this resolution the Security Council:

> *Urges* States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.[136]

This resolution is significant in a number of respects. It is the first time that the Security Council has noted the risk of counter-terrorism measures impeding 'exclusively humanitarian activities' (and that it did so in an operative paragraph in a resolution adopted under Chapter VII should not be overlooked). Also, whereas previously the Security Council had, in relevant operative paragraphs of its counter-terrorism resolutions, increasingly emphasised the need for Member States to act consistently with human rights when implementing specific counter-terrorism measures (ie precisely those measures known to raise human rights concerns, relating, for example, to biometrics, watch-lists, and Passenger Name Record data),[137] it had previously not made such express linkages with respect to IHL obligations, which had hitherto been cited in preambles or in more general operative paragraphs.

Reflecting increasing interest in this topic, the Security Council addressed the issue again in its very next counter-terrorism resolution in July 2019. Resolution 2482 (2019), which was not adopted under Chapter VII, focused on the linkages between terrorism and organised crime but included an operative paragraph in which the Security Council

> [U]rge[d] Member States […] to take into account the potential effects *of counterterrorism measures* on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.[138]

It will be noted that here the linkage to IHL and humanitarian assistance was made with counter-terrorism measures generally, not just measures to counter the financing of terrorism. In a further illustration of the interactions between these legal regimes, earlier in the same resolution the Security Council had highlighted the use of sexual and gender-based violence as a tactic of terrorist groups, including in situations of armed conflict, and called for States to take legislative measures in this regard.[139]

How these resolutions affect the tension, or indeed conflict, between counter-terrorism law and IHL will be considered in section V.

[135] S/RES/2462 (2019), para 6.
[136] S/RES/2462 (2019), para 24.
[137] See, for an example of the latter, S/RES/2396 (2017), paras 11–13.
[138] S/RES/2482, para 16 (emphasis added).
[139] S/RES/2482, para 8; see also S/RES/2467, para 28.

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IV. STATE PRACTICE

How, then, have States reconciled the rules from these two areas of law, and the two objectives of protecting medical and other forms of humanitarian assistance while preventing acts that may support terrorism?[140]

A. Legislation

Looking first at legislation, there is significant disparity. States have:

- expressly *included* medical care as a form of proscribed assistance to terrorism, with no apparent exclusion where such activity takes place in a situation of armed conflict (Saudi Arabia);[141]
- expressly *excluded* from terrorism financing offences the financing of acts that are lawful under IHL (Switzerland);[142]
- criminalised participation in or support to an organisation that has both humanitarian and terrorist aims (Denmark);[143]
- criminalised individuals' presence in designated zones where terrorist organisations are active (those zones often include territories in the midst of an armed conflict) but with the possibility of exemption for those engaged in 'legitimate activity', which can include humanitarian work (Australia,[144] Denmark,[145] the United Kingdom[146]);

[140] See also survey in Mackintosh and Duplat (n 25) 19–43.

[141] Law on Countering the Financing of Terrorism, Kingdom of Saudi Arabia, art 38. See also Financial Action Task Force/MENAFATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Kingdom of Saudi Arabia: Mutual Evaluation Report* (September 2018) 170–1; on application of this provision, see ibid, 82–3 (box 10) and 154 (box 26).

[142] Criminal Code of Switzerland, art 260 *quinquies* (4).

[143] See International Monetary Fund, *Denmark: Detailed Assessment of Anti-Money Laundering and Combating the Financing of Terrorism* IMF Country Report No. 07/2 (January 2007) 219; J Vestergaard, *The Legal Framework Applicable to Combatting Terrorism – National Report: Denmark*, University of Copenhagen (13 December 2013).

[144] Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014, section 119.2. It is a defence if an individual has entered the area(s) solely for the purpose of 'providing aid of a humanitarian nature' or 'performing an official duty for the United Nations or an agency of the United Nations' (sections 119.2(3)(a) and (e)). The responsible Minister may make the declaration in question where s/he is satisfied 'that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country' (section 119.3(1)).

[145] See Criminal Code section 114j, introduced in 2016 and which proscribes presence in designated areas as an offence, but provides that prior permission can be sought by those (individuals or groups) having a legitimate purpose (section 114j(4)) and that no offence is committed where the entry/stay is connected to the pursuit of Danish, foreign or international public service or duties (section 114j(2)) (see Vestergaard 2018 (n 121) 277–82).

[146] The 2019 Counter-Terrorism and Border Security Act criminalising entrance to or presence in a designated area by a UK national or resident (section 4). During the drafting of the bill, concerns had been expressed by a number of NGOs; amendments subsequently introduced by the House of Lords will preclude criminal liability where presence in the designated area was for purposes including 'providing aid of a humanitarian nature' and 'carrying out work for the United Nations or an agency of the United Nations'.

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- excluded from the domestic definition of terrorism those acts which occur in a situation of armed conflict and are, at the material time and place, in accordance with rules of international law applicable to the conflict (Belgium,[147] Canada,[148], New Zealand[149]);
- excluded from the offence of 'associating with terrorist organizations' such association which 'is only for the purpose of providing aid of a humanitarian nature' (Australia);[150]
- excluded the provision of medicine (but not medical assistance) from the offences of providing material support to terrorist acts or to designated foreign terrorist organizations (United States of America),[151]
- required that for the act of providing 'personnel' to fall within that same offence, the individuals must work under the organization's 'direction or control' (United States of America).[152]

Far more common, however, is silence: the legislation of most States simply does not address this issue.

[147] Criminal Code of Belgium, section 141bis ('ne s'applique pas aux activités des forces armées en période de conflit armé, tels que définis et régis par le droit international humanitaire').

[148] Criminal Code of Canada, C-46, section 83.01(1), which states, *inter alia*, that a terrorist act 'does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law'.

[149] Terrorism Suppression Act, section 5(4). This exclusion also applies with respect to financing of terrorism, under section 8 of that Act. Section 8(2) of the Act, which had stipulated that it was *not* 'an offence to provide or collect funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights' was repealed in 2007.

[150] Criminal Code of Australia, section 102.8.4(c). Similarly, section 119.4, which criminalises 'Preparations for incursions into foreign countries for purpose of engaging in hostile activities', does not apply where an individual 'engages in conduct solely by way of, or for the purposes of, the provision of aid of a humanitarian nature' (albeit the defendant bears the evidential burden – section 119.4(7)).

[151] 18 USC, section 2339A (b)(1) defines 'material support or resources' (also for the purposes of section 2339B, which is the offence of providing material support to designated foreign terrorist organizations), as 'any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials'. The exception had previously extended also to the provision of humanitarian assistance to persons not directly involved in terrorist acts, but was narrowed in 1996. As such, the current definition applies to the provision of medical *substances* only, not of medical care more broadly (*United States v Farhane,* 634 F.3d 127, 143 (2nd Cir. 2011); see also discussion in *United States v Shah*, 474 F. Supp. 2d 492 (S.D.N.Y 2007)). It is noted that the material support provisions make no reference to situations of armed conflict, or the idea that certain activities which would otherwise be proscribed may be protected under IHL.

[152] 18 USC, para 2339B(h); see discussion in *Holder v Humanitarian Law Project*, 561 U.S. 1 (2010) at 13.

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B. Prosecutions

Against this varied legislative background, a number of factors increase the risk that humanitarian actors may be subject to prosecution under counter-terrorism laws. First, as noted above, under the relevant UNSC resolutions Member States are to proscribe both the direct and indirect financing of terrorism and the provision of funds to terrorists 'for any purpose'. Second, assistance to terrorist entities, whether medical or financial, has been seen by courts as 'fungible': as articulated by the Supreme Court of the United States, this concept holds that (foreign) terrorist organisations 'are so tainted by their criminal conduct that any contribution to such an organisation facilitates that conduct'.[153] Third, a number of regional organisations have created their own counter-terrorism sanctions regimes, with their own listing criteria and which are applicable to different individuals and entities, and which supplement those adopted by the Security Council.[154] Fourth, the very intention of humanitarian actors is to assist the recipients of aid and, while such actors may be aware that some of those they assist are members of entities engaged in criminal (including terrorist) conduct or have been designated as such, due to IHL principles of impartiality (and without being in any way sympathetic to the goals sought or methods used by the beneficiaries) they may feel obliged to provide this assistance.[155] This becomes more significant in view of the consideration that, fifth, the *mens rea* requirements for offences of supporting or financing terrorism/terrorist organisations vary across jurisdictions and tend to be lower for violations of terrorism sanctions regimes.[156]

[153] In *Holder*, the U.S. Supreme Court held that: '"Material support" is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks' (ibid, 29–31; cf. *M (FC) & Others v HM Treasury,* Case C-340/08, Judgment of the European Court of Justice (29 April 2010) para 61).

[154] A Debarre, 'Safeguarding Humanitarian Action in Sanctions Regimes' (International Peace Institute June 2019). One example is the list maintained by the European Union, on the basis of Common position 2001/931/CFSP, of 'persons subject to restrictive measures'. This list was established to implement Council resolution 1373 (2001), is separate to that established by the EU to implement the Security Council's 1267 sanctions regime, and includes a number of entities and individuals that are not included on the 1267 list.

[155] As stated by Mackintosh and Duplat, 'the basic principle that humanitarian action must be undertaken solely on the basis of need, without discrimination on political or other grounds, requires the fact of terrorist designation or other links to be ignored when dealing directly with individual beneficiaries. When an individual is in need, assistance which aims at preserving life, preventing and alleviating human suffering and maintaining human dignity cannot be denied. Any potential security disadvantage from such an act, for example where it is seen as helping the enemy, is considered to be outweighed by the humanitarian imperative in this situation' (Mackintosh and Duplat (n 25) 117).

[156] Intent or knowledge is often required, but domestic legislation in this area is far from uniform. Depending on the jurisdiction, knowledge that the entity is designated as terrorist (irrespective of intention to further their aims – see, on this point, *Holder* (n 152) 16–17), recklessness as to this fact, or reasonable cause to suspect that the assistance may be used for the benefit of a designated

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Commentators and UN bodies[157] have identified cases where States have prosecuted medical professionals: for providing medical assistance to entities designated (internationally or domestically) as terrorist[158] and for providing language classes to a designated entity in order to assist nurses in reading medicine labels.[159] In one well-known case, the provision of training on political advocacy, and on using IHL and international law to peacefully resolve disputes, was held to be prohibited as amounting to a form of material support to designated foreign terrorist organisations.[160]

C. Other Effects

Concerns are not limited to cases that actually result in prosecution. Commentators also report the chilling effect which the possibility of prosecutions, combined with the lack of clarity regarding the applicable rules, has for humanitarian agencies.[161] In a May 2019 report, the UN Secretary-General noted that 'Aside from their direct impact on humanitarian operations, [counter-terrorism] measures cause uncertainty and anxiety among humanitarian organizations and their staff with regard to the threat of prosecution or other sanctions for carrying out their work'.[162] Assurances that prosecutorial discretion will be exercised in a manner which takes into account humanitarian activities and IHL will not suffice: as a point of principle, criminal laws should be both clear and predictable[163] and, in practice, such assurances are unlikely to assuage concerns of humanitarian actors who will be reluctant to deploy personnel and resources on operations which might, on the text of the statutes, engage counter-terrorism laws. Also, donor States' concerns with complying with counter-terrorism laws has sometimes led them to impose additional requirements in their funding agreements with humanitarian agencies; in turn these can increase costs for and slow the operations of

group, may suffice. Also, where the entity is listed by the 1267 Committee, the laws of certain States provide that making an asset available to the entity is a strict liability offence, or that it creates a presumption that the assistance constitutes assistance to terrorism (Mackintosh and Duplat (n 25) 24–5, 28, 39, 45).

[157] Lewis *et al.* (n 33) 111–41; Debarre (n 67) 30–3; M Buisonnière, S Woznick and L Rubenstein, *The Criminalization of Healthcare* (University of Essex and Johns Hopkins Bloomberg School of Public Health, June 2018) 15–22.

[158] Lewis *et al.* (n 33) 9–10, 111–41.

[159] *US v Warsame*, 537 F. Supp.2d 1005, 1019 (2008).

[160] *Holder* (n 152) 204.

[161] Debarre (n 67) 8–10; JS Burniske and NK Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*; and NK Modirzadeh, *Comment on the 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).

[162] *Protection of Civilians in Armed Conflict: Report of the Secretary-General* (7 May 2019) S/2019/373, para 41

[163] On the problems of relying on prosecutorial discretion to clarify the reach of criminal legislation, see *R v Gul* (n 2) paras 35–37.

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those agencies.[164] Another dimension is that financial institutions, themselves subject to increasing regulation regarding terrorism financing and concerned to minimise their own exposure, engage in 'de-risking' by refusing to provide financial services to humanitarian agencies that operate in situations of armed conflict where terrorist organisations are active.[165]

V. A CONFLICT OF LAWS?

A. Tension between the Rules, or More Than That?

In view of these legal and practical challenges, many commentators have identified 'tension' between the two legal regimes.[166] But does that tell the whole story? Is it more accurate to say that rules from these different areas of international law are actually in conflict, such that the application of the two rules to the same set of facts would produce a different result? With respect to the provision of medical assistance in particular,[167] it is submitted that this is indeed the case.

Consider the following situation: an individual working for a humanitarian NGO provides medical assistance, within a situation of armed conflict, to an individual *hors de combat* who is a member of an armed group party to that conflict but which is also designated as terrorist. On the one hand, the non-punishment rule as it is stated in the Additional Protocols is absolute ('under no circumstances … any person …. regardless of the person benefitting therefrom'), and would, for parties to those instruments, operate to preclude criminal proceedings against the provider of medical assistance. And whereas human rights treaties allow for derogations in cases of public emergencies (including, potentially, a heightened threat of terrorism),[168] IHL makes no

[164] Mackintosh and Duplat (n 25) 47–70. This and the other factors noted here appear to pose greater challenges to the work of smaller, local humanitarian agencies, than to large, well-established international organisations such as ICRC, *Médécins Sans Frontières*, and the UN Office for the Coordination of Humanitarian Affairs. The latter have greater protection in international law (including, potentially, immunity from domestic criminal proceedings of their officials for activities conducted in their official capacity) as well as a greater capacity to fulfil the screening and monitoring requirements imposed by donors, and thus retain the trust of the latter (Mackintosh and Duplat (n 25) 52, 70–1, 112–13; R Shanahan, 'Charities and Terrorism: Lessons from the Syrian Crisis' (2018 Lowry Institute) 9–10, 12.

[165] Gillard (n 67) 19–24. Gillard notes that in some cases, this has led NGOs to resort to informal and unregulated channels for transferring funds, making it more difficult to effectively monitor such funds, and so (from a counter-terrorism perspective) becoming counter-productive (ibid 10, 20).

[166] See, for example, Norwegian Refugee Council (n 3) 8, 16; Gillard (n 67); F Bouchet-Saulner, 'IHL and Counter-Terrorism: Tension and Challenges for Medical Humanitarian Organizations' *Médecins sans Frontières Analysis* (2 June 2016); Debarre (n 67) 4–10.

[167] Given that the protection which IHL extends to *non-medical* assistance is weaker, and that IHL itself envisages circumstances in which this assistance can lawfully be impeded (see discussion in Part 3 above), those parts of IHL can more readily be reconciled with the Security Council resolutions in question.

[168] See art 4, ICCPR; *A v Secretary of State for the Home Department, X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68; and K Keith, 'Protecting Human Rights

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such allowances: parties to the Geneva Conventions undertake to respect and ensure respect for those treaties *in all circumstances*.[169] And yet, on the other hand, the cited provisions of the Security Council resolutions, which constitute binding obligations imposed by the Council on all UN Member States,[170] are framed with a breadth that on a textual reading could plausibly encompass this provision of medical assistance (which is, after all, a form of 'support'). To put it another way, if a conflict between two rules exists where 'one constitutes, has led to, or may lead to, a breach of the other',[171] this appears to be the case here.

As noted by Jenks in the 1950s, and by the International Law Commission in its more recent work on fragmentation, international law has a presumption against normative conflict.[172] In the present case, however, there are two important factors which work to rebut that presumption.

First, the Security Council has thus far refrained from including in any of the global counter-terrorism resolutions imposing mandatory obligations on States any exemption for the provision of medical assistance (or, still less, other forms of humanitarian support) from the criminalisation obligations on States or the application of the 1267 sanctions regime. This omission is even more striking in view of what the Security Council *has* done. It has introduced an exemption into the 1267 sanctions regime, excluding from the asset freezing regime those financial assets determined to be 'necessary for basic expenses' of listed individuals.[173] In a May 2016 resolution under the agenda item 'protection of civilians in armed conflict', the Security Council recalled 'the applicable rules of international humanitarian law relating to the non-punishment of any person for carrying out medical activities compatible with medical ethics'.[174] More recently, the Security Council has included an exemption for humanitarian assistance in a resolution on one of its other sanctions regimes: in resolution 2385 of November 2017, the Security Council decided that, for one year, the

in a Time of Terror: The Role of National and International Law' (2005) 13 Waikato Law Review 3, 32–4.

[169] Art 1 common to the four Geneva Conventions of 1949; AP I, art 1(1). This obligation applies whether or not the State is a party to the armed conflict in question (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136, at paras 158, 163(3)(D)).

[170] Art 25, UN Charter.

[171] J Pauwelyn, *Conflict of Norms in International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 175ff. The notion of conflict used in the ILC work on fragmentation was broader, as 'a situation where two rules or principles suggest different ways of dealing with a problem' (International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, A/CN.4/L.682 (13 April 2006) para 25).

[172] Though as Jenks acknowledged, 'The presumption against conflict is not, however, of an overriding character. It is one of the elements to be taken into account in determining the meaning of a treaty provision, but will not avail against clear language or clear evidence of intention' (CW Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 BYBIL 429); ILC (n 171) paras 37, 42.

[173] S/RES/1452 (2002), para 1(a); S/RES/2253 (2015), para 75(a); S/RES/2368 (2017), para 81 (a).

[174] S/RES/2286 (2016), preamble.

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asset freezing measures imposed in paragraph 8 of resolution 1844 (2008) on Somalia,[175]

> 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 in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organizations participating in the United Nations Humanitarian Response Plan for Somalia[176]

It will be noted that here the Security Council carefully identified the categories of humanitarian agencies to whom this exemption applied. Similarly, in a resolution adopted a month later, the Security Council established a mechanism for authorising humanitarian exemptions from the sanctions regime imposed under resolution 1718 (2006) in respect of the Democratic People's Republic of Korea (DPRK).[177] That mechanism, established under resolution 2397 (2017) and further elaborated in a subsequent notice adopted by the '1718 Sanctions Committee',[178] provides for case-by-case exemptions to be granted by that Committee. States or entities seeking such exemptions must provide detailed information regarding: the nature of the assistance proposed to be provided to the DPRK; the beneficiaries for such assistance and the criteria used for selecting them; the quantities and specifications of the goods involved; the route and date of transfer; and measures which will be taken to ensure that the assistance provided will be used for the intended purpose and not diverted for a prohibited purpose.[179] Again, the care taken in crafting exemption mechanisms is clear.

For present purposes, the point is that the Security Council has not included any clauses of this nature in its counter-terrorism resolutions having global reach (including those adopted in the months before and after resolution 2385 (2017)).

As noted above, resolution 2462 (2019) is significant in a number of respects, though neither here nor in resolution 2482 (2019) did the Security Council go so far as to craft an exemption clause for 'exclusively humanitarian activities'. This is evident when comparing the text used in these resolutions ('urges States… to take into account') with the relevant paragraphs establishing exemptions to the sanctions regimes imposed with respect to Somalia ('shall not apply') and

[175] S/RES/1844 (2008), para 3.

[176] S/RES/2385 (2017), para 33.

[177] S/RES/1718 (2006), para 8. A humanitarian exemption to the travel ban imposed under para 8 (e) was already provided for in para 10 of this resolution, but the broader exemptions came later.

[178] S/RES/2397 (2017), para 25.

[179] See <https://www.un.org/securitycouncil/sanctions/1718/exemptions-measures/humanitarian-exemption-requests>. For an assessment of how this system has worked in practice, see the March 2019 report by the Panel of Experts established pursuant to resolution 1874 (2009), S/2019/171, paras 175–180, and Annex 85.

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DPRK ('decides … exempt any activity'). As confirmed by the International Court of Justice, the contemporaneous practice of the Security Council on similar issues is a relevant factor in interpreting its resolutions.[180]

To underline the point: despite the volume and breadth of UNSC action on terrorism since the emergence of ISIL in 2014;[181] despite the fact that resolution 2178 (2014) imposes criminalisation obligations in response to the FTF phenomenon, which it defines to include those who travel to situations of armed conflict; despite its own precedents in resolution 2385 (2017) and 2397 (2017), the recommendations of a 2015 High Level Review of United Nations Sanctions,[182] frequent discussion of this topic before the Security Council[183] and relevant statements from the General Assembly;[184] the Security Council has not included in any of these resolutions a clause excluding medical assistance (or humanitarian assistance more broadly) from the reach of the counter-terrorism measures it has imposed upon States.[185] This omission should not be seen as an oversight.

Second, with respect to at least two individuals and two entities, the provision of medical assistance has been included by the Security Council's 1267 Committee as one of the bases for designation: that is, as one of the bases for determining that the individual or entity in question is indeed 'associated with' ISIL, Al-Qaida, or affiliated entities.[186] This has been interpreted as an illustration the Security Council itself perceives medical assistance as one form of impermissible support to terrorism.[187]

B. How to Resolve the Conflict?

The principles highlighted by the ILC as methods for resolving normative conflicts include the *lex specialis* and *lex posterior* principles.[188]

[180] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Rep 403, paras 94, 114.

[181] In the five years since ISIL declared its 'caliphate' in June 2014, the Council has adopted 16 resolutions on global counter-terrorism efforts, seven of which were adopted under Chapter VII of the Charter.

[182] *High Level Review of United Nations Sanctions, based on United Nations document* A/69/941-S/2015/432 (November 2015) recommendations 25 and 66, at 54–6.

[183] See S/PV. 8264, meeting of 22 May 2018, at 3, 29, 47–8, 51.

[184] See the July 2016 resolution on the Global Counter-Terrorism Strategy, A/RES/70/291, para 16.

[185] Gillard notes that 'Security Council members are likely to be more open to adopting exemptions for humanitarian action in country-specific sanctions rather than in counterterrorism ones, where sensitivities are more acute and concerns about abuse are more serious' (Gillard (n 67) 10).

[186] Zafar Iqbal (designated individual (QDi. 308), Redendo Cain Dellosa (QDi. 246), Al-Akthar Trust International (QDe. 121) and the Global Relief Foundation (QDe. 091). See also Debarre (n 67) 13.

[187] The subsequent practice of relevant United Nations organs was another factor noted by the ICJ as relevant to the interpretation of Council resolutions (*ICJ Kosovo* (n 180, at para 94).

[188] On which, see, generally ILC (n 171) at paras 56–122 (*lex specialis*) and 223–250 (*lex posterior*).

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Their application does not conclusively resolve the issue here, however. First, because they lead in opposite directions: whereas IHL is generally seen as the *lex specialis* with respect to conduct within armed conflicts,[189] the relevant Security Council resolutions were adopted subsequent to the Additional Protocols. Second, because the application of these principles does not result in simply 'removing' one rule from the equation: the earlier or more general rule 'remains ''in the background'', controlling the way the later and more specific rules are being interpreted and applied'.[190]

If application of these principles does not remove the conflict between these two legal rules, what happens? Some commentaries appear to proceed on the assumption that it is the IHL rules which should prevail, with multiple recommendations on how counter-terrorism law and processes should make allowances for IHL, and very few on the reverse.[191] As a matter of law, this would be incorrect. Article 103 of the Charter, which is rarely mentioned in the commentary[192] but is another important element in international law rules on conflict of norms,[193] states that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under *any other international agreement*, their obligations under the present Charter shall prevail'.[194] States' obligations under the Charter include, of course, their obligation to 'accept and carry out the decisions of the Security Council in accordance with the present Charter', per Article 25.

Article 103 has already played a role in the Security Council's response to acts of terrorism and in the development of its sanctions regimes. In 1992 the Security Council effectively suspended application of the Montreal Convention to demand the immediate surrender of those allegedly responsible for the Lockerbie bombing: in the related litigation, the ICJ confirmed the effect of Article 103.[195] In resolution 670 (1990), on sanctions against Iraq, the Security Council expressed determination to 'ensure respect for its decisions', referred to Article 103, and decided 'that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any

[189] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226, para 25; ILC (n 171) at para 103.

[190] *ICJ Wall* (n 169) at para 106.

[191] See, for example, Debarre (n 67) 26–9; Buisonnière *et al.* (n 157) 14, 29

[192] One exception is Lewis *et al.* (n 33) 103.

[193] ILC (n 171), paras 328–360. See also the Vienna Convention on the Law of Treaties, 1155 UNTS 331, art 30(1). On art 103 generally, see A Paulus and JR Leiβ, 'Article 103' in B Simma *et al.* (eds), *The Charter of the United Nations: A Commentary, Third Edition – Volume II* (Oxford University Press 2013) 2110.

[194] Emphasis added.

[195] S/RES/748 (1992); the Court noted that 'both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter […] and whereas in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention' (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992* [1992] ICJ Rep 114, at para 42).

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international agreement' shall implement the sanctions imposed.[196] Indeed, Article 103 was alluded to by the Security Council in resolution 1267 (1999), when it established what later became the 'Al-Qaida and ISIL Sanctions regime', in an operative paragraph directed at 'all States and all international and regional organizations'.[197]

Notably, Article 103 applies notwithstanding the undoubtedly important objectives of IHL, generally, and of the non-punishment rule, specifically. It also applies notwithstanding the wide ratification of the treaties from which the non-punishment rules derive. In short, as noted by Lord Bingham, 'the reference in Article 103 to "any other international agreement" leaves no room for any excepted categories of treaties'.[198] How Article 103 applies with respect to a non-Charter rule having the status of a peremptory norm is a different matter,[199] but that does not arise here as the non-punishment rule is not asserted to have that status.

In terms of the legal consequences, Article 103 provides that Charter obligations *prevail* over other obligations, not that they abrogate them. Though there is some debate in the doctrine, the better view is that in case of conflict, the non-Charter obligations are suspended while the resolution is in force, rather than invalidated entirely,[200] albeit in the present context this would be an area where the indefinite and norm-creating nature of the Security Council's resolutions is significant.

VI. SOLUTIONS: EXEMPTION CLAUSES, BUT BY WHOM?

Whether the conclusion is that these rules are in conflict or merely that there is tension between them, and that current practice is inconsistent and unhelpful, clarification is necessary for States, for humanitarian agencies and, indeed, for the financial institutions who may provide them with services. In terms of

[196] S/RES/670 (1990), preamble, para 2.

[197] The Council 'call[ed] upon all States and all international and regional organizations to act strictly in conformity with this resolution, notwithstanding the existence of any rights granted or obligations conferred or imposed by any international agreement or of any contract entered into or any licence or permit granted prior to the entry into force of the measures imposed [by the Council]…' (S/RES/1267 (1999), para 7).

[198] *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, [2007] UKHL 58, at para 35; the European Court of Human Rights arrived at a different interpretation of the Security Council resolution at issue in that case, but it did not depart from the findings of the House of Lords regarding the effect of art 103. (*Al-Jedda v The United Kingdom,* App No 27021/08, Judgment (7 July 2011) paras 101–109).

[199] See Paulus and Leiβ (n 193) 2119–20, 2133.

[200] ILC (n 171) at paras 333–334. This appears particularly appropriate in the present case, in view of the nature of the non-Charter obligations at issue. On a related note, art 60(5) of the 1969 Vienna Convention on the Law of Treaties excludes from the standard rules on termination following material breach, 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties' (see K Keith, 'Bilateralism and Community in Treaty Law and Practice – Of Warriors, Workers, and (Hook-)Worms' in U Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 763).

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possible solutions, the EU's 2017 Directive on combatting terrorism includes a clause to the effect that:

> The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case-law of the Court of Justice of the European Union[201]

This clause has been characterised as good practice, to be emulated by States in their domestic legislation and, potentially, in future Security Council resolutions.[202] Moving forward, there are four considerations which must be kept in mind when crafting exemption clauses.

A. Levels of Protection for Different Activities

The first is whether, and how, to reflect the distinction between the provision of medical care and the provision of other forms of humanitarian assistance. If the legal basis for exemption clauses is IHL and the important values which it seeks to protect, then logically the contours of IHL itself, including the special protection given to medical care and the corollary of a lower standard of protection for other forms of assistance, should be reflected in exemption clauses. This point is often missed in commentaries, however, which tend to call for undifferentiated exemption clauses for humanitarian assistance *generally*.[203] Such calls, while fully understandable from the perspective of humanitarian principles, are difficult to reconcile with the structure of IHL. To better reflect that structure, it could be appropriate to include in exemption clauses a requirement that agencies providing non-medical assistance take certain due diligence measures[204] to ensure that their assistance is not, in fact, supporting the activities of terrorist organisations.

B. Gaps in the Reach of IHL

The second consideration also arises from the structure of IHL, namely that, as highlighted in the work of the Harvard Law School Program on International

[201] 2017 EU Directive, Recital 38.

[202] ICRC 2015 (n 67) 21; Debarre (n 70) 27; Gillard (n 67) 6–7, 26-–8; Mackintosh and Duplat (n 25) 117–18; Norwegian Refugee Council (n 3) 11, 34.

[203] See eg Debarre (n 67); see also Mackintosh and Duplat (n 25) 46.

[204] As noted above, IHL envisages the imposition of certain practical requirements on the delivery of non-medical assistance. The imposition of such requirements by donors has been criticised in commentaries, on the basis that they may place unduly onerous burdens on humanitarian agencies (Debarre (n 67) 9, 33). In the opinion of the present author, these can constitute reasonable, practical measures which could provide the necessary assurance to donors and, more to the point, reduce the possibility of well-intentioned assistance indirectly facilitating the acts of terrorist organisations. Moreover, as Gillard notes, if humanitarian agencies do not engage with States and the UN to explain the due diligence measures which they are *already* implementing to address such risks, 'it will be the Security Council or the EU that sets the conditions' (Gillard (n 67) 12).

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Law and Armed Conflict, the protection which IHL accords to *medical care* is itself 'fragmented and non-comprehensive'.[205] Different standards are applicable in different types of armed conflict:[206] notably, the Geneva Conventions do not include a non-punishment rule for 'Common article 3 NIACs'.[207] Also, a number of States have not become a party to one or both of the 1977 Additional Protocols[208] so are not bound by their non-punishment rules: this includes some States that are parties to armed conflicts in which terrorist organisations are involved,[209] as well as States of incorporation/registration/nationality/residence of humanitarian agencies and their employees (thereby increasing the risk of legal proceedings under counter-terrorism laws with extra-territorial reach).[210] As previously discussed, since the non-punishment rule is not (yet) embodied in customary international law the absence of the treaty-based obligations removes one source of protection for humanitarian actors.

A further gap—which has assumed greater relevance in light of the FTF phenomenon—is that IHL does not expressly protect those seeking to travel to conflict zones to provide medical assistance to the wounded and sick.[211] A cognate issue is the distinction, missed in some commentaries but noted in domestic criminal proceedings,[212] between, on the one hand, a humanitarian agency active in a conflict zone and which seeks to provide medical assistance to all those in need, including wounded and sick members of a group designated as terrorist, and, on the other hand, individuals who travel to a situation of armed conflict solely and knowingly to provide medical assistance to such an entity: in the latter situation, can this act really be characterised as 'impartial' so that it should be protected by IHL? And what of the geographic reach of the IHL protections: are these impacted by the consideration that the (terrorist) entity being assisted is active not only within the situation of armed conflict but is also planning and conducting unlawful

[205] Lewis *et al.* (n 33) 5, 38–63.

[206] In this context, it should be noted that the classification of armed conflicts, including those in which terrorist groups are active, can be fluid: while an IAC existed in Afghanistan in 2001, by 2002, in view of the positions of the States involved, this had developed into a NIAC (see discussion in J Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications' (2014) 96 International Review of the Red Cross 893, 81).

[207] Lewis *et al.* (n 33) 88–9.

[208] At time of writing, Additional Protocols I and II had 174 and 168 parties, respectively.

[209] States which have not signed either Protocol include: Israel, Pakistan, Somalia, Turkey, and the United States of America; Syria and Iraq have ratified the First Additional Protocol but not the Second

[210] See Financing Convention, art 7; S/RES/1373 (2001), paras 1(b)–(d), 2(d).

[211] Lewis *et al.* (n 33) 8, 63.

[212] In *United States v Farhane*, the court noted that the defendant 'was not prosecuted for performing routine duties as a hospital emergency room physician, treating admitted persons who coincidentally happened to be al Qaeda members. [He] was prosecuted for offering to work for al Qaeda as its on-call doctor, available to treat wounded mujahideen who could not be brought to a hospital precisely because they would likely have been arrested for terrorist activities' (*Farhane* (n 151), at 141). This distinction was also made in *Shah* (n 151).

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attacks beyond the armed conflict in neighbouring countries or, indeed, on different continents?[213]

In short, simple references to IHL or to 'impartial humanitarian organisations' in exemption clauses will not answer all the questions posed in this area. Exemption clauses in domestic legislation will need to carefully reflect the relevant IHL obligations of the State in question, even if this may result in differing standards for humanitarian agencies that work across multiple States.

C. *Amending Security Council Resolutions*

A third consideration arises from the structure and effect of UNSC resolutions: adding humanitarian exemption clauses in future Security Council resolutions on counter-terrorism, or *a fortiori* in national legislation, would not necessarily 'fix' the issue regarding the mandatory provisions in existing Security Council resolutions. For example, a clause in resolution 2178 (2014) exempting humanitarian action from the measures introduced in that resolution would not have affected the material scope of the mandatory provisions in resolution 1373 (2001). Remedying this will require close attention to the web of obligations created and refined in the Security Council's many resolutions on terrorism, particularly those adopted since 2014.

D. *Who Should Draft the Exemption Clauses?*

The fourth consideration relates to the level at which such clauses should be crafted. Resolution 2462 (2019) has been criticised in some quarters for not going far enough to protect humanitarian activities.[214] Yet it is difficult to see how the Security Council could craft an exemption clause with the specificity needed to satisfy the requirements of both areas of law: drafting clauses applicable to activity in a single country is one thing, doing so in respect of counter-terrorism resolutions that are of global effect, and indefinite, is quite different.

What, then, of possible further activity at the regional level? Whilst the clause included in the EU 2017 Directive is often identified as good practice, this would be difficult to replicate in regions which lack a common body of legal rules comparable to the EU *aquis* or a court of mandatory jurisdiction to rule on any disputes (indeed, the ECJ is directly referenced in the clause in question). Action at the national level may therefore be the most effective.

[213] See, for examples, attacks carried out by Al-Shabaab in Kenya (notably the Westgate shopping centre in September 2013, and Garissa University in April 2015), and the series of attacks carried out by ISIL operatives in Paris in November 2015. On the relevant provisions of IHL, see Saul (n 11) 217–21.

[214] See, for example, <https://www.hrw.org/news/2019/04/02/un-security-council-resolution-undermines-aid-human-rights-work>; <https://www.justsecurity.org/64158/correcting-course-avoiding-the-collision-between-humanitarian-action-and-counterterrorism/>.

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That is not to say that the Security Council's work in this area is done. The Council can still play a crucial and leading role by building on the progress made in resolutions 2462 and 2482 and, in a future resolution, directing Member States to insert in their domestic laws exemption clauses which carefully reflect their precise obligations under both counter-terrorism law and IHL. Such direction would be required with respect to both the criminalisation obligations previously imposed by the Security Council and the counter-terrorism sanctions regime.[215] In order to limit the inevitable inconsistency across jurisdictions, relevant international organisations might assist Member States by developing model exemption clauses[216] which accurately reflect the contours of both areas of law.

CONCLUSION

There are many points of convergence between counter-terrorism law and IHL, as well as areas, perhaps not yet fully explored, in which the latter can support implementation of the former. A particular source of tension relates to the potential for counter-terrorism law to criminalise, or in other ways impede, 'exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with [IHL]'.[217] In some respects, this tension can more accurately be characterised as a conflict of legal rules.

To date, this has produced both inconsistency and a lack of clarity. Inconsistency in that where laws *do* exist they vary widely, meaning that a single project implemented by a single humanitarian agency may be subject to multiple legal regimes that pose very different impediments to the delivery of aid and even risks of prosecution. And a lack of a clarity in that there are generally too few international, regional, or domestic laws to guide the actors involved.

The inconsistency cannot easily be resolved, arising as it does from the variances in applicable IHL rules to different types of armed conflicts and to different Member States. The lack of clarity, however, can more readily be addressed. The inclusion of exemption clauses in counter-terrorism laws is a necessary step to address the very real legal and practical issues outlined here. Such exemption clauses need to be crafted to carefully reflect both the precise contours of IHL as well as the content and structure of the international legal regime on counter-terrorism. Even if they must come with caveats or qualifications, such clauses would be valuable for a range of stakeholders. While humanitarian actors have often seen Security Council

[215] On the latter, see Debarre 2019 (n 154).

[216] The preparation of model legislation is already common in both fields, including through the work of the UN Office on Drugs and Crime (<http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html>), and the ICRC (<https://www.icrc.org/en/document/national-implementation-ihl-model-laws>).

[217] S/RES/2462 (2019), para 24.

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resolutions on terrorism as the source of problems in this area, the adoption of resolutions 2462 and 2482 in 2019 represents significant progress. A further step by the Security Council may now be required to direct the necessary legislative action at the national level.

As the debates on these legal and practical issues continue, the FTF phenomenon and the characteristics of ISIL and other terrorist organisations continue to evolve, rending the legal complexities outlined above more challenging: a fluid, diffuse and decentralised character makes it more difficult to reach reliable conclusions concerning a terrorist organisation's structure and control of territory; it also makes it more difficult to assess its relationship with other non-State armed groups. And yet these conclusions must be reached in order to determine the applicability of relevant rules of IHL and to determine the reach of counter-terrorism law into particular situations of armed conflict. Against a fluid factual background, clarity as to the applicable legal rules becomes all the more important.

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