International Review of the Red Cross (2021), **103** (916-917), 267–293.
Counterterrorism, sanctions and war
doi:10.1017/S1816383121000631

IRRC

International humanitarian law and the criminal justice response to terrorism: From the UN Security Council to the national courts

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Abstract
Since the adoption of the first United Nations Security Council (UNSC) counterterrorism resolution after the 9/11 attacks, the UNSC has increasingly required the domestic criminalization of "terrorism" acts and ancillary activities. Without the inclusion of an explicit international humanitarian law (IHL) or humanitarian exception, the UNSC has – so far – failed to harmonize the counterterrorism legal framework with IHL, leaving it up to States to define the interaction between the two. In their national legislation and courts, States' interpretations have varied but counterterrorism legislations have been used to adjudicate conducts in armed conflicts, regardless of their legality under IHL. As the domestication of UNSC offences is ongoing, good practices are highlighted in this paper and recommendations are offered to ensure the development of international customary law in accordance with IHL.

Keywords: terrorism, international humanitarian law, United Nations Security Council, criminal justice, international criminal law, universal jurisdiction, national courts.

Introduction

After the 9/11 attacks against the United States, the United Nations Security Council (UNSC) significantly contributed to transnational criminal law[1] by requiring the domestic criminalization of "terrorism" acts and ancillary activities.[2] It also listed several non-State armed groups (NSAGs) involved in terrorist activities, including Al-Qaeda, the Islamic State of Iraq and the Levant (ISIL, also known as Da'esh) in Syria and Iraq, and Boko Haram in the Sahel,[3] through the 1267 sanctions regime.[4] Researchers and practitioners,[5] including the International Committee of the Red Cross (ICRC),[6] have warned that these decisions have created some

1 Transnational criminal law is defined by Neil Boister as a subset of international criminal law which deals with treaty crimes. Contrary to the core crimes spelled out in the Rome Statute of the International Criminal Court, these "crimes of international concern" with potential transboundary effects are criminalized and prosecuted at the domestic level. Transnational criminal law treaties require States to cooperate in the investigation and prosecution or extradition of suspects under the principle of "extradite or prosecute". This is the case for the nineteen treaties and conventions, and their protocols, that deal with categories of offences regarded as "terrorist". See Neil Boister, "'Transnational Criminal Law'?", *European Journal of International Law*, Vol. 14, No. 5, 2003.

2 See Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2008, p. 115; Luis Miguel Hinojosa Martinez, "The Legislative Role of the Security Council in Its Fight against Terrorism: Legal, Political and Practical Limits", *International and Comparative Law Quarterly*, Vol. 57, No. 2, 2008. Some authors stress the challenge that this role raises for the multilateral approach to criminal justice and treaty-making processes: see, for example, Nigel D. White, "The United Nations and Counter-Terrorism", in Ana Marià Salinas de Frias, Katja Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, New York, 2012, p. 81; Titilopemi Ogunlade, "The UN Security Council as Legislator: A Critical Analysis", master's thesis, Université de Genève Maîtrise, 2014.

3 See United Nations (UN), "Security Council Al-Qaida Sanction Committee Adds Boko Haram to Its Sanction List", Press Release SC/11410, 22 May 2014, available at: www.un.org/press/en/2014/sc11410.doc.htm (all internet references were accessed in October 2021).

4 Initially known as the 1267 UN sanctions regime, two separate sanctions regimes finally emerged in 2011, as per UNSC Res. 1988 and UNSC Res. 1989, 17 June 2011. The first deals with the Taliban and the second concerns ISIL, Al-Qaeda and associated individuals, groups, undertakings and entities. In June 2021, the ISIL and Al-Qaeda sanctions regime, pursuant to UNSC Res. 1257, 1989, 2253 and 2368, comprised targeted sanctions measures – an arms embargo, a travel ban and an asset freeze – against 261 individuals and eighty-nine entities listed on the ISIL and Al-Qaeda sanctions list.

5 Including Jelena Pejic, "Armed Conflict and Terrorism: There Is a (Big) Difference", in A. M. Salinas de Frias, K. Samuel and N. D. White (eds), above note 2; Tristan Ferraro, "Interaction and Overlap between Counter-Terrorism Legislation and International Humanitarian Law", *Proceedings of the 17th Bruges Colloquium*, 2016; Alice Debarre, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, International Peace Institute, New York, September 2018; Naz K. Modirzadeh, Dustin A. Lewis and Claude Bruderlein, "Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape", *International Review of the Red Cross*, Vol. 93, No. 833, 2011.

6 See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, pp. 57–65; College of Europe and ICRC, "Terrorism, Counter-Terrorism and International Humanitarian Law", *Proceedings of the 17th Bruges Colloquium*, 20–21 October 2016.

https://doi.org/10.1017/S1816383121000631 Published online by Cambridge University Press

overlap and contradictions between the laws governing counterterrorism measures[7] and international humanitarian law (IHL).

IHL regulates situations of international and non-international armed conflict. The existence of armed conflicts is established based on a factual assessment[8] and regardless of the political designation of "terrorist" of one of the parties to the conflict or of its activities. Further, while IHL takes a two-pronged approach in regulating both lawful and unlawful conducts in armed conflicts, terrorism is always regarded as criminal.[9] There is therefore an apparent tension between IHL and counterterrorism, which can be highlighted both at the policy level (in analyzing UNSC resolutions) and in practice (in looking at criminal proceedings in domestic courts). Examining the issue from both of these perspectives, this paper aims to assess the impact of UNSC counterterrorism resolutions on the use of and respect for IHL in national criminal proceedings.

The paper begins with an overview of the development of the UNSC response to terrorism since 2001 and the offences it has required States to criminalize. It analyzes how the UNSC has created conflicting obligations on States, and discusses the judicial and political implications of these conflicts. The first section concludes that the UNSC has left it up to States to define the interaction between the two frameworks and has opened the door to various practices and interpretations at the domestic level.[10] Secondly, the paper surveys State practices in the adjudication of offences regulated by both IHL and national counterterrorism legislation. It observes that individuals whose conduct is governed by both IHL and counterterrorism law have been charged and indicted for terrorist offences, regardless of the legality or illegality of their activities in situations of armed conflict. To remediate this development, the paper highlights two good practices – first, the adoption of an IHL exclusion clause and a sectoral humanitarian exemption in domestic legislation, and second, the use of dual legal qualification in domestic courts. The paper ends with a call for action to national authorities and the UN system to ensure better consideration for IHL in States' domestic criminal justice processes and to shape customary international law in a manner that is consistent with IHL.

7 These measures include the international legal framework (comprised of nineteen treaties and conventions, and their protocols) and domestic criminal laws addressing terrorism.

8 If acts of violence committed by "terrorist" groups are isolated and do not lead to an armed confrontation which passes the threshold of intensity required, the situation would not amount to a non-international armed conflict (NIAC) and IHL would not apply. However, if acts of violence committed by a terrorist group which meets the command-and-control structure criteria pass a threshold of intensity, the situation could escalate to an armed conflict. See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, paras 432–438, 867, available at: https://tinyurl.com/23cfhnh6; International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70; ICTY, *The Prosecutor v Duško Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para. 562.

9 J. Pejic, above note 5.

10 Ben Saul, *Defining Terrorism in International Law*, Oxford Scholarship Online, New York, 2010, p. 50.

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The UNSC's response to terrorism and its implications for IHL

Historical development

Since 2001, the UNSC has tackled terrorism as a threat to international peace and security and has adopted more than twenty binding counterterrorism resolutions under Chapter VII of the UN Charter.[11] These resolutions have expanded the sanctions regime against listed individuals and entities associated with the Taliban, Al-Qaeda and ISIL.[12] Further, in adopting Resolutions 1373,[13] 2178,[14] 2396[15] and 2462,[16] the UNSC has taken a quasi-law-making role[17] and has imposed legal obligations on United Nations (UN) member States. These legal obligations "relate to [States'] general legal frameworks, including codification of the international counterterrorism instruments, denial of safe haven, recruitment, jurisdiction, bringing terrorists to justice, and international legal cooperation".[18] The aforementioned resolutions outline, *inter alia*, a series of "terrorist" and ancillary acts to be established "as serious criminal offences in domestic law and regulations"[19] so as to respond to emerging and evolving threats. With Resolution 1373, the UNSC required member States to criminalize

> the wilful 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.[20]

Resolution 1373 also calls on States to

> [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is

11 The Chapter VII UNSC Resolutions on "threats to international peace and security caused by terrorist acts" are: UNSC Res. 1373, 28 September 2001; UNSC Res. 1452, 20 December 2002; UNSC Res. 1455, 17 January 2003; UNSC Res. 1526, 20 January 2004; UNSC Res. 1535, 26 March 2004; UNSC Res. 1566, 8 October 2004; UNSC Res. 1617, 29 July 2005; UNSC Res. 1735, 22 December 2006; UNSC Res. 1822, 30 June 2008; UNSC Res.1904, 17 December 2009; UNSC Res. 1988, 17 June 2011; UNSC Res. 1989, 17 June 2011; UNSC Res. 2082, 17 December 2012; UNSC Res. 2083, 17 December 2012; UNSC Res. 2160, 17 June 2014; UNSC Res. 2161, 17 June 2014; UNSC Res. 2170, 15 August 2014; UNSC Res. 2178, 24 September 2014; UNSC Res. 2199, 12 February 2015; UNSC Res. 2253, 17 December 2015; UNSC Res. 2396, 21 December 2017; UNSC Res. 2462, 28 March 2019.

12 See above note 4.

13 UNSC Res. 1373, 28 September 2001.

14 UNSC Res. 2178, 24 September 2014.

15 UNSC Res. 2396, 21 December 2017.

16 UNSC Res. 2462, 28 March 2019.

17 See, for instance, L. M. Hinojosa Martinez, above note 2. Some authors stress the challenge such a role has raised for the "criminal justice multilateral approach" to law-making processes, including treaty negotiations and voluntary ratification. See, for example, N. D. White, above note 2, p. 81; T. Ogunlade, above note 2.

18 UNSC, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*, UN Doc. S/2019/998, 21 December 2019, p. 6.

19 UNSC Res. 1373, 28 September 2001.

20 *Ibid.*, op. para. 1(b).

https://doi.org/10.1017/S1816383121000631 Published online by Cambridge University Press

> 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 regulations.[21]

In 2014, as thousands of foreign fighters had travelled to join the self-proclaimed Islamic State (IS) in Iraq and Syria, the UNSC adopted Resolution 2178 to address this trend. The resolution requests States to establish relevant criminal offences to prosecute and penalize[22] nationals and individuals who "travel or attempt to travel to a State other than their States of residence or nationality, for the purpose of perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training".[23] In 2017, as IS faced a military defeat and lost territories, fears grew regarding the return or relocation of foreign fighters, which paved the way for the adoption of UNSC Resolution 2396.[24] This resolution put emphasis on judicial measures, including prosecution, as well as reintegration and rehabilitation of returning individuals and their families.[25] Finally, in 2019, Resolution 2462 was adopted as a consolidated text on countering the financing of terrorism.[26] It reaffirms the provisions contained in previous resolutions on establishing criminal offences against the direct and indirect financing of terrorism as well as against "the travel, recruitment and financing of foreign terrorist fighters".[27] It further requests States to establish serious criminal offences for the "wilful provision or collection of funds, financial assets or economic resources or financial or other related services … to be used for the benefit of terrorist organizations or individual terrorists for any purpose".[28] The UNSC also established the Counter-Terrorism Committee (CTC)[29] and the Counter-Terrorism Committee Executive Directorate (CTED)[30] to monitor the implementation of these binding resolutions and to develop technical recommendations and guiding principles to facilitate their transposition at the national level.[31]

21 *Ibid.*, op. para. 2(e). This is also reiterated in UNSC Res. 2178, 24 September 2014, op. para. 6; UNSC Res. 2396, 21 December 2017, op. para. 17; and UNSC Res. 2462, 28 March 2019, op. para. 2.
22 UNSC Res. 2178, 24 September 2014, op. para. 6.
23 *Ibid.*, op. para. 6(a).
24 UNSC Res. 2396, 21 December 2017.
25 *Ibid.*, op. paras 29–41.
26 UNSC Res. 2462, 28 March 2019.
27 *Ibid.*, op. para. 2.
28 *Ibid.*, op. para. 5.
29 Through UNSC Res. 1373, 28 September 2001, op. para. 6, the UNSC created the CTC "to monitor implementation of this resolution" and called on States to report to the Committee on "steps they have taken to implement this resolution".
30 The UNSC established CTED through the adoption of UNSC Res. 1535, 26 March 2004.
31 See CTED, *Madrid Guiding Principles: A Practical Tool for Member States to Stem the Flow of Foreign Terrorist Fighters*, UN Doc. S/2015/939, 23 December 2015 (Madrid Guiding Principles); CTED, *2018 Addendum to the Madrid Guiding Principles*, 2018; UNSC, above note 18.

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Conflation with IHL and implications

In adopting these Chapter VII resolutions on counterterrorism and expanding criminal liability for "terrorism", the UNSC has created a potential overlap with obligations under IHL. This is due to four main reasons: (1) the UNSC has requested the criminalization of broad "support" and "indirect financing" of terrorism; (2) the UNSC has not legally defined the constitutive elements of terrorist offenses; (3) the UNSC has extended application of these offenses to situations of armed conflict and designated certain NSAGs as terrorists; and (4) the UNSC has adopted these resolutions without providing any explicit IHL exclusion clause or a sectoral humanitarian exemption.[32] These decisions can thus have important judicial repercussions for protected individuals in situations of armed conflict, including impartial humanitarian actors.

First, as noted above, the UNSC has called on all States to criminalize a number of acts and to incorporate these into their domestic laws and regulations as prosecutable offences. It has thus expanded the scope and types of "terrorist" activities, particularly ancillary activities, which it requires States to repress under domestic law. Amongst others, the provision of "any form of support, active or passive, to entities or persons involved in terrorist acts"[33] is prohibited, and the "wilful provision or collection of funds, financial assets or economic resources or financial or other related services"[34] as well as "support" to terrorism is to be punishable by law.[35] However, when "support", "economic resources" or "other related services" are broadly interpreted, impartial humanitarian bodies[36] may be suspected of such offences when providing humanitarian assistance to listed individuals, or in cases of incidental transactions, or of payments of taxation for humanitarian access to listed groups. Such allegations would run directly counter to the principles underpinning impartial humanitarian activities.

Second, the UNSC has not settled the contentious debates surrounding the definition of terrorism, nor has it circumscribed its definitions to specific constitutive elements of crimes with the adoption of a binding resolution.[37] Instead, the UNSC requires States to criminalize the "perpetration of terrorist

32 Note that a fair amount of conceptual uncertainty remains regarding the difference, if any, between the term "humanitarian exemption" and the terms "humanitarian exception" and "humanitarian carve-out", and their relationship with the more generic concept of "humanitarian safeguards". Regarding the lack of consistency in the use of these terms and the implications that this has had, see the contribution by Sue Eckert and the interview with Alena Douhan in this issue of the *Review*.

33 UNSC Res. 1373, 28 September 2001. op. para. 2(a).

34 UNSC Res. 2462, 28 March 2019, op. para. 5.

35 UNSC Res. 1373, 28 September 2001, op. para. 2(e); UNSC Res. 2178, 24 September 2014, op. para. 6; UNSC Res. 2396, 21 December 2017, op. paras 17, 23, 30; UNSC Res. 2462, 28 March 2019, preambular para. 4.

36 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 55, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1.

37 In 2004, the UNSC adopted UNSC Res. 1566, which provided a working definition of terrorism. It "defined terrorism as serious (sectoral) criminal violence intended to provoke a state of terror, intimidate a population or compel a government or organization". This resolution, however, was not adopted under Chapter VII of the UN Charter and is not binding on States. See Ben Saul, "Definition

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acts" without delineating the material elements which would amount to such acts. In effect, the Council has endowed the terms "terrorism" and "terrorist acts" with operative legal meaning without defining or delineating the constitutive elements of these crimes.[38] This has allowed for a broad interpretation of these crimes, which can be in tension with rules under IHL. For instance, in an armed conflict, an act of violence committed by a designated "terrorist" NSAG against an opposing State's armed forces which constitute a military target would not be illegal under IHL if the act respected the principles of distinction, proportionality and precaution, along with all other applicable rules of IHL.[39] If any act of violence committed by the terrorist group is regarded as "terrorist" and is thus automatically considered to be reprehensible, it may suggest "that merely participating in hostilities as a member of a NSAG constitutes a terrorist offence".[40] This rationale is problematic, as it would likely deter armed groups from respecting IHL in their conduct of hostilities.[41] Indeed, if charges of terrorism can be expected regardless of tactical choices in an armed conflict, there may be no reason to limit one's targets and conduct to lawful ones.

Third, the UNSC has extended the application of these terrorist offenses to situations of armed conflict and has designated certain NSAGs as terrorists, which can further create overlaps with obligations under IHL. In particular, direct references to "armed conflict" in Resolutions 2178 and 2396 pertaining to the definition of "foreign terrorist fighters"[42] may allow States to interpret these provisions in a way that could extend and criminalize related terrorist offences in situations of armed conflict.[43] The UNSC resolutions clearly require States to prosecute such offences, which would not be contrary to IHL as it is States' prerogative to prosecute members of NSAGs for their participation in hostilities and actions undertaken in non-international armed conflicts (NIACs), regardless of their lawfulness under IHL.[44] However, this development at the UNSC can

of 'Terrorism' in the UN Security Council: 1985–2004", *Chinese Journal of International Law*, Vol. 4, No. 1, 2005.

38 See B. Saul, above note 10, p. 48; B. Saul, above note 37, p. 159.

39 See T. Ferraro, above note 5, p. 29.

40 Hanne Cuyckens and Christophe Paulussen, "The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law", *Journal of Conflict and Security Law*, Vol. 24, No. 3, 2019, p. 11.

41 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 31 October 2011, pp. 48–51, available at: www.icrc.org/en/doc/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm.

42 Preambular paragraph 10 of UNSC Res. 2178 defines foreign terrorist fighters as "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". Operative paragraph 1 of UNSC Res. 2178 also refers to the participation of foreign terrorist fighters in "armed conflict".

43 See Sandra Krähenmann, "Foreign Fighters, Terrorism and Counter-Terrorism", in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., Edward Elgar, Cheltenham, 2020.

44 In an international armed conflict, the status of combatant confers immunity and privileges to members of armed forces against prosecution for participation in hostilities. Such a status does not exist in NIACs, and members of NSAGs or civilians may be prosecuted under domestic law for their mere participation in hostilities. See Tristan Ferraro, above note 5, p. 29; ICRC, "Immunities", *How Does Law Protect in War?*, available at: https://casebook.icrc.org/glossary/immunities.

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create confusion at the domestic level – including in domestic criminal proceedings – with regard to the applicability of IHL in these cases.[45]

On one end of the spectrum, the requirement for States to prosecute "foreign terrorist fighters" may inhibit certain rules foreseen by customary law in NIACs, including the granting of amnesty at the end of hostilities to those who have participated in the armed conflict without committing any serious violations.[46] On the other end of the spectrum, the broad terrorist offences related to "foreign terrorist fighters"[47] in a situation of NIAC may end up encompassing serious violations of the laws and customs of war applicable in NIACs and war crimes under the Rome Statute of the International Criminal Court. While the UNSC compels States to prosecute terrorist offences, the Geneva Conventions have done so regarding war crimes for seven decades. There are a few arguments for the position that prosecuting an individual for "terrorism" when war crimes have been committed poses both legal and political issues. First, legally, this approach may be inconsistent with IHL and international customary law as there is an obligation on States to investigate and prosecute war crimes, which are considered among the most serious international crimes (along with genocide and crimes against humanity).[48] Absent such investigations and prosecutions, this could sustain the lack of accountability over violations of IHL committed in armed conflicts, including but not limited to Syria, Yemen and Libya. Second, this approach may encourage judges to disregard the legal framework established by the Geneva Conventions to assess conducts in armed conflict, which could lead to a loss of IHL relevancy in national courts. Further, as the criminal responsibility of perpetrators is not fully accounted for and assessed under the relevant legal regimes, this approach is not victim-centred. It does not properly render justice to the victims and survivors of serious international crimes, whose plight is left unaddressed and for which a sense of impunity could perdure.[49] A lack of accountability for the most serious international crimes may jeopardize transitional justice and future reconciliation processes,[50] particularly in post-conflict countries such as Iraq, Mali and the

45 See Stéphane Ojeda, "Out of Balance: Global Counter-Terrorism and the Laws of War", *Humanitarian Law and Policy Blog*, 15 September 2017, available at: https://blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/.

46 Protocol Additional (II) to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 8 June 1977 (entry into force 7 December 1978), Art. 6(5): "At the end of hostilities, the authorities shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict"; ICRC Customary Law Study, above note 36, Rule 159. Also see the example of the Special Jurisdiction for Peace in Colombia, which has the mandate to grant amnesty to Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) ex-combatants who have not been charged with grave crimes. See Colombia, Law No. 1820 Providing for Amnesty, Pardon and Special Criminal Treatment Provisions and Other Provisions, 30 December 2016.

47 UNSC Res. 2178, 24 September 2014, op. para. 6; UNSC Res. 2396, 21 December 2017, op. para. 17.

48 ICRC Customary Law Study, above note 36, Rule 158.

49 Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/75/337, 3 September 2020.

50 Ali Altiok and Jordan Street, "A Fourth Pillar for the United Nations: The Rise of Counter-Terrorism", *Saferworld*, June 2020.

https://doi.org/10.1017/S1816383121000631 Published online by Cambridge University Press

Philippines, where national authorities are seeking to reconstruct society and build trust across communities.[51]

It is important to note that while these developments at the UNSC can create confusion regarding the applicability of IHL at the domestic level – including in domestic criminal proceedings, as noted above – UNSC Resolution 2396 actually "urges member states to develop and implement appropriate investigative and prosecutorial strategies … in accordance with domestic and applicable international human rights law and international humanitarian law".[52] IHL should thus be taken into consideration in strategies for prosecuting "foreign terrorist fighters" and other individuals for terrorist-related offences, when relevant.

Finally, and most critically, the UNSC has not included any explicit IHL exclusion clause or sectoral humanitarian exemption[53] in requiring the criminalization of these terrorist acts and ancillary activities. Since 2004[54] it has mentioned, mostly in preambular paragraphs, that counterterrorism measures should be adopted in accordance with international law, including human rights, refugee and humanitarian law, but it has not provided guidance or directed States towards adopting a clear exception.[55] Council members have only recently made an attempt to reclaim some of the space for IHL, particularly regarding humanitarian activities, in adopting relevant provisions under the Chapter VII UNSC Resolution 2462. This resolution calls, in operative paragraph 5, for domestic law and regulations to be "consistent with obligations under international law, including humanitarian law", and in operative paragraph 6 "[d]emands that Member States ensure that all measures taken to counter terrorism … comply with their obligations under international law, including international humanitarian law". This is the first time that such language demanding compliance in *all* measures for countering terrorism has been featured in operative paragraphs of a counterterrorism resolution.[56] Further, operative paragraph 24 of the same resolution

> [u]rges 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

51 Conversely, see the example of the Special Jurisdiction for Peace in Colombia, which has jurisdiction over war crimes and is part of the transitional justice component of the 2016 Peace Agreement between the government of Colombia and the FARC. See Gwen Burnyeat, Par Engstrom, Andrei Gomez Suarez and Jenny Pearce, "Justice after War: Innovations and Challenges for Colombia's Special Jurisdiction for Peace", *London School of Economics Blog*, 3 April 2020 available at: https://blogs.lse.ac.uk/latamcaribbean/2020/04/03/justice-after-war-innovations-and-challenges-of-colombias-special-jurisdiction-for-peace/.

52 UNSC Res. 2396, 21 December2017, op. para. 18.

53 For the conceptual uncertainty surrounding the use of these terms, see above note 32.

54 Starting with UNSC Res. 1535, 26 March 2004, preambular para. 4.

55 See, for instance, UNSC Res. 2178, 24 September 2014, preambular para. 7; UNSC Res. 2396, 21 December 2017, preambular para. 7; UNSC Res. 2368, 20 July 2017, preambular para. 11.

56 Note that this is not the first time IHL is mentioned in an operative paragraph. For example, operative paragraph 5 of UNSC Res. 2178 provides that "Member States shall, consistent with … international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of" foreign terrorist fighters.

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> carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.[57]

Despite being an achievement, this language reflects a compromise.[58] Urging States to "take into account" the effect of counterterrorism measures on humanitarian activities does not constrain them to interpret this provision as a sectoral humanitarian exemption.[59] Instead, how to implement this paragraph and to "take into account the potential effects" remain subject to States' own interpretations, which vary considerably.[60] While some States, like Switzerland[61] and the Philippines,[62] have introduced a humanitarian exception in their legislation dealing with terrorist activities, others have established multi-stakeholder dialogues "that bring together relevant government agencies with representatives of the non-profit sector to discuss issues relating to humanitarian activities in high-risk jurisdictions".[63] Overall, however, "only a few States have developed a specific response to the potential impact of the counter-financing of terrorism on exclusively humanitarian activities".[64] While the inclusion of operative paragraph 24 should open the way for more States to "take into account the effect of" countering financing of terrorism measures on humanitarian action, its implementation will continue to vary across States.

57 Emphasis added. Note that UNSC Res. 2482, 19 July 2019, contains in operative paragraph 16 broader language targeting all "counter-terrorism measures" and not only "measures to counter the financing of terrorism". This resolution was not adopted under Chapter VII of the UN Charter, however. The same provision was part of a draft Chapter VII UNSC resolution (UN Doc. S/2020/852) that failed to be adopted in August 2020. Operative paragraph 13 of the draft resolution read: "[The UNSC] [u]rges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including humanitarian law, international human rights law and international refugee law, and urges 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."

58 For some background on the negotiation of UNSC Res. 2462, see UNSC, "What's in Blue: Combatting Financing of Terrorism Open Debate", *Security Council Report*, 27 March 2019, available at: www.securitycouncilreport.org/whatsinblue/2019/03/combatting-financing-of-terrorism-open-debate.php.

59 Some legal experts have argued that although they are not as prescriptive as an exception, taken together these three legally binding provisions (operative paragraphs 5, 6 and 24) could ensure that humanitarian activities are safeguarded and not impeded. See Nathalie Weizmann, "Painting Within the Lines: The UN's Newest Resolution Criminalizing Financing for Terrorists – Without Imperiling Humanitarian Activities", *Just Security*, 29 March 2019, available at: www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperiling-humanitarian- activities/; ICRC, "ICRC Submission: Call for Input – UN Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (CT) – Thematic Report to the 75th Session of the UN General Assembly", available at: www.ohchr.org/Documents/Issues/Terrorism/SR/GA75/ICRC-GA75CT.docx.

60 UNSC Res. 2462, 28 March 2019, op. para. 24.

61 Switzerland, Amendment of Art. 260*ter*(2) of Penal Code, Federal Decree of 25 September 2020, available at: www.parlament.ch/centers/eparl/curia/2018/20180071/Texte%20pour%20le%20vote%20final%201%20SN%20F.pdf.

62 Philippines, Republic Act No. 11479, 3 July 2020, Section 13, available at: www.officialgazette.gov.ph/downloads/2020/06jun/20200703-RA-11479-RRD.pdf.

63 UNSC, *Joint Report of the Counter-Terrorism Committee Executive Directorate and the Analytical Support and Sanction Monitoring Team Pursuant to Resolution 1526 (2004) and 2253 (2015)*, UN Doc S/2020/493, 3 June 2020, p. 24.

64 *Ibid.*

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CTED reiterates in its latest documents the need for States to comply with IHL obligations, in furtherance of relevant UNSC resolutions,[65] but it does not suggest any specific ways in which States can do so domestically; instead, it recognizes that States have different legal approaches, have "differing understandings with respect to the incorporation of … international humanitarian law standards into domestic law"[66] and are bound by different legal frameworks, including regional ones, which vary across jurisdictions.[67] While some UN member States recognize the need for humanitarian action to be safeguarded in the fight against terrorism,[68] the UNSC has remained divided over this issue, and this has so far prevented the adoption of an explicit and legally binding safeguard.[69]

In requesting the criminalization of broad terrorist offences without an IHL or humanitarian exception, the UNSC has created a potential clash with obligations under IHL, which may bear judicial repercussions for individuals in situations of armed conflict. In failing to harmonize these two frameworks, the Council has *de facto* left it up to States to define the interaction between the two frameworks. In the next section, this paper will thus focus on domestic cases in order to survey how national courts deal with legal and illegal activities under IHL when these also fall under the scope of counterterrorism legal frameworks.

Domestication of UNSC terrorist-related offences and prosecution of terrorist acts in relation to armed conflicts in national courts

With some guidance by CTED – as a member of the Global Counter-Terrorism Coordination Compact[70] – States have transposed UNSC resolutions and criminalized the offences according to their own interpretations, obligations and legal traditions.[71] More than 140 countries have adopted counterterrorism laws

65 See UNSC, above note 18, in particular pp. 10, 144–145.
66 *Ibid.*, p. 10.
67 Dustin A. Lewis, Naz K. Modirzadeh and Jessica Burniske, *The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law: Preliminary Considerations for States*, legal briefing, Harvard Law School Program on International Law and Armed Conflict, March 2020, p. 21; United Nations Office on Drugs and Crime, "Defining Terrorism", available at: www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html.
68 See statements of member States during the teleconference on "Threats to International Peace and Security Caused by Terrorist Acts: International Cooperation in Combating Terrorism 20 Years after the Adoption of Resolution 1373 (2001)", 12 January 2021; UNSC, *Letter Dated 14 January 2021 from the President of the Security Council Addressed to the Secretary-General and the Permanent Representatives of the Members of the Security Council*, UN Doc. S/2021/48, 15 January 2021, available at: https://undocs.org/en/S/2021/48.
69 Émilie Max, *Room for Manoeuvre? Promoting International Humanitarian Law and Accountability while at the United Nations Security Council: A Reflection on The role of Elected Members*, Academy Briefing No. 17, Geneva Academy, October 2020, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Briefing%2017.pdf.
70 See Marc Porret, "The Role of the United Nations Global Counter-Terrorism Compact Task Force, the UN Office of Counter-Terrorism and Its Counter-Terrorism Centre", in B. Saul (ed.), above note 43.
71 See Law Library of Congress, "Treatment of Foreign Fighters in Selected Jurisdictions", December 2014, available at: https://tile.loc.gov/storage-services/service/ll/llglrd/2014504233/2014504233.pdf; Center for

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since 2001 to comply with UNSC Resolution 1373,[72] and at least fifty others have enacted or amended domestic laws since 2015 to comply with UNSC Resolution 2178 on foreign terrorist fighters.[73] This is the case, for instance, with Australia, which has adopted the 2014 Foreign Fighters Act,[74] as well as Indonesia, which amended its Counterterrorism Law in 2018.[75] The domestication process of UNSC offences – particularly the most recent ones, such as those listed in Resolution 2462 – is ongoing. For instance, the Philippines adopted the Anti-Terrorist Act in July 2020, which includes a limited humanitarian exemption[76] within the spirit of Resolution 2462, operative paragraph 24.[77] Given the various interpretations of the UNSC resolutions by States, the transposition of the required UNSC terrorist and ancillary offences has not aligned counterterrorism legislations around the world, or the ways in which national courts adjudicate over these, with regard to IHL.[78]

This section undertakes an initial comparison of domestic case studies to survey how domestic courts have adjudicated over offences which fall under both IHL and counterterrorism legislation (influenced by UNSC resolutions). The section compiles observations about national courts' mixed legal practices in prosecuting "terrorist" activities (according to domestic legislation) that have occurred in situations of armed conflict. Most defendants mentioned were operating on the side of NSAGs designated as "terrorist" during a NIAC. The section first surveys trials dealing with conduct that could amount to serious violations of the laws and customs of war applicable in NIAC and war crimes

Strategic and International Studies, *Aligning Security with Civic Space: Database of Legislation on the Definition of Terrorism*, February 2018, available at: https://tinyurl.com/44nvxmyn. Examples of anti-terror legislative framework include: Thailand, Criminal Code, Sections 135/1-135/4; Malaysia, Penal Code, Chap. VI; France, Criminal Code of the French Republic, Art. 421-1; United States, United States Code, Title18, Part 1, Chap. 113b. Examples of dedicated anti-terror act include: in Malaysia, the Anti-Money Laundering and Anti-Terrorism Financing Act (2008) and Special Measures Against Terrorism in Foreign Countries Act (2015); in Singapore, the Internal Security Act (1960), Terrorism (Suppression of Financing) Act (2002), Prevention of Money Laundering and Terrorism Financing Act (2019), Terrorism (Suppression of Misuse of Radioactive Material) Act (2017) and Terrorism (Suppression of Bombings) Act (2007); in Afghanistan, the Law on Combat against Terrorism Offences (2008); and in the United States, the Patriot Act (2001).

72 Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide Since September 11*, 29 June 2012, available at: www.refworld.org/docid/4ff6bd302.html.

73 See S. Krähenmann, above note 43; Human Rights Watch, *"Foreign Terrorist Fighter" Laws*, December 2016, available at: www.hrw.org/sites/default/files/news_attachments/ftf_essay_03feb2017_final_pdf.pdf.

74 Australia, Counter-Terrorism Legislation Amendment (Foreign Fighters) Act, No. 116, 2014, available at: www.legislation.gov.au/Details/C2014A00116.

75 Indonesia, Counterterrorism Law, 2003, Amended by Law No. 5, 2018.

76 Philippines, Republic Act No. 11479, above note 62, Section 13.

77 See Permanent Mission of the Republic of the Philippines to the UN and Other International Organizations in Geneva, *Response from the Government on JOL PHL 4/2020 Dated 29 June 2020 Concerning the Anti-Terror Act*, Doc. NV-EPG-331-2020, 27 August 2020, available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=35537.

78 It should be noted, however, that different factors play out in domestication of offences by States, including their international and regional obligations. Further, various factors influence domestic legal proceedings vis-à-vis IHL, including national legal frameworks (whether they have jurisdiction over international crimes such as war crimes and/or terrorism offences), national legal traditions (whether courts can assess a conduct under both IHL and domestic counterterrorism legislation), and procedural barriers (including availability of and access to evidence).

https://doi.org/10.1017/S1816383121000631 Published online by Cambridge University Press

under the Rome Statute, and then focuses on activities that are not prohibited under IHL, namely humanitarian action and non-prohibited conducts in NIAC. The common point between the vast majority of these cases is that defendants have been charged and convicted for terrorism-related offences, regardless of the (il) legality of their conduct under IHL. In most cases, States have not sufficiently developed "prosecutorial strategies … in accordance with … international humanitarian law".[79]

Prosecuting terrorist acts that could amount to war crimes

There is an obligation for States to investigate and prosecute war crimes, which are considered to be among the most serious international crimes (alongside genocide and crimes against humanity).[80] UNSC Resolution 2396 also reaffirms that "those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable".[81] When war crimes have allegedly been committed by members of NSAGs designated as terrorists in an armed conflict, State practice has been twofold: they have either used dual legal qualification to judge an individual under both domestic counterterrorism legislation and IHL, or they have charged the defendants solely for terrorist crimes (with no other incrimination). No cases were observed of individuals associated with designated terrorist groups who were only incriminated for war crimes.[82]

Dual legal qualification

There has been a growing trend in Western Europe to assess the conduct of an individual and adjudicate it under both domestic counterterrorism legislation and IHL. Dual legal qualification has also been referred to as cumulative prosecution or cumulative charging.[83] This, however, is different from cumulative prosecution, defined as the double prosecution of the same act, which would pose rule of law issues, including with regard to the rules of double jeopardy and of fair trial procedure.[84] Bringing

79 UNSC Res. 2396, 21 December 2017, op. para. 18.
80 ICRC Customary Law Study, above note 36, Rule 158.
81 UNSC Res. 2396, 21 December 2017, op. para. 19.
82 Except in countries where "membership" of a terrorist organization is not a criminal offence, such as Sweden (because "membership" and "support" have been the main types of terrorist-related indictments), and in cases of dual legal qualification where the terrorist offence could not be established. See, for instance, German Higher Regional Court of Frankfurt am Main, *Prosecutor v. Aria L*, Case No. 5-3 StE 2/16-4-1/16, Judgment, 12 July 2016; International Criminal Database, "Prosecutor v. Aria Ladjedvardi", available at: www.internationalcrimesdatabase.org/Case/3276; District Court of The Hague, *Prosecutor v. Ahmad al Khedr*, Case No. 09/748001-18, 16 July 2021, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:7533.
83 Genocide Network and Eurojust, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences*, The Hague, May 2020, p. 16, available at: https://tinyurl.com/pj26n2s7.
84 See International Covenant on Civil and Political Rights, 16 December 1966, Art. 14(7); Optional Protocol No. 7 of the European Convention on Human Rights, 22 November 1984, Art. 4.

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terrorism charges in addition to war crimes charges fulfils different functions: first of all, it ensures that the criminal responsibility of perpetrators is fully accounted for and assessed under the relevant legal regimes. As such, it also "delivers more justice to victims",[85] and finally, it often results in higher sentences.[86]

So far, only the national courts of some European Union (EU) member States have developed jurisprudence regarding dual legal qualification.[87] In Germany, for instance, war crimes are regarded as a manifestation of terrorism, which intrinsically implies the use of IHL and domestic criminal law in the same judgment.[88] In other jurisdictions, such as the Netherlands and France, dual legal qualification is possible provided that all relevant facts of the act are not exhaustively judged under one set of legislation.[89] Some examples of dual legal qualification include the cases in the Netherlands of *Oussama A*[90] and in Germany of *Abdelkarim El B*,[91] who were both convicted for the war crime of "humiliating and degrading treatment of a protected person"[92] and for membership of a terrorist organization. Another example is that of Abdul Jawad Al-Khalaf in Germany, who was convicted for the war crime of killing persons protected under IHL[93] and for membership of a terrorist organization[94] More recently in France, an investigation was opened against Ahmed Hamdane El Aswadiin for war crimes and murder in connection with a terrorist enterprise.[95] Accompanying this trend of dual legal qualification is the merging of several specialized anti-terrorist prosecutorial entities with war crimes entities, including

85 Council of the European Union, *Presidency Discussion Paper on Aspects of Terrorism*, WK 12157/2929 INIT, 23 November 2020, p. 6, available at: https://tinyurl.com/jyjx46ae.

86 CTED, *Analytical Brief: The Prosecution of ISIL-Associated Women*, 2020, available at: www.un.org/securitycouncil/ctc/content/cted-analytical-brief-%E2%80%93-prosecution-isil-associated-women.

87 *Ibid.*

88 "According to section 129a paragraph 1 number 1 of the German Criminal Code a terrorist organization is a firmly organized group of persons who inter alia intend to commit international crimes defined by the Germany International Crimes Code, including war crimes." Christian Ritscher, "Panel Discussion: State Response to Foreign Fighters", *Proceedings of the 17th Bruges Colloquium*, 2016, p. 128.

89 Genocide Network and Eurojust, above note 83, p. 16.

90 District Court of The Hague, *Prosecutor v. Oussama A*, Case No. 09/748003-18V and 09/748003-19, Verdict, 23 July 2019, available at: www.eurojust.europa.eu/sites/default/files/2020-09/2019-07-23_NL-Rechtbank-Den-Haag_Case09-748003-18V_3.pdf.

91 German Higher Regional Court of Frankfurt am Main, *Prosecutor v. Abdelkarim EL B*, Case No. 5-3 StE 4/16-4-3/16, Judgment, 8 November 2016.

92 In both cases, these courts have determined that the body of a dead soldier can be regarded as a "protected person" under IHL, referring to existing judgments including the *Brdanin* case at the ICTY, Rule 113 of the ICRC Customary Law Study, and the International Criminal Court's *Elements of Crimes*. This has enabled the courts to convict the defendants for the war crime of "humiliating and degrading treatment of a protected person" under Article 3 common to the four Geneva Conventions, based on pictures or video extracted from mobile phones, or found on social media, of the defendants posing with or recording the mutilation of dead soldiers' bodies. See C. Ritscher, above note 88, p. 128.

93 As defined in the German Code of Crimes against International Law, 30 June 2002, Section 8(6)(3).

94 Stefan Talmon and Tobias Wiass, "Sentencing a Member of the Syrian Opposition for War Crimes against Persons", *German Practice in International Law*, March 2020, available at: https://gpil.jura.uni-bonn.de/2020/03/sentencing-a-member-of-the-syrian-opposition-for-war-crimes-against-persons/.

95 TRIAL International, *Universal Jurisdiction Annual Review 2021*, 12 April 2021, p. 37, available at: https://trialinternational.org/wp-content/uploads/2021/04/TRIAL_International_UJAR-2021.pdf.

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the Parquet National Antiterroriste in France (in 2019),[96] the Special Crime and Counter-Terrorism Division of the UK's Crown Prosecution Service (in 2016),[97] the Office of the German Federal Public Prosecutor in Germany,[98] and the Office of the Attorney-General of Switzerland.[99] Dual legal qualification is discussed as a good practice in the section below entitled "Good Practices at the Domestic Level".

Terrorism charges only (even when conduct may amount to war crimes)

In certain cases, national courts have brought terrorist offence charges only, although the offences were apparently committed in a situation of armed conflict and could allegedly have amounted to serious violations of the laws and customs of war applicable in NIAC and war crimes under the Rome Statute. The absence of incrimination for war crimes may be due to a lack of jurisdiction, diverging legal interpretations and traditions of the courts, legal and judicial barriers (including lack of evidence[100]) or a lack of training of the judiciary in dealing with international crimes. For example, the lack of jurisdiction over war crimes in Turkey[101] and Iraq[102] has prevented courts in these countries from pressing charges of this nature. Consequently, one of the British jihadis who brutalized and beheaded several hostages in Syria, Aine Lesley David, was convicted in

96 Government of France, "Le parquet national anti-terroriste est créé", 1 July 2019, available at: www.gouvernement.fr/le-parquet-national-anti-terroriste-est-cree.

97 See Crown Prosecution Service, "Special Crime and Counter Terrorism Division (SCCTD)", available at: www.cps.gov.uk/special-crime-and-counter-terrorism-division-scctd.

98 See: www.generalbundesanwalt.de/EN/Home/home_node.html.

99 See, for instance, Julia Crawford, "International Crimes: Spotlight on Switzerland's War Crimes Unit", *Justiceinfo.net*, 15 February 2019, available at: www.justiceinfo.net/en/40328-international-crimes-spotlight-on-switzerland-s-war-crimes-unit.html.

100 There is a challenge to collecting sufficient evidence from areas of armed conflict, or battlefield evidence, in order to secure convictions for war crimes and terrorism offences alike. See, for example, the case of the two Iraqi twin brothers in Finland who were suspected of being involved in the ISIL massacre of Iraqi soldiers and cadets at Camp Speicher in Tikrit, Iraq, and who were finally acquitted by the Court of Appeal "on the ground that there was not sufficient evidence for a conviction": TRIAL International, above note 95. Some cases of cumulative charging point to the use of innovative endeavours, including the initiation of partnerships with UN entities, in order to gather sufficient evidence. Certain UN entities, including the International, Impartial and Independent Mechanism related to Syria (IIIM) and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), have supported States in the collection of evidence and in their domestic proceedings. UNITAD, which has been mandated by the UNSC to support domestic proceedings in Iraq and in third States, has notably cooperated with the Finnish authorities in facilitating the hearing of eight witnesses' testimonies for the case on appeal related to the Camp Speicher massacre. To overcome the challenge pertaining to the lack of access to evidence, several guidelines have been developed, including Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, September 2019; CTED, *Guidelines to Facilitate the Use and Accessibility as Evidence in National Criminal Courts of Information Collected, Handled, Preserved and Shared by the Military to Prosecute Terrorist Offences*, December 2019.

101 Law Library of Congress, "Genocides, Crimes against Humanity and War Crimes Jurisdiction", November 2016, available at: https://tile.loc.gov/storage-services/service/ll/llglrd/2016590022/2016590022.pdf.

102 *Ibid*. Also see UN Assistance Mission for Iraq and Office of the UN High Commissioner for Human Rights, *Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Law and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL*, January 2020.

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Turkey on terrorism charges,[103] and the vast majority of cases pertaining to ISIL in Syria and Iraq which have been prosecuted in Iraq have resulted in convictions for terrorism charges.[104] The legal tradition of some countries, such as France and the United States, has led to the indictment and conviction of individuals operating in situations of NIAC under terrorist-related offences.[105] In France, for instance, most foreign fighters have been convicted for "association of wrongdoers in relation to a terrorist enterprise",[106] even in cases directly linked to the armed conflict in Syria and when serious violations of the laws and customs of war applicable in NIAC seem to have been committed. This is because the offence of "association of wrongdoers in relation to a terrorist enterprise" provides a high certainty of prosecutorial success (as "there is no requirement that the individual contributes materially to the commission of the terrorist act in itself, nor that the terrorist plan is executed. … [T]he mere participation in a group that has a plan to commit a terrorist act, with the knowledge that the group has a plan to commit such an act, is enough to qualify as a terrorism-related crime"[107]) and can induce long penalties of over ten years.[108] In 2018, for instance, the French Court of Cassation convicted Mounir Diawara and Rodrigue Quenum on charges of "association of wrongdoers in relation to a terrorist enterprise"[109] although they "had appeared in photos in combat fatigues in Syria, Kalashnikov in hands, one of them brandishing a severed head".[110] Note that in other European domestic courts, such a piece of evidence was used to charge defendants for war crimes (after the courts assessed that the act took place in a situation of armed

103 Martin Chulov, "British Jihadi Aine Davis Convicted in Turkey on Terror Charges", *The Guardian*, 9 May 2017, available at: www.theguardian.com/world/2017/may/09/british-jihadist-aine-davis-convicted-in-turkey-on-terror-charges.

104 Note, however, that "the [Iraqi] Council of Representatives continues to consider legislation to establish a legal basis for the prosecution of ISIL members in Iraq for war crimes, crimes against humanity and genocide". See *Sixth Report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant*, UN Doc. S/2021/419, 3 May 2021, available at: www.unitad.un.org/sites/www.unitad.un.org/files/general/s.2021.419_-_sixth_unitad_report_en.pdf.

105 In regard to France, see Sharon Weill, "French Foreign Fighters: The Engagement of Administrative and Criminal Justice in France", *International Review of the Red Cross*, Vol. 100, No. 907–909, available at: https://international-review.icrc.org/sites/default/files/reviews-pdf/2019-10/100_12.pdf. In regard to the United States, see Karen J. Greenberg (ed.), *The American Exception: Terrorism Prosecutions in the United States: The ISIS Cases*, Center on National Security, 2017, available at: https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf.

106 France, Criminal Code of the French Republic, Art. 421-2-1l.

107 *Ibid*., Art. 223

108 S. Weill, above note 105, p. 223.

109 French Court of Cassation, Decision No. 16-82.692 (Criminal Chamber), 12 July 2016, cited in Sharon Weill, "Transnational Jihadism and the Role of Criminal Judges: An Ethnography of French Courts", *Journal of Law and Society*, Vol. 47, No. S1, 2020, p. 39.

110 TRIAL International, *Universal Jurisdiction Annual Review 2020*, 2020, p. 11, available at: https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf. See also S. Weill, above note 119, p. 39. The latter article highlights that the case of Mounir Diawara and Rodrigue Quenum is important because of the jurisprudence it produced wherein the Court of Cassation ruled that "membership of a group whose purpose is the preparation of felonies can be classified as an [association of wrongdoers in relation to a terrorist enterprise] in the form of a felony, without the need to demonstrate any effective participation in the execution of the crimes or their preparation".

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conflict).[111] The trend may be changing in France, however, with the El-Aswadi case, which is the "first case to be investigated jointly by the anti-terrorism and the specialized unit [for the prosecution of genocide, crimes against humanity, war crimes and torture]".[112] In the United States, where material support violation is the most common incrimination for foreign fighters,[113] no individual has been prosecuted and convicted under the War Crimes Act so far. For instance, Alexanda Kotey and El Shaffee Elsheikh – two high-profile ISIL members involved in the kidnapping and beheading of twenty-seven hostages, including four Americans, in Syria between 2012 and 2015 – were indicted for hostage-taking and terrorist-related crimes, but not for war crimes.[114] Other examples include Egypt, where international crimes have not been used in domestic courts and where detained individuals[115] associated with Wilayat Sinai (a branch of the Islamic State in Iraq and Syria (ISIS) in the Sinai Peninsula) have been tried and convicted for terrorist activities by military courts.[116] In Nigeria, between 2017 and 2018, more than 1,500 individuals were prosecuted for providing support to Boko Haram under the Terrorism Prevention Amendment Act.[117] In some cases, there is a concern that terrorism offences (particularly related to "support" and "participation", which may be encapsulated in "membership") have become catch-all offences which provide more certainty of prosecutorial success due to the often low threshold of burden of evidence needed to secure conviction.[118] These convictions may not reflect the full extent of the crimes committed, when those crimes could amount to serious violations of the laws and customs of war applicable in NIAC and war crimes under the Rome Statute.

111 See above notes 90, 91 and 92.
112 TRIAL International, above note 95.
113 Beth Van Schaack, "National Courts Step Up: Syrian Cases Proceeding in Domestic Courts", February 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327676; K. J. Greenberg (ed.), above note 105.
114 District Court for the Eastern District of Virginia, *United States of America v. Alexanda Amon Kotey and El Shafee Elsheikh*, Criminal No. 1:20-Cr-239, Indictment, 6 October 2020, available at: www.justice.gov/opa/press-release/file/1325721/download. Also see Beth Van Schaack and Julia Brooks, "'With a Little Help from Our Friends': Prosecuting the ISIL 'Beatles' in U.S. Courts", *Just Security*, 22 October 2019, available at: www.justsecurity.org/66653/with-a-little-help-from-our-friends-prosecuting-the-isil-beatles-in-u-s-courts/.
115 Human Rights Watch, *If You Are Afraid for Your Lives, Leave Sinai! Egyptian Security Forces and ISIS-Affiliate Abuses in North Sinai*, 28 May 2019, available at: www.hrw.org/report/2019/05/28/if-you-are-afraid-your-lives-leave-sinai/egyptian-security-forces-and-isis.
116 Samy Magdy, "Egypt Sentences 37 to Death Including Top Militant Leader", *AP News*, 2 March 2020.
117 Human Rights Watch, *Nigeria: Flawed Trials of Boko Haram Suspects*, 17 September 2018, available at: www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects.
118 Contrary to States where "support" or "membership" is a rather easy offence or felony to substantiate, such as France and the United States, in some countries, such as Thailand, the "intent" to commit a terrorist offence has to be proven in order to indict an individual on charges of terrorism. This is much more challenging to substantiate and often results in the prosecution of terrorist offences as general criminal offences. In these cases, the UN recommends that member States swiftly update their national legislation to be in line with UNSC Resolutions 2178 and 2396 in order to ensure jurisdiction over the full range of conducts relating to "foreign terrorist fighters", including preparatory acts and inchoate offences. See Madrid Guiding Principles, above note 31, Guiding Principle 22.

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Prosecuting as "terrorist" conduct which is lawful under IHL

In the past decade, some opinions and decisions have emerged from national courts in favour of designating and criminalizing certain acts and activities as "terrorist" despite their lawfulness under IHL. These have included impartial humanitarian activities and non-prohibited conducts of NSAGs in NIAC.

Impartial humanitarian activities

As the "terrorism" and "support to terrorism" offences have increasingly been broadly interpreted – both in domestic legislation and by national courts – they have grown to encompass the provision of training and education to "terrorist" groups,[119] providing humanitarian assistance and medical care to these groups,[120] or simply being present in designated "terrorist" areas.[121] In particular, Buissonière, Woznick and Rubinstein have found that across sixteen countries surveyed, "practices in at least ten countries appear to suggest that the authorities interpret support to terrorism to include the provision of healthcare".[122] If these laws do not exclude impartial humanitarian activities from their scope of application, this can lead to the prosecution of humanitarian actors, including medical personnel. There have been a number of cases of medical professionals being put on trial for providing assistance to members of NSAGs regarded as "terrorist" after 2001. These legal proceedings were pursued in domestic courts, for "supporting terrorism in the course of armed conflict".[123]

In 2009, a doctor who provided medical and surgical services to members of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) was convicted in Colombia.[124] He had "managed referral to specialized clinics that he thought medically necessary".[125] In this case, the Court "reasoned that those referral services fell outside of the scope of medical activities protected by IHL (as incorporated into Colombian law) and into the crime of

119 See, for example, United States Code, Title 18, Sections 2339A, 2339B; Supreme Court of the United States, *Holder v. Humanitarian Law Project*, Case No. 08-1498, 2010.

120 See, for example, Kingdom of Saudi Arabia, Law on Countering the Financing of Terrorism, Art. 38; US Court of Appeal (Second Circuit), *United States v. Farhane*, 634 F.3d 127, 4 February 2011.

121 UK Counter-Terrorism and Border Security Act, 2019, Chap. 1, Section 4; Australia, Criminal Code Act, No. 12, 1995, Part 5.3, Section 119.2 on entering or remaining in declared areas, available at: www.legislation.gov.au/Details/C2019C00043/Html/Volume_1 (both laws are subject to a number of exceptions, including providing aid of a humanitarian nature). A similar amendment is currently being discussed in the Netherlands by the Senate. For more on the latter, see Christopher Paulussen and Emanuela-Chiara Gillard, *Staying in an Area Controlled by a Terrorist Organization: Crime or Operational Necessity?*, International Center for Counter-Terrorism, 11 January 2021, available at: https://icct.nl/publication/staying-in-an-area-controlled-by-a-terrorist-organisation-crime-or-operational-necessity/.

122 Marine Buissonière, Sarah Woznick and Leonard Rubinstein, *The Criminalization of Healthcare*, Safeguarding Health in Conflict, June 2018, p. 19.

123 Dustin A. Lewis, Naz. K. Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Harvard Law School Program on International Law and Armed Conflict, September 2015; M. Buissonière, S. Woznick and L. Rubinstein, above note 122.

124 Supreme Court of Justice of Colombia (Criminal Cassation Chamber), Case No. 27227, 21 May 2009.

125 M. Buissonière, S. Woznick and L. Rubinstein, above note 122, p. 15.

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rebellion".[126] Further, the Court noted that the medical activities "strengthened the guerrilla group since healed members of the group would subsequently return to fight against the government armed forces",[127] which was "enough to condemn the accused for the crime of rebellion".[128]

Several indictments and convictions in the United States of health personnel[129] have fallen under the "material support" legislation,[130] including in relation to "providing medical support to wounded jihadists knowing that they have engaged in terrorist activity".[131] In these cases, the courts have reasoned that the defendants' allegiance to designated foreign terrorist organizations, such as ISIL and Al-Qaeda, turned their medical activities into material support in the form of "advice or assistance derived from scientific, technical or other specific knowledge".[132] One of the courts "indicated that a different conclusion might have been reached in the case of independent humanitarian workers 'act[ing] entirely independently of [a] foreign terrorist organization'".[133] Buissonière, Woznick and Rubinstein refer to other cases of medical staff who have been investigated, prosecuted and in some cases convicted for offences related to assisting or supporting terrorism, including in Iraq, Syria and Australia.[134]

To comply with their obligations under IHL, and more recently, with the spirit of UNSC Resolution 2462, some States have adopted a sectoral humanitarian exemption. This is the case for Switzerland,[135] the UK,[136] some EU member States (pursuant to Recital 38 of EU Directive 2017/541 on combating terrorism),[137] Australia,[138] New Zealand,[139] the Philippines,[140] Chad and

126 *Ibid.*
127 Supreme Court of Justice of Colombia, above note 124, p. 12, cited in D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 123, p. 116, and Ekateria Ortiz Linares and Marisela Silva Chau, "Reflections on the Colombian Case Law on the Protection of Medical Personnel against Punishment", *International Review of the Red Cross*, Vol. 95, No. 890, 2013, p. 263.
128 E. O. Linares and M. S. Chau, above note 127, p. 263.
129 Including District Court of New York, *U.S. v. Shah*, 474 F.Supp.2d 492, 30 January 2007; District Court of Minnesota, *US v. Warsame*, 651 F.Supp.2d 978 (2009), 24 August 2009; US Court of Appeals (Second Circuit), *United States v. Farhane*, 634 F.3d 127, 4 February 2011.
130 United States Code, Title 18, Sections 2339A, 2339B.
131 D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 123, p. 135.
132 United States Code, Title 18, Section 2339A(b)(3), cited in D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 123, pp. 123–137.
133 M. Buissonière, S. Woznick and L. Rubinstein, above note 122, p. 21, citing District Court of New York, *U. S. v. Shah*, 474 F.Supp.2d 492, 30 January 2007.
134 M. Buissonière, S. Woznick and L. Rubinstein, above note122, pp. 19–22.
135 Switzerland, above note 61.
136 UK Counter-Terrorism and Border Security Act, 2019, Chap. 1, Section 4(5)(a).
137 European Commission, *Report from the Commission to the European Parliament and Council Based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 20002/475/JHA and Amending Council Decision 2005/671/JHA*, COM(2020) 619 Final, Brussels, 30 September 2020, available at: https://perma.cc/FAW7-ABQM.
138 Australia, Criminal Code Act, above note 121, Part 5.3, including Section 83.3 on military-style training involving a foreign government principal, Section 119.2 on entering, or remaining in declared areas, and Section 119.5 on allowing use of buildings, vessels and aircraft to commit offences.
139 New Zealand, Terrorist Suppression Act, 2002, Section 10, available at: www.legislation.govt.nz/act/public/2002/0034/latest/whole.html.
140 Philippines, Republic Act No. 11479, above note 62, Section 13.

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Ethiopia,[141] among others. Humanitarian exceptions, and their nuances, are discussed as a good practice in the section below entitled "Good Practices at the Domestic Level".

Non-prohibited conducts in NIAC

As noted above, in an armed conflict, an act of violence committed by a designated "terrorist" NSAG against the opposing State's armed forces which constitute a military target would not be illegal according to IHL if the attacker respected the principles of distinction, proportionality and precaution, along with all other applicable rules of IHL.[142] It should be noted, however, that there is no immunity for members of NSAGs in domestic law, under which they can be prosecuted for their mere participation in hostilities.[143] Some States, like New Zealand[144] and EU member States such as the Netherlands and Belgium (in accordance with EU Directive 2017/541, which replaced Framework Decision 2005/671/JHA),[145] have resorted to an IHL carve-out in determining that their counterterrorism legislation would not apply to "the actions of armed forces during an armed conflict".[146] Courts' interpretations of what constitutes armed forces vary, however, as some States may solely invoke this clause in favour of States' armed forces and some NSAGs.[147] In Belgium, for instance, while this exclusion was accepted in regard to the Kurdistan Workers' Party (Partiya Karkerên Kurdistanê, PKK), the clause was rejected when invoked in relation to designated terrorist groups such as Al-Shabaab, IS and Jabhat Al-Nusra.[148] Indeed, the prosecutor determined that these groups were "not 'armed forces' in the sense of IHL", in part because they committed terrorist attacks and were terrorist groups.[149]

The examples below show that terrorist offences have been used to prosecute individuals for their participation in hostilities, without necessarily assessing the legality of their conduct under IHL. Although it remains the prerogative of States to do this, it may ultimately give the impression that participation in hostilities is in itself a terrorist offence.[150]

In the case of *Regina v. Mohammed Gul*,[151] the UK Court of Appeal provided a broad interpretation of the UK's Terrorism Act, arguing that attacks by NSAGs against governmental armed forces "with the requisite intention set in

141 ICRC, above note 59.
142 See T. Ferraro, above note 5, p. 29.
143 See above note 44.
144 New Zealand, Terrorist Suppression Act, above note 139, Art. 19.
145 European Commission, above note 137.
146 Belgian Criminal Code, 8 June 1867, as modified by the Law on Terrorist Crimes, 19 December 2003.
147 See, for instance, District Court of the Hague, *Prosecutor v. Imane B et al.*, Case No. 09/842489-14, 10 December 2015, para. 7.36.
148 See Thomas Von Poecke, "The IHL Exclusion Clause, and Why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences", *EJIL: Talk!*, 20 March 2019, available at: www.ejiltalk.org/the-ihl-exclusion-clause-and-why-belgian-courts-refuse-to-convict-pkk-members-for-terrorist-offences/. See also the article by Thomas Van Poecke, Frank Verbruggen and Ward Yperman in this issue of the *Review*.
149 *Ibid.*
150 On this see H. Cuyckens and C. Paulussen, above note 40.
151 UK Court of Appeal, *Regina v. Mohammed Gul*, Case No. 2011/01697/C5, Judgment, 22 February 2012.

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the [Terrorism] Act could qualify as acts of terrorism".[152] In *Prosecutor v. Imane B et al.*,[153] the Court in the Netherlands held that "participation in the armed struggle in Syria on the side of these jihadi armed groups always entails the commission of terrorist crimes".[154] The Court held that "in a non-international armed conflict IHL is not exclusively applicable"[155] and that "participation in the armed conflict in Syria, therefore, is also punishable under Dutch law".[156] The Court also considered that "not a single act of war performed by a member of an organized armed group is legitimate".[157] With the same rationale,[158] in *Prosecutor v. Maher H* in the Netherlands,[159] the defendant was confirmed guilty on appeal for "preparatory acts with a view to committing murder and manslaughter with a terrorist purpose".[160] The accused "participated in the armed Jihadi campaign in Syria with a terrorist objective", and "it can be inferred that the suspect's intent was to … commit a terrorist offence or a crime that facilitates the commission of a terrorist offence".[161] In these cases, it is interesting to note that defendants were charged with preparatory terrorist offences for their participation in hostilities.[162] Indeed, counterterrorism doctrines put strong emphasis on prevention in criminalizing preparatory acts such as the financing of attacks or training for the commission of an attack, as outlined in UNSC Resolutions 2178 and 2396.[163]

Other cases where the link to armed conflict is comparatively more limited than the cases analyzed above are still worth noting, including the case of *R v. Mashudur Choudhury* in the UK (2014),[164] where the defendant was convicted of "one count of engaging in conduct in preparation for acts of terrorism" for his travel to Syria in 2013. More recently, a first case was reportedly filed under the Philippines Anti-Terror Act concerning "preparation for the commission of terrorism" by the wives of Abu Sayaf members in Jolo, Sulu.[165] As States

152 ICRC, "Regina v. Mohammed Gul, Court of Appeal, 22 February 2012", *National Implementation of IHL*, available at: https://tinyurl.com/cx9v3734.
153 District Court of the Hague, *Imane B*, above note 147.
154 N. Boister, above note 1, p. 119.
155 District Court of the Hague, *Imane B*, above note 147, para. 7.17.
156 *Ibid.*, para. 7.29.
157 *Ibid.*, para. 7.41.
158 Court of Appeal of the Hague, *Prosecutor v. Maher H*, Case No. 22-005306-14, Judgement, 7 July 2016, cited in H. Cuyckens and C. Paulussen, above note 40, p. 10.
159 Court of Appeal of the Hague, *Prosecutor v. Maher H*, Case No. 22-005306-14, 7 July 2016.
160 *Ibid.*, para. 13.
161 *Ibid.*, para. 13.
162 In France, while the same rationale was applied in a case before the 16th Criminal Chamber of the Paris Court of First Instance, the tribunal acquitted a person charged with "association of wrongdoers in relation to a terrorist enterprise" for joining the armed group Ahrah Al-Sham in Syria in 2015, because the group could not be qualified as terrorist, according to the judge. See Paris Court of First Instance, Case No. 13099000941, Judgment (16th Criminal Chamber), 28 September 2018, cited in S. Weill, above note 105, p. 225.
163 UNSC Res. 2178, 24 September 2014, op. para. 6(a); UNSC Res. 2396, 21 December 2017.
164 International Criminal Database, "R v. Mashudur Choudhury", available at: www.internationalcrimesdatabase.org/Case/3286.
165 Senate of the Philippines, "'Potential Test Case', Lacson: Suspected Indonesian Suicide Bomber Faces Charges for Violating Anti-Terrorism Act of 2020", press release, 14 October 2020, available at: http://legacy.senate.gov.ph/press_release/2020/1014_lacson1.asp.

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continue to domesticate UNSC Resolutions 2178 and 2396, a surge in the use of terrorism charges to prosecute foreign fighters who participate in hostilities can be expected.[166] As noted above, while not technically wrong this may ultimately convey the message that participation in hostilities is in itself a terrorist offence.[167]

Good practices at the domestic level

If more systematically used and developed (by the legislature and by judicial authorities respectively), the two good practices outlined below – (1) IHL and humanitarian exemptions in counterterrorism legislation, and (2) dual legal qualification – could help harmonize IHL and the counterterrorism frameworks at the national level.

IHL exclusion clauses and humanitarian safeguards

The incorporation of an IHL exclusion clause in national counterterrorism legislation is regarded as a good practice. Among others, this is foreseen by the New Zealand Terrorism Suppression Act,[168] by the Belgium Penal Code[169] and more recently in EU Directive 2017/541 on combating terrorism.[170] These exclusion clauses have different wordings. The EU Directive excludes "activities of armed forces during periods of armed conflict, which are governed by international humanitarian law …, and … activities of the military forces of a State in the exercise of their official duties".[171] The Belgian exclusion clause applies "to the actions of armed forces during an armed conflict as defined in and subject to IHL [and] to the actions of the armed forces of a State during the exercise of their official duties".[172] The New Zealand clause excludes certain offences of the 1961 Crimes Act, including those which relate to jurisdiction in respect of crimes on ships or aircraft beyond New Zealand.[173] These clauses first and foremost aim at excluding activities of States' military forces from the application of the counterterrorism legislation.[174] Depending on the exclusion clause and its interpretation by domestic courts, the clause may exempt certain NSAGs' activities in situations of armed conflict, as the case of the exception

166 Particularly in South East Asia – see Emma Broches, "Southeast Asia's Overlooked Foreign Fighter Problem", *Lawfare*, 5 June 2020, available at: www.lawfareblog.com/southeast-asias-overlooked-foreign-fighter-problem.
167 On this, see H. Cuyckens and C. Paulussen, above note 40, p. 10.
168 New Zealand, Terrorism Suppression Act, above note 139, Art. 19.
169 Belgian Criminal Code, above note 146.
170 See 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, Recital 37, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0541.
171 See, for instance, *ibid.*, Recital 37.
172 Belgian Criminal Code, above note 146, Art. 141*bis*.
173 New Zealand, Terrorism Suppression Act, above note 139, Art. 19.
174 See, for instance, District Court of the Hague, *Imane B*, above note 147.

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provided by a Belgian court to the PKK shows.[175] The adoption and interpretation of IHL exclusion clauses to the benefit of NSAGs is controversial, however, as States' judicial authorities retain the right to prosecute members of NSAGs for their mere participation in hostilities, regardless of the legality of their conduct under IHL.

Another good practice is the adoption of humanitarian safeguards, sometimes referred to as humanitarian exceptions or sectoral humanitarian exemptions,[176] which "grant immunity from counter-terrorism measures in respect to those individuals and entities involved in (principled) humanitarian action".[177] These ensure that humanitarian activities governed by IHL do not fall within the scope of, and are not punishable under, given counterterrorism legislations. Several countries, including Switzerland,[178] Australia,[179] the UK,[180] the Philippines,[181] Chad and Ethiopia,[182] have adopted sectoral humanitarian exemptions in their counterterrorism legislative frameworks. The EU has also adopted a humanitarian exception in its counterterrorism directive,[183] but its transposition remains at member States' discretion.[184] There are various models of sectoral humanitarian exemptions.[185]

Some of these exceptions apply to all principled humanitarian organizations, like Recital 38 of EU Directive 2017/541.[186] On the other hand, others only apply to some humanitarian organizations. For instance, the humanitarian exemption of the Philippine Anti-Terrorist Act is limited to "activities undertaken by the ICRC, the Philippine Red Cross and other State-recognized impartial humanitarian partners or organizations in conformity with IHL".[187] The bill currently under review in the Dutch Senate, similarly, only foresees that "the prohibition to stay [in an area controlled by a terrorist organization] is not applicable if a person is there on behalf of the state or an inter-governmental organisation, or if the person is a representative of the Dutch Red Cross or the International Committee of the Red Cross".[188] Further, some of the sectoral humanitarian exemptions apply in relation

175 See Brussels Court of Appeal, Case No. 2017/2911, Decision (Chamber of Indictment), 14 September 2017.
176 See above note 32.
177 Dustin A. Lewis, "Humanitarian Exemptions from Counter-Terrorism Measures: A Brief Introduction", *Proceedings of the 17th Bruges Colloquium*, 2016, p. 144.
178 Switzerland, above note 61.
179 See above note 138.
180 UK Counter-Terrorism and Border Security Act, 2019, Section 4(4–6).
181 Philippines, Republic Act. No. 11479, above note 62, Section 13.
182 Cited in the ICRC, above note 59.
183 See Directive (EU) 2017/541, above note 170, Recital 38.
184 European Commission, above note 137.
185 See D. A. Lewis, above note 177.
186 Directive (EU) 2017/541, above note 170, Recital 38, states that "the provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do[es] not fall within the scope of this Directive".
187 Philippines, Republic Act. No. 11479, above note 62, Section 13. On this, see Fionnuala Ní Aoláin *et al.*, comment on the Anti-Terrorism Act of 2020, UN Doc. OL PHL 4/2020, 29 June 2020, available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25384; and the Philippine government's reply to this comment, available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25384.
188 C. Paulussen and E.-C. Gillard, above note 121.

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to the entire counterterrorism framework (like in Switzerland[189] and the EU[190]), while others, like in New Zealand,[191] Australia[192] and the UK,[193] concern only some terrorist offences (including entry into a "declared area" or providing resources to a foreign fighter).[194]

Humanitarian safeguards/exemptions/exceptions – particularly as they relate to the entire domestic counterterrorism framework and encompass all principled humanitarian actors – remain the best explicit option for preventing humanitarian activities from being punished under counterterrorism law and for helping to mitigate indirect impacts of counterterrorism legislation on humanitarian actions, including de-risking and an overall "chilling effect".[195]

Dual legal qualification

A second good practice has been for judicial authorities to assess conducts and adjudicate them simultaneously under domestic counterterrorism legislation and IHL. For now, only national courts of some EU member States have used these two legislative frameworks to apply to the same case. In Europe, dual legal qualification has enabled States to develop some interactions between the two bodies of law in order to deal with the same case. As noted above, dual legal qualification is allowed either by a legal framework which intrinsically connects the definition of terrorism to the commission of international crimes, such as in Germany,[196] or "provided that all relevant facts of the act are not exhaustively judged under one set of legislation",[197] such as in the Netherlands. Such practice has enabled States to comply with their obligation to investigate and prosecute war crimes under IHL, and to respond to the obligations imposed by the UNSC. Dual legal qualification ensures that the criminal responsibility of perpetrators is fully accounted for and assessed under the relevant legal regimes.

Conclusion

The UNSC has so far failed to harmonize IHL and the counterterrorism framework. The various interpretations of the UNSC terrorist and ancillary offences by States and their ongoing domestication have not created any coherence among

189 Switzerland, above note 61.
190 Directive (EU) 2017/541, above note 170, Recital 38.
191 New Zealand, Terrorism Suppression Act, above note 139, Section 10(3).
192 See above note 138.
193 See UK Counter-Terrorism and Border Security Act, 2019, Section 4(4–6).
194 See C. Paulussen and E.-C. Gillard, above note 121; M. Buissonière, S. Woznick and L. Rubinstein, above note 122, p. 21; Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, "Legislating against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation", *International Review of the Red Cross*, Vol. 97, No. 897–898, 2016.
195 N. Weizmann, above note 60.
196 See above note 88.
197 Genocide Network and Eurojust, above note 83.

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counterterrorism legislations around the world, nor about the way national courts adjudicate over violations of these with regard to IHL.

A cross-cutting trend has been observed at the domestic level: individuals have been charged and indicted for terrorist offences with regard to activities committed during armed conflict, without prior assessment of the legality or illegality of these activities according to IHL. Across the cases surveyed, it seems that States have not sufficiently developed appropriate prosecutorial strategies in accordance with IHL, as required by UNSC Resolution 2396.[198] Twenty years after 9/11, the consequences of UNSC binding decisions on counterterrorism vis-à-vis IHL have started to resonate in domestic courts. Without a change of approach, this will have further legal and political implications in the long run.

At the national level, States should develop the appropriate legislative and regulatory framework to ensure that they can comply with their obligation to investigate and, if appropriate, prosecute war crimes.[199] States which do not have the jurisdiction to repress war crimes should adapt their legislative and regulatory frameworks, including in activating the principle of universal jurisdiction.[200] Further, States should systematically adopt sectoral humanitarian exemptions to safeguard principled humanitarian activities from repressive counterterrorism frameworks.

When national legislative frameworks allow for it and when relevant, dual legal qualification should be preferred over the prosecution of terrorist offences alone (without any other incrimination), particularly when dealing with serious violations of the laws and customs of war and war crimes under the Rome Statute. In order to overcome procedural barriers to prosecution – including access to evidence – States should actively support and cooperate with evidence collection mechanisms and initiatives.[201]

Finally, an IHL exclusion clause could be adopted in counterterrorism legislations to ensure that conducts which are not prohibited under IHL are not prosecuted as terrorist offences. Indeed, when no serious violations of laws and customs of war have been committed in armed conflict, members of NSAGs should be prosecuted in domestic courts for mere "participation in hostilities" or be granted amnesty at the end of hostilities.[202] As this recommendation remains controversial, States could identify the policy considerations and implications of this practice, depending on contexts, in relevant fora at the UN or with civil society initiatives.[203]

198 UNSC Res. 2396, 21 December 2017, op. para. 18.

199 ICRC Customary Law Study, above note 36, Rule 158.

200 Delegation of the ICRC to the United Nations, "Information and Observations on the Scope and Application of the Principles of Universal Jurisdiction: General Assembly Resolution 74/192", April 2020.

201 Including UN mechanisms such as the IIIM and UNITAD (see above note 100), as well as non-UN entities such as specialized non-governmental organizations.

202 See the example of the Special Jurisdiction for Peace in Colombia, which has the mandate to grant amnesty to FARC ex-combatants who have not been charged with grave crimes. See Colombia, Law No. 1820 Providing for Amnesty, Pardon and Special Criminal Treatment Provisions and Other Provisions, 30 December 2016.

203 Views and practices can be shared across various formal or informal fora at the UN. This can take place in the form of an Arria-Formula (an informal meeting of the UNSC requested by one or more members of the Council to engage on matters within the competence of the Council but on which there may not be any

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In parallel to changes at the national level, efforts should be made by the UN system (including the UNSC, but also the Secretariat and subsidiary organs of the UNSC) and mandated bodies such as the ICRC to support harmonization between IHL and counterterrorism frameworks. To start with, future UNSC counterterrorism resolutions should include humanitarian safeguards requiring States to exempt humanitarian activities from their counterterrorism frameworks at the national level. Stronger language should also be adopted to go further than the UNSC Resolution 2462 provision to "take into account"[204] the effects of counterterrorism measures on humanitarian activities; the UNSC should require States to mitigate these effects.[205] In addition, upcoming UNSC resolutions on counterterrorism could include language on States' obligation to investigate and prosecute activities which may amount to war crimes, regardless of the designation of the perpetrator as "terrorist".[206] This would put emphasis on the obligation of States under IHL to investigate and prosecute war crimes, even in counterterrorism contexts. Further, language emphasizing that the broad criminalization of "terrorism" may limit the scope of political engagement in conflict resolution and peace processes and transitional justice could be adopted to highlight these political risks.[207]

In the meantime, until the language of UNSC counterterrorism resolutions is improved, relevant entities of the UN system should provide practical guidance for the implementation of the existing language.[208] Guidance could be developed by Inter-Agency Working Groups of the Counter-Terrorism Compact – including the Inter-Agency Working Group on Criminal Justice and Legal Responses (chaired by the UN Office on Drugs and Crime and co-chaired by CTED) and the Inter-Agency Working Group on Promoting and Protecting Human Rights and the Rule of Law – in consultation with the Inter-Agency Standing Committee and the ICRC.[209] Finally, CTED, which is mandated to assist States in implementing requirements under UNSC resolutions in line with their

agreement, or to engage with high representatives of government, multilateral organizations, non-State actors, experts, etc.) or a meeting of a relevant Group of Friends (an informal congregation of States working in cooperation to further specific thematic issues). Such a convening could also take place beyond the UN, in being initiated and organized by States (in the form of a retreat, a series of dialogues or a study with the purpose of circulating good practices), or can be led by civil society.

204 See UNSC Res. 2462, 28 March 2019, op. para. 24; UNSC Res. 2482, 19 July 2019, op. para. 16.

205 See the precedential language in operative paragraph 22 of UNSC Res. 2368, renewing and updating the ISIL and Al-Qaeda Sanctions Regime, which calls to "protect non-profit organizations, from terrorist abuse, using a risk-based approach, while working to *mitigate* the impact on legitimate activities" (emphasis added).

206 Operative paragraph 19 of UNSC Res. 2396 "reaffirms that those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable".

207 Ali Altiok and Jordan Street, "A Fourth Pillar for the United Nations: The Rise of Counter-Terrorism", *Saferworld*, June 2020.

208 Including all iterations requiring complying with IHL as well as with operative paragraphs 5, 6 and 24 of UNSC Res. 2462, and operative paragraph 18 of UNSC Res. 2396.

209 Guidance is regularly developed by Inter-Agency Working Groups of the Counter-Terrorism Compact; see, for instance, United Nations, *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters*, November 2018, available at: www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf.

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obligations under IHL, could continue to bolster its IHL expertise and capacity so as to better support States in their interpretation and implementation of those resolutions.[210]

The codification, interpretation and practices of States regarding the adjudication of terrorist-related offences committed in situations of armed conflict will influence the development of customary international law. Although these considerations may seem politically ludicrous when dealing with ISIL and affiliated groups, there is a need to caution against practices that could hamper IHL frameworks along with prospects for peace in the long run. As Ben Saul puts it, "[d]espite the shifting and contested meanings of 'terrorism' over time, the peculiar semantic power of the term, beyond its literal signification, is its capacity to stigmatize, delegitimize, denigrate, and dehumanize those at whom it is directed, including legitimate political opponents"[211] – and such an agenda has the power to erode the protection norms upheld by the laws of war. It is thus fundamental not to develop practices that may seem like a solution to contemporary terrorism but which are detrimental in the long run. Indeed, such practices may erode the carefully crafted balance between humanitarian considerations and military necessities as reflected in IHL and, in turn, shape future NIACs and risk hampering their resolution. Conducts and crimes occurring during and in connection with an armed conflict should be assessed in accordance with IHL, regardless of their "terrorist" label.

210 Concerns exist, however, on the issue of bolstering CTED's mandate in regard to IHL. See D. A. Lewis, N. K. Modirzadeh and J. Burniske, above note 67.

211 B. Saul, above note 10, p. 3.

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