

Counterterrorism and IHL, Humanitarian Exemptions

The fight against terrorism has been on the global agenda for decades. The lack of definition of what terrorism is, however, has brought a series of negative impacts on diverse sectors. In this context, when drafting antiterrorism laws states often criminalize acts that could fall within the activities of humanitarian actors on the ground, which on its turn can cause a chilling effect on them. This issue has been denounced by many actors, such as the United Nation's Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur of the Human Rights Council on extrajudicial, summary, or arbitrary executions. In one of its most recent resolutions, the United Nation's Security Council established such an exception in Afghanistan thanks to the advocacy of humanitarian organizations.

Acknowledgments

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. UNITED NATIONS SECURITY COUNCIL – RESOLUTION 2615 (2021)

[Source: United Nations Security Council, Resolution 2615 (Threats to international peace and security caused by terrorist attacks), 22 December 2021, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/413/83/PDF/N2141383.pdf?OpenElement>]

The Security Council,

Recalling its previous resolutions on Afghanistan,

[...]

Expressing appreciation for the strengthened efforts of the international community to provide humanitarian assistance to the people of Afghanistan since 15 August 2021, *calling upon* the United Nations to take an active role in coordinating such assistance going forward, and *noting* the intention of this resolution is to provide clarity to ensure the continued provision of assistance in the future,

Recalling the expectations that the Taliban will adhere to the commitments made, including with regards to humanitarian access, safe passage, counter-terrorism, security, human rights, and counter-narcotics,

Reaffirming the importance of combating terrorism in Afghanistan, including those individuals and groups designated by the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015), and ensuring the territory of Afghanistan should not be used to threaten or attack any country, to plan or finance terrorist acts, or to shelter and train terrorists, and that no Afghan group or individual should support terrorists operating on the territory of any country,

Determining that the situation in Afghanistan continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations

1. *Decides* that humanitarian assistance and other activities that support basic human needs in Afghanistan are not a violation of paragraph 1 (a) of resolution 2255 (2015), and that the processing and payment of funds, other financial assets or economic resources, and the provision of goods and services necessary to ensure the timely delivery of such assistance or to support such activities are permitted, *strongly encourages* providers relying on this paragraph to use reasonable efforts to minimize the accrual of any benefits, whether as a result of direct provision or diversion, to individuals or entities designated on the 1988 Sanctions List, and *further decides* to review the implementation of this provision after a period of one year;
2. [...]
3. *Calls* on all parties in all circumstances to respect the human rights of all individuals, including women, children, and persons belonging to minorities, and comply with their applicable obligations under international humanitarian law, including those related to the protection of civilians, including humanitarian personnel, and those related to the protection of medical personnel and humanitarian personnel exclusively engaged in medical duties, and *demand*s all parties allow full, safe, and unhindered humanitarian access for the personnel of United Nations humanitarian agencies and other humanitarian actors regardless of gender; and
4. *Decides* to remain actively seized of the matter.

B. REPORT OF THE SPECIAL RAPPORTEUR OF THE HUMAN RIGHTS COUNCIL ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, SAVING LIVES IS NOT A CRIME

[Source: Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Saving lives is not a crime (A/73/314), 6 August 2018, <https://reliefweb.int/report/world/saving-lives-not-crime-report-special-rapporteur-human-rights-council-extrajudicial>]

I. Introduction

1. The present report is submitted by the Special Rapporteur on extrajudicial, arbitrary or summary executions pursuant to General Assembly resolution 71/198 and Human Rights Council resolution 35/15. It summarizes the activities undertaken by the Special Rapporteur during the past year and includes her thematic report, focusing on the criminalization and targeting of life-saving and protection services to people in need.

[...]

III. Saving lives is not a crime

[...]

8. ‘Humanitarian’ action in the form of life-saving measures by private individuals, can be traced back over hundreds of years and across the globe. Diverse faiths, beliefs and morality shaped what emerges today as the modern humanitarian regime. Concepts of charity, solidarity and protection of “the stranger” figure prominently in the historical shaping of societies around the world. [...]

9. In our modern world, millions are on the move globally, with thousands dying each year as they seek to escape war, persecution, climate degradation, and poverty. Responding in the name of deterrence, governments are exacerbating, not reducing, the dangers faced. Appalled by human suffering, people around the world are stepping up to offer rescue and support, including food, water, medical services, lodging and transportation. The result is that civic humanitarian services are reaching levels not seen since the aftermath of World War II. Governments have reacted by harassing even prosecuting “spontaneous” or organized humanitarian acts.

10. At the direction of the Security Council, governments have instituted counter-terrorism legislative frameworks that, given their stringency, potentially criminalize even life-saving medical aid or food relief, and in any case impose chilling effect on the provision of humanitarian aid for people desperately needing help.

[...]

Humanitarian action

21. [...] [W]ith regard to humanitarian services, a State has two set of obligations: a positive obligation to agree to, and facilitate, such services and a negative obligation not to impede the offer and provision of humanitarian services to individuals and populations in need.

22. International humanitarian law clearly imposes an obligation to respect and protect humanitarian actors. Parties to an armed conflict must protect civilian humanitarian actors, not just from attack, but also from harassment, intimidation, arbitrary detention and any other activities that might impede their work. This set of protections is of a corollary nature: the primary obligation is on the party to the conflict to provide for the population, yet when that party fails to discharge its obligation, individuals, as well as impartial humanitarian bodies, may offer and provide their services. These protections undergird the prohibition under customary international humanitarian law of starvation of civilians as a method of warfare/combat and on attacking or destroying objects that are indispensable to their survival. Protecting humanitarian actors is an "indispensable condition" for the delivery of essential care.

23. Under this framework, when the civilian population is not adequately supplied, no party to an armed conflict may arbitrarily withhold consent to offers of legitimate humanitarian services from an impartial humanitarian body. Refusing relief action or consignments is thus not a matter of discretion. Since 1864, humanitarian law has also established that the civilian population itself and local organizations may provide humanitarian services on their own initiative.

[...]

24. The obligation to allow and not impede humanitarian action has increasingly been recognized by soft law instruments in emergency situations. An example is emerging international law on disaster assistance. Principle 25 on the Guiding Principles on Internal Displacement insists that "all authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced." It also demands that consent "shall not be arbitrarily withheld," particularly when authorities concerned are "unable or unwilling to provide the required humanitarian assistance." The Red Cross Movement has called for the recognition of a distinct right to receive humanitarian assistance, as "a fundamental humanitarian principle which should be enjoyed by all citizens of all countries." These instruments tend to focus on State obligations vis-à-vis international humanitarian actions, which raise a range of issues related to national sovereignty, many of which are not present in the case of domestic humanitarian actors.

[...]

26. Acts prohibiting or otherwise impeding humanitarian services violate State's obligation to respect the right to life. Any death that may be linked to such prohibition would constitute an arbitrary deprivation of life.

[...]

28. When the State is not providing food, water, shelter or rescue mechanisms sufficient to protect life and dignity, then humanitarian actors are indispensable in delivering those services. [...] [T]he State has a positive obligation to seek and facilitate humanitarian action (through an act of delegation) and a negative obligation not to prevent it.

[...]

29. Finally, both within and outside the context of armed conflict, laws and policies that seek to prevent life-saving and life-sustaining services to populations because of their ethnicity, religion, or immigration status constitute a violation of Article 6 of the ICCPR. The State may not fail to discharge its obligation to respect and protect the right to life, and then exacerbate and compound that failure by precluding others from undertaking activities aimed at providing that core obligation, particularly if the State's actions or inactions are driven by discriminatory motives or result in discrimination.

IV. The implications of measures combating terrorism

30. In a series of resolutions, the Security Council has obligated Member States to take various measures against terrorism. In general terms, these resolutions require the suppression, including through criminal prosecution, of those providing "funds" or "services" to designated terrorists or in other ways "supporting terrorist acts." The Security Council has added individuals and organizations to sanctions lists in part based on their providing medical services and supplies. It has not, however, defined what constitutes an act of terrorism.

[...]

32. The bulk of these regimes are premised on an overly broad notion of acts supporting terrorism and do not take sufficient cognizance of protected activities, including life-saving ones. Security Council resolutions proclaim, often in preambles, that Member States must ensure that counter-terrorism measures comply with their international law obligations, in particular international human rights, refugee and humanitarian law. As highlighted below, such demand has not been consistently implemented. The lack of a globally agreed definition on terrorism has meant that States have adopted unacceptably wide and nefarious definitions in domestic law. The knock-in effects are that a wide range of humanitarian acts are tagged as supportive of terrorism. What follows is the abrogation of the right to life under the convenient banner of terrorism.

International principles of humanity for the enemy

33. One of the most fundamental norms of international humanitarian law is the need to protect impartial medical care to all wounded and sick, including members of adversary parties and the population under its control. This is a norm under direct attack by counter-terrorism measures. For instance, States are convicting individual doctors who provide impartial medical treatment to designated terrorist groups. Customary international law provides that "medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances." Medical personnel is understood in a broad sense to include any person engaged in medical activities. It covers those working for the armed party, as well as medical personnel made available to that party by a humanitarian organization. Importantly, since 1864, international humanitarian law has also established legal protections for unassigned medical caregivers (those not authorized and controlled by a party to the conflict), such as indigenous doctors and nurses.

[...]

Impact of counter-terrorism on humanitarian aid to civilian populations: prosecution

[...]

36. Particularly problematic counter-terrorism prohibitions are those relating to the provision of services and funding to those deemed terrorists by one party to a conflict (A/HRC/23/39). The failure to clearly exempt humanitarian actors inhibits humanitarian aid, as legitimate humanitarian activities might be deemed impermissible forms of support to "terrorists". Donors have similar concerns about the funding they provide. This fear of prosecution prevents critical aid from reaching the populations controlled by "terrorist" organizations and is thus likely to result in greater harm to life and civilian deaths.

[...]

Impact of counter-terrorism: funding and banking

39. Bans on funding or providing economic resources to a "terrorist" organization have also proven problematic, and impose significant burdens on NGOs and individuals providing potentially vital assistance. Governments and even banks are empowered to make potentially arbitrary decisions concerning the assets of individuals and organizations, including humanitarian organizations. The United States, for example, has frozen the assets of numerous Muslim charities, and many Muslims are "afraid to give their money to charity groups in case they were suspected of providing material support to terrorism."

[...]

41. Humanitarian organizations are now routinely monitored by banks and major donors who insert clauses

into their agreements requiring compliance with Security Council resolutions, counter-terrorism laws, or other administrative or regulatory requirements. Donors and banks may require organizations to vet their local partners, and provide personal information on individuals and detailed reporting on activities. These demands are time-consuming and financially burdensome. Moreover, humanitarian organizations have expressed concerns that these requirements “undermine the[ir] neutrality [...] and make local acceptance harder to achieve [...]”.

42. Importantly, prohibitions on terrorism financing may capture not only payments to partners on the ground, but also a wide variety of operational expenditures, such as administrative fees, checkpoint payments or taxes, or purchase of fuel; all of which can be considered prohibited economic resources under counter-terrorism measures.

[...]

Impact on affected populations

44. The net effect of these burdens, and the increasingly risk-adverse responses of governments, banks, donors and humanitarian agencies, is a significant decrease in humanitarian aid to critically endangered populations. For example, the US shut down Al Barakat, the main organization providing money transfers into Somalia, an action that had “great humanitarian impact” on the region, even though the government never disclosed evidence of ties to terrorism. Humanitarian organizations were asked to perform “pre-vetting finance checks, tracking systems, real-time monitoring, verification of partners’ shareholders, a bond system (requiring a deposit of 30% of the value of goods transported) and the contractual assumption of 100% of financial liability for shipments lost or stolen by contractors.” Funding to humanitarian organizations operating in Somalia declined by 50% from 2008 to 2011. Once the famine hit, the US Office of Foreign Assets Control eased requirements, indicating that “incidental benefits” to the designated terrorist organization Al-Shabaab, such as food and medicine, were “not a focus of OFAC sanctions enforcement,” but this was not clear protection against criminal enforcement. A quarter of a million people starved in that famine.

[...]

46. The potential abuse of counter-terrorism regimes is evidenced by the restrictions Myanmar has placed on aid to internally displaced persons in Kachin State, where it has in some instances effectively blocked all aid. An estimated 97,000 such persons, around 76 percent of whom are women and children, are spread across 140 displacement sites in Kachin State. The inability of humanitarian bodies to reach this population is causing widespread shortages in food, water, medical care, and other essential supplies, and human suffering. In the face of these shortages, on 21 May 2018, the Kachin State Minister of Security and Border Affairs sent a letter to the Kachin Baptist Convention, one of the largest providers of aid to displaced communities, threatening it with prosecution under Article 17/1 of the Unlawful Association Act for providing

aid to communities in conflict-affected areas of Kachin State.

A solid exemption regime

47. [...] There have been some targeted efforts to mitigate the unintended consequences of counter-terrorism on humanitarian aid in particular regions, though primarily through ad hoc and piecemeal exemptions.

48. For instance, Security Council resolution 1916 exempts from sanctions “the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners.” But this measure does not apply to other humanitarian programmes and must be renewed repeatedly. The General Assembly, in its 2016 and 2018 resolutions on the United Nations Global Counter-Terrorism Strategy Review, has urged “States to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law”.

49. European Union Directive 2017/541 on combatting terrorism excludes from the scope of the Directive “[t]he provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law.” This Directive has the potential to have a significant impact; Member States have until 8 September 2018 to make the necessary legal and regulatory changes to comply with it.

50. Certain States provide possible domestic models. Switzerland exempts funds “intended to support acts that do not violate the rules of international law on the conduct of armed conflicts.” Australia exempts from the ban on association with terrorist organizations those that do so “only for the purpose of providing aid of a humanitarian nature” but this exemption is absent from much of its broader counter-terrorism regime. New Zealand’s 2002 Terrorism Suppression Act provides that making property, or financial or related services, available to designated terrorist entities is prohibited unless a “lawful justification or reasonable excuse” exists, such as “where the property (for example, items of food, clothing or medicine) is made available in an act that does no more than satisfy essential human needs of (or of a dependent of) an individual designated under this Act.”

51. These limited initiatives are unlikely to solve the global and daily encroachment on principles that have formed the backbone of international law and humanitarian actions. Rather than making vague references to international law, the Security Council should adopt a resolution expressly clarifying that humanitarian protection and assistance must never be conceptualized as support for terrorism and suppressed or criminalized on that basis. Additionally, it should mandate sector-wide exemptions within United Nations and Member States sanctions regimes. In the meantime, States should issue similar express clarifications, and clearly and unambiguously exempt humanitarian actions from their counter-terrorism measures at every

opportunity possible, nationally, regionally and internationally.

[...]

VII. Conclusion

82. By failing to clearly and practically exempt humanitarian actors from anti-terrorism statutes, governments are knowingly reducing life-saving aid to desperate peoples. Such responses to terrorism also risk unwittingly erosion of a normative pillar of international law [...].

VIII. Recommendations

84. Security Council:

(1) Adopt a resolution exempting humanitarian actions from all counter-terrorism measures, including sanctions, insisting on the broad system of legal protection and normative safeguards under international human rights and humanitarian law;

(2) In all counter-terrorism resolutions, provide that no organization or person providing humanitarian relief should be punished on account of providing such services to an alleged terrorist or a person who is a member of, associated with, or supportive of a terrorist organization and that access to medical care and other life-saving relief by the latter should never be denied on the basis of such designation;

(3) Reaffirm in no uncertain terms the fourth pillar of the United Nations Global Strategy to Counter-Terrorism, and States' obligation to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.,

85. General Assembly:

(5) Include explicit language exempting and/or protecting humanitarian actions in resolutions on countering terrorism, migration and relevant topics.

[...]

88. States:

(11) Publicly champion the work of humanitarian actors, whether they provide services in the context of conflicts, migration, to women, LGBTI persons or other populations;

[...]

(14) Review and amend legislation and policies to counter and prevent terrorism and violent extremism that a) excludes from the scope of offences the provision of humanitarian services, b) protects humanitarian access and acts, c) ensures that access to medical care by an alleged terrorist, a member or supporter of a terrorist organization should never be denied on the basis of such designation, and that no person providing health services should be punished on account of the beneficiaries designation;

[...].

C. ADVANCING HUMAN RIGHTS THROUGH THE POSITIVE INTERFACE OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW IN THE CONTEXT OF COUNTER-TERRORISM

[Source: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/75/337), 3 September 2020, Advancing human rights through the positive interface of international human rights law and international humanitarian law in the context of counter-terrorism, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/228/70/PDF/N2022870.pdf?OpenElement>]

I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, pursuant to Assembly resolution 72/180 and Human Rights Council resolution 40/16. In the report, she analyses the interface between human rights and international humanitarian law in counter-terrorism contexts, with a particular focus on counter-terrorism practices that are inconsistent with or undermine the integrity of fundamental rights, duties and protections under those legal regimes.

[...]

III. Advancing human rights through the positive interplay between human rights and international humanitarian law in the context of counter-terrorism

11. When establishing the mandate of the Special Rapporteur [...] the Commission on Human Rights noted that the work of the mandate holder was contextualized by State “obligations under international law, ... in particular international human rights, refugee and humanitarian law”, and reaffirmed in paragraph 1 of the resolution that “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law”. Previous mandate holders and the current mandate holder have confirmed the necessary intersections of human rights law with other bodies of international law, including international humanitarian law. [...]

12. The importance of that overlap was noted by the Special Rapporteur in her report to the General Assembly [...] in which she observed that counter-terrorism measures were frequently taken in the context of armed conflict in which international humanitarian law applied. That reality is further illustrated by the number of non-international armed conflicts involving non-State armed groups subject to terrorist designation by the United Nations and its targeted sanctions regime or included on regional and national terrorist sanctions lists. The widespread resort by a range of non-State actor groups to acts of terrorism raises legitimate concern and responsiveness from States and the United Nations; in addition, the absence of agreement to conclude a comprehensive multilateral convention has resulted in the expansion of existing counter-terrorism measures and the introduction of new ones. Against that background, the International Committee of the Red Cross (ICRC) and other stakeholders have rightly warned that the lack of sufficient consideration regarding the interaction between international humanitarian law and the norms and standards relevant to countering terrorism is leading to a troubling conflation of the two. The Special Rapporteur is deeply concerned that such conflation serves to weaken human rights protection in fragile, conflict and post-conflict settings.

13. In line with an expansionist and securitizing trend, there is an evidenced tendency to consider any act of violence and many non-violent acts carried out by a non-State armed group in a non-international armed conflict as being “terrorist” by definition, sidestepping assessment of lawfulness under international humanitarian law as well as addressing the legal and political significance of non-international armed conflicts on the territories of States. [...] The qualifier “terrorism”, which should be applied to the most serious and violent acts defined by international law, has regrettably been embraced with enthusiasm to legitimize a range of State action, in some contexts precisely, it would appear, to justify the exclusion of the protective norms of both international humanitarian law and international human rights law. [...] Human rights and humanitarian law have distinct points of divergence in both counter-terrorism and armed conflict contexts. However, these bodies of law operate – whether sequentially or in tandem – to ensure the protection of individuals and optimize the rights of individuals by specifying the duties of States (and non-State armed groups under international humanitarian law) in the most precarious and fraught of circumstances. [...]

14. It is well understood that human rights law and humanitarian law have different historical origins, and codification has followed different paths. However, there has been convergence and overlap between both legal regimes since the adoption of the Universal Declaration of Human Rights in 1948. [...]

15. Without oversimplifying the differences between international humanitarian law and international human rights law, conceptual and practical overlap between these legal regimes is found in the designation of duties and obligations for key actors (noting in particular the obligations of States under both regimes), the centrality of protection as a norm and a practice, the convergence of certain fundamental prohibitions (such as torture and arbitrary detention), the common expression of essential judicial guarantees, the criminalization of breaches, the presumption that both regimes provide sufficient normative content so that no person is left without the coverage of legal norms and the shared core Grundnorm of non-discrimination. In his commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth

Geneva Convention), Jean Pictet notes specific overlap between the protections afforded by the Convention, which are applicable to civilians in international armed conflicts, and the inalienability of rights, the general treatment of protected persons, penal procedure, civil capacity and remedies for internees. The influence of human rights norms on the normative content of Additional Protocols I and II is well documented, deepening the protective obligations that flow in armed conflict, including those that are non-international in nature. There is now a broad consensus that certain fundamental norms that can be derived from both human rights law and international humanitarian law, specifically norms that protect persons from arbitrary deprivations of life, liberty and property, as well as hostage-taking, at the hands of State actors, apply at all times during an armed conflict, including in conflicts in which acts of terrorism occur. The complementarities between those legal regimes affirm that the implementation of international humanitarian law operates as a gateway, in specific contexts, to the meaningful protection of certain human rights, and that the overlap between the legal regimes serves to deepen the obligations of States with regard to certain inalienable rights. [...]

16. The Special Rapporteur acknowledges the distinct stratification of humanitarian law norms in international and non-international armed conflicts. She affirms that a more extensive body of treaty obligations has been agreed upon and applied by States in international armed conflicts. Notwithstanding this, the augmentation of legal obligations in non-international armed conflicts has flourished, through the jurisprudence of ad hoc criminal tribunals and with the adoption of the Statute of the International Criminal Court and the consolidation of the Court's docket. As a result, international humanitarian law is particularly relevant to the protection of individuals and the enforcement of duties in non-international armed conflicts, and it is essential that observance by State and non-State armed groups of the norms of international humanitarian law is sustained in these contexts. Given the current proliferation of such conflicts and the historical unwillingness of States to acknowledge the full applicability of international humanitarian law to them, including common article 3 of the Geneva Conventions, it is precisely in such a context that the categorization of acts as "terrorism" may be seen as a means to displace the applicability of essentially protective legal norms. The dangers of such displacement are not merely formalistic, but have tangible effects on humanitarian action, the provision of humanitarian assistance, the protection of humanitarian personnel, the protection of non-derogable rights and essential judicial guarantees, as well as the principle of non-discrimination. It is imperative that the humanitarian law norms applicable to non-international armed conflicts are robustly defended, that they are applied in practice and that the misuse of counter-terrorism discourse and norms to avoid the application of customary and treaty rules applicable to armed conflict is challenged. This means explicitly defining the appropriate legal limits of counter-terrorism regulation, both normatively and institutionally, and prohibiting overreach by States, counter-terrorism institutions and non-State actors engaged in implementing counter-terrorism measures, including corporate entities.

17. In its jurisprudence, the International Court of Justice has reflected on the respective scope of application of international humanitarian law and international human rights law, including in contexts in which acts of terrorism have been at issue. The Special Rapporteur draws three broad conclusions from the Court's significant jurisprudence relevant to the present report. First, human rights norms continue to apply in

situations of armed conflict, albeit modified to the extent that international humanitarian law is *lex specialis* on a particular issue and to the extent that a State has lawfully derogated from specific norms of human rights law where the armed conflict constitutes a public emergency threatening the life of the nation, as recognized by international humanitarian law. [...]. Second, States continue to validate the applicability of international humanitarian law and international human rights law as the non-negotiable legal norms of relevance specifically in contexts in which acts of terrorism are committed. Third, States broadly seek balance and wish to avoid the distortion of applicable and long-standing international law. This confirms the clear need to ensure that counter-terrorism regulation and practice do not produce unintended consequences by undermining the overarching legal regimes of human rights and international humanitarian law, weakening the overall checks and balances that maintain the stability of international law regimes.

[...]

A. Terrorism and international humanitarian law

19. International humanitarian law shares common ground with counter-terrorism regulation, as it expressly prohibits most acts that are criminalized as “terrorist” under national law, with the inherent presumption that such acts comport with the existent international legal provisions for terrorism.

20. Core differences are necessary, however, to assess the interrelationship between the two regimes. Specifically, in legal terms, “armed conflict is a situation in which certain acts of violence are allowed (lawful) and others prohibited (unlawful)”. International humanitarian law permits (or does not prohibit) attacks on military objectives, whether inflicted by State or non-State parties to the conflict. Critically, acts of violence against civilians not taking a direct part in hostilities or civilian objects are unlawful, unless they result from a proportionate attack on a military objective. International humanitarian law is the only body of international law addressing the protection of persons to take this dichotomous approach.

21. As a regulatory matter, international humanitarian law, on the one hand, prohibits and regards as war crimes specific acts of terrorism perpetrated in armed conflict and, on the other hand, prohibits and usually regards as war crimes a range of other acts that would commonly be deemed “terrorist” if committed outside an armed conflict. In article 51 (2) of Additional Protocol I and article 13 (2) of Additional Protocol II, acts of terrorism are specifically prohibited in the conduct of hostilities, providing that “acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. The prohibition has been deemed customary international law in the decision of the International Tribunal for the former Yugoslavia. The Special Rapporteur discerns a distinct and unfortunate failure to properly address certain violent acts as “war crimes” or other international crimes, such as crimes against humanity, with State preferences to use the nomenclature of terrorism to hazily characterize such harms. Given the sustained lack of accountability for serious violations of international law, and specifically international humanitarian law, in contexts as diverse as Iraq, Libya, Somalia and the Syrian Arab Republic, and the emergent pattern of relying on terrorism membership, support and travel prosecutions as the “fallback” criminal measures, a deep

disservice is done to victims of terrorism and to the responsibility to respect and ensure the enforcement of rights in failing to appropriately harness the legal regime best equipped to regulate and prosecute the perpetrators of such crimes and to symbolically reflect the gravity ascribed to such acts. The Special Rapporteur highlights the specific prohibitions applicable in non-international armed conflicts, including prohibiting attacks against the civilian population with the primary purpose of spreading terror (Additional Protocol II, art. 13.3), and the prohibition of actions that terrorize the population (ibid., art. 4 (2) (d)). She notes the significant capacity in national and international legal systems to pursue prosecutions for war crimes and laments the failure to optimize their use for terrorism crimes committed in armed conflicts.

[...]

c. Contemporary challenges to international humanitarian law and international human rights law resulting from counter-terrorism regulation

25. The Special Rapporteur has consistently documented the ongoing, pernicious and sustained challenges to the protection of human rights resulting from national, regional and global counter-terrorism regulation. In the present section, she highlights the negative effects of counter-terrorism regulation on international humanitarian law and humanitarian action, with consequent and relational effects on the enjoyment of human rights.

26. [...] [T]he consequences for the provision of impartial humanitarian activities in armed conflict and fragile settings resulting from the application of broadly based national and international regulation on terrorism have, it should be acknowledged, been extremely severe.

Impartial humanitarian action, in particular the provision of medical supplies, shelter and food, is the sine qua non in many parts of the world for the exercise of essential social and economic rights, including the rights to food, safe drinking water and adequate access to health care. Designating certain non-State armed groups in non-international armed conflicts as terrorists and linking the provision of humanitarian activities – protection and assistance – as a form of support for terrorism or to persons or entities designated as terrorists result in the lowering of fundamental human rights and humanitarian protections for the weakest and most vulnerable. The state of the applicable law as developed by the Security Council is inadequate, and concerted State attention and remediation are required to address the deficits outlined below. [...] [I]n parallel, listing and sanctions requirements for known or suspected terrorists through watch-listing practices at the national, regional and global levels have evidenced serious human rights deficiencies and are inconsistent with the minimal due process guarantees found in international law. [...]

[...]

E. Protecting the integrity of principled humanitarian action: humanitarian exemptions

30. While acknowledging the importance of criminalizing the financing of terrorism and that of terrorism sanctions regimes, the Special Rapporteur has already addressed the very serious impact of the complex web of interwoven counter-terrorism measures, legislation, regulations, donor requirements and terrorism sanctions regimes aimed at limiting, and sometimes criminalizing, various forms of broadly defined support and assistance to terrorist groups [...]. She is also aware that sanctions regimes have in various instances led to the impediment or delay of humanitarian operations, many of which relate to the core mandate of humanitarian actors, including that of ICRC. The proliferation, coexistence and overlap of these broad and vague measures, which can be opaque and lacking in clear implementation guidance, not only restrict access to needy populations in areas controlled by non-State armed groups but also have an impact on humane, neutral, independent and impartial humanitarian action in various ways. Regrettably, they can result in the arrest and prosecution of humanitarian, human rights and other civil society actors. Indeed, such measures ultimately impede the ability of impartial humanitarian organizations, including ICRC, to carry out life-saving humanitarian tasks assigned to them by States parties to the Geneva Conventions of 1949 and their Additional Protocols, including the provision of food and medical assistance. [...]

31. The Security Council holds a particular responsibility, given that a number of the counter-terrorism measures that it has adopted play a central role in impeding humanitarian action, not least in the areas of sanctions (both sanctions administered by the United Nations and those resulting from Council resolution 1373 (2001)), financing and support for terrorism or terrorist actors and travel. Worryingly, although the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities has never listed an individual solely on the basis of the provision of medical or humanitarian assistance, it has nonetheless referred to medical activities as part of the basis for listing two individuals and two entities, implying that medical care and medical supplies are considered forms of impermissible support for designated terrorist groups.

32. The Special Rapporteur is encouraged that the Secretary-General has called upon States to not impede efforts by humanitarian organizations to engage with armed groups in order to seek improved protection for civilians – even those groups that are proscribed in some national legislation (see S/2009/277, para. 45). [...] The Special Rapporteur is also encouraged that, heeding these calls, the Security Council, following the General Assembly [...] has recently urged States, when designing and applying measures to counter terrorism, to take into account the potential effect of such measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law [...]

33. However, these statements of principle are not sufficient to actively protect the integrity of humanitarian action and actors working in areas where terrorist groups are active. Indeed, humanitarian law already protects engagement for humanitarian purposes, and the importance of humanitarian access is routinely included in Security Council resolutions [...]. Given the effect – real or chilling – that these measures have already had on the delivery of principled humanitarian assistance in challenging environments to populations

in Afghanistan, Iraq, Mali, Nigeria, Somalia, the Syrian Arab Republic, Yemen and Gaza, it is the clear position of the Special Rapporteur that the current matrices do not permit humanitarian actors to carry out their mandates in a way that complies with international humanitarian law, thus compromising the fundamental rights and dignity of vulnerable people. States and international organizations must take specific action to ensure that their counter-terrorism frameworks are effectively respectful of international humanitarian law, thereby advancing the fundamental obligation of States to protect and promote the rights of individuals.

34. In order to ensure the integrity of humanitarian action, States and international organizations must regulate in a way that effectively gives precedence to the rules of international humanitarian law when the latter govern. Correspondingly, States and international organizations are encouraged to authorize and not prohibit the assistance or protection activities carried out by impartial humanitarian organizations in accordance with international humanitarian law, even if they benefit individuals designated as terrorists. [...]

35. [...] The Security Council should draw on its experience with other humanitarian exemptions to sanctions regimes (such as resolution 2397 (2017) on the Democratic People's Republic of Korea), in particular its – albeit limited – humanitarian exemption incorporated into sanctions measures pursuant to resolution 751 (1992) concerning Somalia, which also includes terrorist groups (see resolutions 1916 (2010) and 2444 (2018), para. 48, containing exemptions in the context of famine). In contrast with humanitarian exemptions, derogation systems, temporary authorizations or licences not only raise obstacles but are also often unworkable from an operational perspective. In addition, derogation, authorization or licence systems are not compatible with international humanitarian law, adding a layer of consent to humanitarian action not foreseen under that body of law, which only requires impartial humanitarian organizations to obtain the consent of the belligerents concerned, not that of third States or international organizations, to conduct their activities. Third States and international organizations are only under the obligation to allow and facilitate humanitarian action, a function that derogations do not fulfil. [...]

IV. Recommendations

A. Recommendations for the United Nations

[...]

45. The Security Council should:

(a) Recognize the necessity of upholding human rights and humanitarian law, encourage this through its resolutions and discourage misapplication of counter-terrorism norms to the legitimate scope of human rights and the application of international humanitarian law;

(b) Ensure that any future anti-terrorism resolutions under Chapter VII of the Charter are drafted so as to

exclude the activities of neutral, independent and impartial humanitarian organizations from their scope. The Council should consider mitigating the unexpected negative impact of existing resolutions on impartial humanitarian activities and include adequate humanitarian safeguards in future resolutions regarding terrorism;

(c) Find ways to engage consistently with impartial humanitarian organizations and independent civil society organizations, as well as human rights and humanitarian law experts, to remain apprised of the negative impact of counter-terrorism regulation on the protection of human rights and international humanitarian law.

D. ART. 260TER OF THE SWISS CRIMINAL CODE

[Source : Article 260ter, Swiss Criminal Code, adopted on 25 September 2020, available at: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en]

Art. 260ter

1. Any person who:
 - a. participates in an organisation which pursues the objective of:
 1. committing violent felonies or securing a financial gain by criminal means, or
 2. committing violent felonies aimed at intimidating the population or coercing a State or an international organisation to act or refrain from acting; or who
 - b. supports such an organisation in its activities.

shall be liable to a custodial sentence not exceeding ten years or to a monetary penalty.

2. Paragraph 1 letter b does not apply to humanitarian services provided by an impartial humanitarian organisation, such as the International Committee of the Red Cross, in accordance with the common Article 3 of the Geneva Conventions of 12 August 1949

E. LAW NO. 003/PR/2020 OF THE REPUBLIC OF CHAD ON THE SUPPRESSION OF ACTS OF TERRORISM

[Source: Law No. 003/PR/2020 of the Republic of Chad on the Suppression of Acts of Terrorism, adopted on 28 April 2020, available at: https://www.unodc.org/documents/westandcentralafrica//Loi_terrorisme_du_Tchad_2020.pdf]

SECTION I: Purpose and scope

Article I

1. This law concerns the suppression of acts of terrorism in the Republic of Chad.
2. All criminal provisions in force that do not contradict this law remain applicable.
3. No provision of this law may be interpreted as a derogation of human rights.
4. Activities of an exclusively humanitarian and impartial nature carried out by neutral and impartial humanitarian organizations are excluded from the scope of this law.

[...]

Section II: Definitions

Article 2

For the purposes of this law:

1. an “act of terrorism” means:

a) any act or threat of violence likely to endanger the life, physical integrity or freedoms of a person or a group of persons, which causes or may cause damage to private or public property, to natural resources, to the environment or to cultural heritage, committed with the intention of:

1. intimidating, creating a situation of terror for, compelling, exerting pressure on or causing any government, organization, institution, population or part thereof to undertake any initiative or abstain therefrom, or to adopt or renounce a particular position or to act according to certain principles;
2. disrupting the normal functioning of public services, the delivery of essential services to populations or creating a situation of crisis among populations;
3. causing a general insurrection in the country.

b) the promotion, financing, contribution, ordering, aiding, incitement, encouragement, attempt, threat, conspiracy, organization or equipment of, from, to or by any person intending to commit any act set out in paragraph (a)1–3.

[...]

Section V: Financing terrorism

Article 10

Any natural or legal person that, by any means, directly or indirectly, provides, raises, collects or manages funds, securities or goods, with the intention of their being used or knowing that they will be used, in full or in part, shall be sentenced to life imprisonment for:

- a) committing an act of terrorism, irrespective of whether such an act has taken place;
- b) providing support to a terrorist organization, group or individual, including in the absence of a link to one or several specific terrorist acts.

The offence of financing terrorism shall be deemed to have been committed even if the relevant assets or services were obtained on the territory of another state.

The same principle applies even if the assets or services were not actually used to commit the offence.

Discussion

I. Classification and Applicable Law

1. (*Document A and B*)

1. How do you classify the situation in Afghanistan at the moment the Resolution 2615 was adopted? How does your answer affect the legal regime to be applied? (GC I – IV, AP I and II, CIHL)
2. What are the parties to the conflict?

2. Is the wording “terrorist groups” an IHL wording? May all non-state armed groups be considered as terrorist groups? Are all terrorist groups armed groups in the sense of IHL? What are the criteria to determine if a group can be considered as an organized armed group, party to an armed conflict? Are terrorist activities part of the definition or an exclusion clause to it? (GC I – IV, common Art. 3; ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, para. 6).

3. Is there a definition of terrorism in international law? In IHL? IHRL? What do you think can be the effects of the existence, or lack, of such definition?

4. (*Document D, paras. 19 – 21*) Does IHL prohibit terrorist acts? Could such prohibition be included in other provisions? (GC IV, Art. 33(1); API, Arts. 48 and 51; APII, Art. 4(2)(d); CIHL Rules 11-12).

5. (*Document D, para. 21*) Is there an obligation to criminalize terrorist acts? In IHL? In IHRL? How does the classification of an act as terrorist impact the prosecution of grave breaches and war crimes?

II. Counterterrorism and Humanitarian Assistance

6. (*Documents B, C, D and E*)

1. What are the legal provisions governing humanitarian assistance in IHL? What are the principles governing humanitarian assistance? In what circumstances may a humanitarian organization offer its services? To what addressees? For the benefit of which beneficiaries? (CIHL, Rule 55; GC I-IV, Art. 3; GC IV, Arts. 23 and 59; API, Arts. 69 and 70; AP II, Art. 18 (2))
2. Can parties in conflict refuse humanitarian assistance? If so, on what basis? Do UNSC resolutions condemning certain services offered by humanitarian organizations prevail over the parties' obligation to provide or to consent to humanitarian assistance? Are humanitarian organisations that want to deliver humanitarian assistance obliged to get consent from a non-state armed group with territorial control of a territory? (CIHL, Rule 55; GC I - IV, Art. 3, AP II, Art. 18 (2))
3. Does a State not party to a NIAC violate Common Article 3 if it prohibits services an impartial humanitarian body may offer under that Article? Can a State not a party to a NIAC prohibit the delivery of services of an impartial humanitarian body if that is likely to cause tensions in inter-State relations?

7. (*Document E*) How can the imposing of sanctions affect humanitarian assistance? How can the services provided by impartial humanitarian organizations fall within the scope of "promotion, financing, contribution, order, aid, inducement, encouragement, attempt, threat, conspiracy, organisation or equipping of any person" as established in the Chadian Law?

8. (*Document B, paras 21 – 29*) Do you agree with the Special Rapporteur's conclusion that the deprivation of assistance by states can amount to human rights violations towards the population deprived of assistance? If so, why? If not, why not? Are there IHL rules that reach similar conclusions?

9. (*Document B, para. 29*) Does IHRL apply during an armed conflict? Particularly, does the right to life apply? If so, to whom? In what circumstances? Are all parties bound by it? Are non-State armed groups bound by IHRL?

10. (*Document C, paras 11 – 17*) Should counterterrorism measures be governed by IHL? By IHRL? Do both regimes resemble each other in some provisions? In which areas do they diverge?

11. (*Document B, para. 22*) Does IHL "clearly impose an obligation to respect and protect humanitarian actors [...], not just from attack, but also from harassment, intimidation, arbitrary detention, and any other activities that might impede their work"? Where can those rules be found? (API, Art. 71(2); CIHL, Rule 31)

12. (*Document A; Document B, para. 33; Document D; and Document E*) Do medical personnel in IHL include any person engaged in medical activities? How can counterterrorism measures affect their work? Is the UNSC Resolution protective enough? The Swiss and Chadian laws? (GC I, Arts. 24 – 26; GC II, Art. 36; GC IV, Art. 20; API, Art. 15; CIHL, Rule 25)

13. (*Document A; Document B, paras 36 - 46; Document D; Document E*) Under counterterrorism rules,

could the funding of a humanitarian organization operating in a territory controlled by a terrorist group be considered as “financing terrorist groups”? How could this affect humanitarian work? Does the UNSC Resolution provide an efficient answer for this matter?

14. (*Document B; Document C, para. 35*) What is the difference between humanitarian exemptions, humanitarian exceptions and humanitarian derogations? Would art. 260ter of the Swiss Law be considered a humanitarian derogation, exemption, or exception? What about the Chadian law? And the UNSC Resolution?

15. (*Document C, para. 35*) May a State other than a party to the conflict or a State through whose territory the humanitarian assistance must pass require its permission before humanitarian assistance may be provided? (CIHL, Rule 55; GC I-IV, Art. 3; GC IV, Arts 23 and 59; AP I, Arts 69 and 70; AP II, Art. 18 (2))

16. (*Document B, paras 47 – 51; Document C, paras 26 – 35; Document D; Document E*) Is UNSC Resolution 2615 an acceptable response to the UN Rapporteurs criticism? If so, why? If not, what do you think are the possible limits such a resolution has? In your opinion, what other answer could have been given? Are the Swiss and Chadian law more effective?

17. (*Document B, paras 88; Document C, para. 45*) Are the report’s recommendations binding? If not, are there other rules obliging states to grant humanitarian access?