



The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law: Preliminary Considerations for States

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**THE COUNTER-TERRORISM
COMMITTEE EXECUTIVE
DIRECTORATE AND
INTERNATIONAL
HUMANITARIAN LAW:
PRELIMINARY CONSIDERATIONS FOR STATES**

Dustin A. Lewis, Naz K. Modirzadeh, and Jessica S. Burniske

**HARVARD LAW SCHOOL PROGRAM ON
INTERNATIONAL LAW AND ARMED CONFLICT**

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1. Overview

In developing international humanitarian law (IHL), States have aimed in part to lay down the primary normative and operational framework pertaining to principled humanitarian action in situations of armed conflict. The possibility that certain counterterrorism measures may be instituted in a manner that intentionally or unintentionally impedes such action has been recognized by an increasingly wide array of States and entities, including the United Nations Security Council and the U.N. Secretary-General. At least two aspects of the contemporary international discourse on intersections between principled humanitarian action and counterterrorism measures warrant more sustained attention. The first concerns who is, and who ought to be, in a position to authentically and authoritatively interpret and apply IHL in this area. The second concerns the relationships between IHL and other possibly relevant regulatory frameworks, including counterterrorism mandates flowing from decisions of the U.N. Security Council. Partly in relation to those two axes of the broader international discourse, a debate has emerged regarding whether the U.N. Security Council may authorize one particular counterterrorism entity — namely, the Counter-Terrorism Committee Executive Directorate (CTED) — to interpret and assess compliance with IHL pertaining to humanitarian action in relation to certain counterterrorism contexts. In this briefing, we seek to help inform that debate by raising some preliminary considerations regarding that possibility.

We focus on the possible implications of States and other relevant actors pursuing various responses or not responding to this debate. One of our goals is to help raise awareness of this area with a focus on perspectives drawn from international law. Another is to invite a broader engagement with the question of the preservation of the humanitarian commitments laid down in IHL in a period marked by a growing number — and a deepening — of the intersections between situations of armed conflict and measures to suppress terrorism.

2. Background

Only a relatively small subset of acts of terrorism have a juridically relevant connection to armed conflict. Nonetheless, due in part to (perceived, imputed, or actual) linkages between acts of terrorism and armed conflicts, certain United Nations entities with a counterterrorism mandate have sought to bring purportedly relevant situations of armed conflict under their respective purviews. At least from a legal perspective, it may be warranted to discern and preserve certain distinctions between these frameworks.

Traditionally, ensuring respect for IHL — the principal body of international law designed by States to apply in situations of armed conflict — has primarily been the province of individual States as well as juridical bodies. Examples of the former include training armed forces and

enforcing command discipline, and examples of the latter include war-crimes tribunals and courts martial. This traditional approach flows in part from the historically embedded nature of oversight and enforcement in this area, both of which have long been linked to particular forms of expertise, to treaty delegation, and to customary practice.

Two resolutions adopted by the U.N. Security Council in 2019 might signal a development in relation to the traditional approach to ensuring respect for IHL in certain thematic areas. In particular, a debate has emerged as to whether the Security Council is — and ought to be — positioned to mandate CTED to assess certain aspects of U.N. Member States' compliance with IHL, at least to the extent that such compliance may pertain to certain measures that are mandated by the Security Council to counter terrorism and that relate to compliance with IHL pertaining to humanitarian action. In the terminology of the Security Council, CTED is a “special political mission” operating under the policy guidance of the Counter-Terrorism Committee (CTC); for its part, the CTC appears to be a Security Council-established subsidiary organ.¹

Researchers have identified several thematic and operational areas where certain counterterrorism responses may pose various challenges to, and even impede, engagement in principled humanitarian action, including where such action is contemplated in, or even required by, IHL.² The thumbnail version of this tension is that a rationale underlying some counterterrorism frameworks presumes that impermissible “support” to terrorism is fungible and always unlawful and that humanitarian organizations might function (if unintentionally) as conduits for such support. That support is broadly conceived in some instances to include — in relation to designated actors and communities under their de facto control — such things as the provision of medical care and training on respect for IHL.³ That wide approach implicitly rejects commitments to certain principles, not least impartiality and humanity, that undergird humanitarian action rooted in IHL. In a 2015 report, the International Committee of the Red Cross (ICRC) stated the following:

The designation of a non-State armed group party to a [non-international armed conflict] as “terrorist” means that it is likely to be included in lists of proscribed terrorist

¹ See below, section 3.1.

² See, e.g., Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, U.N. Office for the Coordination of Humanitarian Assistance (OCHA) and the Norwegian Refugee Council (July 2013); Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harv. L. School Program on Int'l L. & Armed Conflict (HLS PILAC), March 2017, <https://pilac.law.harvard.edu/pilot-empirical-survey-study-and-comment>, permalink: <https://perma.cc/MV7F-FZPZ>; *Principles Under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, Norwegian Refugee Council (2018), https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/nrc-principles_under_pressure-report-2018-screen.pdf, permalink: <https://perma.cc/G47K-3EJ2>.

³ See below, section 4.4.

organizations maintained by the UN, regional organizations and States. This may, in practice, have a chilling effect on the activities of humanitarian and other organizations carrying out assistance, protection and other activities in war zones. It has the potential to criminalize a range of humanitarian actors and their personnel, and may create obstacles to the funding of humanitarian activities. The prohibition of unqualified acts of “material support,” “services” and “assistance to” or “association with” terrorist organizations found in certain criminal laws could, in practice, result in the criminalization of the core activities of humanitarian organizations and their personnel that are endeavouring to meet the needs of victims of armed conflicts or situations of violence below the threshold of armed conflict. These activities could include: visits and material assistance to detainees suspected of, or condemned for, being members of a terrorist organization; facilitation of family visits to such detainees; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; aid to meet the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities for [internally displaced persons], where individuals associated with terrorism may be among the beneficiaries.⁴

Several States, the U.N. Security Council, and the U.N. Secretary-General at least implicitly recognize the potential for this tension between counterterrorism measures and humanitarian action covered by IHL to manifest.⁵ International scholarly discourse does not answer all of the questions that might arise in relation to these issues.

What might it mean, and what consequences might arise, were the U.N. Security Council to direct CTED to assess certain aspects of U.N. Member States’ respect for IHL (or lack thereof) in this area, including as it may relate to counterterrorism mandates? CTED was originally created by the U.N. Security Council in large part to provide technical assistance to support Member States’ efforts to implement some of the Council’s counterterrorism resolutions. Given the stakes and in light of recent Council resolutions, the possibility that CTED might contribute to the delineation — de facto if not de jure — of IHL parameters pertaining to humanitarian action in

⁴ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, 32IC/15/11, Oct. 2015, p. 20.

⁵ See U.N. Security Council Resolution 2462 (2019), para. 24; U.N. Security Council Resolution 2482 (2019), para. 16; U.N. Secretary-General, *Protection of civilians in armed conflict: Report of the Secretary-General, S/2019/373*, May 7, 2019, para. 41 (“Steps are needed also to limit the impact of counter-terrorism measures on humanitarian action, which have included the criminalization of certain activities necessary for the conduct of humanitarian operations. Aside from their direct impact on humanitarian operations, such measures cause uncertainty and anxiety among humanitarian organizations and their staff with regard to the threat of prosecution or other sanctions for carrying out their work.”). See also David McKeever, *International Humanitarian Law and Counterterrorism: Fundamental Values, Conflicting Obligations*, 69 *International and Comparative Law Quarterly* 43 (2020); Marine Buissonniere, Sarah Woznick, and Leonard Rubenstein, *The Criminalization of Healthcare*, The University of Essex (June 2018), pp. 26–28.

certain counterterrorism contexts merits careful consideration. The broader potential implications of such a development for the system of legal protection in war merit deliberation as well. So far as we are aware, these possibilities have not received extensive public attention of States nor of other entities or individuals concerned with the system of legal protection pertaining to armed conflict and efforts to suppress terrorism.⁶ Therefore, we aim to raise some preliminary, non-exhaustive considerations — primarily through the lens of international law — regarding the potential that a counterterrorism entity (such as CTED) might increasingly take on a role of assessing Member States' compliance with areas of IHL concerning humanitarian action in relation to U.N. Security Council-mandated counterterrorism measures.

This set of issues has gained a particular salience following the adoption by the U.N. Security Council of a series of counterterrorism mandates culminating in Resolution 2462 (2019). In that resolution, the U.N. Security Council “[d]emands that Member States *ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law, and international refugee law.*”⁷ Also in Resolution 2462 (2019), the U.N. Security Council “[u]rges States, when designing and applying measures to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.”⁸

This collection of U.N. Security Council decisions and directives for Member States, alongside the accompanying mandates pertaining to CTED, brings to the fore several sets of concerns. Included among those concerns is who does and should “own” — in the sense of developing, interpreting, applying, and enforcing — the part of IHL pertaining to the provision of humanitarian assistance and protection activities in relation to situations of armed conflict involving certain counterterrorism measures. To be certain, the U.N. Security Council has made decisions that pertain to the existence of specific armed conflicts under IHL, to the categorization of those conflicts as international or non-international in character, and to the scope of application of IHL in respect of those conflicts. In addition, in relation to certain specific armed conflicts, the U.N. Security Council has also created juridical bodies charged with enforcing

⁶ For some initial considerations, see Nathalie Weizmann, *Painting Within the Lines: The UN's Newest Resolution Criminalizing Financing for Terrorists—Without Imperiling Humanitarian Activities*, Just Security, March 29, 2019, <https://www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperiling-humanitarian-activities/>, permalink: <https://perma.cc/SQ28-3JPN>; Naz K. Modirzadeh, *Safeguarding Principled Humanitarian Action in Counter-terrorism Contexts*, Remarks to the U.N. Security Council, Briefing on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: International Humanitarian Law, 8499th Meeting, April 1, 2019, United Nations Headquarters, New York, U.N. doc. S/PV.8499, pp. 6–7.

⁷ U.N. Security Council Resolution 2462 (2019), at para. 6 (emphasis added).

⁸ Id. at para. 24 (emphasis added).

certain aspects of IHL, in particular serious violations of IHL. The present debate, however, concerns the potential that the U.N. Security Council may seek to “legislate” in general — in the sense of not being linked to a particular context or situation of concern — the applicability, interpretation, and enforcement of IHL and to do so through a counterterrorism lens. In this sense, the issues discussed in this report have potentially far-reaching consequences for the implementation of international law in armed conflict, particularly in areas involving customary IHL. Numerous contemporary situations of armed conflict may be subject to regulation from both counterterrorism frameworks and IHL; consider (among others) Afghanistan, Gaza, Iraq, Mali, Nigeria, Somalia, Syria, and Yemen. In light of the possible implications for affected populations and the system of legal protection in war, these issues warrant more extensive public debate and consideration by States, U.N. system actors, security officials, humanitarians, law- and policy-makers, and legal advisers (among others).

In the rest of this briefing, we further set out our preliminary analysis by sketching, in broad-brush strokes, the relevant aspects of CTED’s mandate and activities, with a focus on its past and current (purported) connection(s) to IHL (section 3). After setting the general background, we highlight two provisions in U.N. Security Council Resolution 2462 (2019) that might pertain to CTED’s possible IHL-assessment mandate, in particular as that mandate may concern humanitarian action contemplated, or undertaken, in relation to counterterrorism contexts that also qualify as situations of armed conflicts under IHL (section 4). We conclude by raising questions that States and other interested actors might evaluate in seeking to respond to this area of legal, operational, and policy concerns (section 5).

3. CTED in the U.N. Charter Framework and in relation to IHL

3.1. The Emergence of the CTC and CTED

Under the U.N. Charter, Member States confer upon the Security Council “primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”⁹ Member States further “agree to accept and carry out decisions of the Security Council in accordance with the ... Charter.”¹⁰ In carrying out its duties, the Security Council is permitted under the U.N. Charter to “establish such subsidiary organs as it deems necessary for the performance of its functions.”¹¹ From a review of international scholarly discourse, it appears that the Security Council may interpret the U.N.

⁹ Art. 24, para. 1, Charter of the United Nations (1945).

¹⁰ *Id.* at Art. 25.

¹¹ *Id.* at Art. 29. See also Art. 7, para. 2, U.N. Charter (“Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.”).

Charter,¹² though neither authentically (in the sense of coming only from the parties to the Charter themselves) nor authoritatively (in the sense of flowing from delegated powers).¹³

Under Article 103 of the U.N. Charter, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the ... Charter and their obligations under any other international agreement, their obligations under the ... Charter shall prevail.”¹⁴ At least according to certain commentators, “it is commonly accepted that obligations under secondary norms derived from the Charter, in particular binding decisions of the [Security Council], are covered by Art. 103.”¹⁵ According to those same authors, “[o]nly in the case of a clear contradiction that

¹² See Anne Peters, *Article 24*, in I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 850 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus eds., 3d ed., 2012) (internal citation omitted); see also *The United Nations and International Law*, in I OPPENHEIM’S INTERNATIONAL LAW: UNITED NATIONS 419 (Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, and James Sloan eds., 2017) (“The Security Council has the more specific mandate of maintaining peace and security, but it has engaged in influential interpretation of the Charter. It has interpreted and modified Charter provisions on membership and voting. A ‘threat to the peace’ under Article 39 has evolved to include humanitarian crises, and ‘armed attack’ in Article 51 has been applied to terrorism. Military measures that have been taken under Chapter VII differ from what was originally conceived of in Articles 42, 43, and 47 of the UN Charter. It has established criminal tribunals and compensation commissions, and become engaged in territorial administration.”) (internal citations omitted).

¹³ See Stefan Kadelbach, *Interpretation of the Charter*, in I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 89 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus eds., 3d ed., 2012). The International Court of Justice (ICJ), in the *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter) advisory opinion, formulated the following position:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute ‘expenses of the Organization’.

Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of July 20, 1962, 1962 I.C.J. Reports, 151, 168 (July 20). At least in line with that reasoning, the results of a U.N. organ’s interpretation are not formally binding on the other organs. Kadelbach, above this note, at 89 (citations omitted). It has been argued that “the Security Council is authorized neither to undertake an authentic interpretation nor to amend the Charter. These powers are incumbent on the members as ‘masters of the treaty.’” Peters, Article 24, above note 12, at 835.

¹⁴ Art. 103, U.N. Charter.

¹⁵ Johann Ruben Leiã and Andreas Paulus, *Article 103*, in II THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 2124 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus eds., 3rd ed., 2012) (internal citations omitted). In the two Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie cases, the ICJ considered that prima facie — at the stage of proceedings on provisional measures — the obligation entailed in Article 25 of the Charter extended to the decision contained in Security Council Resolution 748 (1992) and that, “in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement” Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libya v. U.K.*), Provisional Measures, Order of April 14, 1992, 1992 I.C.J. Reports, 3, 15 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at

cannot be solved by interpretation shall Art. 103 apply,”¹⁶ and “any abrogation of existing treaty law by the [Security Council] must be expressed explicitly or implicitly, in particular with regard to treaties codifying community interests [that is, the interests of the international community as a whole].”¹⁷

In seeking to discharge its primary responsibility for the maintenance of international peace and security, the Security Council has made numerous decisions across a variety of geographic and thematic areas. Especially since the late 1990s, a growing array of those decisions has focused on countering terrorism.¹⁸ Following the September 11, 2001 attacks, the Security Council approached terrorism as a “threat to international peace and security” and has required States to take particular actions to respond to that threat, including by adopting certain counterterrorism measures within their domestic legal systems.¹⁹

To help monitor and assist in the implementation of those counterterrorism decisions, the Security Council has established various entities.²⁰ In Resolution 1373 (2001), the Security Council established what became known as the CTC to monitor implementation of that resolution and called upon all States to report to the CTC on the steps that they have taken to implement it.²¹ In 2004, the Security Council established CTED to enhance the CTC’s ability

Lockerbie (Libya v. U.S.A.), Provisional Measures, Order of April 14, 1992, 1992 I.C.J. Reports, 114, 126 (Apr. 14).

¹⁶ Leïa and Paulus, above note 15, at 2123.

¹⁷ Id. at 2120.

¹⁸ See, e.g., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/72/495, Sept. 27, 2017, paras. 19–22; Nigel D. White, *The United Nations and Counter-Terrorism*, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 68–73 (Ana María Salinas de Frías, Katja Samuel, and Nigel D. White eds., 2012).

¹⁹ See, e.g., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/37/52, March 1, 2018, paras. 63–66.

²⁰ See Stephanie David and Bailey Theado, *The United Nations Counter-Terrorism Complex: Bureaucracy, Political Influence and Civil Liberties*, International Federation for Human Rights (FIDH), Sept. 2017, https://www.fidh.org/IMG/pdf/9.25_fidh_final_compressed-2.pdf, permalink: <https://perma.cc/J4K6-JU3K>.

²¹ U.N. Security Council Resolution 1373 (2001), para. 6. See also, *inter alia*, Annex of U.N. Security Council Resolution 1456 (2003), para. 4 (“The Security Council therefore calls for the following steps to be taken: ... The Counter-Terrorism Committee must intensify its efforts to promote the implementation by Member States of all aspects of resolution 1373 (2001), in particular through reviewing States’ reports and facilitating international assistance and cooperation, and through continuing to operate in a transparent and effective manner, and in that regard the Council; [sic] (i) stresses the obligation on States to report to the CTC, according to the timetable set by the CTC, calls on the 13 States who have not yet submitted a first report and on the 56 States who are late in submitting further reports to do so by 31 March, and requests the CTC to report regularly on progress; (ii) calls on States to respond promptly and fully to the CTC’s requests for information, comments and questions in full and on time, and instructs the CTC to inform the Council of progress, including any difficulties it encounters; (iii) requests the CTC in monitoring the implementation of resolution 1373 (2001) to bear in mind all international best practices, codes and standards which are relevant to the implementation of resolution 1373 (2001), and underlines its support for the CTC’s approach in constructing a dialogue with each State on further action required to fully implement resolution 1373 (2001);”); U.N. Security Council Resolution 1624 (2005), para. 6 (“Directs the Counter-Terrorism Committee to: (a) Include in its dialogue with Member States their efforts to implement this resolution; (b) Work with Member States to help build capacity,

to monitor implementation of Resolution 1373 (2001) — as well as, subsequently, additional resolutions — and to augment the CTC’s capacity-building.²² In subsequent counterterrorism

including through spreading best legal practice and promoting exchange of information in this regard; (c) Report back to the Council in twelve months on the implementation of this resolution.”); U.N. Security Council Resolution 2178 (2014), para. 24 (“*Requests* the Counter-Terrorism Committee, within its existing mandate and with the support of CTED, to identify principal gaps in Member States’ capacities to implement Security Council resolutions 1373 (2001) and 1624 (2005) that may hinder States’ abilities to stem the flow of foreign terrorist fighters, as well as to identify good practices to stem the flow of foreign terrorist fighters in the implementation of resolutions 1373 (2001) and 1624 (2005), and to facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipients, especially those in the most affected regions, including through the development, upon their request, of comprehensive counter-terrorism strategies that encompass countering violent radicalization and the flow of foreign terrorist fighters, recalling the roles of other relevant actors, for example the Global Counterterrorism Forum;”); U.N. Security Council Resolution 2220 (2015), para. 31 (“*Encourages* [the CTC and CTED], within their existing mandates and in close cooperation with all relevant United Nations counter-terrorism bodies, to focus on Member States’ capacities and needs to address the threats posed by accessibility of weapons used by terrorists as well as to counter the supply and trafficking of weapons to terrorists ... ”); U.N. Security Council Resolution 2242 (2015), para. 11 (“... *requests* [the CTC and CTED] to integrate gender as a cross-cutting issue throughout the activities within their respective mandates, including within country-specific assessments and reports, recommendations made to Member States, facilitating technical assistance to Member States, and briefings to the Council, *encourages* the CTC and CTED to hold further consultations with women and women’s organizations to help inform their work, ... ”); U.N. Security Council Resolution 2309 (2016), para. 11 (“*Requests* the [CTC] to hold a Special Meeting within 12 months, in cooperation with [the International Civil Aviation Organization], on the issue of terrorist threats to civil aviation, and invites the Secretary-General of ICAO and the Chair of the CTC to brief the Council on the outcomes of this meeting in 12 months [sic] time;”); U.N. Security Council Resolution 2341 (2017), para. 10 (“*Directs* the CTC, with the support of [CTED] to continue as appropriate, within their respective mandates, to examine Member States efforts to protect critical infrastructure from terrorist attacks as relevant to the implementation of resolution 1373 (2001) with the aim of identifying good practices, gaps and vulnerabilities in this field;”); U.N. Security Council Resolution 2354 (2017), para. 3 (“*Directs* the [CTC], with the support of the [CTED], and in consultation with the Counter-Terrorism Implementation Task Force (CTITF) and other key actors, to facilitate international cooperation to implement the Comprehensive International Framework [to Counter Terrorist Narratives number S/2017/375];”) and para. 4(b) (“*Requests* the [CTC], in this regard, to: ... (b) Continue to review legal measures taken by States to enhance implementation of Security Council resolutions 1373 (2001), 1624 (2005) and 2178 (2014), and propose ways to strengthen international cooperation;”); U.N. Security Council Resolution 2370 (2017), para. 16 (“*Directs* the Counter Terrorism Committee (CTC), with the support of the [CTED] to continue as appropriate, within their respective mandates, to examine Member States efforts to eliminate the supply of weapons to terrorists, as relevant to the implementation of resolution 1373 (2001) with the aim of identifying good practices, gaps and vulnerabilities in this field;”); U.N. Security Council Resolution 2396 (2017), para. 44 (“*Requests* the [CTC], within its existing mandate and with the support of [CTED], to review the 2015 Madrid Guiding Principles in light of the evolving threat of foreign terrorist fighters, particularly returnees, relocators and their families, and other principle gaps that may hinder States’ abilities to appropriately detect, interdict, and where possible, prosecute, rehabilitate and reintegrate foreign terrorist fighter returnees and relocators and their families, as well as to continue to identify new good practices and to facilitate technical assistance, upon their request, specifically by promoting engagement between providers of capacity-building assistance and recipients, especially those in the most affected regions, including through the development of comprehensive counter-terrorism strategies that encompass countering radicalization to violence and the return and relocation of foreign terrorist fighters and their families, recalling the roles of other relevant actors, for example the Global Counterterrorism Forum”).

²² See U.N. Security Council Resolution 1535 (2004), para. 2 (“*Decides* that the revitalized [CTC] will consist of the Plenary — composed of the Security Council member States — and the Bureau, the latter composed of the Chair and the Vice-Chairs, assisted by [CTED] to be established as a special political mission, under the policy guidance of the Plenary, ... , so as to

resolutions, the Security Council expanded the responsibilities of both the CTC and CTED to include the evaluation of States' counterterrorism efforts and the provision of enhanced technical advice for States on their compliance with relevant Security Council resolutions.²³

To understand the powers and responsibilities of the CTC and of CTED as elaborated by the Security Council, it is useful to identify their respective legal statuses. In Resolution 1373 (2001), the Security Council established the CTC — as a committee “consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise...”²⁴ — apparently as a subsidiary organ.²⁵ It seems that the powers of subsidiary organs — and their level of autonomy from the principal organ under whose auspices they have been created — depend at least in part on the intention of the principal organ in establishing them and on the nature of the functions conferred upon them.²⁶ Regarding attribution, it has been said that “[w]hen a subsidiary organ is created, it becomes a subsidiary organ of the U.N. as a whole and not just of the creating organ. As part of the U.N., the conduct of subsidiary organs may be attributable to it.”²⁷ With respect to the limitation of powers of subsidiary organs, it has been said that “[a] subsidiary organ must not violate the delimitation of the U.N. Charter powers between principal organs, nor exceed the powers of the principal organ establishing it. A subsidiary organ is bound by U.N. Charter provisions that regulate or limit the conduct of the principal organ establishing it.”²⁸ Among the powers that have been recognized to be held by (at least certain) subsidiary organs is the power to interpret its competence.²⁹ It nonetheless bears emphasis that in general the establishment of a subsidiary organ by one principal organ (here, in the case of the CTC, by the Security Council) does not infringe on the (potentially overlapping) powers and responsibilities of another principal organ, the General Assembly, which itself has also been active in the area of countering terrorism.³⁰

enhance the Committee's ability to monitor the implementation of resolution 1373 (2001) and effectively continue the capacity-building work in which it is engaged”) and para. 3 (“*Decides* further that the CTED, headed by an Executive Director, will be responsible for the tasks stated in the report of the Committee (S/2004/124)”). See also U.N. doc. S/2004/124.

²³ See, e.g., U.N. Security Council Resolution 1624 (2005), para. 6; U.N. Security Council Resolution 2178 (2014), paras. 24 and 25; U.N. Security Council Resolution 2354 (2017), paras. 3–7.

²⁴ U.N. Security Council Resolution 1373 (2001), para. 6.

²⁵ See, e.g., the “Subsidiary Organs Branch” of the website of the U.N. Security Council, which includes the CTC in its list of subsidiary organs. Subsidiary Organs Branch, U.N. Security Council website, <https://www.un.org/securitycouncil/content/subsidiary-organs-branch>, permalink: <https://perma.cc/6S2M-EH9R>.

²⁶ See I OPPENHEIM'S INTERNATIONAL LAW: UNITED NATIONS, above note 12, at 162 (internal citation omitted).

²⁷ *Id.* (internal citations omitted).

²⁸ *Id.* at 165 (internal citations omitted).

²⁹ See *id.* at 163 (citing to Sir Percy Spender's Separate Opinion in *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the U.N. Charter), I.C.J. Rep 1962, p. 195, where he refers to the fact that any organ of the United Nations, including subsidiary organs, “has in practice to interpret its authority in order that it may effectively function”).

³⁰ But see Art. 12, para. 1, U.N. Charter (laying down that, “[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation

In the terminology of the Security Council, CTED is a “special political mission” operating under the policy guidance of the Plenary of the CTC.³¹ So far as we are aware, from a legal perspective a “special political mission” is not necessarily synonymous with a subsidiary organ, and CTED has not been expressly recognized — at least by the Security Council — as a subsidiary organ. If those contentions are accurate, perhaps it may make more sense to say that CTED’s legal status is in some sense derived from and linked to the status of the CTC. Under that view, CTED’s status as a “special political mission” might be more akin to an adjuvant (of sorts) to the CTC rather than as a (separate) subsidiary organ. In other words, under this interpretation CTED might be seen as having been established primarily to enhance the efficacy of the entity (the CTC) from which it receives policy guidance, but subsidiary-organ status is reserved to the CTC and is not extended to CTED.

3.2. CTED’s Scope of Activities

CTED uses the findings from its visits to Member States as its primary mechanism to monitor the implementation of relevant Security Council counterterrorism resolutions. Each year, the CTC determines a list of Member States that it should “request consent to visit for the purpose of conducting assessments,” while “taking a risk-based approach that acknowledges existing gaps, emerging issues, trends, events, and analysis, while also taking into account prior requests by Member States and consent previously expressed, as well as the fact that a number of Member States have never been visited.”³² According to CTED’s *General Guidelines for Conducting CTC Visits to Member States*, “[a]ll U.N. Member States without any discrimination may be subject to CTC visits[, and] all such visits are to be made with the consent of the State concerned unless the Security Council decides otherwise.”³³

In a resolution adopted in December of 2017, the Security Council underscored both that the “core function” of CTED is its “*neutral, expert assessment* of the implementation of resolutions 1373 (2001), 1624 (2005), 2178 (2014), and other relevant resolutions” and “that the analysis and recommendations from these assessments are an *invaluable aid* to Member States in identifying

with regard to that dispute or situation unless the Security Council so requests.”).

³¹ U.N. Security Council Resolution 2395 (2017), para. 2.

³² U.N. Security Council Resolution 2396 (2017), para. 7. The necessity of State consent is reiterated in CTED guidance, as well as Resolution 2129 (2013): adopted in part with the intent “to ensure that all issues relevant to the implementation of resolutions 1373 (2001) and 1624 (2005) are addressed consistently and even-handedly, including, as appropriate, on country visits that are organized with the consent of the visited Member State and in the delivery of technical assistance.”

³³ *General Guidelines for Conducting CTC Visits to Member States*, <https://www.un.org/sc/ctc/wp-content/uploads/2016/09/general-guidelines-for-ctc-visit.pdf>, permalink: <https://perma.cc/7SS8-L3TE>. The *Guidelines* also state that, “[i]n arranging and conducting visits, the CTC, when appropriate, may invite relevant international, regional, and sub-regional organizations, as well as other United Nations bodies, including [the U.N. Office on Drugs and Crime], and welcomes their contributions to the effective fulfillment of the mission.”

and addressing gaps in implementation and capacity....”³⁴ At that time, the Security Council also called on the newly established U.N. Office of Counter-Terrorism (OCT), all other relevant U.N. funds and programs, Member States, donors, and certain others to use CTED’s expert assessments to “design technical assistance and capacity building efforts,” including in furthering the “balanced implementation” of the U.N. Global Counter-Terrorism Strategy.³⁵ It is of note that disputes have arisen as to whether CTED’s assessments are legally binding as well as with respect to what the relationship is between CTED’s assessments and (at times possibly countervailing) obligations incumbent on States as derived from, for example, applicable treaties and customary international law in the human-rights sphere.³⁶ The Security Council has highlighted what it views as the “*essential role* of CTED within the United Nations to identify and assess issues, trends, and developments relating to the implementation of resolutions 1373 (2001), 1624 (2005), and 2178 (2014), and other relevant resolutions, ... and also to advise the CTC on practical ways for Member States to implement these resolutions....”³⁷

CTED’s remit has grown since its establishment in 2004. In the meantime, certain developments — including the establishment, in 2017, of the OCT and of an Under-Secretary-General for Counter-Terrorism to head that office³⁸ — might be seen as attempts to seek in part to counterbalance the expansion of CTED’s remit.

The report by CTED to the Security Council laying out its program of work for 2019 enumerates six sets of “priority objectives”:

- Monitoring, promoting and facilitating the implementation of Security Council Resolutions 1373 (2001), 1624 (2005) and 2178 (2014) and the tasks conferred in Resolutions 1963 (2010), 2129 (2013), 2133 (2014), 2185 (2014), 2195 (2014), 2220 (2015), 2242 (2015), 2253 (2015), 2309 (2016), 2322 (2016), 2331 (2016), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2388 (2017), 2395 (2017), and 2396 (2017);³⁹
- Facilitating the delivery of technical assistance to States;⁴⁰

³⁴ U.N. Security Council Resolution 2395 (2017), para. 4 (emphasis added).

³⁵ *Id.*

³⁶ See generally the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/37/52, March 1, 2018.

³⁷ U.N. Security Council Resolution 2395 (2017), para. 14 (emphasis added).

³⁸ See U.N. General Assembly Resolution 71/291, Strengthening the capability of the United Nations system to assist Member States in implementing the United Nations Global Counter-Terrorism Strategy, A/RES/71/291, June 19, 2017.

³⁹ See Work programme of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism for 2019 annexed to the Letter dated 28 February 2019 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2019/192, Mar. 6, 2019, pp. 2–5.

⁴⁰ See *id.* at pp. 5–6.

- Identification and assessment of emerging terrorism issues, trends, and developments, and engagement with international and regional partners;⁴¹
- Coordination and cooperation between the CTC, CTED, and the Office of Counter-Terrorism;⁴²
- Maintaining dialogue with States on the implementation of Resolution 1624 (2005);⁴³
- Implementing the U.N. Global Counter-Terrorism Strategy;⁴⁴ and
- Promoting respect for human rights in the context of counterterrorism.⁴⁵

In a resolution adopted in December of 2017, the Security Council decided “that CTED will continue to operate as a special political mission under the policy guidance of the CTC for the period ending 31 December 2021” and that an interim review of CTED will take place by December 31, 2019.⁴⁶

Among CTED’s expanding set of tasks, country-assessment visits — which CTED undertakes with the approval of the CTC and with the consent of the State concerned — reportedly play a particularly significant role. According to a 2015 CTED report, country visits are “an integral part of the direct dialogue and engagement among the [CTC], [CTED] and Member States. They also serve as effective vehicles for the diagnosis of the progress, strengths and good practices of Member States, as well as their weaknesses and capacity needs.”⁴⁷ A “Frequently Asked Questions (FAQs)” document on the CTC website states that “CTED conducts country visits on the Committee’s behalf to assess Member States’ counterterrorism efforts, strengths, weaknesses and technical assistance needs and to identify good practices employed in the implementation of resolutions 1373 (2001), 1624 (2005), 2242 (2015) and 2178 (2014), as well as terrorism-related trends and challenges.”⁴⁸ As noted above, one of CTED’s “priority objectives” is to promote respect for human rights in the context of counterterrorism. Yet it is not clear from a review of publicly available documents whether, in conducting these visits and making these assessments, CTED considers itself bound to include in its analysis, among other

⁴¹ See *id.* at pp. 6–7.

⁴² See *id.* at pp. 7–8.

⁴³ See *id.* at p. 8.

⁴⁴ See *id.* at pp. 8–9.

⁴⁵ See *id.* at p. 9.

⁴⁶ U.N. Security Council Resolution 2395 (2017), para. 2. Such a review is not (yet) available, at least publicly.

⁴⁷ Report of the Counter-Terrorism Committee Executive Directorate on its activities and achievements during the period from 2014 to 2015 annexed to the Letter dated 15 December 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2015/984, Dec. 18, 2015, para. 13.

⁴⁸ Counter-Terrorism Committee, “Frequently Asked Questions (FAQs),” undated, <https://www.un.org/sc/ctc/about-us/frequently-asked-questions-faqs/>, permalink: <https://perma.cc/R74C-Z4J9> (hereafter, CTC FAQs).

things, assessments and recommendations from the Universal Periodic Review or from treaty-monitoring bodies or related entities as well as binding decisions of regional courts.

Led by CTED, the visiting teams may also reportedly “include experts from relevant international, regional and subregional organizations, including the African Union, the European Union, the Financial Action Task Force (FATF), the International Criminal Police Organization (INTERPOL), the International Organization for Migration (IOM), the United Nations Office on Drugs and Crime (UNODC), the World Customs Organization (WCO), and other specialized bodies and institutions with expertise in specific aspects of counterterrorism.”⁴⁹ CTED’s online FAQ further states that these country visits are guided by four main documents:

- “The Framework Document for CTC visits to states in order to enhance the monitoring of the implementation of resolution 1373 (2001)” (2005);⁵⁰
- The “General Guidelines for conducting CTC visits to Member States (2005);”⁵¹
- The “Procedures for CTC visits to Member States” (2005);⁵² and
- The “Guidelines of the Counter-Terrorism Committee for post-visit follow-up, 2012.”⁵³

According to the CTC’s website, CTED currently “uses two main tools in its dialogue with States: the Detailed Implementation Survey (DIS) and country visits conducted with the approval of the host Government. The DIS helps the Committee and CTED to understand and define the counterterrorism situation in each State. Shared only with the State concerned, the DIS is prepared on the basis of information provided by the State concerned, international organizations, and other public sources.”⁵⁴ The CTC’s online FAQ states that “analysis of the information gathered by the [CTC] and CTED during their interaction with Member States is shared with the general public through the global implementation surveys (GIS) of Member States’ implementation” of relevant resolutions, while also incorporating data gathered by CTED in its “ongoing dialogue” with States outside of the context of its country visits, and information

⁴⁹ Id.

⁵⁰ See Framework Document for CTC Visits to States in order to Enhance the Monitoring of the Implementation of Resolution 1373 (2001), Mar. 9, 2005, https://www.un.org/sc/ctc/wp-content/uploads/2016/09/framework_for_statevisits.pdf, permalink: <https://perma.cc/76P7-ERJ5>.

⁵¹ See General Guidelines for Conducting CTC Visits to Member States, undated, <https://www.un.org/sc/ctc/wp-content/uploads/2016/09/general-guidelines-for-ctc-visit.pdf>, permalink: <https://perma.cc/K77J-4VS5>.

⁵² See Procedures for CTC Visits to Member States, undated, <https://www.un.org/sc/ctc/wp-content/uploads/2016/09/procedures-for-visit.pdf>, permalink: <https://perma.cc/Y2RE-VFR6>.

⁵³ See Counter-Terrorism Committee Executive Directorate (CTED), Guidelines of the Counter-Terrorism Committee for post-visit follow-up, adopted Dec. 11, 2012, https://www.un.org/sc/ctc/wp-content/uploads/2016/09/2012-12-11_CTC_guidelines_post-visit.pdf, permalink: <https://perma.cc/UBA7-U5AH>.

⁵⁴ See Counter-Terrorism Committee, Assessments, undated, <https://www.un.org/sc/ctc/resources/assessments/>, permalink: <https://perma.cc/3SK3-MDVA> (hereafter, Assessments).

provided by international, regional, and subregional organizations.⁵⁵ In the GIS, CTED consolidates what it considers to be the most relevant aspects of such implementation efforts related to Resolution 1373 (2001) and Resolution 1624 (2005). (The most recent version of the GIS available on the CTED website was compiled in 2016 and relates to the implementation of Resolution 1624.⁵⁶) In the years immediately after the adoption of Resolution 1373, documents submitted by Member States reporting measures undertaken in the implementation of that resolution were made publicly available on the CTC's website; however, the most recent such report on that website dates from 2006.⁵⁷ The CTC's FAQ states that, "by agreement with the State concerned," CTED "make[s] available information" contained in its assessments to "technical assistance providers and implementing agencies."⁵⁸ CTED's report following a country visit, however, remains confidential "unless that State decides otherwise."⁵⁹ In all, according to a 2018 CTED "Fact Sheet," "[b]y June 2018, more than 140 visits to some 100 UN Member States have been conducted since CTED was declared operational in December 2005."⁶⁰ So far as we are aware, none of these country-visit assessments has been made publicly available nor, more narrowly, has any of those assessments been made available, even in part, to other possibly relevant U.N. system actors (such as the U.N. Office of Counter-Terrorism or pertinent U.N. mandate holders, for example the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism).

In preparing for country visits, over the course of the year CTED develops proposals identifying the Member States that it plans to visit that also "contain preliminary assessments

⁵⁵ CTC FAQs, above note 48. See also Counter-Terrorism Committee Executive Directorate, *Global Survey of the Implementation of Security Council Resolution 1624 (2005) by Member States*, https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Global-Implementation-Survey-1624_EN.pdf, permalink: <https://perma.cc/D83Q-Z9KQ> (hereafter, CTED's Global Survey).

⁵⁶ See CTED's Global Survey, above note 55. See also U.N. Security Council Resolution 2395 (2017), para. 17 ("Recalls that CTED provided to the CTC, in accordance with resolution 2129 (2013), Global Implementation Surveys (GIS) of resolutions 1373 (2001) and 1624 (2005), takes note of the identified shortfalls with regard to the implementation of the aforementioned resolutions, directs CTED to produce updated versions of these GIS, and further directs CTED to provide to the CTC prior to 30 June 2018 a report with recommendations on its survey tools, including the GIS, Detailed Implementation Survey, and Overview of Implementation Assessment, to improve their utility to Member States, donors, recipients, [the U.N. Office of Counter-Terrorism], other United Nations agencies for the purpose of designing technical assistance and capacity-building support, and requests this report consider new mandates given to CTED by relevant resolutions, streamline the number of questions, and consider the most effective use of qualitative and quantitative data").

⁵⁷ See Assessments, above note 54.

⁵⁸ See CTC FAQs, above note 48.

⁵⁹ See *Framework Document for CTC Visits to States In Order To Enhance the Monitoring of the Implementation of Resolution 1373 (2001)*, March 9, 2005, https://www.un.org/sc/ctc/wp-content/uploads/2016/09/framework_for_statevisits.pdf, permalink: <https://perma.cc/A9QT-7KTS>.

⁶⁰ See Counter-Terrorism Executive Directorate, "CTED Fact Sheet 2018," available at https://www.un.org/sc/ctc/wp-content/uploads/2018/07/ctc_cted_fact_sheet_25_june_2018_designed.pdf, permalink: <https://perma.cc/BR35-T9WT>.

outlining the rationale for the visit” and the other entities that CTED proposes accompany it on the visit. The CTC Plenary “make[s] its decision on visits based on the proposals submitted by the CTED,” after which CTED may proceed with “secur[ing] the consent of that State for the visit to take place.”⁶¹

Thus, CTED has become, in a relatively short period, a fundamental component of the Security Council’s counterterrorism apparatus, although one whose key activities, including assessments, appear to have become less — perhaps vanishingly so — susceptible to public scrutiny over time.

3.3. CTED in relation to IHL

IHL is a body of international law — including as derived from treaty law, customary law, and general principles — crafted to provide the primary legal framework regulating conduct in situations of armed conflict. Among the things that it regulates include the means and methods of warfare, protections for persons *hors de combat*, and the provision of humanitarian services. The roots of contemporary IHL are generally recognized as extending at least to the mid-nineteenth century. Today, the framework encompasses thousands of treaty provisions and numerous customary rules as well as an array of general principles.

IHL and Security Council practices intersect in various respects. Consider a few examples. The Security Council established two international criminal tribunals whose jurisdiction included adjudication of certain violations of IHL.⁶² The Security Council has formed and expressed its views on such matters as the existence of an armed conflict to which IHL is applicable; on violations of IHL by one or more parties to an armed conflict; and on particular thematic areas of IHL, including protection of civilians,⁶³ humanitarian personnel,⁶⁴ the medical mission,⁶⁵ and persons with disabilities.⁶⁶ One commentator has described the practice of the Security Council

⁶¹ *Procedures for CTC Visits to Member States*, <https://www.un.org/sc/ctc/wp-content/uploads/2016/09/procedures-for-visit.pdf>, permalink: <https://perma.cc/BQ9V-KA43>.

⁶² U.N. Security Council Resolution 827 (1993), para. 2 (deciding to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between January 1, 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal); U.N. Security Council Resolution 955 (1994), para. 1 (deciding to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between January 1, 1994 and December 31, 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda).

⁶³ See U.N. Security Council Resolutions 1265 (1999), 1296 (2000), 1674 (2006), 1738 (2006), 1894 (2009), 2222 (2015), and 2286 (2016).

⁶⁴ See U.N. Security Council Resolutions 1502 (2003), 2175 (2014), and 2417 (2018).

⁶⁵ See U.N. Security Council Resolution 2286 (2016).

⁶⁶ See U.N. Security Council Resolution 2474 (2019).

(for the period from January 1993 to April 2006) with respect to IHL as falling into two primary sets of functions: first, execution (or implementation) of IHL, and, second, adjudication (or clarification) of IHL.⁶⁷ At least in the view of that commentator, the movement towards more explicit legislative Security Council resolutions that can be observed in certain areas, including counterterrorism matters, does not yet seem to play a role in the context of IHL.⁶⁸

In certain respects, IHL has been considered — at least in the practice of the CTC and CTED — to be of concern in relation to CTED’s mandate. In 2005, the CTC reiterated that “States must ensure that any measures taken to combat terrorism should comply with all their obligations under international law and that they should adopt such measures in accordance with international law, in particular human rights law, refugee law and humanitarian law” and that CTED “should take this into account in the course of its activities.”⁶⁹ It is not necessarily clear whether those statements are meant to reflect (merely) the position that CTED ought to avoid a conflict of laws or (more robustly) that CTED’s mandate might necessarily entail an IHL-relevant component in respect of counterterrorism contexts in which IHL is (also) applicable. In May of 2006, the CTC agreed on the following policy guidance concerning CTED:

When analysing States’ implementation of resolution 1373, preparing draft letters to States, and organising visits, the CTED should, *as appropriate*:

- a. provide advice to the CTC, including for its ongoing dialogue with States on their implementation on resolution 1373 (2001), on international human rights, refugee and humanitarian law, in connection with identification and implementation of effective measures to implement resolution 1373 (2001).
- b. advise the CTC on how to ensure that any measures States take to implement the provisions of resolution 1624 (2005) comply with their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.
- c. liaise with the Office of the High Commissioner for Human Rights and, as appropriate, with other human rights organizations in matters related to counter-terrorism.⁷⁰

So far as we are aware, despite paragraph a. above, CTED has not engaged, at least publicly, in interpretations pertaining to the implementation of international human rights law, international refugee law, and IHL in connection with the identification and implementation of effective

⁶⁷ Georg Nolte, *The Different Functions of the Security Council with Respect to Humanitarian Law*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR 519–534* (Vaughan Lowe ed., 2008).

⁶⁸ *Id.*

⁶⁹ Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate annexed to Letter dated 15 December 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, Dec. 16, 2005, S/2005/800, para. 13.

⁷⁰ Counter-Terrorism Committee, Conclusions for policy guidance regarding human rights and the CTC (adopted under silence procedure on May 25, 2006), S/AC.40/2006/PG.2 (emphasis added).

measures to implement relevant resolutions. If that is accurate, perhaps it is because CTED has deemed that doing so would not be “appropriate” (in the sense of the chapeau of paragraph a.).

A report covering CTED’s activities from 2014 to 2015 indicates that CTED “will continue to take into account the related requirements of the Security Council and encourage[] Member States to continue to work with the United Nations human rights mechanisms to ensure that their counterterrorism measures comply with all their obligations under international law, in particular international human rights, refugee and international humanitarian law.”⁷¹ A search of publicly available documents, however, did not uncover evidence either in support of or contrary to this statement. That 2014–2015 activities report further states that CTED “will also continue to propose related recommendations for technical assistance to Member States.”⁷² A report covering CTED’s activities from 2014 to 2017 indicates that, at least according to CTED, “Member States have made considerable progress in their efforts to review, amend and update their national legislation so as to strengthen their capacities to bring terrorists to justice while protecting and promoting international law, in particular international human rights and humanitarian law.”⁷³ Certain other U.N. system actors, including the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, have elaborated countervailing views on this matter, finding — contrary to CTED — that there has been relatively little to no such “progress.”⁷⁴ It is not clear whether CTED has considered those countervailing positions in making its assessments.

In sum, the precise contours of CTED’s activities and organizational positioning in practice in relation to IHL are unclear. The lack of publicly available reports pertaining both to CTED’s country visits and the technical assistance provided to Member States on these

⁷¹ Report of the Counter-Terrorism Committee Executive Directorate on its activities and achievements during the period from 2014 to 2015 annexed to Letter dated 15 December 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2015/984, Dec. 18, 2015, para. 29.

⁷² *Id.*

⁷³ Report of the Counter-Terrorism Committee Executive Directorate on the activities and achievements of the Counter-Terrorism Committee and the Executive Directorate during the period 2014–2017 annexed to Letter dated 22 December 2017 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2017/1101, Dec. 26, 2017, para. 9. The remainder of this paragraph does not detail how, precisely, Member States have made progress in their efforts to comply with U.N. counterterrorism measures while also complying with international law, including IHL. For instance, the report notes that “United Nations offices have provided States identified by the Executive Directorate as requiring technical assistance in [bringing terrorists to justice while protecting and promoting international law] with the training and resources required to ensure that their criminal justice systems are capable of handling complex cases relating to terrorism and foreign terrorist fighters,” but it does not further elaborate how such changes have been made in accordance with IHL.

⁷⁴ See, e.g., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/37/52, March 1, 2018.

issues contributes to opacity regarding CTED’s possible activities in this area. We have not identified a document or statement indicating what, if any, metrics, analytical tools, or other measures CTED has used, or will use, to evaluate States’ compliance with relevant areas of IHL in this context. So far as we are aware, CTED has never had an IHL expert on staff, at least to date. What it might and should mean, substantively and procedurally, for CTED to provide both a “neutral” and “expert” assessment of the implementation of (sometimes-highly complex and even in certain respects contested) counterterrorism mandates in light of applicable IHL remains unclear in several significant respects, as we sketch below (see section 4).

3.4. CTED’s 2017 Guide

In 2017, CTED published a document titled “Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions” (hereafter, the *Guide*).⁷⁵ So far as we are aware, in creating the *Guide* CTED did not liaise extensively with human-rights bodies or mandate holders. The 2017 version was an update to reflect new requirements that had emerged since the most recent previous version of the *Guide*, which was published in 2009.⁷⁶ In the resolutions considered relevant by CTED in respect of the 2017 *Guide*,⁷⁷ the Security Council makes several decisions laying down a diverse set of obligations⁷⁸ on Member States regarding,

⁷⁵ See United Nations Security Council Counter-Terrorism Committee Executive Directorate, *Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions*, 2017, <https://www.un.org/sc/ctc/wp-content/uploads/2017/08/CTED-Technical-Guide-2017.pdf>, permalink: <https://perma.cc/8F9E-2HSB> (hereafter, the *Guide*).

⁷⁶ See the *Guide*, above note 75, p. 4, para. 1.

⁷⁷ The *Guide* purports to address each relevant paragraph of U.N. Security Council Resolutions 1373 (2001) and 1624 (2005) and to identify relevant provisions of Resolution 2178 (2014), while also taking into account the requirements set forth in Resolutions 2129 (2013), 2133 (2014), 2178 (2014), 2195 (2014), 2220 (2015), 2242 (2015), 2253 (2015), 2309 (2016), 2322 (2016), 2331 (2016), 2341 (2017), and 2354 (2017). See *id.* at p. 4, para. 2.

⁷⁸ Regarding the authority of the U.N. Security Council to impose obligations on U.N. Member States, see, among others, Articles 24(1), 25, 39, 41–43, U.N. Charter. In addition to laying down obligations — in, for instance, paragraphs 2 and 3 of Resolution 1373 (2001) and paragraphs 5 and 6 of Resolution 2178 (2014) — through relatively clear decisions of the U.N. Security Council acting pursuant to authority vested in it via Chapter VII of the U.N. Charter, the U.N. Security Council has also adopted provisions in certain counterterrorism resolutions for which there is some ambiguity as to whether those provisions impose obligations as such on U.N. Member States in part because the language employed by the Security Council is “calls upon” rather than “decides.” See generally, for instance, the analysis in section 4 (“What makes a Council decision binding?”) of Security Council Report, “Security Council Action Under Chapter VII: Myths and Realities,” Special Research Report No. 1, June 23, 2008, <https://www.securitycouncilreport.org/research-reports/lookup-c-gIKWLeMTIsG-b-4202671.php#Whatmakesacouncildecision>, permalink: <https://perma.cc/E559-P2ML> (arguing that “... it should be noted that, in most cases, the Council does use relatively clear language in its operative paragraphs. For example, it can be clearly established that by using ‘urges’ and ‘invites,’ as opposed to ‘decides,’ the paragraph is intended to be exhortatory and not binding. [¶] But some cases are unclear. This is particularly true when the Council adopts paragraphs beginning with words such as ‘calls upon’ and ‘endorses.’”). The *Guide* provides analysis in relation to two counterterrorism related sets of provisions that give rise to some ambiguity as to whether they are obligatory or not — namely, the provisions elaborated in paragraph 3

among other issues:

- Taking steps to prevent and criminalize the financing of terrorism;⁷⁹
- Refraining from supporting entities or persons involved in terrorist acts;⁸⁰
- Taking steps necessary to prevent terrorist acts;⁸¹
- Denying safe haven to terrorists and their supporters;⁸²
- Preventing their territories from being used to commit or support terrorist acts;⁸³
- Bringing to justice any person who commits or supports terrorist acts;⁸⁴
- Ensuring that terrorist acts are established as serious domestic criminal offenses and that the punishment duly reflects their seriousness;⁸⁵
- Affording other States assistance in connection with criminal investigations or proceedings relating to financing or support of terrorist acts;⁸⁶

of Resolution 1373 (2001) (in which the Security Council “*Calls upon* all States to” take certain counterterrorism measures) and certain provisions elaborated in resolution 1624 (2005) (same). See the Guide, above note 75, Chapters III and IV, respectively.

⁷⁹ U.N. Security Council Resolution 1373 (2001), para. 1 (“*Decides* that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) 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; (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities; (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons”).

⁸⁰ Id. at para. 2(a) (“*Decides* ... that all States shall: (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;”).

⁸¹ Id. at para. 2(b) (“*Decides* ... that all States shall: ... (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;”).

⁸² Id. at para. 2(c) (“*Decides* ... that all States shall: ... (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;”).

⁸³ Id. at para. 2(d) (“*Decides* ... that all States shall: ... (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;”).

⁸⁴ Id. at para. 2(e) (“*Decides* ... that all States shall: ... (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice ...”).

⁸⁵ Id. at para. 2(e) (“*Decides* ... that all States shall: ... (e) Ensure ... that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;”).

⁸⁶ Id. at para. 2(f) (“*Decides* ... that all States shall: ... (f) Afford one another the greatest measure of assistance in connection

- Preventing the cross-border movement of terrorists;⁸⁷ and
- Preventing and suppressing “foreign terrorist fighters,”⁸⁸ including by establishing certain domestic criminal offenses in relation to them.⁸⁹

Notably, in adopting these resolutions, the Security Council did not define “terrorism,” “terrorists,” or “terrorist acts” (though it did define “foreign terrorist fighter” for certain relevant contexts).⁹⁰ In

with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;”).

⁸⁷ Id. at para. 2(g) (“*Decides* ... that all States shall: ... (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;”).

⁸⁸ U.N. Security Council Resolution 2178, para. 5 (“*Decides* that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of 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, and the financing of their travel and of their activities;”).

⁸⁹ Id. at para. 6 (“... *decides* that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense: (a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories 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; (b) 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 finance the travel of 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; and, (c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of 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;”).

⁹⁰ See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/73/361, Sept. 3, 2018, paras. 17–18 and 23 (“As highlighted herein, Council resolutions such as 2178 (2014), many of whose provisions are overbroad and vague, including terms such as ‘terrorist act’ that are unconnected to any specific definition or description of prohibited conduct, may create broadly defined criminal offences that fail to satisfy the principle of legality.”). Note, however, that in paragraph 3 of Resolution 1566 (2004), the U.N. Security Council “[r]ecalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature....” Some commentators have interpreted this paragraph as the Security Council taking steps to define “terrorism.” See, e.g., Nigel D. White, *The United Nations and Counter-Terrorism*, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 71 (Ana María Salinas de Frías, Katja Samuel, and Nigel D. White eds., 2012). Separately, in respect of negotiations concerning a draft Comprehensive Convention on International Terrorism, there is (also) a lack of agreement on certain key definitional elements. See, e.g., Amrith Rohan Perera, *The draft United Nations Comprehensive Convention on International Terrorism*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND

the absence of definitions provided by the Security Council in respect of these decisions, States have subjected these mandates to widely varying interpretations in their respective domestic legal frameworks, which has in turn given rise to several sets of legal and policy concerns. For example, multiple U.N. system actors have formed the view that the lack of sufficiently precise and context-specific definitions in this area has contributed to (among other things) widespread abuses against civil society in several domestic contexts.⁹¹

Expressly “intended as a reference tool to help ensure consistent analysis of implementation efforts”⁹² by States of the main “legislative”⁹³ Security Council counterterrorism resolutions, the *Guide* purports, among other things, to “address[] those aspects of international law ([including] in particular international ... humanitarian law) that are relevant to the implementation of the relevant ... resolutions.”⁹⁴ The *Guide* also explicitly states that it “does not purport to impose any obligations upon States apart from those that already exist by virtue of the relevant Council resolutions and decisions, international treaties, customary international law, or other voluntarily undertaken obligations.”⁹⁵ In short, the *Guide* dedicates relatively little attention to IHL despite the *Guide*’s stated objectives and despite CTED being mandated by CTC policy guidance to advise on relevant aspects of IHL.

TERRORISM 157–161 (Ben Saul ed., 2014).

⁹¹ See, e.g., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/40/52, March 1, 2019.

⁹² See the *Guide*, above note 75, p. 4, para. 1.

⁹³ See Paul C. Szasz, “The Security Council Starts Legislating,” 96 AM. J. INT’L L. 901 (2002); Nigel D. White, *The United Nations and Counter-Terrorism*, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 69–70 (Ana María Salinas de Frías, Katja Samuel, and Nigel D. White eds., 2012) (stating that “Resolution 1373 has been characterized as legislative by some commentators, and therefore questionable when considering the Council as an executive body. The Resolution was legislative in the sense that it required states to adopt and implement provisions derived from the 1999 Terrorist Financing Convention, thereby circumventing the requirement of consent (the treaty at the time was not even in force). However, by and large, it put the emphasis on states to adopt national legislation which would fulfil the very broad provisions of Resolution 1373. It certainly was not meant to be directly effective supranational legislation, and the evidence is that some states have used its broad terms to justify quite wide ranging internal legislation. Its definition of terrorism in 2004 was too late in some senses to reverse the trend in national legislative provisions and definitions. Between 2001 and 2004 many states put in place new legislation on terrorism based on their own definitions. To ‘legislate’ against terrorism even indirectly as the Council did in Resolution 1373 was very suspect in terms of one of the basic requirements of the rule of law that the behaviour proscribed by the laws be clearly defined. Nevertheless, at the time states did not object, but in the long term the illegitimacy of incoherent anti-terrorist laws will lead to disparities in compliance, with certain states using those laws for draconian repression, while others refuse to comply because such laws fail to match rule of law standards, including human rights obligations.”) (internal citations omitted); Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/73/361, Sept. 3, 2018, paras. 14–15, 25, 33, 50(a), (c)–(e).

⁹⁴ See the *Guide*, above note 75, p. 4, para. 3. On its terms, the *Guide* “does not purport to impose any obligations upon States apart from those that already exist by virtue of the relevant [U.N. Security] Council resolutions and decisions, international treaties, customary international law, or other voluntarily undertaken obligations.” *Id.*

⁹⁵ See *id.* at p. 4, para. 3.

4. Potential Focus by CTED on Certain Aspects of IHL-related Humanitarian Action

4.1. Resolutions 2462 (2019) and 2482 (2019)

On March 29, 2019, the Security Council adopted Resolution 2462 on countering terrorism financing. The resolution is one in a long line of resolutions in this area of concern.⁹⁶ Several sets of provisions of Resolution 2462 merit attention in this context.

While “reaffirming that terrorism constitutes one of the most serious threats to international peace and security,” and expressly invoking the Council’s Chapter VII powers, in the resolution the Council “[d]ecides that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law[,] and international refugee law, establish serious criminal offenses” related to certain aspects of the financing of terrorism.⁹⁷ In particular, pursuant to the resolution, all States shall:

ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense *the wilful provision or collection* of funds, financial assets or economic resources or financial or other related services, directly or indirectly, *with the intention* that the funds should be used, or *in the knowledge* that they are to be used *for the benefit of terrorist organizations or individual terrorists for any purpose*, including but not limited to recruitment, training, or travel, *even in the absence of a link to a specific terrorist act...*⁹⁸

As noted above, the Council also “[d]emands that Member States *ensure that all measures taken to counter terrorism*, including measures taken to counter the financing of terrorism as provided for in this resolution, *comply with their obligations under international law, including international humanitarian law, international human rights law[,] and international refugee law.*”⁹⁹ Further, the Security Council “[u]rges States, when designing and applying *measures to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.*”¹⁰⁰

Also in Resolution 2462 (2019), the Security Council requests that CTED “strengthen its

⁹⁶ U.N. Security Council Resolution 2462 (2019) further builds on earlier counterterrorism and terrorist financing resolutions, including Resolution 1373 (2001) and Resolution 2178 (2014).

⁹⁷ U.N. Security Council Resolution 2462 (2019), para. 5.

⁹⁸ *Id.* (emphasis added).

⁹⁹ *Id.* at para. 6 (emphasis added).

¹⁰⁰ *Id.* at para. 24 (emphasis added).

[that is, CTED's] assessment process relating to countering the financing of terrorism, including through targeted and focused follow-up visits as complements to its comprehensive assessments and to provide, annually ... a thematic summary assessment of gaps identified and areas requiring more action to implement key counterterrorism financing provisions of relevant U.N. Security Council resolutions for the purpose of designing targeted technical assistance and capacity building efforts...."¹⁰¹ The Council further "[r]equests [the CTC] and [CTED] to hold, within 12 months, a joint special meeting on terrorist financing threats and trends as well as on implementation of the provisions of this resolution"¹⁰² and "[r]equests CTED and the Analytical Support and Sanctions Monitoring Team to prepare, ahead of the joint special meeting, a report on actions taken by Member States to disrupt terrorist financing and in this regard, *invites* Member States to submit to them, in writing, by the end of 2019, information on actions taken to disrupt terrorist financing...."¹⁰³

Finally with respect to the provisions of Resolution 2462 (2019), the Security Council also calls upon CTED, along with certain other entities, to "enhance coordination with the aim of delivering integrated technical assistance on counter-terrorist financing measures, including assistance that will improve the capacity of Member States, upon their request, to implement this resolution...."¹⁰⁴

On July 19, 2019, the Security Council adopted Resolution 2482 (2019) on threats to international peace and security caused by international terrorism and organized crime. The resolution was not expressly adopted under Chapter VII of the U.N. Charter. In operational paragraph 16, the Security Council "[u]rges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including international 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".¹⁰⁵

4.2. CTED's Report on its 2018 and 2019 Activities and Observations from CTED's Executive Director

The report on CTED's activities and achievements during the period 2018 to 2019 stated the following under the heading "International Humanitarian Law":

¹⁰¹ Id. at para. 35.

¹⁰² Id. at para. 36.

¹⁰³ Id. at para. 37.

¹⁰⁴ Id. at para. 34.

¹⁰⁵ U.N. Security Council Resolution 2482 (2019), para. 16.

Pursuant to Security Council resolutions, including most recently 2462 (2019) and 2482 (2019), measures to counter-terrorism [sic], including measures to counter the financing of terrorism comply with obligations under international law, including international humanitarian law (IHL) and calling on all stakeholders to engage in efforts to identify solutions in this area, *CTED established an internal working group in October 2018 to address the issues of counter-terrorism measures in relation to IHL*. Since then, CTED has worked closely with organizations with expertise in IHL and humanitarian assistance, including the Office for the Coordination of Humanitarian Affairs (OCHA) and the International Committee of the Red Cross (ICRC). *CTED brought this topic to the attention of the Counter-Terrorism Committee in May 2019 and will report back to the Committee on its progress in 2020*. CTED will continue to liaise with United Nations humanitarian actors and NGOs and hopes to obtain financial support from States for this work. *CTED is also engaged in identifying related good practices and challenges to be brought to the Committee's attention. In the area of identifying the potential impact of terrorist financing sanctions on humanitarian activities, including medical activities, CTED is also collating existing States['] practices on cooperation between government entities, civil society actors and private sector [sic], including financial institutions*.

Security Council resolution 2462 (2019) reiterates the importance of depriving terrorists of access to any funds. Assessing Member States' implementation of the resolution's provisions will continue to be a key priority for CTED. CTED will produce, in consultation with the Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida and the Taliban and associated individuals and entities, an annual thematic summary of gaps in this area in order to assist in the design of tailored capacity-building programming by United Nations entities. CTED will also support the Committee in the organization, within the first quarter of 2020, of a joint special meeting with the 1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee on terrorism financing threats and trends and on the implementation of the resolution's provisions. Prior to the special meeting, CTED will issue a joint report, together with the Analytical Support and Sanctions Monitoring Team, on actions taken by member States to disrupt terrorism financing. *A dedicated questionnaire developed jointly by CTED and the Monitoring Team was disseminated to all Member States in October 2019.*¹⁰⁶

A note from CTED's Executive Director accompanying that report contains observations and recommendations on the way forward for CTED's work. With respect to IHL, that note

¹⁰⁶ Report to the Counter-Terrorism Committee on the activities and achievements of the Counter-Terrorism Committee and its Executive Directorate (CTED) during the period 2018 to 2019 annexed to the Letter dated 5 February 2020 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2020/99, Feb. 5, 2020, paras. 59–60 (emphasis added).

states the following:

CTED remains an important counter-terrorism arm of the Security Council. Its assessment, analysis and expertise on global, regional and country-specific counter-terrorism profiles should continue to serve as a reference for the Security Council peace and security, counter-terrorism and CVE agenda[s]. In this regard, it would be useful to consider the following, where appropriate and necessary: ... CTED could function as an “information switchboard”, using its partnerships with other relevant United Nations entities, international and regional organizations, academia (including the Global Research Network), civil society, and private-sector actors, where necessary, in analysing and sharing information on emerging issues and risks ..., *as well as implementation challenges (e.g., application of international humanitarian law ...)*.¹⁰⁷

4.3. Discerning CTED’s IHL-related Mandate (If Any)

Regarding CTED’s mandate, it is not necessarily clear from the text of Resolutions 2462 (2019) and 2482 (2019) alone that the Security Council intended therein for the mandate of CTED to expand to include the interpretation and application of possibly relevant aspects of IHL pertaining to humanitarian action (and corresponding “effects” of counterterrorism measures on such action) in the context of the implementation of those resolutions. Arguments in favor of such an expansion of CTED’s mandate might draw upon the following:

- The provision in Resolution 2462 (2019) in which the U.N. Security Council requests that CTED “*strengthen its [that is, CTED’s] assessment process relating to countering the financing of terrorism, including through targeted and focused follow-up visits as complements to its comprehensive assessments and to provide, annually ... a thematic summary assessment of gaps identified and areas requiring more action to *implement key counterterrorism financing provisions* of relevant U.N. Security Council resolutions for the purpose of designing targeted technical assistance and capacity building efforts...*”¹⁰⁸, perhaps especially when read in conjunction with the IHL-related language of paragraphs 5 and 6 of that resolution;
- The provision in Resolution 2462 (2019) in which the Council further “[r]equests [the CTC] and [CTED] to hold, within 12 months, a joint special meeting ... on

¹⁰⁷ Observations on the way forward in enhancing the functional capability of the Counter-Terrorism Committee Executive Directorate (CTED) and its support for the Counter-Terrorism Committee and the Security Council annexed to the Letter dated 5 February 2020 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2020/99, Feb. 5, 2020, para. 26(d) (emphasis added).

¹⁰⁸ U.N. Security Council Resolution 2462 (2019), para. 35.

*implementation of the provisions of this resolution*¹⁰⁹; and

- The provision in Resolution 2462 (2019) in which the Council calls upon CTED, along with certain other entities, to “enhance coordination with the aim of delivering integrated technical assistance on counter-terrorist financing measures, including assistance *that will improve the capacity of Member States, upon their request, to implement this resolution....*”¹¹⁰

On the other hand, arguments against such an expansion of CTED’s mandate might draw upon the following:

- No provision of Resolution 2462 (2019) or of Resolution 2482 (2019) expressly links CTED’s mandate to an assessment of States’ compliance with possibly relevant aspects of IHL in relation to the implementation of either resolution;
- While it is difficult to discern with certainty in light of certain opacity around CTED’s work, and despite the 2006 policy guidance from the CTC, the publicly observable practice preceding the adoption of Resolutions 2462 (2019) and 2482 (2019) seems to have been for CTED not to directly interpret and apply IHL, even where IHL was raised in the resolution, in relation to the implementation of relevant counterterrorism measures made binding on Member States by way of a decision of the U.N. Security Council;
- As a “special political mission,” CTED is institutionally positioned neither to undertake authentic and/or authoritative interpretations of IHL nor to make corresponding assessments of IHL compliance in relation to Member States’ efforts to carry out counterterrorism measures entailed in decisions of the U.N. Security Council; and
- According to a government official, the Council did not intend to provide CTED with an IHL-assessment mandate when it adopted those resolutions and, instead, that such assessments were reserved to the individual State concerned.¹¹¹

4.4. The Possible Role of a Counterterrorism Entity in Interpreting and Applying IHL: Thinking through Some Examples

As noted above, policy guidance given by the CTC to CTED in 2006 requests that CTED “as appropriate ... provide advice to the CTC, including for its ongoing dialogue with States on their

¹⁰⁹ Id. at para. 36 (emphasis added).

¹¹⁰ Id. at para. 34.

¹¹¹ This statement was made during an event held under the Chatham House Rule. Notes on file with one of the authors, who participated in the event, which took place in 2020.

implementation on resolution 1373 (2001), on international ... humanitarian law, in connection with identification and implementation of effective measures to implement resolution 1373 (2001).¹¹² (So far as we are aware, however, CTED has not engaged, at least publicly, in interpretations pertaining to the implementation of IHL in connection with the identification and implementation of effective measures to implement relevant resolutions.) As also noted above, in two resolutions adopted in 2019, the U.N. Security Council implicitly recognized the potential for certain counterterrorism measures to adversely impact “exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law....”¹¹³ In one of those resolutions, the Council also “[d]emand[ed] that Member States ensure that all measures taken to counter terrorism ... comply with their obligations under international law, including international humanitarian law....”¹¹⁴ Finally, as also sketched above, CTED recently reported both that in May 2019 it brought to the CTC the topic of addressing the issues of counterterrorism measures in relation to IHL and that in 2020 CTED will report back to the Committee on its progress. So far as we are aware, little is publicly known as to what other activities, if any, CTED, the CTC, and their partners have undertaken to help bring domestic counterterrorism implementation measures into compliance with relevant U.N. Security Council resolutions while (also) responding to and providing assistance on reconciling areas of possible tension or conflict with other relevant bodies of international law.¹¹⁵ Whether it should be the U.N. Security Council (perhaps primarily through the CTC and/or CTED), another principal U.N. organ, individual States,

¹¹² Counter-Terrorism Committee, Conclusions for policy guidance regarding human rights and the CTC (adopted under silence procedure on May 25, 2006), S/AC.40/2006/PG.2.

¹¹³ U.N. Security Council Resolution 2462 (2019), para. 24; U.N. Security Council Resolution 2482 (2019), para. 16. See also U.N. Security Council Resolution 2462 (2019), paras. 5–6.

¹¹⁴ U.N. Security Council Resolution 2462 (2019), para. 6. See also U.N. Security Council Resolution 2482 (2019), para. 16 (the Security Council “[u]rges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including international humanitarian law....”).

¹¹⁵ For instance, CTED published *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters* (2018), which purports to “provide concrete guidance to States in their efforts to implement resolutions 2178 (2014), 2396 (2017) and other relevant resolutions in compliance with international human rights law, *international humanitarian law* and international refugee law, as intended by the Security Council...” (emphasis added). The document, however, does not otherwise clarify precisely how States should reconcile their counterterrorism obligations with these various bodies of law. For instance, statements such as “[a]ny definition of terrorism [in national legislation] should be fully consistent with international human rights law and international humanitarian law” do not further explain how States might address any tensions between these legal frameworks. The only section of this document dedicated specifically to IHL contains just two paragraphs, one which identifies the Geneva Conventions, the Additional Protocols, and customary law as relevant legal authorities in IHL, while the second paragraph details the applicability of international human rights law “at all times” and that “international humanitarian law and international human rights law share a ‘common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,’ such that there is often substantial overlap in the application of these two distinct bodies of law.” Id. at 8.

and/or others who can and should determine how best to address those issues remains an area of debate and discussion.

To help inform that debate and discussion, it may be of value to keep in mind the following issues pertaining to IHL that might be implicated in the event that a counterterrorism entity — such as CTED — is tasked with assessing IHL-related compliance, whether in respect of a particular counterterrorism situation and/or more generally. The following is not meant to represent an exhaustive account of possibly relevant issues.

In relation to discerning the existence (or not) of an armed conflict, the classification of that conflict, and the scope of application of IHL

As a threshold matter, to make an assessment of IHL it would be necessary to discern whether a situation of armed conflict exists and, if so, what is the conflict's material, geographical, temporal, and personal scope of application. That is because the vast majority of IHL provisions — with the exception of those that also apply during “peacetime,” such as certain provisions concerning dissemination — are applicable only in relation to situations of armed conflict as defined in IHL. In addition, to generate a comprehensive understanding of the applicable IHL provisions, it would also be necessary to discern whether a relevant armed conflict is of an international or non-international character as defined in IHL. That is because — despite a trajectory towards increasing overlap in several respects between the legal rules, principles, and standards applicable in both categories of conflict — there remain certain potentially relevant legal distinctions between international armed conflicts and non-international armed conflicts. Furthermore, as part of this conflict-categorization-and-scope-of-application analysis, it may be necessary to determine whether a particular situation amounts to a military occupation (as a form of an international armed conflict).

Currently, there is no entity authorized — for example, through a universally-subscribed-to IHL treaty — to publicly make on a regular basis binding legal evaluations as to the existence (or not) of all possible armed conflicts around the world, let alone to determine the more narrow question as to whether those conflicts are of an international or non-international character.¹¹⁶ Therefore, it would seem that any counterterrorism entity seeking to make IHL-related assessments — possibly including CTED — would need to make such determinations itself. These

¹¹⁶ Under certain IHL instruments, the International Committee of the Red Cross (ICRC) is empowered to undertake certain activities in relation to situations of armed conflict; in discharging these aspects of its mandate, the ICRC may need to evaluate the existence of an armed conflict, its classification (as international or non-international in character), and the scope of application of IHL. Such determinations by the ICRC, however, are usually not made publicly available; and in any event, strictly speaking it appears that these ICRC's assessments are limited in effect to the particular elements of the ICRC's mandate as laid down in applicable IHL instruments.

determinations may entail legal and perhaps also political and other consequences.

In relation to discerning the identification of the parties to an armed conflict and the status of certain individuals or entities under IHL

Determinations as to the existence (or not) of an armed conflict and a conflict's material, geographical, temporal, and personal scope of application might implicate highly sensitive legal and political matters. This might be so, for example, in respect of the State and non-State entities evaluated to be parties to a particular armed conflict and in respect of the status of certain individuals and entities in relation to those conflicts.

As noted above, there is no entity authorized to publicly make on a regular basis binding legal evaluations as to the existence (or not) of all possible armed conflicts around the world (and the respective scope of application of each of those conflicts), nor to determine whether those conflicts are of an international or non-international character. Similarly, there is no such entity to make these evaluations in respect of who is and is not a party to armed conflicts and what the status of certain individuals and entities is in relation to those conflicts. Therefore, it would seem that — as with the existence (or not) of an armed conflict, a conflict's scope of application, and a conflict's classification — any counterterrorism entity seeking to make IHL-related assessments (possibly including CTED) would need to make determinations concerning the parties to the conflict and the status of certain individuals and entities in relation to those conflicts.

Some examples of possibly relevant armed conflicts and parties to those conflicts may be highlighted. Academic researchers working on “The War Report” project under the editorship of Dr. Annyssa Bellal identified 18 international armed conflicts, including 11 military occupations, and 51 non-international armed conflicts that, in the non-binding view of those researchers, took place at least at some point in 2018.¹¹⁷ Several of those purported conflicts involved non-State parties that were (also) designated under certain U.N. Security Council, regional, and/or national counterterrorism frameworks. Those designated entities include: the Abu Sayyaf Group; al-Nusra Front; al-Shabaab; Ansar al-Sharia; Boko Haram; Ejército de Liberación Nacional; the Haqqani Network; Hezbollah; the Islamic State of Iraq and the Levant as well as reportedly affiliated entities of ISIL, such as ISIL-Afghanistan, ISIL-Libya, ISIL-Sinai Province, and the Islamic State in the Greater Sahara; Jama'a Nusrat ul-Islam wa al-Muslimin; the Kurdish Workers' Party; Lashkar i Jhangvi; the Taliban; Tehrik-e Taliban Pakistan; and the United Self Defense Forces of

¹¹⁷ See THE WAR REPORT: ARMED CONFLICTS IN 2018 31 (Annyssa Bellal ed., 2019), <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf>, permalink: <https://perma.cc/Q8CY-RWRW> (hereafter, THE WAR REPORT 2018).

Colombia.¹¹⁸ In all, those purported conflicts — at least as identified in a non-binding manner by researchers in *The War Report: 2018* — involved the following States and/or international organizations (among others), either as ostensible parties to the conflict or supporters of a party or parties: Afghanistan, AMISOM, Benin, Burundi, Cameroon, Chad, Colombia, Djibouti, Egypt, Ethiopia, Iraq, Kenya, Libya, Mali, Niger, Nigeria, Pakistan, the Philippines, the Russian Federation, Somalia, Syria, Turkey, Uganda, the United Arab Emirates, the United States, and Yemen.¹¹⁹ Furthermore, several of the purported situations of military occupation (as a form of international armed conflict) identified in *The War Report: 2018* might involve the participation of entities designated under certain U.N. Security Council, regional, and/or national counterterrorism frameworks, perhaps including the following: Lebanon/Israel; Palestine/Israel; Syria/Turkey; and Western Sahara/Morocco.¹²⁰

The status of certain individuals or groups under IHL may also raise consequential legal and political issues in relation to entities designated under certain U.N. Security Council, regional, and/or national counterterrorism frameworks. A few possible examples may be raised:

- The determination whether such a designated entity may — and, if so, does — fulfill the criteria established under IHL to constitute a non-State party to an armed conflict;
- The determination whether an individual engaged in certain forms of “support” — such as providing non-permanent logistical support or various forms of political solidarity — to such a designated entity that also qualifies as a non-State party to an armed conflict may or may not be considered to form part of that entity for purposes of discerning that person’s status as a member or not of that party under IHL;
- The determination whether an individual who provides certain forms of “support” in relation to such a designated entity but who is deemed not to be a member of a non-State party may or may not be considered a civilian directly participating in hostilities as defined in IHL; and

¹¹⁸ The inclusion of a reference to an entity designated under a counterterrorism framework (such as by the Security Council or at the regional or domestic level) here is not meant to signify support or lack of support for the relevant legal assessment made in THE WAR REPORT 2018 as to whether that entity may or may not be considered a party to an armed conflict under IHL. Nor is the inclusion of a reference to an entity designated under a counterterrorism framework (such as by the Security Council or at the regional or domestic level) here meant to signify support or lack of support for that designation itself.

¹¹⁹ The inclusion of a reference to a State or international organizations here is not meant to signify support or lack of support for the relevant legal assessment made in THE WAR REPORT 2018 as to whether a particular State or international organization may or may not be considered a party to an armed conflict under IHL or to have provided support in relation to a party to such a conflict.

¹²⁰ The inclusion of a reference to a State or other entity here is not meant to signify support or lack of support for the relevant legal assessment made in THE WAR REPORT 2018 as to whether a particular State or other entity may or may not be considered a party to a situation of military occupation under IHL.

- The determination whether the members of such a designated entity who are (also) members of a militia or other volunteer corps belong to a party to an international armed conflict such that those members qualify for prisoner-of-war status as defined in IHL.

In relation to the provision of impartial medical care

IHL treaty law and customary IHL lay down an array of provisions aimed at protecting impartial medical care — including for an adversary and for civilian populations under the de facto control of an adversary — in situations of armed conflict. In effect, certain States' responses to terrorism have recast aspects of impartial medical care in armed conflicts involving designated entities as impermissible support to the enemy.¹²¹

Against that backdrop, one set of legal issues that may be particularly salient concerns the methodologies available to interpret and apply the extensive (and in certain respects highly technical) array of IHL provisions concerning impartial medical care as they may relate to mandates contained in counterterrorism frameworks. Those mandates include, for example, certain provisions elaborated by the U.N. Security Council aimed at countering terrorism in a manner that complies with IHL. For instance, in evaluating Member States' attempts to give effect to the U.N. Security Council's demand in Resolution 2462 (2019) that those States ensure that all measures taken to counter terrorism comply with their respective obligations under IHL, a counterterrorism entity (such as CTED) may need to form a position on the scope of protections that IHL safeguards in respect of impartial medical care for an adversary. That might include situations where the adversary is designated under a U.N. Security Council, regional, and/or national counterterrorism framework and where that adversary (also) qualifies — under IHL — either as (part of) a non-State party to a non-international armed conflict or as part of a party to an international armed conflict (for example, by constituting members of a militia who belong to a party to such a conflict).

In other words, in general, in order to assess IHL-related compliance, a counterterrorism entity (such as CTED) would seemingly need to form a position regarding the law — including IHL treaty law and customary IHL — applicable in relation to each relevant counterterrorism situation that (also) qualifies as an armed conflict as defined in IHL. With respect to medical care more specifically, this would entail making a determination regarding each relevant State's respective set of applicable IHL provisions (whatever their origin) relating to the provision of impartial medical care. Making that determination might include, for example, discerning the applicable IHL provisions pertaining to the provision of impartial medical care for an adversary

¹²¹ See generally Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Harv. L. School Program on Int'l L. & Armed Conflict (HLS PILAC), Sept. 2015, <https://dash.harvard.edu/handle/1/22508590>, permalink: <https://perma.cc/Z48M-783M>.

and/or for a civilian population under the de facto control or in the power of an adversary. It might also include discerning the applicable IHL provisions concerning persons involved in the provision of such care and/or to the means necessary to provide that care. Furthermore, once they are discerned, those applicable IHL provisions might need to be evaluated — for example, if a possible tension or conflict might arise — in relation to other potentially binding legal provisions, including those applicable under counterterrorism frameworks.

Through this process, a counterterrorism entity (such as CTED) would apparently need to form positions on the following: (1) the existence and scope of applicable IHL provisions; (2) the existence and scope of applicable counterterrorism provisions; and (3) the relationship(s), if any, between those sets of provisions. With respect to impartial medical care (as well as several other areas of IHL), forming and implementing those positions might entail complex legal and factual evaluations and assessments.

It seems inescapable that a counterterrorism entity (such as CTED) would need to formulate positions — for each relevant country assessment — on applicable IHL, on applicable counterterrorism obligations, and on the relationship(s) between them. In light of the primary counterterrorism mandate of CTED, those positions might in practice be more or less expansive or more or less limited in terms of safeguarding the foundational humanitarian commitments contained in IHL pertaining to impartial medical care.

Giving effect to those positions might involve, in respect of certain country assessments, determinations as to whether each State has comported with both the demand to ensure that all measures taken to counter terrorism comply with its obligations under IHL¹²² as well as the decision that all States shall ensure that their domestic laws and regulations establish serious criminal offenses in relation to any person who participates in supporting terrorist acts.¹²³ On one end of the spectrum, CTED might determine, for example, that a State has contravened its obligations to comply with applicable IHL. For instance, this might arise where a State legislates that the provision of any impartial medical care in territory under the de facto control of a non-State party to an armed conflict constitutes a criminal offense. On the other end of the spectrum, giving effect to those positions might involve, in respect of certain other country assessments, a determination that, even in light of the extensive protections for impartial medical care laid down in IHL, a State has not taken sufficient steps to implement counterterrorism mandates. This might arise, for example, were CTED to assess that a State, by enacting — with a view to the progressive development of IHL — an exemption in that State's domestic counterterrorism laws for all medical care provided in all armed conflicts, has not satisfied its obligation to ensure that any

¹²² See U.N. Security Council Resolution 2462 (2019), para. 6.

¹²³ See U.N. Security Council Resolution 1373 (2001), para. 2(e), which the Security Council has reaffirmed in subsequent resolutions.

person who participates in supporting terrorist acts is brought to justice.¹²⁴

In relation to safeguards for persons deprived of liberty or whose liberty has been otherwise restricted

IHL contains rules aimed at protecting persons deprived of liberty or whose liberty has been otherwise restricted, such as prisoners of war in an international armed conflict and members of a party to a non-international armed conflict. Among other things, these IHL rules aim to address the basic needs of those persons, including providing them with adequate food, water, clothing, shelter, and medical attention. In the view of the ICRC, “[a]ccording to practice, if the detaining power is unable to provide for the basic needs of detainees, it must allow humanitarian agencies to provide assistance in their stead and detainees have a right to receive individual or collective relief in such a context.”¹²⁵ As noted above, the ICRC has voiced concern that certain counterterrorism measures “could, in practice, result in the criminalization of the core activities of humanitarian organizations and their personnel,” including “visits and material assistance to detainees suspected of, or condemned for, being members of a terrorist organization[... and] facilitation of family visits to such detainees....”¹²⁶

As with impartial medical care, it would seem that to make an assessment regarding IHL compliance in respect of persons deprived of liberty, a counterterrorism entity (such as CTED) would apparently need to form positions on the following: (1) the existence and scope of applicable IHL provisions; (2) the existence and scope of applicable counterterrorism provisions; and (3) the relationship(s), if any, between those sets of provisions. With respect to persons deprived of liberty (as with medical care), forming and implementing those positions might entail complex legal and factual evaluations and assessments. This might involve, for example, a determination by CTED — for each relevant country assessment — as to the relationship between applicable IHL provisions and the decision by the U.N. Security Council — originally laid down in 2001 and highlighted as recently as 2019 — that all States shall prohibit their nationals or any persons and entities within their territories from making any economic resources or related services available, directly or indirectly, for the benefit of persons who participate in the commission of terrorist acts.¹²⁷

¹²⁴ See *id.*

¹²⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 441 (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005) (hereafter, ICRC, CUSTOMARY IHL VOL. I).

¹²⁶ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, 32IC/15/11, Oct. 2015, p. 20.

¹²⁷ See U.N. Security Council Resolution 1373 (2001), para. 1(d); U.N. Security Council Resolution 2462 (2019), para. 3.

In relation to the dissemination of IHL

Several instruments contain provisions mandating dissemination of IHL, including in relation to the armed forces of a State and/or the wider population.¹²⁸ With respect to non-international armed conflicts, in the view of the ICRC “dissemination is generally seen as an indispensable tool” in relation to the obligation on parties — including non-State parties — to respect and ensure respect for IHL. In practice, according to the ICRC, “armed opposition groups have frequently allowed the ICRC to disseminate international humanitarian law among their members.”¹²⁹ Today, a range of non-governmental organizations are involved in efforts to disseminate IHL to non-State parties to armed conflict with a view to enhancing respect for the law. As noted above, the ICRC has voiced concern that certain counterterrorism measures “could, in practice, result in the criminalization of the core activities of humanitarian organizations and their personnel,” such as “IHL dissemination to members of armed opposition groups included in terrorist lists....”¹³⁰

As with IHL concerning impartial medical care and persons deprived of liberty, it would seem that to make an assessment regarding IHL compliance in respect of dissemination of IHL to non-State parties that are (also) designated under a counterterrorism framework, a counterterrorism entity (such as CTED) would apparently need to form positions on the following: (1) the existence and scope of applicable IHL provisions; (2) the existence and scope of applicable counterterrorism provisions; and (3) the relationship(s), if any, between those sets of provisions. With respect to dissemination of IHL to non-State parties (as with medical care and persons deprived of liberty), forming and implementing those positions might entail complex legal and factual evaluations and assessments.

As with medical care, giving effect to CTED’s positions concerning dissemination of IHL might involve, in respect of certain country assessments, determinations as to whether each State has comported with both the demand to ensure that all measures taken to counter terrorism comply with its obligations under IHL¹³¹ as well as the decision that all States shall ensure that their domestic laws and regulations establish serious criminal offenses in relation to any person

¹²⁸ See, among others, art. 47, Geneva Convention I (1949); art. 48, Geneva Convention II (1949); art. 127, Geneva Convention III (1949); art. 144, Geneva Convention IV (1949); art. 83, Additional Protocol I (1977); art. 19, Additional Protocol II (1977); art. 25, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954); art. 30, Second Protocol to the Hague Convention on the Protection of Cultural Property (1999); art. 6, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (as amended on Dec. 21, 2001).

¹²⁹ ICRC, *CUSTOMARY IHL VOL. I*, above note 125, at 505.

¹³⁰ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, 32IC/15/11, Oct. 2015, p. 20.

¹³¹ See U.N. Security Council Resolution 2462 (2019), para. 6.

who participates in supporting terrorist acts.¹³² On one end of the spectrum, CTED might determine, for example, that a State has contravened its obligations to comply with applicable IHL. For example, this might arise where a State legislates that the provision of any dissemination of IHL in territory under the de facto control of a non-State party to an armed conflict constitutes a criminal offense. On the other end of the spectrum, giving effect to those positions might involve, in respect of certain other country assessments, a determination that, even in light of the dissemination provisions laid down in IHL, a State has not taken sufficient steps to implement counterterrorism mandates. This might arise, for example, were CTED to assess that a State, by expressly exempting and/or actively supporting — with a view to the progressive development of the law — efforts to disseminate IHL to non-State parties to armed conflicts (including by civil society organizations), has not satisfied its obligation to refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts.¹³³

5. Potential Avenues for Engagement and Questions for Consideration

So far as we are aware, there has been little to no public discourse, at least among States, as to whether a counterterrorism entity (such as CTED) has already been, or ought to be, tasked with engaging substantive — including threshold — questions of IHL and perhaps even assessing States' IHL compliance in this area. Nor, so far as we are aware, and despite applicable U.N. Security Council resolutions, have any States publicly elaborated their views regarding modalities to interpret and apply IHL as it may relate to relevant Security Council counterterrorism mandates. This includes questions of compliance related to how States interpret and apply IHL and counterterrorism mandates within their domestic legal systems.

As noted above, CTED's most recent activities report indicates that, in May 2019, CTED brought to the CTC the topic of addressing the issues of counterterrorism measures in relation to IHL and that, in 2020, CTED will report back to the Committee on its progress. CTED has reportedly issued a questionnaire for States asking what steps (if any) States have taken in relation to paragraph 24 of Resolution 2462 (2019).¹³⁴ It would therefore seem that the coming months

¹³² See U.N. Security Council Resolution 1373 (2001), para. 2(e), which the Security Council has reaffirmed in subsequent resolutions.

¹³³ See U.N. Security Council Resolution 1373 (2001), para. 2(a).

¹³⁴ CTED recently distributed a questionnaire to Member States (on file with the authors). In this questionnaire, CTED asks Member States to provide information on the implementation of Resolution 2462, including whether the State “developed [countering terrorism financing] mechanisms, laws or policies regarding [nonprofit organizations] that take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law, in accordance with resolution 2462 (2019)?”. Reportedly, the replies that CTED had received, at least as of early March 2020, suggested that some States misapprehended the question and that some States had not instituted any relevant measures to make such an assessment.

may present a particularly important period and time-sensitive opportunity for States, U.N. system actors, and other interested stakeholders to consider and to publicly express their views on the issues discussed herein. Against that backdrop, in this concluding section we raise a number of potential avenues for engagement by States. These considerations aim to help States formulate and implement their engagement in light of the potentially rapid pace of developments in this area.

As also noted above, in Resolution 2462 (2019), the U.N. Security Council — acting expressly under its Chapter VII authority — “[d]emand[ed] that Member States ensure that all measures taken to counter terrorism ... comply with their obligations under international law, including [IHL],” and, in Resolution 2482 (2019), the Council “urge[d] 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 [IHL].”¹³⁵

In giving effect to these provisions, States have the opportunity to publicly express their views on several important elements. One such element concerns who is — and ought to be — positioned to assess compliance with IHL in relation to counterterrorism mandates, including those laid down by the U.N. Security Council. In short, CTED might become by default the entity that takes up IHL assessments in this area, perhaps especially in light of CTED’s existing assessment mandate for certain previous Security Council resolutions, and alongside the 2006 policy guidance given by the CTC to CTED pertaining — “as appropriate” — to IHL. That might arise, for example, if States do not proactively confirm, articulate, and clarify their views on: (1) the existence and scope of applicable IHL provisions; (2) the existence and scope of applicable counterterrorism provisions; and (3) the relationship(s), if any, between those sets of provisions.¹³⁶

To emphasize, part of what is at stake here concerns the authority — as a matter of sovereignty and in light of applicable international-law sources and methodologies — of each State to discern what IHL-related obligations it has undertaken, the scope and applicability of those obligations, and the relationship(s) between those IHL-related obligations and counterterrorism mandates, at the international, regional, and domestic levels. The exercise of this authority includes each State’s interpretation of customary IHL and application of IHL treaty provisions, including with respect to humanitarian action. For example, for a State seeking to progressively develop IHL in the area

¹³⁵ U.N. Security Council Resolution 2462 (2019), para. 6; U.N. Security Council Resolution 2482 (2019), para. 16. See also U.N. Security Council Resolution 2462 (2019), para. 24.

¹³⁶ On the possible role(s) of silence or inaction in international law, with a focus on the area of the prohibition of use of force in international relations, see Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, *Quantum of Silence: Inaction and Jus ad Bellum*, Harv. L. School Program on Int’l L. & Armed Conflict (HLS PILAC), July 2019, <https://dash.harvard.edu/bitstream/handle/1/40931878/Quantum%20of%20Silence%202019.pdf?isAllowed=y&sequence=1>, permalink: <https://perma.cc/FP27-A4RT>.

of humanitarian access in non-international armed conflicts involving designated entities, what is at stake is not only that State's own interpretation of IHL but also the broader framing and development of the intersection between IHL-related obligations and counterterrorism measures.

The confidentiality of CTED's engagements with individual Member States, including CTED's country-level assessments, could operate in ways that have an effect on IHL. Because of that confidentiality, those effects might not be immediately discernible as CTED takes positions on often-complex matters of IHL interpretation and application. As States are assessed against CTED's positions on IHL, then over time these assessments may have a broader effect in practice on the interpretation and application of IHL treaty provisions and on the formulation and development of customary IHL. It is possible that these interpretations and corresponding effects may not align with States' actual interpretation of IHL treaty law and customary IHL.

For these reasons, States may wish to express their views on these IHL-related issues. The following forums (among others) may be considered:

- One example is through their engagements with existing counterterrorism entities. For instance, a State may — in clarifying the parameters of CTED's country-assessment visit to that State — express its views on the applicability and scope of IHL protections in this area and on the relationship(s) between those protections and counterterrorism measures. It might be particularly effective to express these views in advance of any visit by CTED. In addition, U.N. Member States may request clarification from CTED regarding how CTED envisions addressing the issues addressed herein, and to request that CTED communicate those views more broadly. Another possible example of an opportunity to express views on IHL is States' engagements with the Financial Action Task Force (FATF). Yet another possibility is to express views in debates convened by relevant U.N. principal organs on countering terrorism.
- States might also see value in utilizing bodies dedicated to the reaffirmation and development of IHL. Dialogue and exchange within such bodies may draw on participants' experience and expertise in this body of law. One possibility could include convening a conference of the High Contracting Parties to the Geneva Conventions I–IV of 1949 (as deemed relevant) on measures to enforce and ensure respect for those Conventions — including the humanitarian commitments laid down therein — in relation to counterterrorism frameworks.¹³⁷ Indeed, in light of the universal subscription

¹³⁷ For example, conferences of certain High Contracting Parties to Geneva Convention IV of 1949 have been undertaken, including the Conference of High Contracting Parties to the Fourth Geneva Convention on Dec. 17, 2014; the Conference of High Contracting Parties to the Fourth Geneva Convention on Dec. 5, 2001; and the Conference of High Contracting Parties to the Fourth Geneva Convention on July 15, 1999. See also Article 7, Additional Protocol I (1977) ("The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon

to the Geneva Conventions of 1949, such a conference or other similar forums may provide — for the purpose of addressing any open questions concerning the interpretation and application of IHL in contemporary conflicts — an opportunity to reaffirm the centrality of bodies dedicated to respect for IHL.

- States might see Resolution 2462 (2019) and Resolution 2482 (2019) as opportunities to strengthen IHL protections for humanitarian action in respect of the implementation of their domestic counterterrorism legal frameworks. Such efforts might include, for example, implementation of exemptions, carve-outs, and other measures that preserve IHL protections for humanitarian action in contexts involving counterterrorism measures.
- Of course, in addition to specific forums for counterterrorism measures and/or IHL, States are always in a position to express — on their own initiative — their respective positions on the content of binding international law. Such views may be expressed unilaterally and/or in combination with other States.

In formulating and deciding whether to express their views in these and other forums, States may wish to consider the following sets of issues:

- Does Resolution 2462 (2019) and/or Resolution 2482 (2019) provide sufficient authority for CTED to interpret its mandate to assess relevant aspects of the applicability and scope of IHL and compliance with IHL in this area? Would a (new) resolution be capable of providing such authority? If so, would it be desirable for the Security Council to provide that authority to CTED?
- Are CTED's interpretations and/or assessments binding as a matter of international law?
- Should (at least certain) aspects of CTED's assessments be made available to States other than the State under evaluation or perhaps more broadly, including with respect to CTED's interpretation and assessment of IHL?
- Does CTED have the requisite expertise and capacity to engage in assessment of compliance with IHL in relation to counterterrorism mandates? If not, and if States were to find such an approach desirable, what would be required to sufficiently enhance CTED's expertise and capacity to assess these issues?
- Would CTED's IHL interpretations and assessments of IHL compliance in this area be considered to reflect the position only of CTED (and/or of the CTC)? Or would they also — as a matter of the law of international organizations — reflect the view of the U.N. Security Council, the United Nations Organization, and/or individual U.N. Member States?

the approval of the majority of the said Parties, to consider general problems concerning the Application of the Conventions and of the Protocol.”).

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