



# Advancing Humanitarian Commitments in Connection with Countering Terrorism: Exploring a Foundational Reframing concerning the Security Council

## Citation

Dustin A. Lewis, Radhika Kapoor, and Naz K. Modirzadeh, Advancing Humanitarian Commitments in Connection with Countering Terrorism: Exploring a Foundational Reframing concerning the Security Council, Harvard Law School Program on International Law and Armed Conflict, December 2021, <https://doi.org/10.54813/UZAV2714>.

## Published Version

<http://blogs.harvard.edu/pilac/files/2021/12/Advancing-Humanitarian-Commitments.pdf>

## Permanent link

<https://nrs.harvard.edu/URN-3:HUL.INSTREPOS:37371628>

## Terms of Use

This article was downloaded from Harvard University's DASH repository, WARNING: No applicable access license found.

## Share Your Story

The Harvard community has made this article openly available. Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

December 2021

DUSTIN A. LEWIS, RADHIKA KAPOOR, AND NAZ K. MODIRZADEH

A Guide  
for States

**ADVANCING HUMANITARIAN COMMITMENTS IN  
CONNECTION WITH COUNTERING TERRORISM**

**EXPLORING A FOUNDATIONAL REFRAMING  
CONCERNING THE SECURITY COUNCIL**

# **Advancing Humanitarian Commitments in Connection with Countering Terrorism**

## **Exploring a Foundational Reframing concerning the Security Council**

*A Guide for States*

Dustin A. Lewis, Radhika Kapoor, and Naz K. Modirzadeh

Harvard Law School Program on International Law and Armed Conflict

December 2021

## EXECUTIVE SUMMARY

The imperative to provide humanitarian and medical services on an urgent basis in armed conflicts is anchored in moral tenets, shared values, and international rules. States spend tens of billions of dollars each year to help implement humanitarian programs in conflicts across the world. Yet, in practice, counterterrorism objectives increasingly prevail over humanitarian concerns, often resulting in devastating effects for civilian populations in need of aid and protection in war. Not least, confusion and misapprehensions about the power and authority of States relative to the United Nations Security Council to set policy preferences and configure legal obligations contribute significantly to this trajectory.

In this guide for States, we present a framework to reconfigure relations between these core commitments by assessing the counterterrorism architecture *through* the lens of impartial humanitarianism. We aim in particular to provide an evidence base and analytical frame for States to better grasp key legal and policy issues related to upholding respect for principled humanitarian action in connection with carrying out the Security Council's counterterrorism decisions. We do so because the lack of knowledge regarding interpretation and implementation of counterterrorism resolutions matters for the coherence, integrity, and comprehensiveness of humanitarian policymaking and protection of the humanitarian imperative. In addition to analyzing foundational concerns and evaluating discernible behaviors and attitudes, we identify avenues that States may take to help achieve pro-humanitarian objectives. We also endeavor to help disseminate indications of, and catalyze, States' legally relevant positions and practices on these issues.

In section 1, we introduce the guide's impetus, objectives, target audience, and structure. We also describe the methods that we relied on and articulate definitions for key terms.

In section 2, we introduce key legal actors, sources of law, and the notion of international legal responsibility, as well as the relations between international and national law. Notably, Security Council resolutions require incorporation into national law in order to become effective and enforceable by internal administrative and judicial authorities.

In section 3, we explain international legal rules relevant to advancing the humanitarian imperative and upholding respect for principled humanitarian action, and we sketch the corresponding roles of humanitarian policies, programs, and donor practices. International humanitarian law (IHL) seeks to ensure — for people who are not, or are no longer, actively participating in hostilities and whose needs are unmet — certain essential supplies, as well as medical care and attention for the wounded and sick. States have also developed and implemented a range of humanitarian policy frameworks to administer principled humanitarian action effectively. Further, States may rely on a number of channels to hold other international actors to account for safeguarding the humanitarian imperative.

In section 4, we set out key theoretical and doctrinal elements related to accepting and carrying out the Security Council's decisions. Decisions of the Security Council may contain (binding) obligations, (non-binding) recommendations, or a combination of the two. UN members are obliged to carry out the Council's decisions. Member States retain considerable interpretive latitude to implement counterterrorism resolutions. With respect to advancing the humanitarian imperative, we argue that IHL should represent a legal floor for interpreting the Security Council's decisions and recommendations.

In section 5, we describe relevant conduct of the Security Council and States. Under the Resolution 1267 (1999), Resolution 1989 (2011), and Resolution 2253 (2015) line of resolutions, the Security Council has established targeted sanctions as counterterrorism measures. Under the Resolution 1373 (2001) line of resolutions, the Security Council has adopted quasi-“legislative” requirements for how States must counter terrorism in their national systems. Implementation of these sets of resolutions may adversely affect principled humanitarian action in several ways. Meanwhile, for its part, the Security Council has sought to restrict the margin of appreciation of States to determine how to implement these decisions. Yet international law does not demand that these resolutions be interpreted and implemented at the national level by elevating security rationales over policy preferences for principled humanitarian action. Indeed, not least where other fields of international law, such as IHL, may be implicated, States retain significant discretion to interpret and implement these counterterrorism decisions in a manner that advances the humanitarian imperative.

States have espoused a range of views on the intersections between safeguarding principled humanitarian action and countering terrorism. Some voice robust support for such action in relation to counterterrorism contexts. A handful call for a “balancing” of the concerns. And some frame respect for the humanitarian imperative in terms of not contradicting counterterrorism objectives. In terms of measures, we identify five categories of potentially relevant national counterterrorism approaches: measures to prevent and suppress support to the people and entities involved in terrorist acts; actions to implement targeted sanctions; measures to prevent and suppress the financing of terrorism; measures to prohibit or restrict terrorism-related travel; and measures that criminalize or impede medical care. Further, through a number of “control dials” that we detect, States calibrate the functional relations between respect for principled humanitarian action and countering terrorism. The bulk of the identified counterterrorism measures and related “control dials” suggests that, to date, States have by and large not prioritized advancing respect for the humanitarian imperative at the national level.

Finally, in section 6, we conclude by enumerating core questions that a State may answer to help formulate and instantiate its values, policy commitments, and legal positions to secure respect for principled humanitarian action in relation to counterterrorism contexts.

## CREDITS

### About HLS PILAC

The Harvard Law School Program on International Law and Armed Conflict (HLS PILAC) researches critical challenges facing the various fields of public international law related to armed conflict. Its mode is critical, independent, and rigorous. HLS PILAC's methodology fuses traditional public international law research with targeted analysis of changing security environments.

### About the Authors

Dustin A. Lewis is the Research Director of HLS PILAC. Radhika Kapoor is a Program Fellow at HLS PILAC. And Naz K. Modirzadeh is the Founding Director of HLS PILAC and a Professor of Practice at Harvard Law School.

### Acknowledgments

HLS PILAC expresses its gratitude for the generous financial support provided by the Department for UN Policy, Conflict and Humanitarian Affairs of the Swedish Ministry for Foreign Affairs for this project. The authors gratefully acknowledge research support from Jennifer Allison of the Harvard Law School Library and research assistance from HLS students Deyaa Alrwishdi, Anoush Baghdassarian, Marta Canneri, and Carolina Rabinowicz.

### Disclaimers

The views and opinions reflected in this guide are those solely of the authors, and the authors alone are responsible for any errors. The views expressed in this guide should not be taken, in any way, to reflect an official opinion of the Swedish Ministry of Foreign Affairs.

### License

Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International license (CC BY-NC-SA 4.0).

### Web

This legal briefing is available free of charge at <https://pilac.law.harvard.edu>.

### Correspondence

Correspondence concerning this guide may be sent to [pilac@law.harvard.edu](mailto:pilac@law.harvard.edu).

# CONTENTS

<b>EXECUTIVE SUMMARY .....</b>	<b>i</b>
<b>CREDITS .....</b>	<b>iii</b>
<b>1. INTRODUCTION .....</b>	<b>1</b>
1.1. IMPETUS.....	1
1.2. OBJECTIVES .....	5
1.3. TARGET AUDIENCE.....	6
1.4. METHODS .....	7
1.5. DEFINITIONS .....	8
1.6. STRUCTURE .....	9
<b>2. LEGAL BASICS.....</b>	<b>10</b>
2.1. KEY ACTORS.....	10
2.2. SOURCES OF INTERNATIONAL LAW.....	12
2.3. INTERNATIONAL LEGAL RESPONSIBILITY .....	13
2.4. RELATIONS BETWEEN INTERNATIONAL LAW AND NATIONAL LAW .....	13
<b>3. UPHOLDING RESPECT FOR PRINCIPLED HUMANITARIAN ACTION .....</b>	<b>16</b>
3.1. INTERNATIONAL LAW .....	16
3.2. HUMANITARIAN POLICY FRAMEWORKS.....	18
3.3. HOLDING OTHERS TO ACCOUNT .....	20
<b>4. ACCEPTING AND CARRYING OUT SECURITY COUNCIL DECISIONS .....</b>	<b>21</b>
4.1. THE UN CHARTER AND RELEVANT ROLES AND RESPONSIBILITIES OF THE SECURITY COUNCIL.....	21
4.2. TYPES AND EFFECTS OF SECURITY COUNCIL ACTS .....	23
4.3. INTERPRETATION .....	24
4.4. RELATIONS BETWEEN IHL AND SECURITY COUNCIL COUNTERTERRORISM DECISIONS .....	25
<b>5. CONDUCT OF THE SECURITY COUNCIL AND STATES IN THIS FIELD.....</b>	<b>27</b>
5.1. FIELD OF APPLICATION.....	27
5.2. THE SECURITY COUNCIL .....	28
5.2.1. <i>The Resolution 1267 (1999), Resolution 1989 (2011), and Resolution 2253 (2015) Line of Resolutions .....</i>	<i>28</i>
5.2.2. <i>The Resolution 1373 (2001) Line of Resolutions .....</i>	<i>31</i>

5.3. STATES .....	36
5.3.1. <i>Evidence Base</i> .....	36
5.3.2. <i>Views</i> .....	37
5.3.3. <i>Measures and “Control Dials”</i> .....	44
<b>6. ADVANCING THE HUMANITARIAN IMPERATIVE IN RELATION TO COUNTERTERRORISM CONTEXTS .....</b>	<b>50</b>
6.1. VALUES .....	51
6.2. POLICY .....	52
6.3. LAW .....	53
6.4. PROGRAMS.....	54
6.5. INSTITUTIONS.....	55
<b>ANNEXES.....</b>	<b>56</b>
<b>ANNEX I: HLS PILAC RESEARCH QUESTIONNAIRE.....</b>	<b>57</b>
<b>ANNEX II: COVER EMAIL TRANSMITTING RESEARCH QUESTIONNAIRE .....</b>	<b>61</b>
<b>ANNEX III: STATES’ WRITTEN RESPONSES TO AN HLS PILAC RESEARCH QUESTIONNAIRE .....</b>	<b>64</b>
(A) BELGIUM.....	64
(B) CANADA .....	73
(C) SWEDEN.....	77
<b>ANNEX IV: INDICATIVE COMPENDIUM OF CERTAIN COUNTERTERRORISM DECISIONS AND RECOMMENDATIONS ADOPTED BY THE SECURITY COUNCIL.....</b>	<b>82</b>



## 1. INTRODUCTION

Counterterrorism objectives increasingly prevail in practice over humanitarian concerns, often resulting in devastating effects for civilian populations in need of aid and protection in war.<sup>1</sup> Confusion and misapprehensions about the power and authority of States relative to the United Nations Security Council to set policy preferences and configure legal obligations contribute significantly to counterterrorism objectives predominating over the humanitarian imperative. It is possible — and, we believe, urgently called for — to arrest this trajectory and safeguard principled humanitarian action. Short-term and ad-hoc solutions<sup>2</sup> are less likely to uphold the humanitarian imperative. We present a framework for States to reconfigure the relations between these core commitments by deciding to assess the counterterrorism architecture *through* the lens of impartial humanitarianism.

### 1.1. Impetus

The imperative to provide humanitarian and medical services on an urgent basis in armed conflicts is anchored in principled ideas, moral tenets, and shared

---

<sup>1</sup> See, e.g., Lindsay Hamsik and Lissette Almanza, ‘Detrimental Impacts: How Counter-Terror Measures Impede Humanitarian Action’ (2021) <<https://www.interaction.org/wp-content/uploads/2021/04/Detrimental-Impacts-CT-Measures-Humanitarian-Action-InterAction-April-2021.pdf>>; Jessica S Burniske and Naz K Modirzadeh, ‘Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action’ (2017) <<https://pilac.law.harvard.edu/pilot-empirical-survey-study-and-comment/>>; Nathalie Weizmann, ‘Respecting International Humanitarian Law and Safeguarding Humanitarian Action in Counterterrorism Measures: United Nations Security Council Resolutions 2462 and 2482 Point the Way’ (2021) *International Review of the Red Cross* 1.

<sup>2</sup> In the US, for example, certain humanitarian activities are on occasion permitted through ad-hoc licenses. See, e.g., the recent general licenses for Yemen that permitted certain activities in support of humanitarian projects to meet basic human needs, including transactions that might otherwise be prohibited under counterterrorism sanctions. OFAC ‘General License No. 11: Certain Transactions in Support of Nongovernmental Organizations’ Activities in Yemen’ (January 2021) (US) <[https://home.treasury.gov/system/files/126/ct\\_gl11.pdf](https://home.treasury.gov/system/files/126/ct_gl11.pdf)>. Note that this license was revoked in February 2021 concomitant with the removal of the designation of the concerned entity, Ansarallah, under Global Terrorism Sanctions Regulations. See also: The Anti Terrorism Act, 1997 (Pakistan), sec. 11OO: “The Federal Government may permit a person to make available to a proscribed organization or proscribed person such services, money or other property as may be proscribed, including such money as may be required for meeting necessary medical and educational expenses and for subsistence allowance, and such person shall not be liable for an offence under this Act on account of provision.” Rather than a standing measure that could reassure humanitarian and medical actors servicing areas where proscribed terrorist organizations or persons are active, this provision appears to contemplate ad-hoc licensing of individual transactions by the government. Canada similarly reports reliance, at least to an extent, on ad-hoc “permits or certificates.” See Annex III(B): Canada’s Response to an HLS PILAC Research Questionnaire.

values.<sup>3</sup> Those normative foundations animate and structure commitments to provide impartial aid and protection to all civilians in need and fighters rendered *hors de combat* (out of the fight) and medical care and attention to the wounded and sick, irrespective of the affiliation of the affected person. As part of their efforts to instantiate those commitments, many of which are embodied and expressed in international humanitarian law (IHL),<sup>4</sup> States spend tens of billions of dollars each year to help implement humanitarian programs in conflicts across the world.<sup>5</sup>

Yet a majority of those donor States and many others also enact security rationales that discredit the values and norms that underlie humanitarian services and medical care.<sup>6</sup> Often instituted under the banner of countering terrorism, these security rationales increasingly permeate legal and policy regimes, institutional bureaucracies, military campaigns, and donor stipulations.<sup>7</sup> Through these

---

<sup>3</sup> Naz K Modirzadeh and Dustin A Lewis, 'Humanitarian Values in a Counterterrorism Era' (2021) *International Review of the Red Cross* 1. See also: UNGA 'Strengthening Of The Coordination Of Humanitarian Emergency Assistance Of The United Nations' (December 1991) A/RES/46/182, Annex; NRC, 'Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action' (2018) <<https://www.nrc.no/resources/reports/principles-under-pressure/>>.

<sup>4</sup> See, e.g., International Committee of the Red Cross, 'Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field', *Commentary on the First Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016 Update, Cambridge University Press 2016) <<https://ihl-databases.icrc.org/ihl/full/GCI-commentary>> (GC I Commentary), paras. 1150–1152; International Committee of the Red Cross, 'Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea', *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (2017 Update, Cambridge University Press 2017) <<https://ihl-databases.icrc.org/ihl/full/GCII-commentary>>, paras. 1188–1190; ICRC, *Commentary on the Third Geneva Convention* (2020) <<https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>> (GC III Commentary), paras. 1134–1335, 737–749, 822–824. See further: Dustin A Lewis and Naz K Modirzadeh, 'Taking Into Account the Potential Effects of Counterterrorism Measures on Humanitarian and Medical Activities' (2021) Harvard Law School Program on International Law and Armed Conflict 5–6 <<https://pilac.law.harvard.edu/take-into-account-report-web-version>>.

<sup>5</sup> See OCHA Financial Tracking Service, 'Funding for 2021 from Top 10 Donors Globally, Humanitarian Aid Contributions 2021' <<https://fts.unocha.org/>>.

<sup>6</sup> See, e.g., Emanuela-Chiara Gillard, Sangeeta Goswami and Fulco van Deventer, 'Screening of Final Beneficiaries – a Red Line in Humanitarian Operations. An Emerging Concern in Development Work' (2021) *International Review of the Red Cross* 1; Weizmann (n 1); Françoise Bouchet-Saulnier, 'How Counterterrorism Throws Back Wartime Medical Assistance and Care to Pre-Solferino Times' (2021) *International Review of the Red Cross* 1.

<sup>7</sup> See, e.g., Kate Mackintosh and Patrick Duplat, 'Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action' (2013) <<https://www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf>>; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2011) [Footnote continued on next page]

approaches, aspects of principled humanitarian action are conceived as giving illegitimate support or benefits to terrorists.<sup>8</sup> A growing base of evidence documents how counterterrorism measures rooted in these foundations contribute to a welter of detrimental impacts on humanitarian actors. Those adverse effects include security perils, legal endangerment, operational impairments, reputational harm, and funding precarity.<sup>9</sup> In numerous armed conflicts also considered to constitute counterterrorism contexts, those detrimental effects may lead to diminished or complete lack of access for humanitarian and medical actors to the persons affected by the conflict, whether civilians or fighters placed *hors de combat*. The measures may also adversely affect the scope, amount, or quality of humanitarian and medical services provided to those people.<sup>10</sup> Restrictive counterterrorism measures continue to proliferate despite increased awareness of the impediments that they pose to principled humanitarian action.<sup>11</sup>

---

<<https://www.icrc.org/en/doc/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>>; Dustin A Lewis, “‘Criminalization’ of Humanitarian Action Under Counterterrorism Frameworks: Key Elements and Concerns” (2018) 112 Proceedings of the ASIL Annual Meeting 268; UNGA ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (September 2020) A/75/337. Some donor States, such as Sweden, choose not to impose counterterrorism clauses in humanitarian agreements. See Annex III(C): Sweden’s Response to an HLS PILAC Research Questionnaire.

<sup>8</sup> Under this framing, certain humanitarian and medical activities may be conceptualized as a form of support to terrorists. See, e.g., Providing material support to terrorists, 18 U.S. Code § 2339A(b) (US); Terrorism Act 2000 (UK, updated till June 26, 2021), sec. 15. See further: Charity & Security Network ‘Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States’ (June 2012); Marine Buissonniere et al, ‘The Criminalization of Healthcare’ (The University of Essex 2018) <<https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf>>. In practice, such approaches may impede or prevent certain humanitarian and medical activities, including the provision of medical care to wounded and sick members of the adversary party; 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 trainings; war-surgery seminars; and IHL dissemination to members of armed opposition groups included in terrorist lists. See ICRC (n 7).

<sup>9</sup> See, e.g., Hamsik and Almanza (n 1); Emma O’Leary, ‘Politics and Principles: The Impact of Counterterrorism Measures and Sanctions on Principled Humanitarian Action’ (2021) International Review of the Red Cross 1, 6; Human Rights Council ‘Assault on medical care in Syria’ (September 2013) A/HRC/24/CRP.2 (HRC ‘2013 Syria Report’); Burniske and Modirzadeh (n 1).

<sup>10</sup> See Hamsik and Almanza (n 1); Lewis and Modirzadeh (n 4); Dustin Lewis et al, ‘Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism’ (2015) Harvard Law School Program on International Law and Armed Conflict; ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (2015) <<https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>>; Alejandro Pozo Marin and Rabia Ben Ali, ‘Guilty by Association: Restricting Humanitarian Assistance in the Name of Counterterrorism’ (2021) International Review of the Red Cross 1.

<sup>11</sup> While the adoption of limited humanitarian carve-outs by the Security Council (and by some States) evinces [Footnote continued on next page]

At the center of the controversy today sit the United Nations Security Council and its resolutions directing States to prevent and suppress terrorism. Many States are deeply concerned about the humanitarian imperative and its potential erosion, including through restrictive counterterrorism policies flowing from those resolutions. But States are also keen to carry out, and to be seen as carrying out, the binding counterterrorism decisions issued by the Council over the last two decades. That is not only because States are legally required to implement those decisions but also because contemporary counterterrorism concerns exert an extraordinary political force.

All the while, in developing and executing their humanitarian and security positions, States exhibit considerable confusion about policy defaults and legal requirements. Central to much of that confusion is the invalid premise that counterterrorism objectives must take precedence over the humanitarian imperative as a matter of States' policy preferences. Connected with that premise is the notion that legal positions and practices must necessarily default to prioritizing counterterrorism concerns over protections for principled humanitarian action. The approach to countering terrorism adopted by the Security Council and its bodies helps entrench the potential for these misperceptions and misapprehensions. The general lack of publicly available information and knowledge about how States interpret and implement these counterterrorism resolutions at the national level contributes to this confusion as well.<sup>12</sup>

---

recognition of the potential adverse effects of counterterrorism measures on humanitarian action, those actors have not yet pursued sufficient steps to comprehensively safeguard the humanitarian imperative. For example, in Resolution 2462 (2019), the Security Council implicitly recognized those adverse effects (*see, e.g.*, OP 24), yet, despite including an IHL "savings clause," the Council nevertheless expanded the potential scope and applicability of restrictive measures. *See* UNSCR 2462 (2019), OP 3, highlighting "that the obligation regarding the prohibition in paragraph 1 (d) of resolution 1373 applies to making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, 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." *See also*: Fiona de Londras, 'The Transnational Counter-Terrorism Order: A Problématique' (2019) 72 *Current Legal Problems* 203, 215.

<sup>12</sup> Counterterrorism measures have typically been, and largely continue to be, a sensitive matter rooted in national security concerns, and States may be reticent to publicly share detailed information around their domestic counterterrorism practices. International institutions, such as the UN and the Europol, depend on States' willingness to submit implementation information, contributing to what has been characterized as a paucity of "systematic and comparable data." Monica den Boer, 'Policing Terrorism, Extremism and Radicalization: A Legal-Comparative Perspective' in Monica den Boer, *Comparative Policing from a Legal Perspective* (Edward Elgar Publishing 2018). *See also*: Myriam Feinberg, *Sovereignty in the Age of Global Terrorism: The Role of International Organisations* (Brill | Nijhoff 2016). Further, while there was a great deal of international and regional interest in tracking States' "compliance" with counterterrorism instruments, including as it relates to [Footnote continued on next page]

In short, States conduct themselves by and large in ways that frame the core concern in terms of whether the humanitarian imperative can be aligned with counterterrorism objectives. To achieve those security aims, States develop counterterrorism measures that restrict or even prohibit principled humanitarian action. Yet that foundational framing is far from the only possible avenue available to States. Indeed, States may — and, we assert, ought to — decide to pose the root issue in terms of whether counterterrorism approaches advance the humanitarian imperative. That approach would arguably help arrest the current trajectory by focusing on devising counterterrorism measures that facilitate, rather than impede, principled humanitarian action. The power, authority, and resources to achieve that objective reside, first and foremost, in States, not in the Security Council.

## 1.2. Objectives

In this guide, we aim to help show States how to restore respect for the humanitarian imperative in counterterrorism contexts. We attempt to throw clarifying light on existing confusion that operates in ways that, in our view, privilege counterterrorism rationales over humanitarian concerns without a sufficient justification. Indeed, those misapprehensions persist even in the face of compelling arguments to interpret and apply counterterrorism measures through a pro-humanitarian lens.

Our specific objective is to provide an evidence base and analytical frame for States to better grasp key legal and policy issues related to upholding respect for

---

Security Council resolutions, in the immediate aftermath of the September 11, 2001 acts of terrorism, enthusiasm appears to have dwindled, at least in certain respects, in subsequent years. Many detailed studies concerning domestic implementation are now outdated, and, of the existing studies, some focus solely on sanctions implementation without extending also to general counterterrorism obligations arising in the Resolution 1373 (2001) regime. See, e.g., Vera Gowlland-Debbas and Djacoba Liva Tehindrazanarivelo, *National Implementation of United Nations Sanctions: A Comparative Study* (Martinus Nijhoff Publishers 2004); Andrea Bianchi, 'Security Council's Anti-Terror Resolutions and Their Implementation by Member States: An Overview' (2006) 4 *Journal of International Criminal Justice* 1044. While these concerns are limited to publicly available documentation, the Counter-Terrorism Committee Executive Directorate (CTED) — through its frequent contact with States and by virtue of its increasing focus on relations between counterterrorism measures and IHL — may have certain information about how States approach intersections between counterterrorism measures and humanitarian and medical activities. However, under policy guidance concerning its assessments of States' implementation of relevant resolutions, CTED operates largely in a confidential, closed-door manner unless the State concerned chooses to make aspects of the process more transparent. In practice, this current set up rarely brings to light significant information on which the public may reliably evaluate in a comprehensive manner States' and CTED's practices and positions in this area.

principled humanitarian action in connection with accepting and carrying out the Security Council’s relevant counterterrorism decisions. We focus on that particular set of issues for two reasons. First, in our experience, relevant State actors often do not understand these admittedly complex matters well.<sup>13</sup> Second, this set of issues entails significant power to shape and influence how the core policy objectives — safeguarding principled humanitarian action and countering terrorism — are ultimately addressed. In short, the lack of knowledge regarding interpretation and implementation of these counterterrorism resolutions matters for the coherence, integrity, and comprehensiveness of humanitarian policymaking and protection of the humanitarian imperative.<sup>14</sup> In addition to analyzing foundational concerns and evaluating discernible behaviors and attitudes, we identify avenues that States may take to help achieve pro-humanitarian objectives. Finally, we endeavor to help disseminate indications of, and catalyze, States’ legally relevant positions and practices on these issues.<sup>15</sup>

### 1.3. Target Audience

We wrote this guide for the following primary intended audience: State actors concerned with upholding respect for principled humanitarian action as it relates to carrying out the Security Council’s counterterrorism decisions. Those actors’ portfolios may touch on a diverse assortment of matters, cutting across humanitarian affairs, security issues, legal advice, and other relevant fields and practice areas. In addition, we hope that the guide may be useful for other actors, including those who work in the UN system, for non-governmental organizations (NGOs), or in academia.

We drafted this report on the assumption that our target audience does not necessarily have a legal background. In the footnotes, we seek not only to provide

---

<sup>13</sup> As some recent scholarly and policy analysis has indicated, in light of the array of publications concerning the impact of counterterrorism measures on humanitarian action, some States have adopted useful — albeit short-term — safeguards. *See, e.g.*, Emanuela-Chiara Gillard, ‘IHL and the Humanitarian Impact of Counterterrorism Measures and Sanctions’ (Chatham House 2021), discussing recent instances of States adopting express safeguards in relation to humanitarian action. Yet the tendency to adopt ad-hoc safeguards can imply, for instance, that absent those (often-highly-circumscribed) safeguards, principled humanitarian action would be impermissible, and thus evidences a continued willingness to refract humanitarian issues through a counterterrorism lens, rather than assuming primacy — or, at least, parity — for the humanitarian imperative.

<sup>14</sup> Other analyses have focused on different (albeit related) issues, such as national implementation practices concerning sanctions (*see, e.g.*, Gowlland-Debbas and Tehindrazanarivelo (n 12); Bianchi (n 12)) and the impact of domestic policies in donor States on principled humanitarian action (*see, e.g.*, Mackintosh and Duplat (n 7)).

<sup>15</sup> *See* Annex III: States’ Written Responses to HLS PILAC Research Questionnaire.

sources and evidence to sustain our claims but also to set out further analysis and references through which readers with a legal background may go into greater detail, breadth, and depth.

#### 1.4. Methods

In developing this guide, we relied on several interconnected methods. We examined sources of international, regional, and national law.<sup>16</sup> We reviewed academic and policy literature. We conducted interviews with about 20 representatives

---

<sup>16</sup> We examined treaties, international custom, and the general principles of law recognized by nations. We also consulted judicial decisions and scholarly writings as a subsidiary means for the determination of rules of law. Further, we reviewed select domestic legislative enactments, regulatory instruments, national laws, proposed legislative amendments, legislative preparatory documents, implementation circulars, judicial decisions, and donor agreements. *See, e.g.*, Radka Druláková and Štěpánka Zemanová, ‘Why the Implementation of Multilateral Sanctions Does (Not) Work: Lessons Learned from the Czech Republic’ (2020) 29 *European Security* 524, 526 (“Consistent with previous research on compliance with international law ... we consider UNSC sanctions decisions legally implemented when the respective national legislation enters into force.”).

To help decide which States to focus on, we considered — and were constrained by — a range of factors, including the limited time period for the project, the language in which the research was performed, and the (non-)responsiveness of States to our inquiries. We sought to include policies and practices of at least some States that may represent the following three categories: States with a prominent role in shaping counterterrorism policy; humanitarian donor States; and States on whose territories individuals or entities characterized as terrorists under certain domestic, regional, or Security Council-based regimes are active, including often also as involved as parties to an armed conflict.

Because we do not possess expertise in the national legal systems of all States whose practices and policies we sought to analyze, our research and findings come with certain limitations, including those that typically accompany foreign legal research. *See, e.g.*, Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (2015) *Law and Method* <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>>; Edward J Eberle, ‘The Methodology of Comparative Law’ 16 *Roger Williams University Law Review* 23. For instance, we primarily conducted research in English. In some cases, official English translations of certain legislation or legislative bills were not publicly available. In those instances, translations were obtained using publicly available translation services; those translations should therefore be considered unofficial or provisional. In some cases, online resources did not reliably provide up-to-date legislation and other law-related enactments, regulations, and the like. *See* Hoecke 4, noting that “some translations of legal texts in English... do not always follow changes made to the law, so that they may rapidly be outdated.” Among the sources that we used to identify elements of national legal systems are the following online resources: Legislation Online (Sweden; Switzerland <<https://www.legislationline.org/>>); Pakistan Code (Pakistan <<http://www.pakistancode.gov.pk/english/Xki72H>>); Manupatra (India <<https://www.manupatrafast.in/pers/Personalized.aspx>>); India Code (India <<https://www.indiacode.nic.in/>>); Syrian Legislation Group (Syria <<http://parliament.gov.sy/arabic/index.php>>); FedLex (Switzerland <[https://www.fedlex.admin.ch/en/home?news\\_period=last\\_day&news\\_pageNb=1&news\\_order=desc&news\\_itemsPerPage=10](https://www.fedlex.admin.ch/en/home?news_period=last_day&news_pageNb=1&news_order=desc&news_itemsPerPage=10)>); National Archives (UK ); New Zealand Legislation (New Zealand <<https://legislation.govt.nz/>>); Droit Afrique (Chad <<http://www.droit-afrique.com/>>); Legal Information Institute (US <<https://www.law.cornell.edu/uscode/text>>).

The cut-off date for our desk research was August 5, 2021. Practice and views — including that of States and the Security Council — emerging subsequent to that date may not have been recorded or examined herein.

from States, the UN system, humanitarian organizations, and academia.<sup>17</sup> We participated in a range of initiatives convened by States, UN-system actors, NGOs, and scholars. And we consulted informally with States' legal advisers, counterterrorism specialists, and senior UN officials. Our research, engagements, and consultations were conducted primarily in English.

Additionally, we developed and distributed a questionnaire for UN Member States focused on identifying what actions, if any, States had already taken to accept and carry out Security Council counterterrorism decisions and uphold respect for international humanitarian law (IHL) protections for humanitarian services.<sup>18</sup> Three States — Belgium, Canada, and Sweden — provided written responses to the questionnaire.<sup>19</sup>

### 1.5. Definitions

In this guide, we use the term *principled humanitarian action* as a composite notion to include all of the acts taken by an entity or one or more natural persons related to the preparation, facilitation, or provision of humanitarian services — both assistance and protection activities — or medical services as foreseen in IHL.<sup>20</sup> By the *humanitarian imperative*, we mean a foundational commitment to

---

<sup>17</sup> We conducted interviews with ten government officials, including representatives from States influential in counterterrorism policymaking and humanitarian donorship. The portfolios of those representatives included counterterrorism and related aspects, such as multidimensional security issues, sanctions, humanitarian files, counter-financing of terrorism, regional security, international criminal law, law enforcement, and UN affairs.

To complement those interviews, we conducted a series of interviews with representatives from UN system actors, other humanitarian actors, and academic institutions. Questions posed during interviews were tailor-made for each interviewee, and, as such, the precise list of questions posed differed from interview to interview. Specific interlocutors have not been named in the guide. Quotations, wherever used, have been ascribed anonymously.

<sup>18</sup> See Annex I: HLS PILAC Research Questionnaire; Annex II: Cover Email Transmitting Research Questionnaire.

<sup>19</sup> See Annex III: State Responses to HLS PILAC Research Questionnaire. On June 3, 2021, we distributed the questionnaire to each member State's New York-seated Permanent Mission to the UN and requested a substantive response no later than July 31, 2021. The transmittal cover email indicated that we may not examine responses received after that date. On June 30, 2021, we sent a reminder email to each member State's New York-seated Permanent Mission to the UN. Before July 31, 2021, two States requested an extension until August 31, 2021, and one State requested an extension until August 15, 2021, to submit their respective responses to the questionnaire. We granted extensions in response to those requests. While it is likely that a longer window for responses may have produced more responses, we are also aware that the paucity of responses could be symptomatic of States' typical reticence to share publicly and/or in detail domestic approaches to countering terrorism.

<sup>20</sup> See Modirzadeh and Lewis (n 3); UNGA 'Strengthening Of The Coordination Of Humanitarian Emergency Assistance Of The United Nations' (December 1991) A/RES/46/182, Annex. Those entities may include, among others, a State or non-State party to an armed conflict or an impartial humanitarian body, such as the [Footnote continued on next page]



undertake — on an urgent basis — impartial humanitarian activities where needs are unaddressed.<sup>21</sup> By *impartial humanitarianism*, we mean concern for the urgent fulfillment of human needs in an armed conflict as a preeminent moral good and the accompanying disposition to act based on that concern rather than for other reasons.<sup>22</sup> In referring to *terrorists*, we mean entities or natural persons, or a combination of both, characterized under an applicable legal definition as terrorists or as having engaged in conduct characterized under an applicable legal definition as an act of terrorism.<sup>23</sup>

## 1.6. Structure

In addition to this introduction (section 1), we organized this guide into five sections. In section 2, we introduce the main relevant legal actors, sources of law, the notion of international legal responsibility, and relations between international and national law.

In section 3, we explain important contextual elements concerning efforts to advance the humanitarian imperative and uphold respect for principled humanitarian action. We first outline international legal rules, then sketch the roles of humanitarian policies, programs, and donor practices, after which we underline the importance of holding others to account.

---

International Committee of the Red Cross (ICRC). See Lewis and Modirzadeh (n 4). The beneficiaries of such relief or protection services may include civilians in need or fighters rendered *hors de combat*, or some combination of such categories of persons. We focus on situations of armed conflict that double as counterterrorism contexts. At the time of writing, armed conflicts in parts of Afghanistan, Colombia, Iraq, Mali, Nigeria, Somalia, Syria, and Yemen (among others) may involve entities characterized as terrorists. See Annysa Bellal (ed), *The War Report: Armed Conflicts In 2018* (Geneva Academy 2019); Dustin A. Lewis, Naz K. Modirzadeh, and Jessica S. Burniske, ‘CTED and IHL: Preliminary Considerations for States’ (2020) Harvard Law School Program on International Law and Armed Conflict 29–30. While not our focus for this guide, it is important to also bear in mind that principled humanitarian action may be undertaken in relation to disasters and situations of violence other than armed conflicts as well.

<sup>21</sup> Modirzadeh and Lewis (n 3). See also: The Sphere Handbook, ‘Humanitarian Charter’ <<https://spherestandards.org/wp-content/uploads/2018/07/the-humanitarian-charter.pdf>>.

<sup>22</sup> Modirzadeh and Lewis (n 3). In using this term, we mean a set of moral commitments and dispositions that are not necessarily synonymous in all respects with the definition of impartiality as an element of humanitarian activities in line with IHL and humanitarian-policy frameworks.

<sup>23</sup> Clear delineation of what constitutes “terrorism” or “terrorist acts,” including in respect of counterterrorism resolutions, remains lacking. See Feinberg (n 12); Jelena Pejic, ‘Armed Conflict and Terrorism’ in Ana María Salinas de Friás (ed), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012) 171–204; Reetta Toivanen, ‘Counterterrorism and Expert Regimes: Some Human Rights Concerns’ (2010) 3 Critical Studies on Terrorism 277. Note that we do not mean to weigh in on the (in)validity of any specific international or domestic legal definition pertaining to such a characterization of a person or entity, nor do we mean to characterize the actual legal status of any particular individual or entity.

In section 4, we set out key theoretical and doctrinal elements related to accepting and carrying out the Security Council's binding decisions. We discuss roles and responsibilities of the Security Council, types and effects of Security Council acts, and interpretation of those acts. We also sketch legal relations between IHL and the Security Council's counterterrorism decisions.

In section 5, we aim to describe the conduct of the Security Council and States concerning instances and situations in which the interpretation and implementation of the Council's binding counterterrorism decisions interact with States' commitments to advance the humanitarian imperative. After setting out the field of application, we describe relevant conduct of the Security Council and its bodies. Then we explain aspects of national-level positions and practices of States.

In section 6, we conclude by identifying areas where States may use their power, authority, and resources to advance the humanitarian imperative and uphold respect for principled humanitarian action in connection with carrying out the Security Council's counterterrorism decisions. We focus on key questions that States may answer to help formulate and instantiate their values, policy commitments, and legal positions.

We attach four annexes to the guide. Annex I contains the questionnaire distributed to UN Member States. Annex II reproduces the transmittal email for the questionnaire. Annex III contains verbatim reproductions of the responses of the three States — Belgium, Canada, and Sweden — that answered the questionnaire. Finally, Annex IV sets out an indicative compendium of obligations and recommendations from Security Council counterterrorism resolutions.

## 2. LEGAL BASICS

In this section, we introduce the main relevant legal actors, sources of law, and the notion of international legal responsibility. We also explain relations between international law and national law.

### 2.1. Key Actors

States continue to retain an exceptional footing in the international legal system.<sup>24</sup>

---

<sup>24</sup> James R. Crawford, 'State', *Max Planck Encyclopedia of Public International Law* (2011) para. 1. See also: *ibid.* [Footnote continued on next page]

Nonetheless, other actors — including, prominently, international organizations and NGOs — can also exercise significant influence in developing, implementing, enforcing, and otherwise shaping relevant aspects of modern international law. Among the most influential international organizations in relevant fields are the United Nations Organization (UN);<sup>25</sup> the Financial Action Task Force (FATF) and FATF-style regional bodies;<sup>26</sup> and the European Union (EU).<sup>27</sup> As for NGOs, the International Committee of the Red Cross (ICRC) — which has a unique legal status<sup>28</sup> — retains particular importance in relation to both upholding respect for IHL and conducting principled humanitarian action.<sup>29</sup> Additional NGOs with influence in these areas include other organizations involved in principled humanitarian action, certain rights-advocacy bodies, and entities that seek to support efforts to prevent and suppress terrorism.<sup>30</sup>

---

paras. 2–12. “Exclusive and general” characteristics of States include that: in principle, States have plenary competence to perform acts, make treaties, and the like in the international sphere; in principle, States are exclusively competent with respect to their internal affairs; in principle, States are not subject to compulsory international process, jurisdiction, or settlement without their consent; in international law, at a basic level, States have equal status and standing; and derogations from these principles will not be presumed. *Ibid.*

<sup>25</sup> That includes certain principal organs, subsidiary organs, special political missions, agencies, and other actors involved in the UN system. On the overall influence of the UN as regards the international legal system, *see, e.g.*, Christopher C. Joyner, *The United Nations and International Law* (Cambridge University Press 1997).

<sup>26</sup> The Financial Action Task Force (FATF) is an intergovernmental body that develops international standards concerning money laundering and counter-financing of terrorism. *See* FATF ‘Mandate’ (April 2019) <<https://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf>>. *See further:* Gillard (n 13). FATF-style regional bodies “can ... play an essential role in identifying and addressing ... technical assistance needs for their individual members. In those FSRBs that carry out this co-ordination work, technical assistance necessarily complements mutual evaluation and follow-up processes by helping jurisdictions to implement the FATF standards.” FATF ‘High-Level Principles and Objectives for FATF and FATF-style regional bodies’ (February 2019) <<https://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf>>.

<sup>27</sup> *See, e.g.*, Annex III(A): Belgium’s Response to an HLS PILAC Research Questionnaire; Annex III(C): Sweden’s Response to an HLS PILAC Research Questionnaire.

<sup>28</sup> *See* Statutes of the International Committee of the Red Cross (adopted December 21, 1917) (ICRC Statute) art. 2(2): “In order to fulfil its humanitarian mandate and mission, the ICRC enjoys a status equivalent to that of an international organization and has international legal personality in carrying out its work.”

<sup>29</sup> *See* ICRC Statute, art. 4(1): “1. The role of the ICRC shall be in particular... (c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts...” and “(d) to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results...”

<sup>30</sup> Such bodies may include, for instance, the Norwegian Refugee Council, the Charity & Security Network, and Alliance for Peacebuilding. *See, e.g.*, Norwegian Refugee Council, ‘Annual Report from the Board 2020’ (2021) <<https://www.nrc.no/globalassets/pdf/annual-reports/2020/annual-report-from-the-board/nrc-annual-report-from-the-board-2020.pdf>>.

## 2.2. Sources of International Law

Among the most relevant sources of international law relating to advancing the humanitarian imperative in relation to counterterrorism contexts are treaties, customary international law, and binding decisions of international organizations. In particular, conventional and customary IHL,<sup>31</sup> the UN Charter, binding decisions of the Security Council, and conventional<sup>32</sup> and customary international law<sup>33</sup>

---

<sup>31</sup> See, e.g., Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Fourth Edition, Oxford University Press 2021) 21. See also: Statute of the International Court of Justice (entered into force October 24, 1945) 3 Bevans 1179 (ICJ Statute) art. 38(1). The four foundational IHL treaties — the Geneva Conventions of 1949 — have been ratified universally. See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted August 12, 1949) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted August 12, 1949) 75 UNTS 85 (GC II); Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted August 12, 1949) 75 UNTS 135 (GC III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted August 12, 1949) 75 UNTS 287 (GC IV). Many of the provisions in those conventions may also be reflective of or constitute customary international law (Fleck, 35). Customary international law is classically understood as having two constituent elements: (1) general practice that is (2) accepted as law (ILC ‘Draft conclusions on identification of customary international law, with commentaries’ (2018) A/73/10). A vast majority of States, but not all States, have ratified the 1977 Protocols Additional to the Geneva Conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force December 7, 1978) 1125 UNTS 3 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force December 7, 1978) 1125 UNTS 609 (AP II).

<sup>32</sup> While there is no single, comprehensive body of counterterrorism laws at the international level, States have developed a collection of treaties to pursue specific anti-terrorism objectives, such as suppressing the financing of terrorism and terrorist bombings. See, e.g., International Convention for the Suppression of Acts of Nuclear Terrorism (signed September 14, 2005) 2445 UNTS 89; International Convention for the Suppression of the Financing of Terrorism (adopted December 15, 1997) 2178 UNTS 197; International Convention for the Suppression of Terrorist Bombings (signed January 12, 1998) 2149 UNTS 256; Convention on the Safety of United Nations and Associated Personnel (adopted December 9, 1994) 2051 UNTS 363; Convention on the Marking of Plastic Explosives for the Purpose of Detection (signed March 1, 1991) ICAO Doc. 9571; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (entered into force August 6, 1989) ICAO Doc. 9518; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (entered into force January 16, 1973) 974 UNTS 177; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (signed March 10, 1988) 1678 UNTS 304; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (signed March 10, 1988) 1678 UNTS 201; Convention on the Physical Protection of Nuclear Material (adopted October 26, 1979) 1456 UNTS 101; International Convention against the Taking of Hostages (signed December 18, 1979) 1316 UNTS 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (entered into force February 20, 1977) 1035 UNTS 167; Convention for the Suppression of Unlawful Seizure of Aircraft (entered into force October 14, 1971) 60 UNTS 105; Convention on Offences and Certain Other Acts Committed on Board Aircraft (signed September 14, 1963) 704 UNTS 219.

<sup>33</sup> See, e.g., Kai Ambos and Anina Timmermann, ‘Terrorism and Customary International Law’ in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Second edition, Edward Elgar Publishing 2020) 16–30.

governing counterterrorism issues figure prominently.<sup>34</sup>

### 2.3. International Legal Responsibility

International law provides a basis for certain actors to be held responsible for breaches of international legal obligations attributable to those actors.<sup>35</sup> In the context of a State, for example, that breach may occur through the acts or omissions of the State's organs exercising executive, legislative, or judicial functions.<sup>36</sup> For instance, if a State fails to perform IHL obligations concerning the humane treatment of certain categories of protected persons,<sup>37</sup> then the State's international legal responsibility may be entailed. The concepts underlying State and international-organization responsibility — namely, attribution, breach, circumstances precluding wrongfulness, and consequences — are general in character and apply unless excluded, for example by operation of a specific treaty provision.<sup>38</sup> What constitutes a breach depends on the nature and content of the applicable obligation, which may be found in, for example, a binding counterterrorism decision of the Security Council or a rule of customary IHL.

### 2.4. Relations between International Law and National Law

For this guide, three aspects of the complex relations between international law and national law<sup>39</sup> warrant emphasis. First, the characterization of an act of a State

---

<sup>34</sup> Additional sources of law, including general principles of law recognized by States and unilateral acts, may also be relevant. Further, at least under the Statute of the International Court of Justice (ICJ) — which is the principal judicial organ of the UN and whose function it is to decide in accordance with international law such legal disputes as are submitted to it — judicial decisions and teachings of the most highly qualified authors may serve as means to establish the existence of sources of law. Statute of the International Court of Justice (entered into force October 24, 1945) 3 Bevens 1179 (ICJ Statute) art. 38(1)(d).

<sup>35</sup> See James R. Crawford, 'State Responsibility', *Max Planck Encyclopedia of Public International Law* (2006); UNGA 'Report of the International Law Commission on the work of its fifty-third session, 23 April–1 June and 2 July–10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 — Draft articles on responsibility of States for internationally wrongful acts' (November 2001) A/56/10 (DARSIWA); UNGA 'Report of the International Law Commission, Sixty-third session (26 April–3 June and 4 July–12 August 2011), Official Records of the Sixty-sixth session, Supplement No. 10 — Draft articles on the responsibility of international organizations' (2011) A/66/10 (DARIO).

<sup>36</sup> See DARSIWA, art. 1, art. 2.

<sup>37</sup> See, e.g., GCs I–IV, art. 3(1).

<sup>38</sup> Crawford (n 35) para. 3.

<sup>39</sup> Which is alternatively called internal, domestic, or municipal law.

or an international organization as internationally wrongful is governed by international law, not national law.<sup>40</sup> That means that the characterization of an act of a State as internationally wrongful is not affected by the characterization of the same act as lawful by national law.<sup>41</sup> Relatedly, a State may not invoke the provisions of its internal law as justification for its failure to perform a binding obligation under an international agreement.<sup>42</sup> For example, suppose a State enacts and applies a domestic counterterrorism statute that requires punishment in an armed conflict of all medical care to terrorists, despite the State being obliged under IHL not to punish ethically sound medical care regardless of who benefits from that care.<sup>43</sup> The State cannot escape the characterization of the enactment and application of the statute as wrongful by IHL by pleading that its acts conform to the provisions of its internal law, even if, under that internal law, the State was bound to impose those punishments.<sup>44</sup>

Second, Security Council resolutions are not usually subsumed automatically into nationally applicable law; in other words, they require incorporation into national law to become effective and enforceable by internal administrative and judicial authorities.<sup>45</sup> For example, Pakistan and India have legislation that authorizes the passing of provisions “necessary or expedient for enabling [the Security Council’s] measures to be effectively applied” and to punish persons offending such provisions.<sup>46</sup> In the wake of Resolution 1267 (1999), Pakistan relied on its enabling UN legislation to implement the asset freeze mandated by

---

<sup>40</sup> DARSWA, art. 3; DARIO, art. 5.

<sup>41</sup> DARSWA, art. 3.

<sup>42</sup> Vienna Convention on the Law of Treaties (adopted May 22, 1969) 1155 UNTS 331 (VCLT) art. 27.

<sup>43</sup> Consider, for example, Syria’s Law no. 19, which, in conjunction with accompanying Laws no. 20 and 21, criminalizes the provision of medical care to the opposition, including those characterized as terrorists. HRC ‘2013 Syria Report’ (n 9). See also: AP I, art. 16(1), art. 17(1), third sentence; AP II, art. 10(1); GC I, art. 18, third para. For a discussion of customary IHL concerning non-punishment of ethically sound medical care, see Jean-Marie Henckaerts et al (eds), *Customary International Humanitarian Law*, vol 1 (Cambridge University Press 2005) 86–88.

<sup>44</sup> DARSWA Commentary, 36.

<sup>45</sup> Jörg Polakiewicz, ‘International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts’, *Max Planck Encyclopedia of International Law* (2011), para. 18. To overcome the problem of potential delays resulting from recourse to special legislation, which may impede effective implementation of Security Council resolutions calling for immediate action, some States have adopted general statutes authorizing the government to use executive orders to implement Security Council decisions. Ibid. para. 19.

<sup>46</sup> The United Nations (Security Council) Act 1948 (Pakistan), sec. 2; United Nations (Security Council) Act 1947 (India), sec. 2.

the resolution.<sup>47</sup> Canada implements counterterrorism resolutions through an analogous enabling legislation titled the United Nations Act.<sup>48</sup> Mexico issues executive orders distilling key obligations under those resolutions into distinct legal obligations.<sup>49</sup> Sweden constitutes commissions of inquiry to comprehensively investigate how domestic legislation may be brought in line with new resolutions.<sup>50</sup>

The rules and principles governing the status of Security Council decisions in international law, especially as contained in the UN Charter, are one of the important sets of factors determining the internal effect of the Council's decisions.<sup>51</sup> Other factors include the existence (or not) of incentives for compliance, potential consequences for non-compliance, and the reputation and authority of the Security Council itself and the UN Organization more broadly.<sup>52</sup>

Third, under general public international law, the effect of an international norm in domestic law is determined by domestic law.<sup>53</sup> Yet EU law constitutes a special case.<sup>54</sup> One thematic example of why that matters for this guide is that, in order to carry out Security Council decisions, member States of the EU may look to relevant EU instruments that give effect to those decisions.<sup>55</sup>

---

<sup>47</sup> UNSC 'Third report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities' (September 2005) S/2005/572.

<sup>48</sup> Annex III(B): Canada's Response to an HLS PILAC Research Questionnaire. *See also*: 'Sanctions, International Humanitarian Law and the Humanitarian Space in the Canadian Perspective: An Interview with Elissa Golberg: Assistant Deputy Minister, Global Affairs Canada' (2021) *International Review of the Red Cross* 1.

<sup>49</sup> Interview with a government official, dated June 4, 2021.

<sup>50</sup> *See, e.g.*, Annex III(C): Sweden's Response to an HLS PILAC Research Questionnaire.

<sup>51</sup> Polakiewicz (n 45) para. 42. In general, the UN Charter may be interpreted by relying on the rules for treaty interpretation contained in the VCLT, which reflect customary international law. *See* Stefan Kadelbach, 'Interpretation of the Charter' in Bruno Simma et al (ed), *The Charter of the United Nations: A Commentary, Volume I* (Third Edition, Oxford University Press 2012). Articles 31–33 of the VCLT lay down rules for treaty interpretation, including that treaties "shall be interpreted in good faith", in accordance with the "ordinary meaning" of the terms of the treaty "in their context and in the light of [the treaty's] object and purpose." VCLT, art. 31(1). Supplementary means of interpretation, if necessary, include the treaty's drafting history. VCLT, art. 32.

<sup>52</sup> Polakiewicz (n 45) para. 42.

<sup>53</sup> *Ibid.* para. 43.

<sup>54</sup> *Ibid.*

<sup>55</sup> *See, e.g.*, Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, 2001/931/CFSP, European Union, December 2001. *See further*: Annex III(A), Belgium's Response to an HLS PILAC Research Questionnaire. *See also*: Polakiewicz (n 45) para. 19.

### 3. UPHOLDING RESPECT FOR PRINCIPLED HUMANITARIAN ACTION

In this section, we explain important contextual elements concerning efforts to advance the humanitarian imperative and uphold respect for principled humanitarian action. We first outline international legal rules. Then, we sketch the roles of humanitarian policies, programs, and donor practices. Lastly, we underline the importance of holding others to account.

#### 3.1. International Law

International legal rules governing aspects of principled humanitarian action are set down in at least two interrelated frameworks.<sup>56</sup> First, as the primary legal framework regulating armed conflict, IHL comprises international legal rules that regulate (among other things) the treatment of persons — including fighters, civilians, and the wounded and sick — in armed conflicts.<sup>57</sup> Second, general public international law governs certain aspects of principled humanitarian action, such as the international legal responsibility of relevant actors and obligations concerning consent from relevant actors to undertake cross-border relief operations.<sup>58</sup>

Broadly speaking, IHL seeks to ensure — for people who are not, or are no longer, actively participating in hostilities and whose needs are unmet — certain essential supplies (such as food, water, means of shelter, and bedding) and objects necessary for religious worship,<sup>59</sup> as well as medical care and attention for the wounded and sick. To complement rules relating to medical and humanitarian activities, IHL also sets out protections for certain people, objects,

---

<sup>56</sup> While our guide addresses general public international law and IHL, other international legal fields, such as international human rights law and international criminal law, may also be relevant to the provision of principled humanitarian action in certain contexts.

<sup>57</sup> See, e.g., Fleck (n 31) 21. IHL seeks to limit the effects of armed conflict, including by protecting those affected by conflict. See Henckaerts et al (eds) (n 43) xv. IHL is often conceptualized as reflecting a kind of normative and operational balance that States and other international actors have reached between military and humanitarian considerations. See, e.g., Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 *Virginia Journal of International Law* 795.

<sup>58</sup> See OCHA, 'Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict' (2016) 42–43, 48–51 <<https://www.unocha.org/publication/oxford-guidance-law-relating-humanitarian-relief-operations-situations-armed-conflict>>.

<sup>59</sup> See, e.g., GC IV, art. 23 (first para.); AP I, art. 69, art. 70(2); AP II, art. 18(2). See also: GC III Commentary (n 4), paras. 858–860, 1333; Henckaerts et al (eds) (n 43) 193–200.



and facilities involved in those activities.<sup>60</sup> Numerous IHL rules require that humanitarian services and medical care and attention be provided on an impartial basis, in the sense that the allocation and provision of services be guided by the needs of the persons affected by the conflict and not, for example, by the person's affiliation.<sup>61</sup>

Under IHL, the party to the armed conflict concerned bears the primary responsibility for meeting the humanitarian needs of the people affected by the conflict and providing medical care and attention to the wounded and sick.<sup>62</sup> Where those needs remain unmet or where such care and attention are not provided, IHL lays down several legal bases for humanitarian and medical activities to be offered and provided by other actors, including impartial humanitarian organizations, such as the ICRC, and even individuals.<sup>63</sup> Legal rights and obligations also relate to allowing the passage of, searching, and arranging for certain humanitarian consignments;<sup>64</sup> protecting and facilitating the distribution of certain relief consignments;<sup>65</sup> and receiving relief shipments.<sup>66</sup> Further, a major IHL treaty lays down an obligation on encouraging and facilitating effective international coordination of certain relief actions.<sup>67</sup> In addition, IHL instruments prohibit punishment of people involved in certain humanitarian and medical activities.<sup>68</sup> To become effective and enforceable by internal administrative

---

<sup>60</sup> See, e.g., GC I, art. 19, art. 24, and art. 35; AP I, art. 12, art. 15(1), art. 16(1), and art. 21; AP II, art. 9(1), art. 10(1), and art. 11(1). See also: GC I, art. 3 and art. 9; GC II, art. 3 and art. 9; GC III, art. 3 and art. 9; GC IV, art. 3 and art. 10; AP I, art. 81. See further: GC III Commentary (n 4) paras. 844–860, 1319–1333.

<sup>61</sup> See, e.g., GC III Commentary (n 4) paras. 833, 1345.

<sup>62</sup> See, e.g., *ibid.*, paras. 819, 1307.

<sup>63</sup> See, e.g., GC I, art. 3(2), art. 9, and art. 18, second para.; GC II, art. 3(2) and art. 9; GC III, art. 3(2) and art. 9; GC IV, art. 3(2), art. 10, and art. 59; AP I, art. 17(1), second sentence, art. 17(2), first sentence, art. 70(1), and art. 80; AP II, art. 18(1).

<sup>64</sup> See, e.g., GC IV, art. 23 and art. 59 third–fourth paras.; AP I, art. 70(2)–(3). OCHA (n 58) 21, 26–30. *But see* Sean Watts, 'Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions' (2019) 95 *International Law Studies* 1, 26–46.

<sup>65</sup> See, e.g., GC IV, art. 61, first–second paras.; AP I, art. 70(1) last sentence, art. 70(3)(b), and art. 70(4). See also: OCHA (n 58) 29, 35; Bruno Zimmermann et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Brill Nijhoff 1987) para. 2865.

<sup>66</sup> GC III, art. 72. See also: GC III Commentary (n 4), paras. 3229–3231.

<sup>67</sup> AP I, art. 70(5). See also: OCHA (n 58).

<sup>68</sup> See AP I, art. 16(1) ("Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom."); AP I, art. 17(1), third sentence ("No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts."); AP II, art. 10(1) ("Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom."); GC I, art. 18, third para. ("No one may ever be molested or convicted for having nursed the wounded or sick."). See also: Zimmermann et al (n 65) para.

[Footnote continued on next page]

and judicial authorities, these rules and principles of international law require incorporation into national law.<sup>69</sup> Steps to implement IHL nationally may include a range of measures, including training relevant persons in IHL, ensuring the presence of legal advisers within armed forces, taking IHL into consideration while developing military tactics, and adopting criminal legislation penalizing war crimes.<sup>70</sup>

There is no international humanitarian court to directly pronounce the compatibility of domestic law and practices with IHL standards concerning principled humanitarian action. Proceedings in other types of international or domestic courts concerning those standards are not unknown but are relatively rare. Rather, in practice, compliance, implementation, and enforcement of international legal rules on principled humanitarian action are largely dealt with — where they are dealt with at all — out of public view and, indeed, outside formal juridical scrutiny, by some combination of States, non-state parties, international organizations, the ICRC and other humanitarian bodies, or (other) advocacy or operational NGOs.<sup>71</sup>

### 3.2. Humanitarian Policy Frameworks

Commitments to the humanitarian imperative are embodied in part in national policies to uphold respect for principled humanitarian action. States have developed and implemented a range of humanitarian policy frameworks to administer principled humanitarian action in relevant contexts effectively. Perhaps most prominently, through General Assembly Resolution 46/182 (1991), States

---

646: “The object of this provision is obviously to remove all fear of punishment from persons who may get involved in caring for the wounded who are the true beneficiaries of this provisions. As a matter of fact, the threat of punishment hanging over the head of persons able to help them means that they would be in danger of being left without care.” *See also*: Henckaerts et al (eds) (n 43) 86–88.

<sup>69</sup> *See generally*: ICRC, “The Domestic Implementation of International Humanitarian Law: A Manual” (2015) <<https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf>>. *See also*: Annex III(B): Canada’s Response to an HLS PILAC Questionnaire: “Canada’s Geneva Conventions Act translates Canada’s international legal obligations under international humanitarian law into our national laws and policies.”

<sup>70</sup> ICRC (n 69).

<sup>71</sup> *See, e.g.*, Emanuela-Chiara Gillard, ‘The law regulating cross-border relief operations’ (2013) 95 *International Review of the Red Cross* 351, 354 (“[I]n the situations under review, arguments based on law will not be used in litigation, where an independent and impartial judicial body makes a determination of the relative merits of the legal arguments of those wishing to provide assistance and of affected states. Instead, they will be the background to guide negotiations with affected states – negotiations which are unlikely to be legal in nature and which will be shaped by political considerations. Accordingly, an argument that might win the day in court might not lead to any progress in the dialogue with the affected state.”).

committed to humanitarian assistance being provided in accordance with the principles of humanity, neutrality, and impartiality;<sup>72</sup> further, the General Assembly recognized the principle of independence in Resolution 58/114 (2004).<sup>73</sup>

In 2016, 180 States participated in the World Humanitarian Summit, which aimed to remobilize commitment to humanitarian action and humanitarian principles.<sup>74</sup> The Summit gave rise to 32 “core commitments” and over 3,100 individual and joint commitments to action by 185 stakeholders, including dozens of States.<sup>75</sup>

Humanitarian-donor States have instituted the Good Humanitarian Donorship (GHD) initiative, a platform facilitating informal exchanges between donors and with the larger humanitarian ecosystem.<sup>76</sup> GHD members collectively endorse and promote adherence to the GHD principles, which include respecting and promoting the implementation of IHL, allocating humanitarian funding based on needs, and supporting the implementation of humanitarian action and the facilitation of humanitarian access.<sup>77</sup>

---

<sup>72</sup> UNGA ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ (December 1991) A/RES/46/182, Annex, para. 2 (“Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality”). On a contemporary tension, in the context of Security Council negotiations concerning certain country contexts, between States that support including language referring to “the relevant provisions of international law and the humanitarian principles,” on the one hand, and those that support including language referring to the “guiding principles of humanitarian assistance,” on the other hand, see Security Council Report, ‘In Hindsight: Humanitarian Space and the Security Council’ (August 31, 2021) *September 2021 Monthly Forecast* <<https://www.securitycouncilreport.org/monthly-forecast/2021-09/in-hindsight-humanitarian-space-and-the-security-council.php>>. See also: Stefan Talmon, ‘Russia accuses Germany of bringing “dissent, division and negative emotion” to the Security Council’ (November 11, 2021) *German Practice in International Law* <<https://gpil.jura.uni-bonn.de/2021/11/russia-accuses-germany-of-bringing-dissent-division-and-negative-emotion-to-the-security-council/>>.

<sup>73</sup> UNGA ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ (February 5, 2004) A/RES/58/114, preamble (“Recognizing that independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented, is also an important guiding principle for the provision of humanitarian assistance”).

<sup>74</sup> Agenda for Humanity, ‘World Humanitarian Summit’ <<https://agendaforhumanity.org/summit.html>>.

<sup>75</sup> World Humanitarian Summit, ‘Commitments to Action’ (May 2016) <[https://agendaforhumanity.org/sites/default/files/resources/2017/Jul/WHS\\_commitment\\_to\\_Action\\_8September2016.pdf](https://agendaforhumanity.org/sites/default/files/resources/2017/Jul/WHS_commitment_to_Action_8September2016.pdf)>.

<sup>76</sup> Good Humanitarian Donorship Initiative, ‘Concept Note for the Co-Chairmanship of EU-Switzerland of the Good Humanitarian Donorship Initiative’ (July 2018–June 2020) <<https://www.ghdinitiative.org/assets/files/GHD%20Reports%20%26%20Updates/GHD-concept-note-2018-2020.pdf>>. See also: Annex III(B): Canada’s Response to an HLS PILAC Questionnaire.

<sup>77</sup> Good Humanitarian Donorship, ‘24 Principles and Good Practice of Humanitarian Donorship’, <<https://www.ghdinitiative.org/ghd/gns/principles-good-practice-of-ghd/principles-good-practice-ghd.html>> (GHD ‘24 Principles’). See also: Good Humanitarian Donorship, ‘About GHD’ <<https://www.ghdinitiative.org/ghd/gns/about-us/about-ghd.html>>.

States may also formulate national-level action plans, agendas, or strategy documents to guide the provision of humanitarian assistance.<sup>78</sup> In formulating humanitarian policy frameworks and administering humanitarian action, States may also be guided by various sets of principles and ethical and legal standards, including those set out by humanitarian organizations.<sup>79</sup>

### 3.3. Holding Others to Account

Holding other international actors to account for their conduct is another facet of securing respect for principled humanitarian action. A State may seek to institute responsibility for breaches of international law. Additionally or alternatively, States may use more informal mechanisms. For example, a State may monitor and respond to the development and application of international legal rules and national legal systems with the potential to affect respect for principled humanitarian action.<sup>80</sup> At the multilateral level, States may negotiate legal or political instruments

---

<sup>78</sup> Sweden’s humanitarian aid strategy for the period 2017–2020, for example, emphasizes that “the humanitarian principles of humanity, impartiality, neutrality and independence, and the impartial mission and nature of the humanitarian actors must be respected.” Sweden, ‘Strategy for Sweden’s humanitarian aid provided through the Swedish International Development Cooperation Agency (Sida) 2017–2020’ (2017) <<https://www.government.se/494ab9/contentassets/70eebc1992ae40b69318e430c93aefcf/strategy-for-sweden-humanitarian-aid-provided-through-the-swedish-international-development-cooperation-agency-sida-20172020.pdf>>. Among other aspects, the strategy contemplates “needs-based, fast and effective humanitarian response,” and “increased protection for people affected by crises and increased respect for international humanitarian law and the humanitarian principles.” Additionally, members of regional institutions — like the EU — may commit collectively to providing humanitarian assistance in line with certain agreed principles. The European Consensus on Humanitarian Aid, for example, defines humanitarian aid as a “moral imperative” and sets out the basis for humanitarian aid to be delivered in accordance with the “principles of neutrality, impartiality, humanity and independence of humanitarian action, enshrined in International Law, in particular International Humanitarian Law.” Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission [2008] OJ C 25. *See also*: Annex III(A), Belgium’s Response to an HLS PILAC Questionnaire.

<sup>79</sup> *See, e.g.*, The Sphere Handbook (n 21); ICRC, ‘Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief’ (1994) <<https://www.icrc.org/en/doc/assets/files/publications/icrc-002-1067.pdf>>. *See also*: GHD ‘24 Principles’, principle 16: “Promote the use of ... the 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief.”

<sup>80</sup> Consider, for example, recent views set out by Nigeria and the US, asserting that IHL does not necessarily require States to allow unfettered humanitarian assistance. US Mission to UN, ‘US Explanation of Position on the UN General Assembly Adoption of the Global Counter-Terrorism Strategy’ (June 30, 2021) <<https://usun.usmission.gov/explanation-of-position-on-the-un-general-assembly-adoption-of-the-global-counter-terrorism-strategy/>>; Nigeria, ‘Statement During the Plenary adoption of the 7th review of The United Nations Global Counter Terrorism review at the General Assembly, July 6, 2021’ (July 2021) <<https://estatements.unmeetings.org/estatements>>.

— potentially including Security Council decisions — that emphasize respect for the humanitarian imperative and principled humanitarian action.<sup>81</sup> States may also examine and respond to counterterrorism-related conduct of UN bodies, such as the Counter-Terrorism Committee (CTC) and the Counter-Terrorism Committee Executive Directorate (CTED), and other influential non-UN entities, such as the FATE, and offer their views on whether that conduct is consonant with international law and policy concerning principled humanitarian action.

## 4. ACCEPTING AND CARRYING OUT SECURITY COUNCIL DECISIONS

In this section, we set out key theoretical and doctrinal elements related to accepting and carrying out the Security Council's binding decisions. We begin by introducing the UN Charter and relevant roles and responsibilities of the Security Council. Next, we describe types and effects of Security Council acts. We then outline fundamental aspects concerning interpretation. Lastly, we sketch legal relations between IHL and the Security Council's counterterrorism decisions.

### 4.1. The UN Charter and Relevant Roles and Responsibilities of the Security Council

All UN member States are parties to the UN Charter.<sup>82</sup> The Charter —

---

<sup>81</sup> See, e.g., UNSCR 2286 (2016), preamble (reaffirming, among other aspects, “the need for all parties to armed conflict to respect the humanitarian principles of humanity, neutrality, impartiality and independence in the provision of humanitarian assistance, including medical assistance”).

<sup>82</sup> Charter of the United Nations (entered into force October 24, 1945) 1 UNTS XVI (UN Charter) preamble (States “have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.”). To interpret the UN Charter, reliance may be placed on the rules for treaty interpretation contained in the Vienna Convention on the Law of Treaties (VCLT), which reflect customary international law. Kadelbach (n 51). See also: VCLT, art. 5, providing that those rules apply to “any treaty which is the constituent instrument of an international organization.” The Charter — including its provisions related to the Security Council's counterterrorism decisions — shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. VCLT, art. 31(1). The Charter's text, including its preamble, is one of the constitutive elements of the context for the purpose of interpretation. VCLT, art. 31(2). Together with the context, certain other aspects shall be taken into account as well, including any subsequent practice in the application of the Charter that establishes the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between the parties. VCLT, art. 31(3)(b)–(c). Further, a special meaning shall be given to a term in the Charter if [Footnote continued on next page]

sometimes regarded as a “constitution” for UN member States<sup>83</sup> — sets out the purposes and principles of the UN, as well as the powers and functions of UN organs. In so doing, it confers on the Security Council primary responsibility for the maintenance of international peace and security.<sup>84</sup> Members agree that, in carrying out its duties under that responsibility, the Security Council acts on their behalf.<sup>85</sup> The UN Charter provides an express basis for the Security Council to establish such subsidiary organs as it deems necessary to perform its functions.<sup>86</sup> In pursuit of the designated purposes, the UN, including the Security Council, and its members are obliged to act in accordance with certain principles.<sup>87</sup> Nothing contained in the Charter authorizes the UN, including the Security Council, to intervene in matters that are essentially within the domestic jurisdiction of any state; however, this principle does not prejudice the application of enforcement measures by the Security Council under Chapter VII, including those entailed in binding decisions aimed at countering terrorism.<sup>88</sup> Decisions of the Security Council may contain (binding) obligations, (non-binding) recommendations, or a combination of those two types of acts; decisions containing binding elements may be issued under Chapters VI and VII of the UN Charter.<sup>89</sup> In the event of a conflict between the obligations of the

---

it is established that the parties so intended. VCLT, art. 31(4). To confirm the meaning resulting from the application of those elements, or to determine the meaning when the interpretation according to those elements leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, recourse may be had to supplementary means of interpretation. VCLT, art. 32. Those supplementary means include the preparatory work of the Charter and the circumstances of its conclusion. VCLT, art. 32.

<sup>83</sup> See, e.g., Sufyan Droubi, *Resisting United Nations Security Council Resolutions* (First Edition, Routledge 2014).

<sup>84</sup> UN Charter, art. 24(1).

<sup>85</sup> Ibid. The specific powers granted to the Security Council for the discharge of these duties concern pacific settlement of disputes (Chapter VI); action with respect to threats to the peace, breaches of the peace, and acts of aggression (Chapter VII); regional arrangements (Chapter VIII); and an international trusteeship system (Chapter XII). In discharging those duties, the Security Council is obliged to act in accordance with the purposes and principles of the UN. UN Charter, art. 24(2). Those purposes include (among others) to maintain international peace and security and to achieve international co-operation in solving international problems of a humanitarian character. UN Charter, arts. 1(1), 1(3).

<sup>86</sup> Ibid. art. 29. See also: *ibid.* art. 7(2).

<sup>87</sup> For members, those principles include fulfilling in good faith the obligations assumed by them in accordance with the Charter; settling their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; and giving the UN every assistance in any action it takes in accordance with the Charter while refraining from giving assistance to any state against which the UN is taking preventive or enforcement action. UN Charter, arts. 2(2), 2(3), 2(5).

<sup>88</sup> Ibid. art. 2(7).

<sup>89</sup> Anne Peters, ‘Article 25’ in Bruno Simma et al (ed), *The Charter of the United Nations: A Commentary, Volume I* (Third Edition, Oxford University Press 2012) 793.

members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter prevail.<sup>90</sup>

#### 4.2. Types and Effects of Security Council Acts

All UN members agree to accept and carry out decisions of the Security Council in accordance with the Charter.<sup>91</sup> This means, in short, that members are obliged to carry out the Council's decisions.<sup>92</sup> For its part, the UN Charter does not necessarily prescribe a particular model of implementation for States to “carry out” binding elements of counterterrorism resolutions.<sup>93</sup> Nevertheless, in practice, Security Council acts that contain provisions that are intended to be enforced in national law typically formulate principles or obligations of result.<sup>94</sup> That approach leaves it to each State concerned to determine how to implement the provisions in practice.<sup>95</sup>

Binding decisions and non-binding recommendations are often found side by side in a single Security Council resolution.<sup>96</sup> The legal effect of a Security Council recommendation has been said to be that members retain discretion

---

<sup>90</sup> Charter, art. 103.

<sup>91</sup> *Ibid.* art. 25; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 [1971] ICJ Rep 16, 54. As parties to the Charter, which is a multilateral treaty, UN member States must “perform” obligations imposed by the Charter. “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” See VCLT, art. 26. *See also*: Anthony Aust, ‘Pacta Sunt Servanda’, *Max Planck Encyclopedia of Public International Law* (2007); VCLT, preamble: “Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized.”

<sup>92</sup> *See* Peters (n 89) 795 (also raising the possibility of “the exceptional situation that a decision which has been found, in a proper proceeding, to be manifestly illegal, need not be carried out”) (citation and internal cross-reference omitted). As Peters notes, this view — that under Article 25 members are obliged to carry out the Council's decision — is corroborated by Article 2(5) of the UN Charter, which contains a general obligation of members to give “every assistance in any action” the UN takes in accordance with the Charter. *Id.* On the “accept to agree” verb, *see ibid.* (“The verb ‘agree to accept’ refers to the overall consent given by States upon ratification of the Charter. This is technically speaking superfluous but in political terms significant. Because of the revolutionary nature of the binding quality of Security Council decisions the drafters deemed it wise to remind the States that they have consented to this. That reminder underscores both the novelty and the importance of the bindingness of the Security Council decisions and forbids admitting excuses for non-implementation light-heartedly.”) (internal citation omitted).

<sup>93</sup> *See Case of Nada v. Switzerland* European Court of Human Rights Application no. 10593/08 (September 2012); Clara Portela, ‘National Implementation of United Nations Sanctions: Towards Fragmentation’ (2009) 65 *International Journal* 13, 21.

<sup>94</sup> Polakiewicz (n 45) para. 4.

<sup>95</sup> *Ibid.*

<sup>96</sup> *See* Peters (n 89) 793.

whether or not to act, but they must exercise that discretion in good faith and consider the recommendation in that sense.<sup>97</sup>

### 4.3. Interpretation

Agents and organs of States<sup>98</sup> typically need to undertake an interpretive exercise to understand and “carry out” the Security Council’s decisions. Relevant interpretive considerations for State actors arguably include the intent of the Security Council as expressed in the words of the decision, statements made by Council members during the adoption of that decision, subsequent practice of the Council, and the context of the Charter itself.<sup>99</sup>

The power of “authentic” — but not necessarily “authoritative” — interpretation has been said to lie with the Security Council.<sup>100</sup> However, while the “authentic” interpretation given by the Security Council does not strictly bind members and other actors, it has been said to bear more legal and political weight than interpretations pronounced by others.<sup>101</sup>

In adopting Resolution 1373 (2001), the Security Council departed from its traditional approach of applying concrete measures in specific situations by using the powers granted to it under Chapter VII of the UN Charter to impose a kind of binding international legislation.<sup>102</sup> Notably, even as the Council continues to lay down extensive obligations and recommendations concerning counterterrorism,

---

<sup>97</sup> See Peters (n 89) 793 (citing Jochen A. Frowein, ‘Implementation of Security Council Resolutions Taken under Chapter VII in Germany’, *United Nations Sanctions and International Law* 253, 263 (Editor Vera Gowlland-Debbas 2001)).

<sup>98</sup> Being devoid of a “physical existence,” States act through “organs or agents” whose “conduct is performed on behalf of the State.” Robert Kolb, *The International Law of State Responsibility* (Edward Elgar 2017) 70. See also: DARSIVA, art. 4: “Conduct of organs of a State—1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”; art. 5: “Conduct of persons or entities exercising elements of governmental authority—The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

<sup>99</sup> Michael Wood, ‘The Interpretation of Security Council Resolutions, Revisited’ (2017) 20 *Max Planck Yearbook of United Nations Law* Online 1.

<sup>100</sup> Peters (n 89) 798. See also: Wood (n 99).

<sup>101</sup> Peters (n 89) 798.

<sup>102</sup> Christian Walter, ‘Terrorism’, *Max Planck Encyclopedia of Public International Law* (2011) para. 65. See also: Paul C Szasz, ‘The Security Council Starts Legislating’ (2002) 96 *American Journal of International Law* 901.



the Council has not yet defined key terms, such as what constitutes “terrorism” or “terrorist acts” in respect of these counterterrorism resolutions.<sup>103</sup> The continued absence, at the Council level, of a consistent definition of “terrorism” has led to the proliferation of related — and also interpretively ambiguous — terms, such as “support,” “involvement,” and “association” in relation to terrorism.<sup>104</sup> It has been asserted that, in the case of these counterterrorism resolutions, deliberately “fuzzy” or unclear language can help push through international commitments on the typically fraught subject of terrorism while affording States certain flexibility in what to make of those commitments domestically.<sup>105</sup>

In sum, each member State retains notable, if not unlimited, interpretive latitude to implement the Council’s decisions into its national legal and policy system.

#### 4.4. Relations between IHL and Security Council Counterterrorism Decisions

In theory, where a provision of a Security Council counterterrorism decision and a provision of IHL are both applicable and are considered to concern the same norm, one of two situations may arise: either a normative incompatibility between the provisions may arise or it may not. International law provides techniques and methods aimed at securing interpretations that are compatible to the greatest extent possible.<sup>106</sup> International law contains a strong presumption against normative conflict,<sup>107</sup> and, whenever ambiguous, Security Council decisions ought to be construed to avoid conflicts with fundamental international obligations, including those contained in IHL.<sup>108</sup> Moreover, the Security Council

---

<sup>103</sup> See Feinberg (n 12); Pejic (n 23); Toivanen (n 23).

<sup>104</sup> UNGA ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ August 2006 ‘A/61/267’. See also: Ben Saul, ‘From Conflict to Complementarity: Reconciling International Counterterrorism Law and International Humanitarian Law’ (2021) *International Review of the Red Cross* 1, 33.

<sup>105</sup> Victoria Martín de la Rosa and Elena Domínguez Romero, ‘Epistemic and Non-Epistemic Modals: The Key to Interpreting the Spirit of Counter-Terrorism United Nations Security Council Resolutions’ (2021) 180 *Journal of Pragmatics* 89.

<sup>106</sup> See Lewis and Modirzadeh (n 4) 21 and citations therein.

<sup>107</sup> ILC, ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law’ (2006) A/CN.4/L.682, 25–26; Droubi (n 83) 10.

<sup>108</sup> Hans-Peter Gasser, ‘Collective Economic Sanctions and International Humanitarian Law: An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?’ (1996) 56 *Zeitschrift Fur Ausländisches Öffentliches Recht Und Völkerrecht* 871, 883; Alexander Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations [Footnote continued on next page]

is arguably bound at least by certain norms of IHL pertaining to principled humanitarian action.<sup>109</sup> While the Charter contains a so-called primacy clause, the conditions to bring that provision into operation appear to be relatively strict.<sup>110</sup> For its part, the Security Council often directs States to ensure that the application of counterterrorism measures is undertaken in a manner consistent with States' obligations under international law, including (as relevant) IHL.<sup>111</sup> And, in Resolution 2462 (2019) and Resolution 2482 (2019), the Security Council urged States to take into account the potential effects of certain counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with IHL.<sup>112</sup>

Potential for ambiguity and interpretive latitude concerning the Security Council's relevant binding counterterrorism decisions risk creating a misapprehension that those decisions automatically trump IHL rules protecting the humanitarian imperative. In our view, the cumulative elements set out in the

---

Security Council Resolutions' (2005) 16 *European Journal of International Law* 59. In the European context, for example, this question was explored in the *Al-Jedda* case, where it was found that in the event of ambiguity, an attempt must be made to interpret Security Council resolutions in line with fundamental rules of international law contained in the ECHR, which bound member states. *Case of Al-Jedda v. the United Kingdom* European Court of Human Rights Application no. 27021/08 (July 2011).

<sup>109</sup> In particular, at least those IHL norms that have a customary-law status and that thereby form part of general international law. See Peters (n 89) 827.

<sup>110</sup> Although Article 103 contains a clear "primacy clause" concerning Charter provisions, that clause does not necessarily imply that all Security Council resolutions prevail over all other international legal obligations. Article 103 expressly concerns obligations only in relation to "other international agreement[s]" and does not necessarily subsume obligations under non-treaty sources (or origins). Orakhelashvili (n 108) 69; Derek Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' [1994] 5 *European Journal of International Law* 89, 92. See also: *Separate Opinion of Judge Lauterpacht, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [1993] ICJ Rep 440.

<sup>111</sup> See, e.g., UNSCR 1624 (2005), OP 4; UNSCR 2178 (2014), OP 5; UNSCR 2462 (2019), OP 6; UNSCR 2482 (2019), OP 16. Resolution 1373 (2001) did not expressly require States to ensure that domestic implementing measures complied with IHL, leaving open the question of how counterterrorism measures would interact with IHL (UNSCR 1373 (2001)). See also: Clémentine Olivier, 'Human Rights Law and the International Fight Against Terrorism: How Do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373)' (2004) 73 *Nordic Journal of International Law* 399. See further: David McKeever, 'International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations' (2020) 69 *International and Comparative Law Quarterly* 43, 61.

<sup>112</sup> UNSCR 2462 (2019), OP 24 (the Council urges "States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law..."); UNSCR 2482 (2019), OP 16 (the Council 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..."). See further: Lewis and Modirzadeh (n 4).

preceding paragraph leave a vanishingly thin basis to assert persuasively that the Security Council's binding counterterrorism decisions prevail over IHL rules on principled humanitarian action. The more compelling argument is, from our perspective, that IHL represents at least a legal floor for interpreting the Security Council's relevant counterterrorism-related binding decisions and non-binding recommendations.

## 5. CONDUCT OF THE SECURITY COUNCIL AND STATES IN THIS FIELD

The Security Council's increasingly complex directives aimed at countering terrorism have often been characterized as vague and overly broad as well as reflecting little, if any, precaution regarding the potential that they may give rise to detrimental consequences for principled humanitarian action.<sup>113</sup> Despite an apparently widespread assumption to the contrary, the relatively few clear rules and principles applicable to States' interpretation and implementation of these decisions do not necessarily dictate that counterterrorism rationales must take precedence over respect for the humanitarian imperative; quite the contrary.

In this section, we aim to describe the conduct of the Security Council and States concerning instances and situations in which the interpretation and implementation of the Council's binding counterterrorism decisions interact with States' commitments to advance the humanitarian imperative. We briefly set out the field of application, after which we explain the conduct of the Security Council and its bodies. Then we outline key aspects of States' positions and practices.

### 5.1. Field of Application

The field of application encompasses situations or instances in which both the Security Council's relevant counterterrorism decisions and principled humanitarian action are simultaneously implicated. Over recent years, those contexts have included at least parts of Afghanistan, Colombia, Iraq, Libya, Mali, Nigeria, Pakistan, the Philippines, Somalia, Syria, Turkey, and Yemen.<sup>114</sup> In addition to the acts and omissions of the States on whose territories those contexts occur, the

---

<sup>113</sup> See UNGA 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' August 2006 'A/61/267'. See also: Saul (n 104) 33.

<sup>114</sup> See Bellal (ed) (n 20); Lewis et al (n 20) 29–30.

conduct of dozens of other States has also variously diminished or facilitated the humanitarian imperative in these contexts. Examples include application of those other States' restrictive extraterritorial counterterrorism laws or funding of humanitarian projections by those other States.<sup>115</sup>

## 5.2. The Security Council

In at least two lines of resolutions, which at certain points overlap,<sup>116</sup> the Security Council has adopted a constellation of binding decisions and non-binding recommendations aimed at countering terrorism.

### 5.2.1. *The Resolution 1267 (1999), Resolution 1989 (2011), and Resolution 2253 (2015) Line of Resolutions*

Under the Resolution 1267 (1999), Resolution 1989 (2011), and Resolution 2253 (2015) line of resolutions, the Security Council has established targeted sanctions as counterterrorism measures, which are currently imposed against the Islamic State in Iraq and the Levant (Da'esh), Al-Qaida, and associated individuals, groups, undertakings, and entities.<sup>117</sup> These measures may adversely affect principled humanitarian action in at least three respects.<sup>118</sup>

First, the Security Council has specified the types of sanctions that States

---

<sup>115</sup> See, e.g., Counterterrorism and Humanitarian Engagement in Somalia and Mali' (Counterterrorism and Humanitarian Engagement Project) <<http://blogs.harvard.edu/cheproject/files/2012/10/CHE-Project-Somalia-and-Mali.pdf>>; Charity & Security Network, 'The Impact on Women: Counterterrorism Laws and Policies Restricting Peacebuilding and Humanitarian Work' (2015) <[https://charityandsecurity.org/sites/default/files/files/Issue%20Brief%20-%20women%20in%20conflict\(1\).pdf](https://charityandsecurity.org/sites/default/files/files/Issue%20Brief%20-%20women%20in%20conflict(1).pdf)>.

<sup>116</sup> See, e.g., UNSCR 1456 (2003); UNSCR 2170 (2014); UNSCR 2199 (2015).

<sup>117</sup> See, e.g., UNSCR 1267 (1999); UNSCR 1333 (2000); UNSCR 1363 (2001); UNSCR 1388 (2002); UNSCR 1390 (2002); UNSCR 1452 (2002); UNSCR 1455 (2003); UNSCR 1456 (2003); UNSCR 1526 (2004); UNSCR 1617 (2005); UNSCR 1699 (2006); UNSCR 1730 (2006); UNSCR 1732 (2006); UNSCR 1735 (2006); UNSCR 1822 (2008); UNSCR 1904 (2009); UNSCR 1989 (2011); UNSCR 2083 (2012); UNSCR 2161 (2014); UNSCR 2170 (2014); UNSCR 2178 (2014); UNSCR 2199 (2015); UNSCR 2253 (2015); UNSCR 2368 (2017); UNSCR 2560 (2020). Note that, with Resolutions 1988 (2011) and 1989 (2011), the Security Council bifurcated the monitoring and sanctions regimes, with the former applying to the Taliban (and associated individuals, groups, undertakings, and entities) and the latter applying to al-Qaeda (and associated individuals, groups, undertakings, and entities).

<sup>118</sup> See Rebecca Brubaker and Sophie Huvé, 'Conflict-related UN sanctions regimes and humanitarian action: A policy research overview' (2021) International Review of the Red Cross 1; Rebecca Brubaker and Sophie Huvé, *UN Sanctions and Humanitarian Action Review of Past Research and Proposals for Future Investigation* (United Nations University 2021) <[http://collections.unu.edu/eserv/UNU:7895/UNSHA\\_ScopingPaper\\_FINAL\\_WEB.pdf](http://collections.unu.edu/eserv/UNU:7895/UNSHA_ScopingPaper_FINAL_WEB.pdf)>.

must carry out. Under this line of resolutions, the Security Council has required the imposition of sanctions in the following categories: assets freezes, travel bans, and arms embargoes. Application of these sanctions may affect the ability of humanitarian actors to administer impartial medical care or principled humanitarian action. For example, sanctions may render it difficult or impossible for those actors to function in certain areas or transact with certain individuals or groups.<sup>119</sup> That is partly because banks and other financial institutions may be unable or unwilling to service humanitarian and medical actors in some contexts.<sup>120</sup>

Second, the Security Council's 1267/1989/2253 Committee designates individuals and entities against whom States are required to impose those targeted sanctions.<sup>121</sup> The basis, secrecy, opacity, and (in)adequacy of the procedures of the listing system have been subject to frequent criticism, particularly in human-rights terms, and various reforms related to listing and de-listing have been instituted.<sup>122</sup> Concerns around IHL and principled humanitarian action have received far less attention even though the reasons given for four of the listings may signal a potential lack of respect for medical services in armed conflicts. In particular, the “[a]dditional information” included with respect to the reasons for listing two

---

<sup>119</sup> Mackintosh and Duplat (n 7) 20–21; Emanuela-Chiara Gillard, ‘Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action’ 6; Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, ‘Legislating against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation’ (2015) 97 *International Review of the Red Cross* 235, 252–254; Weizmann (n 1) 15.

<sup>120</sup> For example, UK-based non-profits have reported facing a range of difficulties in accessing financial services necessary for their work, particularly in relation to operations in areas where terrorist entities subject to sanctions are active. Victoria Metcalfe-Hough et al, ‘UK Humanitarian Aid in the Age of Counterterrorism: Perceptions and Reality’ (Overseas Development Institute 2015) 7 <<https://odi.org/en/publications/uk-humanitarian-aid-in-the-age-of-counterterrorism-perceptions-and-reality/>>. Even if banks and financial institutions can in theory service humanitarian actors under some sanctions-related laws and policies, they may be disinclined to do so for fear of blowback from authorities. See ICRC, ‘Counter-Terrorism Measures Must Not Restrict Impartial Humanitarian Organizations from Delivering Aid’ <<https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations>>; Gillard (n 119) 3; NRC (n 3) 25.

<sup>121</sup> In Resolution 1267 (1999), the Security Council established “a Committee of the Security Council consisting of all the members of the Council to undertake [certain] tasks and to report on its work to the Council with its observations and recommendations” concerning the targeted sanctions entailed in that resolution. That Committee has now come to be known as the 1267/1989/2253 Committee.

<sup>122</sup> See, e.g., Gavin Sullivan and Ben Hayes, ‘Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights’ (2010) *European Center for Constitutional and Human Rights* 13. In Resolution 1822 (2008), the Security Council directed the 1267/1989/2253 Committee to make accessible on the Committee’s website a narrative summary of reasons for listing. UNSCR 1822 (2008), OP 13.

individuals and two entities refer to certain medical-care-related activities.<sup>123</sup> The invocation of those grounds may cause concern for those engaged in medical care as part of providing principled humanitarian action in counterterrorism contexts.<sup>124</sup> IHL rules related to principled humanitarian action that might come into play include those concerning provision of medical care and attention to the wounded and sick,<sup>125</sup> assignment of medical personnel by a party,<sup>126</sup> and prohibitions on punishment of ethically sound medical care.<sup>127</sup> This part of the listing practice may suggest that the Security Council and its anti-terrorism sanctions committee do not take a precautionary approach to upholding respect for principled humanitarian action, including medical services.

Third, the Security Council precludes the application of certain targeted sanctions on limited humanitarian grounds. In this way, the Security Council “carves out” those measures from applying based on a particular humanitarian rationale.<sup>128</sup> In Resolution 1267 (2001), the Security Council decided that all States shall apply the asset freeze entailed in that resolution except as may be authorized by the 1267/1989/2253 Committee on a case-by-case basis on the grounds of

---

<sup>123</sup> In particular, the following is included as “additional information” in relation to certain individuals or entities. First, as of mid-November 2001, the Al-Akhtar Trust was secretly treating wounded members of Al-Qaida at the medical centers it was operating in Afghanistan and Pakistan <[https://www.un.org/securitycouncil/sanctions/1267/aq\\_sanctions\\_list/summaries/entity/al-akhtar-trust-international](https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/entity/al-akhtar-trust-international)>. Second, in November 2001, a Global Relief Fund medical relief coordinator traveled to Kabul, Afghanistan, and had dealings with Taliban officials until the collapse of the Taliban regime <[https://www.un.org/securitycouncil/sanctions/1267/aq\\_sanctions\\_list/summaries/entity/global-relief-foundation-%28grf%29](https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/entity/global-relief-foundation-%28grf%29)>. Third, as of 2010, Zafar Iqbal was the president of the Lashkar-e-Tayyiba/Jamaat-ud-Dawa medical wing <[https://www.un.org/securitycouncil/sanctions/1267/aq\\_sanctions\\_list/summaries/individual/zafar-iqbal](https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/individual/zafar-iqbal)>. And fourth, Redendo Cain Dellosa provided medical supplies to members of the Abu Sayyaf Group <[https://www.un.org/securitycouncil/sanctions/1267/aq\\_sanctions\\_list/summaries/individual/redendo-cain-dellosa](https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/individual/redendo-cain-dellosa)>.

<sup>124</sup> See Lewis et al (n 10) 109–111.

<sup>125</sup> See, e.g., GC I, art. 3(2), art. 12; GC II, art. 3(2), art. 12; GC III, art. 3(2), art. 15; GC IV, art. 3(2); AP I, art. 10; AP I, art. 7. See also: GC IV, art. 16; AP II, art. 18(1), second sentence; GC III Commentary (n 4), para. 798.

<sup>126</sup> See, e.g., AP I, art. 8(c), art. 15; AP II, art. 9. See also: GC I, art. 24; GC II, art. 36; GC I Commentary (n 4), para. 1947.

<sup>127</sup> See n 68.

<sup>128</sup> The term “carve-outs” — which may overlap with “exemptions” or “exceptions,” depending on prevailing usage and context — may be said to refer to instruments, provisions, or interpretive elements that preclude the applicability of otherwise enforceable measures. See further: Dustin Lewis, ‘Humanitarian Exemptions from Counter-Terrorism Measures: A Brief Introduction’ (2016) Proceedings of the Bruges Colloquium <<https://dash.harvard.edu/handle/1/40268420>>. On various arguments in favor of and against these types of measures, see Katie King, Naz K Modirzadeh and Dustin A Lewis, ‘Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action’ <<https://dash.harvard.edu/handle/1/29998395>>. See also: UNGA ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (September 2020) A/75/337.

individual humanitarian need.<sup>129</sup> In Resolution 1452 (2002), the Security Council replaced this approach with a carve-out providing that certain asset-freeze provisions<sup>130</sup> would not apply to funds and other financial or economic resources determined by the relevant State to be necessary for certain basic expenses<sup>131</sup> or for extraordinary expenses approved by the 1267/1989/2253 Committee.<sup>132</sup> In this manner, the relevant case-by-case carve-out requires authorization by the concerned State and notification to or approval by, where applicable, the 1267/1989/2253 Committee.<sup>133</sup>

### 5.2.2. *The Resolution 1373 (2001) Line of Resolutions*

Under the Resolution 1373 (2001) line of resolutions, the Security Council has adopted binding decisions and non-binding recommendations related to the overall goal of countering terrorism without reference to a particular situation or set of actors. These resolutions concern, among other objectives, preventing the financing of terrorist acts and ensuring that any person who participates in supporting terrorist acts is brought to justice.<sup>134</sup> This line of resolutions additionally entails certain obligations and recommendations concerning making available funds, financial assets, or economic resources, directly or indirectly, to certain terrorist entities or for the benefit of certain entities characterized as terrorists.<sup>135</sup> Depending on how they are interpreted and applied, these obligations have the potential to significantly limit — and possibly transform — what is considered to constitute legitimate forms of principled humanitarian action.

As part of this set of resolutions, the Security Council has decided that all States shall (among other actions) criminalize certain conduct related to terrorist

---

<sup>129</sup> UNSCR 1267 (1999), OP 4(b).

<sup>130</sup> See, e.g., UNSCR 1267 (1999), OP 4(b); UNSCR 1390 (2002), OP 2(a).

<sup>131</sup> “Basic expenses” included “payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges.” UNSCR 1452 (2002), OP 1. The “basic expenses” carve-out would apply after notification to the 1267/1989/2253 Committee and in the absence of a negative decision by that Committee within 48 hours of such notification.

<sup>132</sup> UNSCR 1452 (2002), OP 1. Various subsequent counterterrorism resolutions remind States to be mindful of this carve-out in implementing sanctions. See, e.g., UNSCR 1455 (2003), preamble; UNSCR 1526 (2004), preamble; UNSCR 1822 (2008), OP 7.

<sup>133</sup> See UNSCR 1452, OP 1.

<sup>134</sup> UNSCR 1373 (2001), OPs 1(a), 2(e). See Annex IV for an indicative compendium of obligations arising from Security Council counterterrorism resolutions.

<sup>135</sup> See, e.g., UNSCR 1373 (2001), OP 1(d); UNSCR 2199 (2015), OP 2; UNSCR 2368 (2017), OP 20; UNSCR 2462 (2019), OPs 3 and 5.

acts and ensure that certain terrorist acts — including supporting terrorist acts — are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of those terrorist acts.<sup>136</sup> Notably, the Security Council has not expressly defined what constitutes such terrorist acts or supporting those acts. Nor has the Security Council expressly provided a basis to preclude the application on humanitarian grounds of any of the counterterrorism measures that States are obliged to carry out under the Resolution 1373 (2001) line of resolutions. Under certain counterterrorism rationales and corresponding implementation regimes, at least some humanitarian and medical activities have been conceptualized as providing “support” — whether intentionally or not, or knowingly or not — to terrorists.<sup>137</sup>

A key issue is whether these Security Council decisions ought to be interpreted and applied in a manner that includes or excludes a notion of “support” that might encompass, in its material scope, at least humanitarian or medical activities that are compatible with IHL.<sup>138</sup> IHL rules related to principled humanitarian action that might come into play include those concerning offering and providing impartial humanitarian services to a party to an armed conflict;<sup>139</sup> facilitation of visits to persons whose liberty has been deprived or restricted;<sup>140</sup> instruction and training in IHL;<sup>141</sup> provision of medical care and attention to the wounded and sick;<sup>142</sup> assignment of medical personnel by a party;<sup>143</sup> and prohibitions on punishment of humanitarian services and ethically sound medical care.<sup>144</sup>

Additionally and relatedly, under certain counterterrorism rationales and corresponding implementation regimes, at least some humanitarian and medical activities have been conceptualized as resulting — intentionally or not, or

---

<sup>136</sup> UNSCR 1373 (2001), OPs 1(b), 2(e); UNSCR 2178 (2014), OP 6; UNSCR 2396 (2017), OP 1; UNSCR 2462 (2019), OPs 2 and 5.

<sup>137</sup> See, e.g., Providing material support to terrorists, 18 U.S. Code § 2339A(b) (US); Terrorism Act 2000 (UK), sec. 15. See further: Charity & Security Network (n 8); Buissonniere et al (n 8); O’Leary (n 9) 6.

<sup>138</sup> For example, the provision of impartial medical care to the wounded and sick and relief supplies — including essential food, clothing, and water — to civilians residing in areas controlled de facto by those characterized as terrorists. Lewis and Modirzadeh (n 4) 27–28.

<sup>139</sup> See n 63.

<sup>140</sup> See, e.g., Henckaerts et al (eds) (n 43) 442–445, 448–449. See further: ICRC (n 7) 52.

<sup>141</sup> See, e.g., ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (2019) 60 <<https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>>.

<sup>142</sup> See n 125.

<sup>143</sup> See n 126.

<sup>144</sup> See n 68.



knowingly or not — in a “benefit” to those characterized as terrorists.<sup>145</sup> In 2019, the Security Council laid down an obligation to prohibit the collection or provision of funds intending that those funds should be used or knowing that they are to be used for the “benefit” of a terrorist organization or individual terrorists for any purpose, even in the absence of a link to a specific terrorist act.<sup>146</sup> The scope of the Security Council’s notion of prohibited financial “benefit” has raised concerns for humanitarian bodies, including the ICRC.<sup>147</sup> A key issue is whether this decision ought to be interpreted and applied in a manner that includes or excludes a notion of proscribed financial “benefit” that might potentially encompass, in its material scope, at least humanitarian or medical activities compatible with IHL.<sup>148</sup> IHL rules related to principled humanitarian action that might come

---

<sup>145</sup> For measures predicated on the notion of a perceived “benefit” to those characterized as terrorists, *see, e.g.*, The Unlawful Activities (Prevention) Act, 1967 (India), sec. 17; Terrorism Suppression Act 2002 (NZ), sec. 8(2A). It is not difficult to contemplate that humanitarian and medical activities “benefiting,” in some sense, those characterized as terrorists may become implicated under such frameworks. This could purportedly occur, for instance, where potential beneficiaries of impartial medical care include those characterized as terrorists, thereby “benefiting” the concerned terrorists. Separately, where the “benefit” notion encompasses the provision of monetary resources, incidental payments — such as tolls or taxes — made to terrorist entities to secure access to civilians may run afoul of counterterrorism measures.

<sup>146</sup> UNSCR 2462 (2019), OP 5: “[The Security 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, 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[...].” *See further* UNSCR 2462 (2019), OP 3, in which the Security Council highlights “that the obligation regarding the prohibition in paragraph 1 (d) of resolution 1373 applies to making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, 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*” (emphasis added). *See also*: de Londras (n 11) 215.

<sup>147</sup> *See, e.g.*, ICRC, ‘Statement to Counter Terrorism Committee Meeting on 20th anniversary of the adoption of Security Council resolution 1373’ (November 2021) <<https://www.icrc.org/en/document/icrc-statement-counter-terrorism-committee-meeting-20th-anniversary-adoption-security>>, describing how the use of overly broad language in Resolution 2462 (2019), OP 5 creates challenges for impartial humanitarian action.

<sup>148</sup> Lewis and Modirzadeh (n 4) 27–28 (“Suppose, for example, that a State, a non-governmental organization, or an individual provides money to a humanitarian organization with the aim of supporting the provision of impartial medical care to wounded and sick fighters hors de combat in an armed conflict. Suppose, too, that those fighters qualify under an applicable framework — such as domestic law — as members of a terrorist organization. In this hypothetical, the State, NGO, or individual wilfully collects and provides financial resources intending that the funds should be used, and in the knowledge that they will be used, for a ‘benefit’ to members of the terrorist organization, even though there may be no ‘link to a specific terrorist act’ and the [Footnote continued on next page]

into play include those concerning offering and providing impartial humanitarian services to a party to an armed conflict;<sup>149</sup> provision of medical care and attention to the wounded and sick;<sup>150</sup> and prohibitions on punishment of humanitarian services and ethically sound medical care.<sup>151</sup>

In at least three respects, the Security Council's approach in this line of resolutions restricts the margin of appreciation (or discretion) of States to determine how to implement provisions of Council decisions that are intended to be enforced in national law. One way relates to the quasi-“legislative” character of the resolutions.<sup>152</sup> Through Resolution 1373 (2001) and over a dozen subsequent decisions, the Security Council adopted under Chapter VII of the UN Charter a series of decisions analogous to binding international “legislation.”<sup>153</sup> Notably, unlike the UN General Assembly, the Security Council does not have universal membership. Concerns have arisen regarding the (lack of) authority and power of the Council to adopt such quasi-“legislative” measures.<sup>154</sup>

Second, in 2001, the Security Council established the CTC, comprising all members of the Council, as a subsidiary organ tasked with monitoring the implementation of Resolution 1373 (2001) and assessing reports from UN members.<sup>155</sup> In 2004, the Security Council established CTED as a special political

---

purpose of the ‘benefit’ is to provide impartial medical care consistent with IHL. Numerous other examples could be identified relating to an array of other humanitarian and medical activities subject to protections under IHL. [¶] [...] In this context, a key issue is whether the notion in [operative paragraph] 5 of Resolution 2462 (2019) of a financial or economic ‘benefit’ for ‘terrorist organizations and individual terrorists for any purpose’ ought to be interpreted to include or exclude such a ‘benefit’ which may be conceptualized as arising in relation to humanitarian and medical activities that are compatible with IHL. This issue matters for at least two reasons. One is that, in theory, the notion of prohibited ‘benefit’ might be interpreted, as the hypothetical above illustrates, to encompass certain humanitarian and medical activities that are subject to protection under IHL. A second is that there is apparently little practice and authoritative guidance to date on how to interpret this notion of prohibited ‘benefit.’”)

<sup>149</sup> See n 63.

<sup>150</sup> See n 125.

<sup>151</sup> See n 68.

<sup>152</sup> See Walter (n 102) para. 65. See also: Szasz (n 102).

<sup>153</sup> Ibid.

<sup>154</sup> Concerns may be particularly sharp in the context of the relatively greater “legislative” power exercised in practice by the five permanent members of the Security Council. See, e.g., Kim Lane Scheppele, ‘The Empire Of Security And The Security Of Empire’ (2014) 27 Temple International and Comparative Law Journal 241, 248–249: “In practice, the five veto-bearing states on the Security Council—the United States, the United Kingdom, France, Russia, and China—can act together with some combination of rotating states in the Security Council to become ‘the international community’ on whose behalf the new law is being created, while the vast majority of states to whom this new law applies have never been consulted and it is far from clear that they, their courts, or their populations would have consented if they had been.”

<sup>155</sup> See UNSCR 1373 (2001), OP 6.

mission tasked with enhancing — under the policy guidance of the CTC — the CTC’s ability to monitor the implementation of Resolution 1373 (2001) and, subsequently, additional resolutions.<sup>156</sup> The CTC has been characterized as acting as a kind of administrative rule-maker, establishing standards of best practice that purport to specify the content of the resolution and giving member States guidelines on how to implement the obligations entailed in the resolution.<sup>157</sup> Meanwhile, for its part, CTED conducts regular assessment visits to States, examining States’ counterterrorism measures across several substantive areas and identifying what it perceives as shortfalls in States’ implementation of relevant resolutions.<sup>158</sup> CTED arguably acts as a kind of monitor of States’ implementation of relevant resolutions and a technical-assistance provider with the potential to shape aspects of States’ interpretation and application of IHL pertaining to principled humanitarian action in counterterrorism contexts.<sup>159</sup>

Third, the Security Council’s relations with the FATF also warrant consideration in this connection. According to interviewees from multiple States, the core obligations concerning counter-financing of terrorism in Resolution 2462 (2019) are aimed at replicating, in substantial part, recommendation five issued by the

---

<sup>156</sup> On “special political missions,” *see further*: UNSC, ‘Special Political Missions’ <<https://www.un.org/securitycouncil/content/repertoire/political-missions-and-offices>>; UNDPPA, ‘DPPA Around the World’ <<https://dppa.un.org/en/dppa-around-world>>. CTED operates under the “policy guidance” of the CTC. UNSCR 2395 (2017), OP 2. In that policy guidance, the CTC instructed the CTED to advise the CTC on, as relevant and among other aspects, “[IHL], in connection with identification and implementation of effective measures to implement resolution 1373 (2001)” and on “how to ensure that any measures States take to implement the provisions of resolution 1624 (2005) comply with their obligations under ... [IHL].” CTC ‘Conclusions for policy guidance regarding human rights and the CTC’ (May 2006) S/AC.40/2006/PG.2.

<sup>157</sup> Walter (n 102) para. 68.

<sup>158</sup> *See* CTC, ‘Framework document for Counter-Terrorism Committee visits to Member States aimed at monitoring, promoting and facilitating the implementation of Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2396 (2017), 2462 (2019) and 2482 (2019) and other relevant Council resolutions’ (July 2020) S/2020/731 (CTC Framework Document) (“The purpose of the updated framework document is to familiarize Member States, United Nations entities and international and regional organizations with the guidelines, goals, thematic areas, modalities, preparations and timelines related to the assessment visits to Member States conducted on behalf of the Counter-Terrorism Committee by its Executive Directorate.... An assessment visit may demonstrate that the host Member State is facing challenges or difficulties in its efforts to fully and effectively implement the resolutions because of a lack of technical capacity....”); CTED, ‘Global survey of the implementation by Member States of Security Council resolution 1373 (2001)’ (January 2016) S/2016/49 (“The survey relies on data compiled on the basis of ... reports on visits to Member States (the Executive Directorate has visited more than 90 States on behalf of the Committee)....”); UNSCR 2129 (2013), OP 9 (“Directs CTED to report to the Committee in a timely manner...on the work of CTED, including its visits to Member States”). CTED also produces global implementation surveys assessing the implementation of Resolution 1373 (2001), divided into major geographic regions and sub-regions (CTED, ‘Global survey of the implementation by Member States of Security Council resolution 1373 (2001)’ (January 2016) S/2016/49).

<sup>159</sup> *See* Lewis et al (n 20).

FATF on the financing of terrorism.<sup>160</sup> In that resolution, the Security Council also urges States to implement at the domestic level the FATF’s recommendations concerning the financing of terrorism.<sup>161</sup> The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has expressed concern that soft law, including FATF recommendations, has the potential to help fill certain interpretive ambiguities in politically negotiated documents, such as counterterrorism resolutions.<sup>162</sup>

Stepping back, it bears emphasis that, despite these restrictive steps by the Security Council, international law doctrine does not demand that these decisions be interpreted and implemented at the national level by elevating particular security rationales over policy preferences for principled humanitarian action. Indeed, not least where other fields of international law, such as IHL, may be implicated, States retain significant discretion to interpret and implement these decisions in a manner that advances the humanitarian imperative.

### 5.3. States

#### 5.3.1. Evidence Base

States’ views and practices on upholding respect for principled humanitarian action in connection with carrying out the Security Council’s relevant counterterrorism decisions merit scrutiny for several reasons. Civilians residing in areas under terrorist control might remain underserved by humanitarian organizations or actors seeking to avoid reputational harm or de-funding. Under certain domestic rationales and corresponding measures, wounded and sick persons and fighters rendered

---

<sup>160</sup> Interview with six government officials, dated July 9, 2021; interview with two government officials, dated July 12, 2021; interview with a government official, dated July 16, 2021. *See also*: FATF ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation’ (2012–2020) (FATF Recommendations), recommendation 5 (“Countries should criminalise terrorist financing on the basis of the Terrorist Financing Convention, and should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts. Countries should ensure that such offences are designated as money laundering predicate offences”).

<sup>161</sup> UNSCR 2462 (2019), OP 4.

<sup>162</sup> UNGA ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (August 2019) A/74/335. *See further*: FATF Recommendations, recommendation 6 concerning the implementation of certain Security Council resolutions by States: “Security Council resolutions relating to the prevention and suppression of terrorism and terrorist financing...require countries to freeze without delay the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity either (i) designated by, or under the authority of, the United Nations Security Council under Chapter VII of the Charter of the United Nations, including in accordance with resolution 1267 (1999) and its successor resolutions; or (ii) designated by that country pursuant to resolution 1373 (2001).”

*hors de combat* (by sickness, injury, detention, or for any other cause) might be left without necessary care.<sup>163</sup> And humanitarian actors might face a range of risks or penalties for undertaking principled assistance, protection, or medical activities.<sup>164</sup> The stakes concerned, therefore, are high; it is not uncommon for matters of life and death to be implicated.

Yet information in the public domain concerning States' practices relating to these critical issues remains relatively scant, at least to our knowledge. Indeed, so far as we can detect, it is rather exceptional for a State to engage in (at least publicly discernible) practices directly or indirectly related to this combination of issues. States may be reticent to publicly share detailed information around domestic counterterrorism rationales and corresponding implementation measures, including those rationales and measures relating to upholding respect for principled humanitarian action. Further, while certain UN bodies are charged with collecting information from States concerning the implementation of counterterrorism measures,<sup>165</sup> similarly extensive monitoring structures are absent regarding legal and policy commitments to upholding respect for principled humanitarian action.<sup>166</sup> Through its contact with States and by virtue of its increasing focus on relations between counterterrorism measures and IHL,<sup>167</sup> CTED may have certain information concerning how States approach this issue. But CTED operates in a largely confidential, closed-door manner, which does not throw much light on these matters.

With these contextual elements in view, in the following two sub-sections, we seek to outline some of the main themes and potential trajectories that we could discern.

### 5.3.2. Views

By and large, States may espouse one or more of the following sets of views: (1) expressing support for principled humanitarian action in relation to

---

<sup>163</sup> See further: Lewis et al (n 10).

<sup>164</sup> See, e.g., HRC '2013 Syria Report' (n 9).

<sup>165</sup> See, e.g., UNSCR 1373 (2001), OP 6, establishing the CTC to "monitor implementation of [Resolution 1373 (2001)]."

<sup>166</sup> On methods and mechanisms concerning the enforcement and implementation of IHL, see Fleck (n 31) 647–700, particularly 661–683, 688–698.

<sup>167</sup> See, e.g., CTC Framework Document, noting that the CTED's current scope of work encompasses "assess[ing] the extent to which the measures taken by [a State] are consistent with its obligations under international law, in particular ... [IHL]."

counterterrorism contexts; (2) expressing the need for a balance between upholding respect for principled humanitarian action and meeting counterterrorism objectives; and (3) framing respect for principled humanitarian action in terms of not contradicting counterterrorism objectives.

Typically, views falling within the first category assume the virtue and necessity of principled humanitarian action. Ireland, for example, stated that “humanitarians should never be criminalized for carrying out principled humanitarian action, particularly when they choose to stay and deliver in some of the most dangerous contexts to the world’s most vulnerable people.”<sup>168</sup> Further, States espousing views in this category may recognize, at least implicitly, the potential for counterterrorism measures to adversely affect principled humanitarian action. Consider the following statement from Belgium:

[W]e must prohibit measures within the framework of combating terrorism that impede the work of humanitarian organizations, whose activities are neutral, independent and impartial. It is therefore essential to take into account the potentially adverse effects on the humanitarian situation of the policies we adopt against terrorist groups operating in war zones, as well as sanctions measures that could have a negative impact on carrying out humanitarian work in specific contexts.<sup>169</sup>

Similarly, Ireland is firmly of the following view:

[C]ounter-terrorism measures should not undermine principled humanitarian activity that is consistent with the principles of independence, impartiality and neutrality that allow humanitarian actors to operate safely and effectively in conflict. Counter-terrorism measures should not impede access to, or delivery of, indiscriminate responses to civilian populations.<sup>170</sup>

Along similar lines, in the view of Mexico, sanctions and counterterrorism measures:

[H]ave a negative impact on the delivery of humanitarian assistance. . . . Those potential consequences have a so-called “chilling effect” and inhibit humanitarian action. It is therefore essential that measures be

---

<sup>168</sup> Department of Foreign Affairs, ‘Statement at Security Council Arria Formula Meeting on Overcoming Challenges in Situations of Armed Conflict and Counter-Terrorism Operations’ (August 11, 2021) (Ireland) <<https://www.dfa.ie/pmun/newyork/news-and-speeches/securitycouncilstatements/statementsarchive/statement-by-mr-martin-gallagher-at-arria-meeting-on-counterterrorism-and-humanitarian-action.html>>.

<sup>169</sup> Statement of Belgium, ‘The Promotion And Strengthening Of The Rule Of Law In The Maintenance Of International Peace And Security—International Humanitarian Law’ (April 2019) S/PV.8499.

<sup>170</sup> Department of Foreign Affairs, Ireland (n 168).

taken to mitigate such impacts and efforts be sustained to ensure that new sanctions do not directly or indirectly affect the operations of humanitarian organizations.<sup>171</sup>

Other positions from Belgium<sup>172</sup> and Ireland,<sup>173</sup> in addition to views from Germany,<sup>174</sup> Liechtenstein,<sup>175</sup> Saint Vincent and the Grenadines,<sup>176</sup> South Africa,<sup>177</sup>

---

<sup>171</sup> Statement of Mexico, ‘Protection of civilians in armed conflict, Preserving humanitarian space’ (July 2021) S/PV.8822.

<sup>172</sup> See, e.g., Statement of Belgium, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“While we understand that the reality on the ground is often very complex and that terrorist organizations can operate in war zones, we believe it is important to take into account the potentially harmful effects of our counter-terrorism policy on the work of humanitarian organizations.”). Statement of Belgium, ‘The promotion and strengthening of the rule of law in the maintenance of international peace and security—International humanitarian law’ (August 2019) S/PV.8596 (“[W]e must ensure that no measures taken in the fight against terrorism hinder the work of humanitarian organizations in their neutral and impartial activities.”).

<sup>173</sup> See, e.g., ‘Statement by Ambassador Brian Flynn, Deputy Permanent Representative at Joint special meeting of the Counter-Terrorism Committee and the ISIL (Da’esh) and Al-Qaida Sanctions Committee on latest terrorism financing trends and threats, as well as the implementation of Security Council resolution 2462’ (November 2019) <<https://www.un.org/securitycouncil/ctc/sites/www.un.org/securitycouncil.ctc/files/ireland.pdf>> (“On a number of occasions this year, both the Council and the Counter Terrorism Committee have heard about how the application of CFT regulations on humanitarian actors, and the derisking practices that result, have particularly adverse consequences for the provision of humanitarian aid. Indeed, the Secretary General has shared similar concerns... We reiterate once more that CFT measures must not impede the delivery of principled humanitarian assistance or infringe upon the legitimate activities of humanitarian and civil society organisations carrying out vital work.”).

<sup>174</sup> See, e.g., Statement of Germany, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“Counter-terrorism operations do not override the responsibility of parties to protect civilians, nor should they impede impartial humanitarian action.”). Statement of Germany, ‘The Promotion And Strengthening Of The Rule Of Law In The Maintenance Of International Peace And Security—International Humanitarian Law’ (April 2019) S/PV.8499 (“[T]he law itself must not become the target of attacks — for instance, through national laws that supposedly take precedence over humanitarian law. We see that ever-more frequently, especially in the case of counter-terrorism laws. It is good that we at the United Nations are now discussing the impact of such laws as well as the consequences of sanctions on humanitarian work.”).

<sup>175</sup> See, e.g., Statement of Liechtenstein, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“We share the concerns that certain provisions of Security Council resolutions may lead to the de facto or de jure obstruction of humanitarian action.... Liechtenstein encourages the Council to issue consistent guidance to States to avoid unintended consequences in the implementation of its resolutions and to adopt a more coherent approach to ensure that humanitarian actors are given the necessary space to operate.”).

<sup>176</sup> See, e.g., Statement of Saint Vincent and the Grenadines, ‘Protection of civilians in armed conflict, Preserving humanitarian space’ (July 2021) S/PV.8822 (“[S]anctions and counter-terrorism measures, set out in various Security Council resolutions, must not restrict the ability of humanitarian workers to undertake relief efforts.”).

<sup>177</sup> See, e.g., Statement of South Africa, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496: “It is also important that the fight against terrorism be undertaken in a manner that does not have a negative impact on the provision of humanitarian aid and medical assistance.”

and Switzerland,<sup>178</sup> as well as the EU,<sup>179</sup> may be said to fall into this category. Statements from Belgium,<sup>180</sup> Brazil,<sup>181</sup> Canada,<sup>182</sup> Estonia,<sup>183</sup> France,<sup>184</sup> Germany,<sup>185</sup>

---

<sup>178</sup> See, e.g., Statement of Switzerland, ‘Protection of civilians in armed conflict’ (May 2019) S/PV.8534 (“[W]e call on States to ensure that counter-terrorism legislation and measures do not impede impartial humanitarian and medical activities or engagement with all relevant actors, as foreseen by international humanitarian law.”).

<sup>179</sup> See, e.g., Delegation of EU to UN New York ‘EU Statement – United Nations Security Council Arria-Formula Meeting: Humanitarian Action: Overcoming Challenges in Situations of Armed Conflict and Counter-Terrorism Operations’ (August 2021) <[https://eeas.europa.eu/delegations/un-new-york/102986/eu-statement-%E2%80%93-united-nations-security-council-arria-formula-meeting-humanitarian-action\\_en](https://eeas.europa.eu/delegations/un-new-york/102986/eu-statement-%E2%80%93-united-nations-security-council-arria-formula-meeting-humanitarian-action_en)> (“[T]he humanitarian community often reports how these measures indirectly hinder the delivery of humanitarian aid and lead to a restricted access to aid for some parts of the civilian populations, which may live in areas controlled by non-state armed groups for example. Indirect adverse effects, such as over-compliance, bank de-risking and an overall chilling effect, can translate into operational difficulties for humanitarian actors in the field.”). Statement of the EU, ‘The United Nations Global Counter-Terrorism Strategy’ (July 2021) A/75/PV.89 (“We must work harder to ensure that counter-terrorism measures do not impede humanitarian action. We continue to regret that not all delegations are yet ready to ensure that humanitarian assistance is prioritized but we very much welcome the improved language in the resolution.”).

<sup>180</sup> See, e.g., Statement of Belgium, ‘The promotion and strengthening of the rule of law in the maintenance of international peace and security—International humanitarian law’ (August 2019) S/PV.8596 (“Respect for international humanitarian law remains essential everywhere and in all circumstances, and the policies we may adopt towards terrorist groups do not give us the right to depart from these rules.”).

<sup>181</sup> See, e.g., Statement of Brazil, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“[A]ny counter-terrorism action, including on financing, must abide by international law, in particular human rights law, humanitarian law and refugee law.”).

<sup>182</sup> See, e.g., Statement of Canada, ‘Protection of civilians in armed conflict’ (May 2019) S/PV.8534 (“Canada urges the Council to preserve humanitarian space in counterterrorism contexts, in accordance with international humanitarian law, international human rights law and international refugee law.”). See also: Annex III(B), Canada’s Response to an HLS PILAC Questionnaire.

<sup>183</sup> See, e.g., Statement of Estonia, ‘Threats to international peace and security caused by terrorist acts’ (August 2021) S/PV.8839 (“States must ensure that all counterterrorism measures comply with their obligations under international law, in particular international human rights law, refugee law and international humanitarian law.”).

<sup>184</sup> See, e.g., Statement of France, ‘Threats to international peace and security caused by terrorist acts’ (August 2021) S/PV.8839 (“[T]he fight against terrorism must be conducted in accordance with our principles. Most importantly, it must be carried out within the framework of respect for human rights, international law and international humanitarian law.”).

<sup>185</sup> See, e.g., Statement of Germany, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“[Resolution 2462] reaffirms and reminds us of our obligations under international law, including international humanitarian law, human rights law and refugee law. All the counter-terrorism measures that we have agreed on today must comply with those bodies of law.”).



Norway,<sup>186</sup> Poland,<sup>187</sup> South Africa,<sup>188</sup> Switzerland,<sup>189</sup> and Vietnam,<sup>190</sup> as well as the EU,<sup>191</sup> emphasize compliance with IHL and respect for principled humanitarian action as it relates to application of counterterrorism measures. Meanwhile, some States call for general or specific safeguards or (other) mitigation measures for principled humanitarian action in relation to counterterrorism contexts. To

---

<sup>186</sup> See, e.g., Permanent Mission to the UN in New York, ‘Statement by Deputy Permanent Representative Odd-Inge Kvalheim at the Arria-Formula Meeting on Humanitarian Action: Overcoming challenges in situations of armed conflict and counter-terrorism operations’ (August 2021) (Norway) <<https://www.norway.no/en/missions/UN/statements/security-council/2021/arria-humanitarian-action-and-counter-terrorism/>> (“All parties to armed conflict are obligated to abide by international humanitarian law, and to ensure conditions for humanitarian actors to conduct their work safely, and unimpeded in accordance with the principles of humanity, neutrality, impartiality, and independence.”).

<sup>187</sup> See, e.g., Statement of Poland, ‘Threats to international peace and security caused by terrorist acts—Eighth report of the Secretary-General on the threat posed by ISIL (Da’esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat’ (February 2019) S/PV.8460 (“[I]n our view all activities aimed at fighting terrorists must be conducted in full compliance with international humanitarian law....”).

<sup>188</sup> See, e.g., Statement of South Africa, ‘Threats to international peace and security caused by terrorist acts—Tenth report of the Secretary-General on the threat posed by ISIL (Da’esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat’ (February 2020) S/PV.8716 (“It is also critical that counterterrorism measures be implemented in full compliance with international law, including international human rights law and international humanitarian law....”).

<sup>189</sup> See, e.g., Statement of Switzerland, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“Switzerland calls upon the international community, including the Security Council and its subsidiary bodies, to ensure that counter-terrorism measures are as focused as possible and in line with international law, particularly international humanitarian law.”).

<sup>190</sup> See, e.g., Statement of Vietnam, ‘Threats to international peace and security caused by terrorist acts’ (August 2021) S/PV.8839 (“[A]n effective counter-terrorism strategy must be in full compliance with the Charter of the United Nations and international law, including international humanitarian law, human rights law and refugee law.”).

<sup>191</sup> See, e.g., Statement of the EU, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“We therefore underline that the implementation of measures to counter the financing of terrorism should be in full compliance with international law — in particular human rights law, international humanitarian law and international refugee law....”).

varying degrees, Belgium,<sup>192</sup> Ireland,<sup>193</sup> Mexico,<sup>194</sup> Norway,<sup>195</sup> and Switzerland,<sup>196</sup> as well as the EU,<sup>197</sup> have done so.

In the second category of views, States voice support for balancing respect for principled humanitarian action and counterterrorism objectives. These views usually posit interests related to principled humanitarian action and counterterrorism as two separate, possibly related, goals. For example, in the wake of the adoption of Resolution 2462 (2019), Germany stated as follows:

We believe that the resolution that we adopted today strikes necessary balance in a very convincing way, promoting effective counter-terrorism measures, on the one hand, and a safe space for principled humanitarian action, including with the necessary financial transactions, on the other.<sup>198</sup>

---

<sup>192</sup> Statement of Belgium, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“We therefore believe that mitigation measures should be taken to prevent the possible negative consequences of this policy, or at least reduce them to a minimum.”).

<sup>193</sup> See, e.g., ‘Statement by Ambassador Brian Flynn, Deputy Permanent Representative at Joint special meeting of the Counter-Terrorism Committee and the ISIL (Da’esh) and Al-Qaida Sanctions Committee on latest terrorism financing trends and threats, as well as the implementation of Security Council resolution 2462’ (November 2019) <<https://www.un.org/securitycouncil/ctc/sites/www.un.org/securitycouncil.ctc/files/ireland.pdf>> (“One area where further implementation is required is in mitigation of the impacts of CFT measures on principled humanitarian action... Council resolutions, including Resolution 2462, should be operationalised through well-framed humanitarian exemptions; enhanced dialogue with humanitarian organisations; and engagement with the financial sector.”). Department of Foreign Affairs, Ireland (n 168) (“As a Council member, Ireland will continue to push for enhanced humanitarian safeguards within CT resolutions and sanctions regimes... Ireland affirms its continued commitment to preserving humanitarian space, through the adoption of appropriate mitigating measures.”).

<sup>194</sup> See, e.g., Statement of Mexico, ‘Protection of civilians in armed conflict, Preserving humanitarian space’ (July 2021) S/PV.8822 (“It is therefore essential that measures be taken to mitigate such impacts and efforts be sustained to ensure that new sanctions do not directly or indirectly affect the operations of humanitarian organizations.”).

<sup>195</sup> See, e.g., Permanent Mission to the UN in New York, Norway (n 186) (“[Norway has] a particular focus on avoiding negative unintended consequences of sanctions, and promoting humanitarian exemptions and efficient exemption procedures.”).

<sup>196</sup> See, e.g., Statement of Switzerland, ‘Protection of civilians in armed conflict’ (May 2019) S/PV.8534 (“We support the call of the Secretary-General for the systematic inclusion of safeguards for impartial humanitarian activities in a manner consistent with international humanitarian law when deciding on counter-terrorism measures.”).

<sup>197</sup> See, e.g., Delegation of EU to UN New York (n 179) (“It is therefore crucial to work on mitigating measures that do not put into question the effectiveness of counter-terrorism measures while allowing impartial humanitarian actors carry out their work in a manner consistent with international humanitarian law and humanitarian principles.”).

<sup>198</sup> Statement of Germany, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496.

Germany,<sup>199</sup> Russia,<sup>200</sup> and the United States,<sup>201</sup> as well as, perhaps, Peru,<sup>202</sup> may be said to espouse views falling within this “balancing” category.

Finally, under a third category, respect for principled humanitarian action is framed by and large in terms of not contradicting counterterrorism objectives. Typically, views falling within this category reflect — whether implicitly or expressly — a concern that at least certain humanitarian or medical activities may negatively affect States’ abilities to counter terrorism effectively. According to India, for example:

Strong and effective counter terrorism measures at the national, regional and international levels are imperative to tackle the menace of terrorism. There can be no compromise while dealing with terrorism. Further, humanitarian action should not contradict the objective of counter-terror operations.<sup>203</sup>

Relatedly, States espousing views in this category may assert that the “onus” rests with humanitarian actors. In July 2021, for example, Kenya stated the following:

It is critical that humanitarian actors actively find new ways for effective cooperation with security agencies. In financial networks and across many other domains, compliance with critical security needs is becoming a normal part of doing business. Humanitarian actors can be more innovative and ambitious in protecting their supply chains and processes from penetration and exploitation — by terrorists in particular.<sup>204</sup>

---

<sup>199</sup> See, e.g., *ibid.*

<sup>200</sup> See, e.g., Statement of Russia, ‘The promotion and strengthening of the rule of law in the maintenance of international peace and security—International humanitarian law’ (April 2019) S/PV.8499 (“Through concerted efforts the Council found a balanced way . . . Protection, according to paragraph 24 of [Resolution 2462], is to be given to ‘exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.’”).

<sup>201</sup> See, e.g., US Mission to the UN, ‘Remarks at a UN Security Council Arria-Formula Meeting on Overcoming Challenges in Situations of Armed Conflict and Counter-Terrorism Operations’ (August 2021) <<https://usun.usmission.gov/remarks-at-a-un-security-council-arria-formula-meeting-on-overcoming-challenges-in-situations-of-armed-conflict-and-counter-terrorism-operations/>> (“Policies addressing humanitarian assistance, sanctions, and counterterrorism issues are often intertwined, and we must ensure they are mutually-reinforcing. While we ensure that Member States fully implement their international sanctions obligations, we must see to it that they do not compromise the very security those sanctions seek to safeguard.”).

<sup>202</sup> See, e.g., Statement of Peru, ‘The promotion and strengthening of the rule of law in the maintenance of international peace and security—International humanitarian law’ (April 2019) S/PV.8499 (“[A]ny State action in the area of counter- terrorism must consider the effects it could have on humanitarian assistance efforts.”).

<sup>203</sup> Permanent Mission of India to the UN, ‘Statement by Ambassador R. Ravindra, Deputy Permanent Representative - Political Coordinator at UNSC Arria-Formula Meeting on Humanitarian Action: Overcoming Challenges in situations of Armed Conflict and Counter-Terrorism Operations’ (August 2021) <<https://pminewyork.gov.in/IndiaatUNSC?id=NDMyMg,>>.

<sup>204</sup> Statement of Kenya, UNSC ‘Protection of civilians in armed conflict, Preserving humanitarian space’ (July 2021) S/PV.8822.

The following month, Kenya further elaborated its views:

Humanitarian organisations ... need to take steps on their part to demonstrate that there is minimal exploitation of their supply chains by terrorists. This is not easy, nor is it cheap, and we understand that they are greatly strained already. But it is unlikely that counter terrorism actors will relent their efforts lacking some minimum assurances.<sup>205</sup>

Among the States setting out positions that may fall into this third category are India,<sup>206</sup> Kenya,<sup>207</sup> Russia,<sup>208</sup> and the United States.<sup>209</sup>

### 5.3.3. *Measures and “Control Dials”*

In this sub-section, we identify five categories of potentially relevant national counterterrorism measures. In addition, we detect certain “control dials” through which States calibrate relations between safeguarding principled humanitarian action and countering terrorism.

Each type of identified national counterterrorism measure involves legal and policy choices that may have a bearing on respect for the humanitarian imperative in counterterrorism contexts. These measures might be framed as being rooted in Security Council decisions, in regional instruments implementing those decisions, in the national legal system, or in some combination of such origins. These different types of measures might be instituted through various means, including the national legal system, such as legislative enactments,

---

<sup>205</sup> Permanent Mission of the Republic of Kenya, ‘Statement By Amb. Martin Kimani, Permanent Representative, at Security Council Arria-Formula Meeting on Humanitarian Action: Overcoming Challenges in situations of Armed Conflict and Counter-Terrorism Operations’ <[https://www.un.int/kenya/sites/www.un.int/files/Kenya/kenya\\_statement\\_on\\_humanitarian\\_action\\_and\\_ct\\_in\\_the\\_arria\\_formula\\_meeting\\_on\\_11\\_august\\_2021.pdf](https://www.un.int/kenya/sites/www.un.int/files/Kenya/kenya_statement_on_humanitarian_action_and_ct_in_the_arria_formula_meeting_on_11_august_2021.pdf)>.

<sup>206</sup> See, e.g., Permanent Mission of India to the UN (n 203).

<sup>207</sup> See, e.g., Statement of Kenya, ‘Threats to international peace and security caused by terrorist acts—Preventing and combating the financing of terrorism’ (March 2019) S/PV.8496 (“We should never justify or condone terrorism under any pretext, least of all that of humanitarian assistance.”).

<sup>208</sup> See, e.g., Statement of Russia, ‘Protection of civilians in armed conflict’ (May 2019) S/PV.8534 (“We firmly reject the use of humanitarian pretexts ... to support terrorists ....”). Permanent Mission Of The Russian Federation To The United Nations, ‘Statement by representative of the Russian Federation Natalia Karmazinskaya at Arria-Formula VTC of UNSC members on Humanitarian action: overcoming challenges in situations of armed conflict and counter-terrorism operations’ (August 2021) <[https://russiaun.ru/en/news/arria\\_110821](https://russiaun.ru/en/news/arria_110821)> (“[T]he task to create conditions for the work of humanitarian organizations and medical personnel must not be used as a reason for non-compliance with obligations under international and national law in the area of countering terrorism.”).

<sup>209</sup> See, e.g., US Mission to UN (n 80).

executive regulations, judicial acts; domestic policy frameworks; or administrative instruments. In developing and applying these national counterterrorism measures, certain States have relied on various external actors, including the CTC and CTED; the EU; FATF and FATF-style regional bodies; and the ICRC and other humanitarian bodies.<sup>210</sup>

A first category concerns measures adopted to prevent and suppress support to the people and entities involved in terrorist acts.<sup>211</sup> In relation to the humanitarian imperative, such measures may be concerning for several reasons. Measures against support to terrorism may conceive of such support broadly, potentially including within their scope forms of humanitarian and medical activities, such as the provision of impartial medical care to the wounded and sick and relief supplies — including essential food, clothing, and water — to civilians residing in areas de facto controlled by terrorists.<sup>212</sup> Sometimes, but not always, such measures are accompanied by corresponding humanitarian carve-outs that preclude the application of part or all of those measures to at least certain humanitarian or medical activities, actors, or goods.<sup>213</sup>

A second category encompasses actions to implement targeted sanctions adopted as counterterrorism measures.<sup>214</sup> Targeted sanctions adopted as

---

<sup>210</sup> For an example of how humanitarian bodies may inform the formulation of certain domestic measures, consider Switzerland's recent humanitarian exemption, which was adopted in the context of intense advocacy by humanitarian organizations, including Geneva Call, the Swiss Red Cross, and Terre des Hommes. Geneva Call, 'An Exemption for Humanitarian Activities in the New Swiss Counter-Terrorism Law: A Much-Needed Safeguard and a Welcome Step Protecting the Humanitarian Space' (October 2020) <<https://www.genevacall.org/an-exemption-for-humanitarian-activities-in-the-new-swiss-counter-terrorism-law-a-much-needed-safeguard-and-a-welcome-step-protecting-the-humanitarian-space/>>. See Swiss Criminal Code, art. 260 ter (2). See also: Interview with a government official, dated July 16, 2021.

<sup>211</sup> Measures aimed at preventing and suppressing support to terrorism may be traced in part to Resolution 1373 (2001), in which the Security Council decides that States shall "refrain from providing any form of support, active or passive" to those involved in terrorist acts. UNSCR 1373 (2001), OP 2(a). In addition to Resolution 1373 (2001), various other Security Council decisions reiterate States' obligation to suppress support to terrorism. See, e.g., UNSCR 2170 (2014), OP 11; UNSCR 2395 (2017), OP 22; UNSCR 1456 (2003), OP 1.

<sup>212</sup> See, e.g., Providing material support to terrorists, 18 U.S. Code § 2339A(b) (US); Terrorism Act 2000 (UK), sec. 15. See further: Charity & Security Network (n 8); Buissonniere et al (n 8); O'Leary (n 9) 6.

<sup>213</sup> See, e.g., Swiss Criminal Code of December 21, 1937 (unofficial translation, Status as of July 1, 2021), <[https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en)> (Swiss Criminal Code) art. 260 ter (2).

<sup>214</sup> For example, New Zealand's Terrorism Suppression Act 2002 implements Resolution 1267 (1999) at the domestic level. Terrorism Suppression Act 2002 (NZ), sec. 3. Also, Belgium's Law of May 2, 2019 similarly obliges Belgium to implement at the domestic level asset-freezing measures adopted by the Security Council. See Annex III(A), Belgium's Response to an HLS PILAC Research Questionnaire. Note that domestic measures that implement Security Council-imposed counterterrorism sanctions regimes may overlap in effect with measures taken to counter the financing of terrorism. This is because both sets of measures typically aim, substantively, to hinder the provision of resources to those characterized as terrorists.

counterterrorism measures can restrict the ability of humanitarian actors to function in certain areas or to transact with certain individuals or groups or with banks or other financial institutions.<sup>215</sup>

A third category concerns measures to prevent and suppress the financing of terrorism.<sup>216</sup> Sometimes, these measures are predicated on the notion of a perceived “benefit” to those characterized as terrorists.<sup>217</sup> In effect, those measures stipulate that financial or economic resources should not be made available for the “benefit” of those characterized as terrorists or to those who carry out terrorist acts. Those measures may include limited carve-outs that preclude the application of these measures in respect of certain humanitarian or medical activities.<sup>218</sup>

A fourth category encompasses measures to prohibit or restrict terrorism-related travel. States have adopted measures aimed at addressing different aspects pertaining to terrorism-related travel, such as the financing of travel, the act of travel, or presence in specific “terrorist” areas, each of which might adversely affect certain aspects of humanitarian or medical services.<sup>219</sup>

A fifth category covers measures that criminalize or otherwise impede the provision of medical care in particular.<sup>220</sup> Under certain regimes, medical care

---

<sup>215</sup> Mackintosh and Duplat (n 7) 20–21; Gillard (n 119); Wynn-Pope et al. (n 119) 252–254; Weizmann (n 1) 15.

<sup>216</sup> Potentially relevant practices arguably may include domestic measures to prevent and suppress terrorism financing that proscribe or prohibit a wide variety of financial transactions involving those characterized as terrorists or those who otherwise carry out terrorist acts. *See, e.g.*, Terrorism Suppression Act 2002 (NZ), sec. 3, sec. 8. Where the provision of finances to those characterized as terrorists is conceived as (illegitimate) “financial support” to terrorism, measures to prevent and suppress terrorism financing may overlap with norms against support to terrorism. *See, e.g.*, Providing material support to terrorists, 18 U.S. Code § 2339A(b) (US).

<sup>217</sup> *See, e.g.*, The Unlawful Activities (Prevention) Act, 1967 (India), sec. 17; Terrorism Suppression Act 2002 (NZ), sec. 8(2A).

<sup>218</sup> *See, e.g.*, Swiss Criminal Code, art. 260 quinquies (4).

<sup>219</sup> For an example of potentially relevant practices concerning criminalization of presence in “designated” areas, *see* Terrorism Act 2000 (UK), sec. 58B. Other potentially relevant practices arguably may include: Act on Criminal Responsibility for the Financing of Particularly Serious Crime in some cases 2002 (Sweden, unofficial translation, updated till March 18, 2016) <[https://www.legislationline.org/download/id/7961/file/Sweden\\_Act\\_criminal\\_responsibility\\_financing\\_particularly\\_serious\\_crime\\_2002\\_am2016.pdf](https://www.legislationline.org/download/id/7961/file/Sweden_Act_criminal_responsibility_financing_particularly_serious_crime_2002_am2016.pdf)> (Swedish Act on Criminal Responsibility for the Financing of Particularly Serious Crime) sec. 1(2); Swiss Criminal Code, art. 260 sexies; ‘Regulatory Impact Assessment - Terrorism Suppression Act (Part 1)’ (New Zealand) <<https://www.justice.govt.nz/assets/Documents/Publications/RIA-Terrorism-Suppression-Act-part-1.pdf>>. *See also*: Annex III(A): Belgium’s Response to an HLS PILAC Questionnaire and Annex III(C): Sweden’s response to an HLS PILAC Questionnaire.

<sup>220</sup> While Security Council decisions do not expressly proscribe medical care, medical services can become implicated under some of those decisions. Several resolutions contemplate “otherwise supporting” acts or activities of entities characterized as terrorist as a basis for inclusion in the Security Council’s counterterrorism [Footnote continued on next page]

is considered to constitute impermissible support to terrorism, thereby falling within the purview of, for example, domestic measures aimed at preventing and suppressing support to terrorism.<sup>221</sup> In relation to the humanitarian imperative, not only measures that proscribe or penalize medical care<sup>222</sup> but also measures that impose certain disclosure requirements on service providers have the potential to adversely affect the provision of medical care and attention to the wounded and sick.<sup>223</sup>

Alongside these national counterterrorism measures, States use a number of “control dials” to calibrate the functional relations between respect for principled humanitarian action and countering terrorism. Identification and evaluation of these “control dials” afford States opportunities to assess how their own approaches and those of other international actors weigh the various interests and concerns at issue.

One “control dial” concerns whether the measure is grounded in a “material support” rationale, whereby the provision of any funds or other material resources to terrorists is impermissible because those resources may be used to sustain support for the terrorists or obtain resources to conduct acts of terrorism.<sup>224</sup> Under this rationale, which relates to the “benefit” and “support” notions described above, support or assistance to terrorist groups is almost always

---

sanctions regime, and medical-care providers can in certain cases themselves run the risk of qualifying under those terrorist designations. *See, e.g.*, UNSCR 2161 (2014), OP 2; UNSCR 2368 (2017), OP 2; UNSCR 1617 (2005), OP 2; UNSCR 1822 (2008), OP 2; UNSCR 1904 (2009), OP 2; UNSCR 2083 (2012), OP 2. *See also*: Weizmann (n 1) 12; Lewis et al (n 10).

<sup>221</sup> Potentially relevant practices arguably may include: Providing material support to terrorists, 18 U.S. Code § 2339A(b) (US); Terrorism Act 2000 (UK), sec. 15. *See further*: Charity & Security Network (n 8); Buissonniere et al (n 8).

<sup>222</sup> Syria, for example, has passed laws criminalizing the provision of medical care to the opposition, which includes those characterized as terrorists. *See further*: HRC ‘2013 Syria Report’ (n 9).

<sup>223</sup> Potentially relevant practices arguably may include the Terrorism Act 2000 (UK), sec. 38B.

<sup>224</sup> Potentially relevant practices arguably may include the US’ notion of “material support,” characterized as among the broadest in “[W]estern democracies.” Charity & Security Network, “The Prohibition on Material Support and Its Impacts on Nonprofits’ (2019) <<https://charityandsecurity.org/issue-briefs/the-prohibition-on-material-support-and-its-impacts-on-nonprofits/>>. The relevant notion of material support in US federal law is not limited to monetary support or the provision of other tangible goods, and it excludes only “medicine or religious materials.” Providing material support to terrorists, 18 U.S. Code § 2339A(b) (US): “(1) [T]he term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials; (2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and (3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.”

illegitimate.<sup>225</sup> The humanitarian imperative contemplates that certain forms of engagement and assistance may be permissible in some contexts, regardless of whether those forms of engagement and assistance are provided to those engaged or deemed to be engaged in terrorism. Implicated IHL rules may include, among others, those concerning offering and providing impartial humanitarian services to a party to an armed conflict;<sup>226</sup> provision of medical care and attention to the wounded and sick;<sup>227</sup> and prohibitions on punishment of humanitarian services and ethically sound medical care.<sup>228</sup>

Another “control dial” concerns how the measure relates to assumptions about risk. On one end of the spectrum, certain national counterterrorism approaches reflect a zero-tolerance rationale, presuming that no resources should ever be provided to terrorists on the theory that they may use it for terrorist purposes.<sup>229</sup> On the other end of the spectrum, some measures accept that certain humanitarian activities may involve a degree of transmission of resources to a terrorist group.<sup>230</sup>

Yet another “control dial” relates to the constituent mental-state element, if any, that must be present for the national counterterrorism measure to be applicable — in short, whether the person engaging in principled humanitarian action needs to have intended or known (or both) that their conduct would result in an

---

<sup>225</sup> Ibid. Notably, provisions against support to terrorism in India, Pakistan, and the UK also criminalize solicitation or invitation of “support for a proscribed organization.” The Anti Terrorism Act, 1997 (Pakistan), sec. 11F; Terrorism Act 2000 (UK), sec. 12; The Unlawful Activities (Prevention) Act, 1967 (India), sec. 39. Indian authorities arrested a doctor under India’s provisions concerning support to terrorism; reportedly, incriminating evidence against that individual included visits to an ISIL medical camp to treat wounded fighters and developing a medical application to treat wounded ISIL members. NDTV, ‘Bengaluru Doctor, 28, Arrested For Alleged ISIS Links’ (August 2020) <<https://www.ndtv.com/india-news/probe-agency-ndia-arrests-bengaluru-doctor-for-alleged-links-with-isis-2281603>>.

<sup>226</sup> See n 63.

<sup>227</sup> See n 125.

<sup>228</sup> See n 68.

<sup>229</sup> This approach may be illustrated by the following statement made by a government official during an interview: “Say you have a hundred dollars. If you give ninety dollars to humanitarian workers, but ten dollars end up with the terrorists, the damage caused by those ten dollars is much greater than the good caused by the ninety dollars.” Interview with six government officials, dated July 9, 2021. Potentially relevant practices arguably may also include the UK’s sanctions implementing measures that penalize all payments made in violation of sanctions regimes, regardless of the purpose for which the payment was made. Terrorist Asset-Freezing etc. Act 2010 (UK), sec. 11-12. See also: Mackintosh and Duplat (n 7) 40.

<sup>230</sup> Potentially relevant practices arguably may include: Swiss Criminal Code, art. 260 quinquies (4). See also: Thomas Van Poecke, Frank Verbruggen and Ward Yperman, ‘Terrorist Offences and International Humanitarian Law: The Armed Conflict Exclusion Clause’ (2021) *International Review of the Red Cross* 1, 13.



impermissible “benefit” to or “support” of a terrorist.<sup>231</sup> Where the threshold for the constituent mental state is high or is linked to the commission of a terrorist act, persons engaging in principled humanitarian action may be less likely to run afoul of the relevant measures.<sup>232</sup> Conversely, where the threshold for the constituent mental state is low or is linked to the mere likelihood of commission of a terrorist act, persons engaging in principled humanitarian action may be more likely to violate the measures.<sup>233</sup>

A final “control dial” concerns whether the application of some element or all of a counterterrorism measure is excluded due to a humanitarian rationale — in other words, whether a humanitarian carve-out is applicable.<sup>234</sup> Examples include limited humanitarian carve-outs applicable in relation to national counterterrorism measures adopted by certain States.<sup>235</sup>

---

<sup>231</sup> Potentially relevant practices arguably may include The Anti Terrorism Act, 1997 (Pakistan), sec. 11H. Under that provision, it is an offense to provide or receive money or property when a person “knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism” or “by a terrorist or organization concerned in terrorism.” See also: The Anti Terrorism Act, 1997 (Pakistan), sec. 11I. An analogous provision in the UK contains a similar “reasonable cause” threshold. Terrorism Act 2000 (UK), sec. 15. The Indian position possibly straddles different thresholds: raising funds for a terrorist organization is an offense where there is an “intention to further the activity of a terrorist organisation,” but it is also an offense to provide or collect funds with the knowledge that the funds are “likely to be used” to commit a terrorist act. The Unlawful Activities (Prevention) Act, 1967 (India), sec. 40 and sec. 17.

<sup>232</sup> Potentially relevant practices arguably may include Art. 140 of the Belgian Penal Code concerning participation in the activities of a terrorist group, where liability is based on a “specific criminal intent.” See Annex III(A): Belgium’s Response to an HLS PILAC Research Questionnaire; *Code Penal* (Belgium, amended in 2021), art. 140.

<sup>233</sup> For example, low thresholds for the constituent mental-state may affect the provision of principled humanitarian action in contexts where those involved in such activities are aware that the entity with which they are transacting — albeit incidentally, and typically to gain access to civilians in need, fighters rendered *hors de combat*, or the wounded and sick — is a terrorist entity.

<sup>234</sup> Potentially relevant practices arguably may include: Swiss Criminal Code of December 21, 1937 (unofficial translation, Status as of July 1, 2021), <[https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en)> (Swiss Criminal Code) art. 260 ter (2); Swiss Criminal Code, art. 260 quinquies (4); *Projet de loi N°003/PR/2020 Portant répression des actes de terrorisme en République du Tchad* (Chad) art. 1.

<sup>235</sup> See, e.g., *Projet de loi N°003/PR/2020 Portant répression des actes de terrorisme en République du Tchad* (Chad) art. 1; Swiss Criminal Code of December 21, 1937 (unofficial translation, Status as of July 1, 2021), <[https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en)> (Swiss Criminal Code) art. 260 ter (2); Swiss Criminal Code, art. 260 quinquies (4); Providing material support to terrorists, 18 U.S. Code § 2339A(b) (US): “(1) [T]he term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials...” Additionally, counterterrorism provisions in the New Zealand and the UK encompass a “reasonable excuse” or “lawful justification” defense [Footnote continued on next page]

In conclusion, the bulk of the identified counterterrorism measures and related “control dials” suggests that, to date, States have by and large not prioritized advancing respect for the humanitarian imperative at the national level. The most robust efforts to uphold principled humanitarian activities in this area revolve around ad-hoc and limited humanitarian carve-outs, which have not proven up to the task of safeguarding the humanitarian imperative. In the next and final section, we explore avenues through which States may reconfigure the foundational framing to advance principled humanitarian action in connection with carrying out the Security Council’s counterterrorism decisions.

## 6. ADVANCING THE HUMANITARIAN IMPERATIVE IN RELATION TO COUNTERTERRORISM CONTEXTS

States possess the power, authority, and resources to advance the humanitarian imperative. Doing so in connection with counterterrorism contexts, including carrying out binding decisions of the Security Council, seems likely to require renewed and refashioned commitments grounded in foundational humanitarian values. Meeting that core objective may require reframing the current controversy in terms of accommodating counterterrorism rationales and measures in a manner that advances principled humanitarian action.

Each State concerned may exercise its policy discretion and configure its legal positions to achieve this goal amid indeterminacies embedded in the existing slate of Security Council counterterrorism resolutions. To date, the current lack of information and knowledge regarding what is obligatory and discretionary in terms of carrying out those decisions at the national level operates in practice to the detriment of the humanitarian imperative.

Debates over these issues often focus primarily on States involved in armed conflicts, major humanitarian donors, and recipients of aid. Yet because these issues implicate the coherence and comprehensiveness of the international legal and policy system, arguably all States have an interest in formulating their views and acting in relation to the identified issues and concerns. In terms of avenues, States

---

for certain offenses. Counter-Terrorism and Border Security Act 2019 (UK), sec. 4(2); Terrorism Suppression Act 2002 (NZ), sec. 8, sec. 10. Under New Zealand’s Terrorism Suppression Act, “[a]n example of making property available with a reasonable excuse...is where the property (for example, items of food, clothing, or medicine) is made available in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under this Act.”

may develop and disseminate their pro-humanitarian views in, for example, their humanitarian diplomacy, donor forums, engagements with other States, and dealings with humanitarian organizations, security bodies, and financial institutions.

In this final section, we enumerate core questions that a State may answer to help secure respect for the humanitarian imperative. For it to be effective, this process may require the buy-in of a diverse array of possibly relevant State actors. It may thus be necessary to involve those who hold humanitarian, security, legal, or other potentially relevant portfolios and those who exercise relevant executive, legislative, judicial, foreign policy, or other relevant functions.

### 6.1. Values

Arguably, at the root of the core controversy is a values clash. The humanitarian imperative is based on normative commitments to provide, in all armed conflicts, impartial aid and protection to all civilians in need and fighters rendered *hors de combat*, irrespective of affiliation. The Security Council's counterterrorism architecture is not built on the same core normative commitments. The first step to engender respect for the humanitarian imperative may be to establish the State's values in this area.

- i. Is the State committed to upholding respect for humanitarian values? If so, what are the content of those values and the normative commitments underlying them?
- ii. With respect to the provision of humanitarian assistance, is the State committed to upholding strict respect for the principles of humanity, impartiality, independence, and neutrality?
- iii. In line with the State's humanitarian values, may principled humanitarian and medical services be conceived as illegitimate support to terrorists?
- iv. In line with the State's humanitarian values, may principled humanitarian and medical actors offer and provide their services in relation to a terrorist group's members rendered *hors de combat*, to civilian populations in need under the group's de facto control or authority, and to the wounded and sick?

## 6.2. Policy

To advance principled humanitarian action, States formulate and administer national and international policy commitments that extend beyond what is required under legal obligations.<sup>236</sup> Efforts to safeguard the humanitarian imperative may require reviewing and adjusting existing policy commitments and frameworks and possibly developing new ones.

- i. What are the State's existing national and international humanitarian policy commitments and frameworks?
- ii. Do the State's existing national humanitarian policy commitments and frameworks sufficiently reflect the State's values? If so, in what ways can the State strengthen implementation of those commitments and frameworks? If not, what adjustments should the State seek to make to existing national policy commitments and frameworks, and what new ones, if any, should the State seek to develop?
- iii. Do existing international humanitarian policy commitments and frameworks sufficiently reflect the State's values? If so, in what ways can the State strengthen implementation of those commitments and frameworks? If not, what adjustments should the State seek to make to existing international humanitarian policy commitments and frameworks, and what new ones, if any, should the State seek to develop?
- iv. What mechanisms are in place for the State to identify, evaluate, and respond to the counterterrorism-related conduct of other international actors that does not respect the State's humanitarian policy commitments? What steps does the State take to effectively address those aspects of others' conduct?
- v. What mechanisms are in place for the State to effectively convey its humanitarian policy commitments to:
  - a. Other States?
  - b. The Security Council?

---

<sup>236</sup> See section 3.2 above.

- c. The General Assembly?
- d. The CTC and CTED?
- e. FATF and FATF-style regional bodies?
- f. Financial institutions?

### 6.3. Law

Advancing the humanitarian imperative will likely require formulating and implementing positions on key legal questions, many of which concern relations between IHL and the Security Council's relevant counterterrorism decisions as well as connections between international law and national law. Achieving this objective may also involve identifying, evaluating, and responding to counterterrorism-related conduct of other international actors. An essential step is for the State to ensure that its legal positions reflect its values and policy commitments aimed at advancing the humanitarian imperative.

- i. Does the State's national legal system reflect the State's values and policy commitments aimed at advancing the humanitarian imperative? If so, in what ways can relevant State organs, agencies, and actors strengthen implementation of the system? If not, what adjustments does the State need to make to that system, and what steps should the State take to make those adjustments?
- ii. Does the international legal system reflect the State's values and policy commitments aimed at advancing the humanitarian imperative? If so, in what ways can relevant State organs, agencies, and actors strengthen the implementation of the system? If not, what adjustments does the State need to seek to make to that system, and what steps should the State take to help make those adjustments?
- iii. What adjustments may be necessary to bring the national legal system in line with the State's obligations concerning principled humanitarian action under IHL, including as it may relate to counterterrorism contexts?
- iv. What mechanisms are in place for the State to identify, evaluate, and respond to the counterterrorism-related conduct of other international actors — including other States, the Security Council and its bodies, and FATF and

FATF-style regional bodies — that may impede the State’s efforts to secure respect for international law pertaining to the humanitarian imperative?

- v. How has the State applied its interpretive discretion concerning Security Council counterterrorism decisions as it may pertain to legal aspects related to advancing the humanitarian imperative?
- vi. What is the State’s legal position concerning whether the Security Council’s binding counterterrorism decisions may prevail over IHL rules pertaining to principled humanitarian action?<sup>237</sup>
- vii. What is the State’s legal position concerning whether principled humanitarian and medical activities are excluded from the scope of the Security Council’s notion of prohibited “support” for terrorists?<sup>238</sup>
- viii. What is the State’s legal position concerning whether principled humanitarian and medical activities are excluded from the scope of the Security Council’s notion of a proscribed financial “benefit” for terrorists?<sup>239</sup>

#### 6.4. Programs

Commitments to the humanitarian imperative are concretized in part through the development and administration of humanitarian programs by States at the national, regional, and international levels. These programs range widely in scope and scale. They may include, for example, the provision or receipt of humanitarian goods and services as well as money and other forms of financial support to principled humanitarian actors. Programmatic elements may be implicated in procurement policies, financing arrangements, grant agreements with humanitarian agencies, and contingencies associated with the provision or receipt of aid, among other things. Ensuring that the State’s humanitarian programs reflect its values, policy commitments, and legal positions is one pathway to help secure respect for the humanitarian imperative.

- i. What are the State’s humanitarian programs at the national, regional, and international levels?

---

<sup>237</sup> See section 4.4 above.

<sup>238</sup> See section 5.2.2 above.

<sup>239</sup> See section 5.2.2 above.

- ii. Are the State's national, regional, and international humanitarian programs reflective of the State's values, policy commitments, and legal positions aimed at advancing the humanitarian imperative? If so, what mechanisms are in place to ensure that those values, policy commitments, and legal positions continue to be reflected in the State's humanitarian programs? If not, what steps does the State need to take so that its humanitarian programs reflect those values, policy commitments, and legal positions?
- iii. What mechanisms are in place for the State to identify, evaluate, and respond to counterterrorism-related conduct of other international actors that may adversely affect the State's humanitarian programs?

### 6.5. Institutions

Respect for the humanitarian imperative may be upheld through sustained and concerted engagement in and with a wide array of institutions. These entities may include intergovernmental organizations, financial institutions, donor platforms, international conferences, and national political bodies. Ensuring that the State's engagements in and with national, regional, and international institutions reflect the State's values, policy commitments, and legal positions is another pathway to help safeguard principled humanitarian action.

- i. What national, regional, and international institutions are relevant for advancing the State's humanitarian commitments?
- ii. What mechanisms are in place for the State to ensure that its engagements with relevant institutions reflect the State's values, policy commitments, and legal positions aimed at advancing the humanitarian imperative?
- iii. What institutional forums and opportunities exist for the State to publicize and enhance transparency concerning the State's values, policy commitments, and legal positions aimed at advancing the humanitarian imperative?
- iv. What mechanisms are in place for the State to identify, evaluate, and respond to relevant institutions' counterterrorism-related conduct that may affect the State's efforts to advance the humanitarian imperative?

## ANNEXES



## ANNEX I: HLS PILAC RESEARCH QUESTIONNAIRE

**HARVARD LAW SCHOOL**

## Program on International Law and Armed Conflict

*Questionnaire for United Nations Member States*

3 June 2021

**OVERVIEW**

This document consists of a questionnaire developed and administered by the Harvard Law School Program on International Law and Armed Conflict (HLS PILAC). **It is requested that your State formulate answers to the questions below and send your State's responses to those questions to HLS PILAC via email ([pilac@law.harvard.edu](mailto:pilac@law.harvard.edu)) no later than 31 July 2021.**

The questionnaire comprises three sets of questions aimed at developing a better understanding as to how States address at the national level certain matters concerning intersections between counterterrorism measures and humanitarian and medical activities in relation to armed conflicts also characterized as counterterrorism contexts.

We kindly request that relevant departments and agencies in your government coordinate in order to formulate comprehensive responses to the questions. Given the cross-cutting nature of the issues embedded in the questions, it may be advisable to engage with the entities and individuals that cover relevant portfolios and that exercise relevant functions. That may include, for example, foreign affairs, justice, security, and interior ministries; humanitarian aid divisions; legal departments; and entities exercising (other) executive, legislative, judicial, or other functions in respect of this area.

A premise underlying our research is that identifying the practice and perspectives of various States on these important matters is fundamental to developing a holistic understanding of these issues. To help reach that objective, we have produced a brief questionnaire. We do not aim to document compliance or violations but rather to help bring to light a better understanding by States, humanitarian actors, counterterrorism actors, and U.N. system actors as to how States interpret and implement Security Council resolutions in this area.

**BACKGROUND**

HLS PILAC researches critical challenges facing the various fields of public international law related to armed conflict. Its mode is critical, independent, and rigorous. HLS PILAC's methodology fuses traditional public international law research with targeted analysis of changing security environments. While its contributors may express a range of views on contentious legal and policy debates, HLS PILAC does not take institutional positions on such matters.

HLS PILAC is pursuing a research project that seeks to better understand how U.N. Member States approach the diverse issues that may arise in relation to countering terrorism and safeguarding humanitarian and medical activities in line with international humanitarian law (IHL) and humanitarian-policy frameworks. In particular, we are seeking to better understand how in practice States approach — at the national level — carrying out Security Council-decided counterterrorism measures in light of applicable international humanitarian law and humanitarian-policy frameworks governing humanitarian action and medical services, with a focus on how these issues relate to situations of armed conflict also characterized as counterterrorism contexts. More information about this project is available at the following link: < <https://pilac.law.harvard.edu/humanitarian-assistance-ihl-and-counterterrorism-mandates> >.

It may be recalled that, in Resolution 2462 (2019) and Resolution 2482 (2019), the U.N. Security Council urged States to take into account the potential effects of counterterrorism measures on exclusive humanitarian activities, including medical activities, carried out by impartial humanitarian actors in a manner consistent with IHL. As part of our research, we are attempting to develop an in-depth understanding concerning the impacts of Resolution 2462 (2019) and Resolution 2482 (2019) in relation to States' interpretation of their counterterrorism obligations — and the relations between those obligations and IHL protections for humanitarian and medical activities — at the national level. This project builds on a briefing published by HLS PILAC in May 2021, which analyzes certain key legal aspects of Resolutions 2462 and 2482. That briefing is available online at the following link: < <https://pilac.law.harvard.edu/take-into-account-report-web-version> >.

#### **CONDITIONS AND DISCLOSURES**

Please ensure that your State's response to the questionnaire is submitted to [pilac@law.harvard.edu](mailto:pilac@law.harvard.edu) no later than 31 July 2021. HLS PILAC may not be able to examine responses received after that date.

Please note that HLS PILAC may decide, at its sole discretion, to excerpt or otherwise

reproduce publicly a portion or all of the substance of your State's responses to the questionnaire, including in a publicly available annex or appendix to an HLS PILAC publication. In other words, your State's response will not be treated confidentially but rather may be made available for public consideration.

Please note as well that HLS PILAC may decide, at its sole discretion, to indicate publicly, including in an HLS PILAC publication, which States did not respond substantively to the questionnaire.

If a representative from your State would like to seek to engage with a member of the research team on aspects outside the scope of the questionnaire in a non-attributable, off-the-record capacity, you may reach out to the research team via email at [pilac@law.harvard.edu](mailto:pilac@law.harvard.edu).

## QUESTIONS

The following are the three sets of questions to which HLS PILAC is seeking your State's response. Please respond by typing in the space beneath each question (take as much space as is needed to respond comprehensively to each question) or by appending a separate document with your State's substantive responses to the questions. We invite you to also append to your State's response the text of laws, executive instruments, judicial decisions, donor policies, or other relevant texts.

### *First Set of Questions:*

- 1.1. When the U.N. Security Council adopts a resolution that entails a binding counterterrorism-related obligation, what actions does your State take to accept and carry out the decision in your State's national system?
- 1.2. What national laws and policies govern the actions enumerated in response to question 1.1?
- 1.3. What actions does your State take to ensure that all relevant organs, agencies, officers, and the like comply with the decisions referred to in question 1.1?

### *Second Set of Questions:*

- 2.1 What actions does your State take to address intersections between counterterrorism obligations arising from binding Security Council decisions and the obligation to respect and ensure respect for international humanitarian law provisions governing humanitarian services and medical services in armed conflicts, including armed conflicts also characterized as counterterrorism contexts?

- 2.2 What national laws and policies govern the actions enumerated in response to question 2.1?
- 2.3 What other actions, if any, has your State taken to safeguard humanitarian services and medical services in armed conflicts, including armed conflicts also characterized as counterterrorism contexts?
- 2.4 What national laws and policies govern the actions enumerated in response to question 2.3?

***Third Set of Questions:***

- 3.1 What actions has your State taken in relation to taking 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?<sup>240</sup>
- 3.2 What national laws and policies govern the actions enumerated in response to question 3.1?

**INQUIRIES**

Inquiries regarding this questionnaire or other aspects of HLS PILAC's work may be sent via email to [pilac@law.harvard.edu](mailto:pilac@law.harvard.edu).

\*\*\*

---

<sup>240</sup> It may be recalled that, in operative paragraph 24 of Resolution 2462 (2019) and in operative paragraph 16 of Resolution 2482 (2019), the U.N. Security Council urged States to take into account the potential effects of (certain) counterterrorism measures on those activities.

## ANNEX II: COVER EMAIL TRANSMITTING RESEARCH QUESTIONNAIRE

Dear Excellencies,  
Dear Colleagues,

I hope this message finds you well. I am writing on behalf of the Harvard Law School Program on International Law and Armed Conflict (HLS PILAC). At HLS PILAC, we conduct research and related policy engagement with States and U.N. system actors on contemporary challenges concerning international law related to armed conflict. More information about our work, including our current areas of focus, can be found online at the following link: < <https://pilac.law.harvard.edu/> >.

### OVERVIEW

**I am writing to request that your State fill out the enclosed, short questionnaire and send your response to HLS PILAC via email ([pilac@law.harvard.edu](mailto:pilac@law.harvard.edu)) no later than 31 July 2021.** Please respond by typing in the space beneath each question (take as much space as is needed to respond comprehensively to each question) or by appending a separate document with your State's substantive responses to the questions. We invite you also to append to your State's response the text of laws, executive instruments, judicial decisions, donor policies, or other relevant texts.

The questionnaire comprises three sets of questions aimed at developing a better understanding as to how States address at the national level certain matters concerning intersections between counterterrorism measures and humanitarian and medical activities in relation to armed conflicts also characterized as counterterrorism contexts.

### BACKGROUND

HLS PILAC researches critical challenges facing the various fields of public international law related to armed conflict. Its mode is critical, independent, and rigorous. HLS PILAC's methodology fuses traditional public international law research with targeted analysis of changing security environments. While its contributors may express a range of views on contentious legal and policy debates, HLS PILAC does not take institutional positions on such matters.

Currently, HLS PILAC is pursuing a research project that seeks to develop a better understanding as to how U.N. Member States approach the diverse issues that may arise in relation to countering terrorism and safeguarding humanitarian and medical activities

in line with international humanitarian law (IHL) and humanitarian-policy frameworks. In particular, we are seeking to better understand how in practice States approach — at the national level — carrying out Security Council-decided counterterrorism measures in light of applicable international humanitarian law and humanitarian-policy frameworks governing humanitarian action and medical services, with a focus on how these issues relate to situations of armed conflict also characterized as counterterrorism contexts. More information about this project is available at the following link: < <https://pilac.law.harvard.edu/humanitarian-assistance-ihl-and-counterterrorism-mandates> >.

It may be recalled that, in Resolution 2462 (2019) and Resolution 2482 (2019), the U.N. Security Council urged States to take into account the potential effects of counterterrorism measures on exclusive humanitarian activities, including medical activities, carried out by impartial humanitarian actors in a manner consistent with IHL. As part of our research, we are attempting to develop an in-depth understanding concerning the impacts of Resolution 2462 (2019) and Resolution 2482 (2019) in relation to States' interpretation of their counterterrorism obligations arising from (other) Security Council resolutions — and the relations between those obligations and IHL protections for humanitarian and medical activities — at the national level. This project builds on a briefing published by HLS PILAC in May 2021, in which HLS PILAC analysts evaluated key legal aspects of Resolutions 2462 and 2482. That briefing is available online at the following link: < <https://pilac.law.harvard.edu/take-into-account-report-web-version> >.

## QUESTIONNAIRE

A premise underlying our research is that identifying the practice and perspectives of various States on these important matters is fundamental to developing a holistic understanding of these issues. To help reach that objective, we have produced a brief questionnaire. We do not aim to document compliance or violations but rather to help bring to light a better understanding by States, humanitarian actors, counterterrorism actors, and U.N. system actors as to how States interpret and implement Security Council resolutions in this area.

We kindly request that relevant departments and agencies in your government coordinate in order to formulate comprehensive responses to the questions. Given the cross-cutting nature of the issues embedded in the questions, it may be advisable to engage with the entities and individuals covering relevant portfolios and exercising relevant functions. That may include, for example, foreign affairs, justice, security, and interior ministries; humanitarian aid divisions; legal departments; and entities exercising (other) executive, legislative, judicial, or other functions.

**The questionnaire comprises three sets of questions. Please ensure that your State's response to the questionnaire is submitted to [pilac@law.harvard.edu](mailto:pilac@law.harvard.edu) no later than 31 July 2021. We may not be able to examine responses received after that date.**

Please note that HLS PILAC may decide, at its sole discretion, to excerpt or otherwise reproduce publicly a portion or all of the substance of your State's responses to the questionnaire, including in a publicly available annex or appendix to an HLS PILAC publication. In other words, your State's response will not be treated confidentially but rather may be made available for public consideration. Please note as well that HLS PILAC may decide, at its sole discretion, to indicate publicly, including in an HLS PILAC publication, which States did not respond substantively to the questionnaire.

If a representative from your State wants to engage with a member of the research team on aspects outside the scope of the questionnaire in a non-attributable, off-the-record capacity, you may reach out to the research team via email at [pilac@law.harvard.edu](mailto:pilac@law.harvard.edu).

Thank you in advance for any time and assistance you are able to provide. Your State's responses will help illuminate this important legal and policy area.

Please accept, Excellencies, assurances of our highest consideration.

Best,  
Radhika Kapoor  
On behalf of HLS PILAC

\*\*\*

**ANNEX III: STATES' WRITTEN RESPONSES TO AN  
HLS PILAC RESEARCH QUESTIONNAIRE**

**(A) Belgium**

***First Set of Questions:***

- 1.1. When the U.N. Security Council adopts a resolution that entails a binding counterterrorism-related obligation, what actions does your State take to accept and carry out the decision in your State's national system?

When the UN Security Council adopts a resolution that entails a binding obligation in the fight against terrorism, Belgium drafts laws or other regulations to implement the resolution in question.  
Most of the time, the obligations contained in UN resolutions are included in regional instruments such as the Council of Europe or the European Union, with which Belgium must comply.

- 1.2. What national laws and policies govern the actions enumerated in response to question 1.1?

Various laws have been passed in recent years in the fight against terrorism: the law of 19 December 2003 on terrorist offences (M.B. 27.12.2003), the law of 18 February 2013 amending Book II, Title I ter of the Criminal Code (M.B. 04.03. 2013), the Act of 20 July 2015 to strengthen the fight against terrorism (M.B. 05.08. 2015), the Act of 3 August 2016 containing various provisions on the fight against terrorism (III) (M.B. 11.08.2016) and the Act of 14 December 2016 amending the Penal Code with regard to the suppression of terrorism (M.B. 22.12.2016).

Here are some examples of legislation adopted on the basis of UN resolutions related to terrorism:

Résolution ONU	Mise en œuvre en BE
The sanctions regimes against the	-Law of 11 May 1995 on the implementation of United Nations Security Council decisions



<p>Islamic State of Iraq and the Levant (Daech), Al-Qaida and the Taliban: Resolution 1267 (1999) and subsequent Security Council resolutions</p>	<p>-Law of 2 May 2019 on various financial provisions (art. 235-240)</p> <p>Several ministerial orders were adopted in this framework and regularly updated  <a href="https://finances.belgium.be/fr/arr%C3%AAt%C3%A9s-minist%C3%A9riels">https://finances.belgium.be/fr/arr%C3%AAt%C3%A9s-minist%C3%A9riels</a></p> <p>Title VIII (art. 235-240) of the Law of 2 May 2019 on miscellaneous financial provisions remedied this shortcoming by abolishing the system of ministerial decree (art. 238) and by stipulating that freezing measures adopted by the UN Security Council must be implemented from the moment they are adopted by the UN Security Council (art. 236).</p>
<p>Prevention and Suppression of Acts of Terrorism: UNSCR 1373 (2001)</p>	<p>The <b>procedure for freezing funds and economic resources</b> is provided for in the Royal Decree of 28 December 2006 on specific restrictive measures against certain persons and entities with a view to combating the financing of terrorism. The Royal Decree was confirmed by Article 115 of the Law of 25 April 2007 and thus acquired the force of law. The procedure provided for in the Royal Decree was adopted following Resolution 1373 of the United Nations Security Council of 28 September 2001, acting on the basis of Chapter VII of the Charter of the United Nations, and following European Union Regulation 2580/2001 of 27 December 2001.</p> <p><b>Fight against the financing of terrorism:</b> at the repressive level, Article 141 of the Criminal Code incriminates the financing of terrorism. Money laundering is covered by Article 505 of the Penal Code. At the preventive level, there is the law of 18 September 2017 on the prevention of money laundering and terrorist financing and the limitation of the use of cash and its implementing orders.</p>
<p>Acts of terrorism and weapons of mass destruction:</p>	<p>– Art. 137, § 3, 3° of the Penal Code considers the manufacture, possession, acquisition, transport or supply of nuclear, radiological or chemical weapons, the use of</p>

<p>Security Council resolutions 1540 (2004) and 2325 (2016)</p>	<p>nuclear, biological, radiological or chemical weapons, as well as the research and development of radiological or chemical weapons as a terrorist offence.</p> <ul style="list-style-type: none"> <li>– Title IX, Chapter I, Section IIbis of the Criminal Code on theft and extortion of nuclear materials (art. 477 to 477sexies) +331bis, 2° on the threat of theft of nuclear materials also refers to this issue.</li> </ul> <p>Belgium is part of the International Partnership against Impunity for the Use of Chemical Weapons.</p> <p>Belgium has donated two million euros for the creation of a new OPCW laboratory that will carry out chemical analysis and train scientists from around the world.</p> <p>Belgium is also part of the International Partnership on Disarmament Verification (IPNDV), which is examining how to address the technical challenges of verifying the dismantlement of nuclear weapons.</p> <p>The Nuclear Suppliers Group (NSG) is a group of nuclear supplier countries that seeks to contribute to the non-proliferation of nuclear weapons by implementing two sets of guidelines for exports of nuclear and nuclear-related items. Belgium is part of the NSG and holds the chairmanship for 2020-2021.</p>
<p>Incitement to terrorism: Security Council resolution 1624 (2005)</p>	<p>Article 140bis of the Penal Code on public incitement to commit a terrorist infraction.</p>
<p>Abductions by terrorist groups: Security Council resolution 2133 (2014)</p>	<p>Article 137, § 3, 3° of the Penal Code considers kidnapping under Articles 428 to 430, and 434 to 437 of the Penal Code as a terrorist offence.</p>

<p>Foreign terrorist fighters: Security Council resolutions 2178 (2014), 2249 (2015) and 2253 (2015)</p>	<p>Article 140sexies of the Criminal Code criminalising travel for terrorist purposes.</p>
<p>Terrorism and trafficking in cultural property: Security Council resolutions 2199 (2015) and 2347 (2017)</p>	<p>These behaviours constitute crimes under international law (art. 136quater of the Criminal Code)</p>
<p>UNSCR 2396 builds on and complements UNSCR 2178 (2014)</p>	<p><b>The European Advanced Passenger Information (API) Directive</b> of 2004 is a system for obtaining identity and travel data from passenger lists of flights at the time of check-in.</p> <p><b>The European Passenger Name Record Directive</b> was adopted in April 2016 and provides for the establishment of a European Passenger Name Record (PNR) register to prevent, detect, investigate and prosecute terrorist offenses.</p> <p>Parliament has already approved the Belgian transposition law at the end of December 2016. The law (12/25/2016) makes it possible to keep the lists of passengers of all international air and maritime transport as well as international bus and high speed trains in the fight against terrorism. Passenger data are transferred to a database of the Ministry of Home Affairs, which only the police and security services have access to.</p> <p><b>A common database on foreign terrorist fighters created in Belgium by the law of 21 April 2016.</b></p> <p>Each service, including the local level, can view the files and add new information. A tailored response with a specific risk assessment for each returning foreign fighter is made. As the</p>

	<p>threat evolves and the phenomenon of local terrorists gains in importance, it was decided to expand the database to home grown terrorists, hate preachers, potential violent extremist.</p> <p><b>Border control:</b> On 7 April 2017, the agreement on the adaptation of the Schengen Borders Code entered into force. As a result, anyone entering or leaving the Schengen area must now be systematically checked in all relevant databases. In addition, the identity and nationality of the person are verified, as well as the validity and authenticity of the travel document, including by using biometrics (iris scan).</p> <p><b>Fight against extremism:</b> In 2021, the Radicalism Action Plan has been transformed into a Strategic Note on Terrorism, Extremism and Radicalisation which harmonises the different responsibilities (federal, regional and local) and structures the multidisciplinary approach. It aims to enable all competent authorities and their services to work within a common framework, with a common strategy, while respecting the specific mission and methodology of the services. This Strategic Note highlights the importance of a broad socio-preventive approach in parallel to the security approach in the fight against terrorism. Other plans are also made at different levels of government.</p> <p>Regarding prosecution, rehabilitation and reintegration Public, non-governmental, regional and local initiatives exist to try to reintegrate foreign terrorist fighters and their families into the Belgian society, as well as national programs and a network of specialists in de-radicalization. The backbone of this policy is the follow up through the structures foreseen in the Plan R (National Task Force, Local Task Forces), together with Local Integrated Security Cells.</p>
--	--

1.3. What actions does your State take to ensure that all relevant organs, agencies, officers, and the like comply with the decisions referred to in question 1.1?

<p>Legislation is published in the Moniteur Belge and is accessible to the public, including the competent authorities.</p>
---

In Belgium, there are networks of experts who analyse legal and practical problems and promote the circulation of information among members of the public prosecutor's office. They also issue recommendations and draft circulars, which enable the College of Procurators General to pursue a coherent and coordinated criminal policy. Information on new legislation is disseminated to members of the public prosecution service by means of these circulars. One of the expert networks is dedicated to terrorism.

**Second Set of Questions:**

- 2.1 What actions does your State take to address intersections between counterterrorism obligations arising from binding Security Council decisions and the obligation to respect and ensure respect for international humanitarian law provisions governing humanitarian services and medical services in armed conflicts, including armed conflicts also characterized as counterterrorism contexts?

Belgium has implemented all its international obligations relating to the international humanitarian law, and the prosecution of war crimes. It must be underlined that, under the current legislation, an act falling into the scope of the definition of war crimes cannot be prosecuted for act of terrorism, but only for war crime.

- 2.2 What national laws and policies govern the actions enumerated in response to question 2.1?

Belgian Penal Code, articles 136<sup>quater</sup> to 136<sup>octies</sup>, and article 141<sup>bis</sup>.

- 2.3 What other actions, if any, has your State taken to safeguard humanitarian services and medical services in armed conflicts, including armed conflicts also characterized as counterterrorism contexts?

The Belgian Interministerial Commission for Humanitarian Law is namely in charge with the implementation of [IHL] obligations in the Belgian Legislation (<https://cidh.be/en>).

Since 2017, Belgium has led different types of actions and advocacy in order to safeguard humanitarian space. In 2017, a first Ministerial roundtable was organised at national level, to discuss the impact of counter terrorism measures on humanitarian aid. Since then, several events have also been organised at EU or UN level, for instance the side event on « UN counter-terrorism frameworks and sanctions regimes: safeguarding

humanitarian space » in 2019 in the framework of the UNGA (see point 3).

2.4 What national laws and policies govern the actions enumerated in response to question 2.3?

Royal Decree (6<sup>th</sup> of December 2000, as modified in 2016) on the reorganization of the Interministerial Commission for Humanitarian Law.

The law on development cooperation, the Royal Decree on Humanitarian aid, the Humanitarian aid strategy. The Belgian law and humanitarian strategy defend a principled humanitarian action and humanitarian aid based on needs identified by humanitarian actors recognised by the international community, guaranteeing aid to the most vulnerable populations. If sanctions regimes and measures to fight terrorism have a negative impact on the delivery of humanitarian aid, these measures contradict our humanitarian policy.

***Third Set of Questions:***

3.1 What actions has your State taken in relation to taking 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?<sup>241</sup>

Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, contains, inter alia, recital (38): Humanitarian activities carried out by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case law of the Court of Justice of the European Union.

The aim of Directive 2017/541 is not to allow the criminalisation of humanitarian activities carried out by impartial humanitarian organisations but to criminalise participation in a terrorist group with criminal intent. In this sense, the European Parliament decided to introduce Recital 38 into the Directive, which gives a clear signal to international organisations that they are not targeted when they provide

<sup>241</sup> It may be recalled that, in operative paragraph 24 of Resolution 2462 (2019) and in operative paragraph 16 of Resolution 2482 (2019), the U.N. Security Council urged States to take into account the potential effects of (certain) counterterrorism measures on those activities.

medical aid and incidentally food aid, as long as they do not act with this particular intention.

The most difficult provision in this context is therefore Article 140 of the Criminal Code on participation in the activities of a terrorist group and its mental element.

The mental element of Article 140 PC is characterised by a special intent and must include two behaviours, namely

- The perpetrator must have the intention to participate in the activities of a terrorist group;
- The perpetrator must have knowledge or should have had knowledge that his or her participation contributes or could contribute to the activities of a terrorist group, as amended by the legislator in 2016.

These last elements, which qualify the subjective element required, were inserted by the law of 14 December 2016. This implies that:

- The participant must have the intention to participate in the activities of a terrorist group (but it is not required that he or she intends that a terrorist offence be committed);
- The participant must have contributed to the activities of a terrorist group: he or she must have facilitated or made it easier for the group to commit the acts;
- The participant must know that the group for which he or she provides information or means is a terrorist group.
- The assessment of the mental element will be made on a case-by-case basis. The judge will have to determine the degree of knowledge on the part of the person providing assistance. This assessment will be made on the basis of all the factual elements in the file.

Therefore, the Belgian judges consider that all terrorist offences in the Belgian Penal Code are based on a specific "criminal intent" (special intent), but that this intent is never sufficient to convict, prosecute or deprive a person of his liberty. All terrorist offences require specific material elements as well as criminal intent. The prosecution will always have to show both criminal intent and material elements.

### 3.2 What national laws and policies govern the actions enumerated in response to question 3.1?

Article 141bis of the Penal Code was introduced into Belgian law by the above-mentioned law of 19 December 2003 and is therefore immediately part of Title Iter on terrorist offences. It reads as follows: "This title does not apply to the activities of armed forces in times of armed conflict, as defined and governed by international humanitarian law, nor to activities carried out by the armed forces of a State in the exercise of their official duties, insofar as they are governed by other rules of international law.["]

This article introduces a clause excluding the activities of armed forces governed by international humanitarian law, and those of the armed forces of a State in the exercise of their official duties, in so far as they are governed by other rules of international law. It actually takes over recital 11 of Framework Decision 2002/475/JHA, which became recital 37 in Directive 2017/541.

Article 141bis of the Criminal Code was introduced in order to avoid overlap between these two bodies of law during an armed conflict. It gives priority to international humanitarian law over criminal law provisions relating to terrorist offences.

\*\*\*



**(B) Canada*****First Set of Questions:***

1.1. When the U.N. Security Council adopts a resolution that entails a binding counterterrorism-related obligation, what actions does your State take to accept and carry out the decision in your State's national system?

- Canada recognizes the importance of ratification and implementation of the terrorism-related international conventions and protocols in the global fight against terrorism
- Canada believes that combating terrorism must be pursued in full compliance with established international norms, including international human rights law, international humanitarian law and refugee law. Canadian anti-terrorism legislation is drafted with due regard for human rights guarantees enshrined both domestically (as in the constitution of a country), as well as internationally.
- Canada's Geneva Conventions Act translates Canada's international legal obligations under international humanitarian law into our national laws and policies.
- Canada implements binding decisions of the United Nations Security Council (UNSC) to impose sanctions into domestic law through regulations made under the *United Nations Act*. In order to ensure full compliance with UNSCR 1267 and its complimentary resolutions (notably 1988 and 1989), the restrictions against individuals and entities listed by the Al-Qaida Sanctions Committee and the Taliban Sanctions Committee have been imposed under the *Regulations Implementing the United Nations Resolutions on the Taliban, ISIL (Da'esh) and Al-Qaida* (the "UNAQTR").
- Equally, UNSC Resolution 1373 (2001) is implemented into Canadian law via the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism* and the *Criminal Code* (the "RIUNRST"). Canada is also an active participant and fully implements the Financial Action Task Force's (FATF) special recommendations.

1.2. What national laws and policies govern the actions enumerated in response to question 1.1?

- The following laws that govern Canadian action on UNSC counter terrorism resolutions are as follows:
  - *United Nations Act*, including the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism* and the *Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da'esh) and Al-Qaida*;

- Criminal Code;
- Geneva Conventions Act;
- Justice for Victims of Terrorism Act;
- Proceeds of Crime (Money Laundering) and Terrorist Financing Act

1.3. What actions does your State take to ensure that all relevant organs, agencies, officers, and the like comply with the decisions referred to in question 1.1?

- Canada implements UNSC counter terrorism resolutions into Canadian domestic law under the *United Nations Act* and other relevant legislation.
- In order to promote enhanced compliance, Canadian officials will provide information and regularly engage in outreach with a range of domestic stakeholders, in order to increase awareness of their compliance obligations with respect to this legislation.

***Second Set of Questions:***

2.1 What actions does your State take to address intersections between counterterrorism obligations arising from binding Security Council decisions and the obligation to respect and ensure respect for international humanitarian law provisions governing humanitarian services and medical services in armed conflicts, including armed conflicts also characterized as counterterrorism contexts?

- Canada supports safeguarding principled humanitarian action in sanctions regimes and counter-terrorism contexts, in accordance with international humanitarian law, international refugee law, international human rights law, domestic legislation, and our obligations under various UNSC resolutions and international obligations designed to maintain and restore international peace and security.
- Through the use of targeted sanctions measures, we strive to minimize the adverse and unintended consequences of sanctions for civilian populations, including through legislated exceptions for legitimate humanitarian activities.
- The Government of Canada also mitigates unintended humanitarian consequences of sanctions through legislated exceptions for certain activities, including implementing any related UN Security Council exemptions or decisions, as required.
- Canada implements humanitarian exceptions for activities such as the delivery of food, medicine and medical supplies, to limit the negative

impact and potentially adverse effects on vulnerable groups, such as women and girls.

- Where exceptions do not apply under the UNAQTR and RIUNRST, Canadians and persons in Canada may request a permit or certificate from the Minister of Foreign Affairs, authorizing activities that would otherwise be prohibited. With respect to terrorist financing provisions under the *Criminal Code*, this applies exclusively to property that is owned or controlled by a terrorist and that has been frozen and involves an authorization by the Minister of Public Safety.
- Canada's approach and legislation involves layers of decision-making and risk mitigation. It is a question of balance to deliver on our commitments as a good humanitarian donor to support humanitarian partners' rapid and unimpeded access to crisis-affected populations while also achieving our counter-terrorism and sanctions objectives.
- To respond to the needs of organizations operating in countries targeted by Canada's sanctions regime during the COVID-19 pandemic, we have also taken steps to accelerate and enhance the processing of any application for a permit or certificate where applicants have identified a link to the global health crisis.

2.2 What national laws and policies govern the actions enumerated in response to question 2.1?

- See response to Q1.2.

2.3 What other actions, if any, has your State taken to safeguard humanitarian services and medical services in armed conflicts, including armed conflicts also characterized as counterterrorism contexts?

- Canada recognizes the ongoing concerns in this area and is committed to further exploring how to mitigate these concerns while achieving effective CT solutions.
- Canada sponsored a virtual roundtable organized by the International Peace Institute (IPI) in February 2021 to facilitate engagement between humanitarian actors and UN sanctions authorities, as well as other relevant stakeholders including donors, financial institutions, and the private sector. The purpose of this roundtable was to develop a shared understanding of the challenges faced by humanitarian actors delivering assistance in areas where the UNSC sanctions regime relating to the Islamic State in Iraq and the Levant (Da'esh) and Al-Qaida applies, and to identify concrete solutions to address these problems. The result of these discussions will be incorporated into an issue brief that IPI intends to publish and disseminate widely.

- IPI is currently refining an issue brief that, along with the results of a series of interviews with humanitarian actors and sanctions-related stakeholders, draws on the outcomes of the roundtable. The brief aims to provide a concrete and comprehensive set of recommendations to proactively and preventively stem the impact of the UN ISIL/Al-Qaida sanctions regime on humanitarian action.

2.4 What national laws and policies govern the actions enumerated in response to question 2.3?

- See response to Q1.2.

***Third Set of Questions:***

3.1 What actions has your State taken in relation to taking 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?<sup>242</sup>

- In general, the Humanitarian Assistance Bureau keeps an open dialogue with Canada's humanitarian partners to understand any concerns and challenges they may have encountered in relation to counter-terrorism and sanctions measures. Canada actively participates in the Good Humanitarian Donorship initiative in Geneva, which frequently explores the issue of safeguarding principled humanitarian action in counter-terrorism contexts.

3.2 What national laws and policies govern the actions enumerated in response to question 3.1?

- Canada supports safeguarding principled humanitarian action in counter-terrorism and sanctions contexts in accordance with international humanitarian law, international refugee law, international human rights law, domestic legislation, and our obligations under various UNSC resolutions and international obligations designed to combat terrorism.
- See response to Q1.2

\*\*\*

---

<sup>242</sup> It may be recalled that, in operative paragraph 24 of Resolution 2462 (2019) and in operative paragraph 16 of Resolution 2482 (2019), the U.N. Security Council urged States to take into account the potential effects of (certain) counterterrorism measures on those activities.

## (C) Sweden

### *First Set of Questions:*

- 1.1. When the U.N. Security Council adopts a resolution that entails a binding counterterrorism-related obligation, what actions does your State take to accept and carry out the decision in your State's national system?

To illustrate action taken as a result of binding obligations in a Security Council resolution, Resolution 2178 (2014) may be used as an example. The resolution concerns measures against foreign terrorist fighters. As a preliminary analysis indicated that amendments to criminal law were necessary, a committee of inquiry was tasked to draft new legislation. Following the standard legislative procedure, its proposal was circulated to stakeholders for consultation, after which the Ministry of Justice prepared first a proposal to be scrutinized by the Council on Legislation and then a government bill that was submitted to Parliament. Specific criminal law provisions aiming to implement the resolution and to counteract and prevent terrorism travel were introduced in April 2016, making it a criminal offence to travel to another country for terrorist purposes, to finance such travel and to receive training regarding e.g. terrorist offences.

- 1.2. What national laws and policies govern the actions enumerated in response to question 1.1?

National policies: In the Swedish Counter-Terrorism Strategy (Government Communication 2014/14:146), the central role and importance of the UN in the international work to prevent and combat violent extremism and terrorism is underlined. This of course includes the agreements that exist within the UN of significance for countering terrorism.

- 1.3. What actions does your State take to ensure that all relevant organs, agencies, officers, and the like comply with the decisions referred to in question 1.1?

National inter-agency work is fundamental to uphold and enforce the agreements that exist within the UN in the field of counter-terrorism. For example, the Swedish Counter-Terrorism Cooperation Council works to increase Sweden's ability to counter terrorism and consists of 15 Swedish agencies including the Security Service, Police Authority, Armed Forces, Coast Guard and Migration Agency.

More specifically, as regards linkages between terrorism and organised crime, the Swedish Police Authority and the Swedish Security Service (as responsible authority for detecting terrorism activities) work in close cooperation, both at a strategic and at an operational level. The cooperation makes it possible to detect any connections between organised crime and actors linked to terrorism swiftly. Through the close cooperation the two authorities improve their ability to identify, plan and conduct targeted actions against radicalized individuals and groups.

Coordination and cooperation between authorities has been identified as one key factor in countering organised crime. Since 2009, twelve Swedish authorities with different mandates are working together to direct their joint efforts against organised crime, e.g. fraud against the welfare system. This is a cooperation between both law enforcement authorities and authorities who have other assignments, for example, the Swedish Tax Agency, the Public Employment Service, the Social Insurance Authority and Swedish Enforcement Authority.

***Second Set of Questions:***

- 2.1 What actions does your State take to address intersections between counterterrorism obligations arising from binding Security Council decisions and the obligation to respect and ensure respect for international humanitarian law provisions governing humanitarian services and medical services in armed conflicts, including armed conflicts also characterized as counterterrorism contexts?

In 2019, the UN's Counter-Terrorism Committee noted that Sweden appeared "to be fully aware that all measures that it undertakes to combat terrorism should comply with its obligations under international law, in particular international human rights, refugee and humanitarian law"<sup>243</sup>. Sweden reported in its second report to the Committee under Res. 1624 that it viewed the need for any measures in the fight against terrorism to be in full compliance with international law, in particular international humanitarian, refugee and human rights law, as one of the most pressing challenges in the fight against terrorism. Sweden stated that in its foreign policy positions it demanded respect for human rights and the rule of law in counter-terrorism measures<sup>244</sup>.

When drafting the national legislation described above under 1.1, IHL was taken

---

<sup>243</sup> The Counter-Terrorism Committee Executive Directorate (CTED)'s 2019 overview of implementation assessment (OIA) for Security Council resolution 1373 (2001) by Sweden with comments by Sweden, p. 9.

<sup>244</sup> The Counter-Terrorism Committee Executive Directorate (CTED)'s 2019 detailed implementation survey (DIS) for Security Council resolution 1373 (2001) by Sweden with comments by Sweden, p. 69.

into consideration. In the *travaux préparatoires* (Government Bill 2015/16:78) concerning the travel offence, it is stated that participation in training in humanitarian law is not covered by criminal liability.

2.2 What national laws and policies govern the actions enumerated in response to question 2.1?

The Council of the European Union emphasized in 2019 the need for EU member states to seek to avoid any potential negative impact on humanitarian action when designing and applying all counter-terrorism measures and in 2021 called for the consistent inclusion of humanitarian exceptions in EU restrictive measures regimes where relevant<sup>245</sup>. This exception system under EU law is consistent with the system of exceptions operated under UN sanctions.

2.3 What other actions, if any, has your State taken to safeguard humanitarian services and medical services in armed conflicts, including armed conflicts also characterized as counterterrorism contexts?

The Ministry for Foreign Affairs continuously maintains, including during Sweden's membership of the UN Security Council or other international fora, a principled posture with a focus on safeguarding international humanitarian law and enabling needs-based, neutral humanitarian policy. Extensive actions have also been taken to facilitate humanitarian exemptions and reinforce mechanisms to prevent the implementation of restrictive measures from unintentionally impacting humanitarian work. The Ministry of Foreign Affairs multiannual core funding agreements with humanitarian partners do not include any stipulations on combating terrorism.

The Ministry has also supported the serious efforts undertaken by the EU to further prevent the unintended impact of EU sanctions. In the context of the COVID-19 pandemic, the Commission has set up an EU-level contact point for humanitarian aid in environments subject to EU sanctions to support and facilitate the activities of humanitarian operators engaged in the provision of humanitarian aid in environments subject to EU sanctions<sup>246</sup>. It has also published guidance notes to facilitate the task of humanitarian operators in certain sanctioned environments<sup>247</sup>.

---

<sup>245</sup> Council conclusions from 25 November 2019 (Humanitarian Assistance and International Humanitarian Law - [link](#)) and 20 May 2021 (Communication from the Commission to the European Parliament and the Council on the EU's humanitarian action: new challenges, same principles - [link](#)).

<sup>246</sup> European Commission, "EU-level contact point for humanitarian aid in environments subject to EU sanctions" ([link](#)).

<sup>247</sup> Guidance note on the provision of humanitarian aid to fight the COVID-19 pandemic in certain [Footnote continued on next page]

The Ministry of Foreign Affairs and/or competent authorities have had a number of government-wide coordination meetings as well as ad hoc meetings with various stakeholders from the private and civil sectors to discuss so-called “de-risking” and “chilling effects” and other unintentional negative impacts reported by humanitarian actors.

In 2020, to ensure compliance with EU regulations on restrictive measures, including sanctions for counter-terrorism purposes, the Swedish International Development Cooperation Agency (Sida) introduced specific anti-terrorism conditions in its contracts with its implementing partners<sup>248</sup>. Sida decided upon a general exemption from applying these conditions in its funding of humanitarian activities based on humanitarian law and principles and the EU decisions and guidelines mentioned above, while assuming responsibility for ensuring that the funds were not made available to, or would not benefit, groups and individuals on the EU’s sanctions list. Sida deemed all of its partners to operate based on the humanitarian principles, in accordance with international humanitarian law.

#### 2.4 What national laws and policies govern the actions enumerated in response to question 2.3?

Sida’s use of humanitarian funds is governed by the Strategy for Sweden’s humanitarian aid provided through Sida for the years 2021-2025.

### ***Third Set of Questions:***

#### 3.1 What actions has your State taken in relation to taking 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?<sup>249</sup>

As part of activities aiming to increase the effective functioning of the international humanitarian system and its implementing partners, Sida’s Unit for Humanitarian Assistance is responsible for working in close dialogue with the Government

---

environments subject to EU sanctions (Iran, Nicaragua, Syria, Venezuela and EU counter-terrorism sanctions) | European Commission ([europea.eu](https://europea.eu)).

<sup>248</sup> New conditions stipulating that the implementing partner should ensure that the funds are not made available to, or provided for the benefit of, third parties included in the EU’s collective sanctions list.

<sup>249</sup> It may be recalled that, in operative paragraph 24 of Resolution 2462 (2019) and in operative paragraph 16 of Resolution 2482 (2019), the U.N. Security Council urged States to take into account the potential effects of (certain) counterterrorism measures on those activities.



(Ministry for Foreign Affairs) on measures to reduce adverse effects of counter-terrorism measures and of restrictive measures against principled humanitarian action.

3.2 What national laws and policies govern the actions enumerated in response to question 3.1?

See above responses (1.2, 2.2, 2.4)

\*\*\*

## ANNEX IV: INDICATIVE COMPENDIUM OF CERTAIN COUNTERTERRORISM DECISIONS AND RECOMMENDATIONS ADOPTED BY THE SECURITY COUNCIL

### “Support” to terrorism or terrorists

- States shall “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.”<sup>250</sup>
- “All States must take urgent action to prevent and suppress all active and passive support to terrorism.”<sup>251</sup>
- The Council “underlines the obligation on States to deny financial and all other forms of support and safe haven to terrorists and those supporting terrorism.”<sup>252</sup>

### Bringing perpetrators to justice

- “States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute.”<sup>253</sup>
- “States shall 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.”<sup>254</sup>
- “[T]hose responsible for committing, organizing, or supporting terrorist acts must be held accountable.”<sup>255</sup>

### Basis for listing

- “[A]ny individual, group, undertaking or entity either owned or controlled, directly or indirectly, by, or otherwise supporting, any individual, group, undertaking or entity associated with Al-Qaida or ISIL, including on the ISIL (Da’esh) & Al-Qaida Sanctions List, shall be eligible for listing.”<sup>256</sup>
- “[A]cts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida and eligible for inclusion in the Al-Qaida Sanctions List include... otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof.”<sup>257</sup>

---

<sup>250</sup> UNSCR 1373 (2001), OP 6; UNSCR 2170 (2014), OP 11; UNSCR 2395 (2017), OP 22.

<sup>251</sup> UNSCR 1456 (2003), OP 1.

<sup>252</sup> UNSCR 1377 (2001), preamble.

<sup>253</sup> UNSCR 1456 (2003), OP 3.

<sup>254</sup> UNSCR 2199 (2015), OP 11; UNSCR 1373 (2001), OP 2(e).

<sup>255</sup> UNSCR 2253 (2015), OP 12.

<sup>256</sup> UNSCR 2253 (2015), OP 5.

<sup>257</sup> UNSCR 2161 (2014), OP 2; UNSCR 2368 (2017), OP 2; UNSCR 1617 (2005), OP 2; UNSCR 1822 (2008), OP 2; UNSCR 1904 (2009), OP 2; UNSCR 2083 (2012), OP 2.

**Financing of terrorism**

- States shall “prevent and suppress the financing of terrorist acts.”<sup>258</sup>
- States shall “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.”<sup>259</sup>

**Making economic resources available**

- States shall “[p]rohibit 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.”<sup>260</sup>
- “States are required ... to ensure that their nationals and those in their territory not make assets or economic resources, directly or indirectly, available to ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida.”<sup>261</sup>
- “[T]he obligation in paragraph 1 (d) of resolution 1373 (2001) applies to making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, 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.”<sup>262</sup>

**Establishing criminal offenses**

- States shall ensure that “terrorist acts are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”<sup>263</sup>
- States shall “establish serious criminal offenses regarding the travel, recruitment, and financing of foreign terrorist fighters.”<sup>264</sup>

**Diversion of funds to terrorists**


---

<sup>258</sup> UNSCR 2170 (2014), OP 11.

<sup>259</sup> UNSCR 1373 (2001), OP 1(b); UNSCR 2462 (2019), OP 2.

<sup>260</sup> UNSCR 1373 (2001), OP 1(d).

<sup>261</sup> UNSCR 2199 (2015), OP 2.

<sup>262</sup> UNSCR 2368 (2017), OP 20; UNSCR 2462 (2019), OP 3.

<sup>263</sup> UNSCR 1373 (2001), OP 2(e).

<sup>264</sup> UNSCR 2462 (2019), OP 2; UNSCR 2178 (2014), OP 6.

- The Council urges States to “ensure financial flows through charitable giving are not diverted to ISIL, ANF or any other individuals, groups, undertakings and entities associated with Al-Qaida.”<sup>265</sup>

**Abuse of non-profit organizations**

- The Council “[c]alls upon Member States to move vigorously and decisively to cut the flows of funds and other financial assets and economic resources to individuals and entities on the Al-Qaida Sanctions List...and taking into account relevant FATF Recommendations and international standards designed to prevent the abuse of non-profit organizations... while working to mitigate the impact on legitimate activities through these mediums.”<sup>266</sup>
- The Council “[c]alls upon Member States to move vigorously and decisively to cut the flows of funds and other financial assets and economic resources to individuals, groups, undertakings and entities on the ISIL (Da’esh) & Al-Qaida Sanctions List...and taking into account relevant FATF Recommendations and international standards designed to enhance financial transparency ... as well as to protect non-profit organizations, from terrorist abuse, using a risk-based approach, while working to mitigate the impact on legitimate activities through all of these mediums.”<sup>267</sup>

---

<sup>265</sup> UNSCR 2199 (2015), OP 22.

<sup>266</sup> UNSCR 2161 (2014), OP 12; UNSCR 2253 (2015), OP 21.

<sup>267</sup> UNSCR 2368 (2017), OP 22.

