



# Taking into Account the Potential Effects of Counterterrorism Measures on Humanitarian and Medical Activities: Elements of an Analytical Framework for States Grounded in Respect for International Law

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May 2021

**DUSTIN A. LEWIS AND NAZ K. MODIRZADEH**

Legal  
Briefing

# **TAKING INTO ACCOUNT THE POTENTIAL EFFECTS OF COUNTERTERRORISM MEASURES ON HUMANITARIAN AND MEDICAL ACTIVITIES**

**ELEMENTS OF AN ANALYTICAL FRAMEWORK FOR  
STATES GROUNDED IN RESPECT FOR  
INTERNATIONAL LAW**

Harvard Law School Program on International Law and Armed Conflict

## EXECUTIVE SUMMARY

For at least a decade, States, humanitarian bodies, and civil-society actors have raised concerns about how certain counterterrorism measures can prevent or impede humanitarian and medical activities in armed conflicts. In 2019, the issue drew the attention of the world's preeminent body charged with maintaining or restoring international peace and security: the United Nations Security Council. In two resolutions — Resolution 2462 (2019) and Resolution 2482 (2019) — adopted that year, 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 international humanitarian law (IHL). By implicitly recognizing that measures adopted to achieve one policy objective (countering terrorism) can impair or prevent another policy objective (safeguarding humanitarian and medical activities), the Security Council elevated taking into account the potential effects of certain counterterrorism measures on exclusively humanitarian activities to an issue implicating international peace and security.

In this legal briefing, we aim to support the development of an analytical framework through which a State may seek to devise and administer a system to take into account the potential effects of counterterrorism measures on humanitarian and medical activities. Our primary intended audience includes the people involved in creating or administering a “take into account” system and in developing relevant laws and policies. Our analysis zooms in on Resolution 2462 (2019) and Resolution 2482 (2019) and focuses on grounding the framework in respect for international law, notably the U.N. Charter and IHL.

In section 1, we introduce the impetus, objectives, and structure of the briefing. In our view, a thorough legal analysis of the relevant resolutions in their wider context is a crucial element to laying the conditions conducive to the development and administration of an effective “take into account” system. Further, the stakes and timeliness of the issue, the Security Council's implicit recognition of a potential tension between measures adopted to achieve different policy objectives, and the relatively scant salient direct practice and scholarship on elements pertinent to “take into account” systems also compelled us to engage in original legal analysis, with a focus on public international law and IHL.

In section 2, as a primer for readers unfamiliar with the core issues, we briefly outline humanitarian and medical activities and counterterrorism measures. Then we highlight a range of possible effects of the latter on the former. Concerning armed conflict, humanitarian activities aim primarily to provide relief to and

protection for people affected by the conflict whose needs are unmet, whereas medical activities aim primarily to provide care for wounded and sick persons, including the enemy. Meanwhile, for at least several decades, States have sought to prevent and suppress acts of terrorism and punish those who commit, attempt to commit, or otherwise support acts of terrorism. Under the rubric of countering terrorism, States have taken an increasingly broad and diverse array of actions at the global, regional, and national levels. A growing body of qualitative and quantitative evidence documents how certain measures designed and applied to counter terrorism can impede or prevent humanitarian and medical activities in armed conflicts. In a nutshell, counterterrorism measures may lead to diminished or complete *lack of access* by humanitarian and medical actors to the persons affected by an armed conflict that is also characterized as a counterterrorism context, or those measures may adversely affect the scope, amount, or quality of humanitarian and medical services provided to such persons. The diverse array of detrimental effects of certain counterterrorism measures on humanitarian and medical activities may be grouped into several cross-cutting categories, including operational, financial, security, legal, security, and reputational effects.

In section 3, we explain some of the key legal aspects of humanitarian and medical activities and counterterrorism measures. States have developed IHL as the primary body of international law applicable to acts and omissions connected with an armed conflict. IHL lays down several rights and obligations relating to a broad spectrum of humanitarian and medical activities pertaining to armed conflicts. A violation of an applicable IHL provision related to humanitarian or medical activities may engage the international legal responsibility of a State or an individual. Meanwhile, at the international level, there is no single, comprehensive body of counterterrorism laws. However, States have developed a collection of treaties to pursue specific anti-terrorism objectives. Further, for its part, the Security Council has assumed an increasingly prominent role in countering terrorism, including by adopting decisions that U.N. Member States must accept and carry out under the U.N. Charter. Some counterterrorism measures are designed and applied in a manner that implicitly or expressly “carves out” particular safeguards — typically in the form of limited exceptions or exemptions — for certain humanitarian or medical activities or actors. Yet most counterterrorism measures do not include such safeguards.

In section 4, which constitutes the bulk of our original legal analysis, we closely evaluate the two resolutions in which the Security Council urged States to take into account the effects of (certain) counterterrorism measures on humanitarian and medical activities. We set the stage by summarizing some aspects of the legal relations between Security Council acts and IHL provisions pertaining to

humanitarian and medical activities. We then analyze the status, consequences, and content of several substantive elements of the resolutions and what they may entail for States seeking to counter terrorism and safeguard humanitarian and medical activities. Among the elements that we evaluate are: the Security Council's new notion of a prohibited financial "benefit" for terrorists as it may relate to humanitarian and medical activities; the Council's demand that States comply with IHL obligations while countering terrorism; and the constituent parts of the Council's notion of a "take into account" system.

In section 5, we set out some potential elements of an analytical framework through which a State may seek to develop and administer its "take into account" system in line with Resolution 2462 (2019) and Resolution 2482 (2019). In terms of its object and purpose, a "take into account" system may aim to secure respect for international law, notably the U.N. Charter and IHL pertaining to humanitarian and medical activities. In addition, the system may seek to safeguard humanitarian and medical activities in armed conflicts that also qualify as counterterrorism contexts. We also identify two sets of preconditions arguably necessary for a State to anticipate and address relevant potential effects through the development and execution of its "take into account" system. Finally, we suggest three sets of attributes that a "take into account" system may need to embody to achieve its aims: utilizing a State-wide approach, focusing on potential effects, and including default principles and rules to help guide implementation.

In section 6, we briefly conclude. In our view, jointly pursuing the policy objectives of countering terrorism and safeguarding humanitarian and medical activities presents several opportunities, challenges, and complexities. International law does not necessarily provide ready-made answers to all of the difficult questions in this area. Yet devising and executing a "take into account" system provides a State significant opportunities to safeguard humanitarian and medical activities and counter terrorism while securing greater respect for international law.

## **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.

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## 1. INTRODUCTION

For at least a decade, States, humanitarian bodies, and civil-society actors have raised concerns about how certain counterterrorism measures can prevent or impede humanitarian and medical activities in armed conflicts.<sup>1</sup> In 2019, the issue drew the attention of the world's preeminent body charged with maintaining or restoring international peace and security:<sup>2</sup> the United Nations Security Council.<sup>3</sup> In two resolutions adopted that year, 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 international humanitarian law (IHL).<sup>4</sup>

Over the past century and a half, States have developed IHL — as a body of international law applicable to armed conflicts — in part to safeguard humanitarian and medical activities. In an armed conflict, humanitarian activities are undertaken to relieve and protect people not, or no longer, actively participating in hostilities whose needs are unmet.<sup>5</sup> For their part, extensive protections for impartial medical care for all wounded and sick — including the enemy — are at the foundation of the legal regime.<sup>6</sup> By implicitly recognizing that measures adopted to achieve one policy objective (countering terrorism) can impair or prevent another policy objective (safeguarding humanitarian and medical activities), the Security Council elevated taking into account the potential effects of certain counterterrorism measures on exclusively humanitarian and medical activities to an issue implicating international peace and security. By and large, States have yet to formulate and adopt systematic approaches to addressing these issues.

In this legal briefing, we aim to support the development of an analytical framework through which a State may seek to devise and administer a system to take into

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<sup>1</sup> See, e.g., Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, U.N. Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, July 2013 (hereafter, OCHA/NRC, *Study*); International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 31IC/11/5.1.12, October 2011, pp. 48–53 (hereafter, ICRC, *2011 Challenges Report*).

<sup>2</sup> See Charter of the United Nations (1945), Art. 24(1).

<sup>3</sup> See Nathalie Weizmann, *Painting Within the Lines: The UN's Newest Resolution Criminalizing Financing for Terrorists—Without Imperiling Humanitarian Activities*, Just Security, March 29, 2019, <https://www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperiling-humanitarian-activities/>, <https://perma.cc/SQ28-3JPN>.

<sup>4</sup> UNSCR 2462 (2019), OP 24; UNSCR 2482 (2019), OP 16.

<sup>5</sup> See below section 3.1: Key Aspects of IHL concerning Humanitarian and Medical Activities.

<sup>6</sup> *Id.*



account the potential effects of counterterrorism measures on humanitarian and medical activities. So far as we are aware, no State has developed a comprehensive system to take such effects into account. Yet at least some States are actively considering whether and how to develop such systems or other mechanisms to address intersections between counterterrorism measures and humanitarian and medical activities. Further, a Security Council subsidiary organ and a related special political mission — both with counterterrorism mandates — have started to engage with States on some of these issues.<sup>7</sup> More broadly, efforts to catalog and evaluate specific detrimental effects of counterterrorism measures on humanitarian and medical activities are an important ongoing part of these considerations among States.<sup>8</sup>

In our view, a thorough legal analysis of the relevant resolutions in their wider context is a crucial element to identify the conditions conducive to the development and administration of an effective “take into account” system. Further, the stakes and timeliness of the issue, the Security Council’s implicit recognition of a potential tension between measures adopted to achieve different policy objectives, and the relatively scant salient direct practice and scholarship on elements pertinent to “take into account” systems also compelled us to engage in original legal analysis, with a focus on public international law and IHL.

Our primary intended audience includes the people involved in the creation or administration of a “take into account” system and in the development of relevant laws and policies. Our analysis zooms in on two particular Security Council

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<sup>7</sup> See Joint report of the Counter-Terrorism Committee Executive Directorate and the Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015) concerning Islamic State in Iraq and the Levant (ISIL) (Da’esh), Al-Qaida and the Taliban and associated individuals and entities on actions taken by Member States to disrupt terrorist financing, prepared pursuant to paragraph 37 of Security Council resolution 2462 (2019), annexed to Letter dated 3 June 2020 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism and the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council, S/2020/493, June 3, 2020, paras. 83–85.

<sup>8</sup> See, e.g., Lindsay Hamsik and Lissette Almanza, *Detrimental Effects: How Counter-terror Measures Impede Humanitarian Action — A Review of Available Evidence*, InterAction, April 2021, <https://www.interaction.org/wp-content/uploads/2021/04/Detrimental-Impacts-CT-Measures-Humanitarian-Action-InterAction-April-2021.pdf>, <https://perma.cc/8LXE-ABTG> (hereafter, InterAction, *Detrimental Effects*); Norwegian Refugee Council, *Principles Under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 2018, [https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/nrc-principles\\_under\\_pressure-report-2018-screen.pdf](https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/nrc-principles_under_pressure-report-2018-screen.pdf), [permalink: https://perma.cc/G47K-3EJ2](https://perma.cc/G47K-3EJ2); Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict, March 2017, <https://pilac.law.harvard.edu/pilot-empirical-survey-study-and-comment>, <https://perma.cc/7DL7-L6AV> (hereafter, PILAC, *Pilot Study*).

resolutions — Resolution 2462 (2019) and Resolution 2482 (2019) — and focuses on grounding the framework in respect for international law, notably the U.N. Charter and IHL. We have sought to build on existing analyses of legal issues and to complement efforts aimed at illustrating the range of detrimental effects of counterterrorism measures on humanitarian and medical activities.

We approach these issues primarily through the lens of international law because States universally recognize that international law is applicable to all armed conflicts and that international law governs aspects of certain counterterrorism measures. Distinct from domestic legislation or globally oriented anti-terrorism-financing policies, for example, international law is the only system agreed by States at the international level to impose binding rules in order both to protect people affected by war and to counter terrorism. Further, the status and consequences of Security Council resolutions in relation to rules from other bodies of law, including IHL, remain unsettled in some key respects.

In our view, it is warranted at this time to read the relevant provisions of these Security Council resolutions under a legal microscope. A core reason is that an agreed, systematic approach to these legal issues has not yet arisen, so far as we are aware, either in practice or scholarship. Partly as a result, whether the humanitarian and medical needs of fighters *hors de combat* (out of the fight) and civilians in an armed conflict also characterized as a counterterrorism context are ultimately met depends partly on complex legal argumentation. In particular, the Security Council resolutions implicate at least two sets of linked potential legal fault lines, each with significant stakes. A first possible fault line concerns whether the *characterization of an adversary as a terrorist* may justify limiting the applicability, scope, or content of international legal rules meant to safeguard humanitarian and medical activities in relation to that adversary, including provisions aimed at meeting the needs of fighters *hors de combat*. A second concerns whether *humanitarian and medical activities themselves* — including services aimed at addressing the unmet needs of civilians in territories under the control of a party characterized as a terrorist entity — may be legitimately considered to constitute prohibited “support” to terrorists.

At a practical level, these stakes implicate urgent matters of life and death in numerous contemporary wars that double as counterterrorism contexts. At a legal-institutional level, the issues concern the relative authority of the Security Council not only to “(quasi-)legislate” counterterrorism matters<sup>9</sup> but also to shape

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<sup>9</sup> See, e.g., Stefan Talmon, *The Security Council as World Legislature*, 99 *American Journal of international Law* 175 (2005).

Member States' disposition towards IHL and other bodies of law.<sup>10</sup> And at a normative level, the interpretation and application of these resolutions may affect whether some of the foundational ethical commitments and value judgments reflected in existing IHL rules meant to provide protection, relief, and medical care in all armed conflicts will endure.<sup>11</sup>

We proceed in the following sections. In section 2, as a primer for readers unfamiliar with the core issues, we briefly outline humanitarian and medical activities and counterterrorism measures, as well as a range of possible effects of the latter on the former. In section 3, we explain some of the key legal aspects relating to humanitarian and medical activities and counterterrorism measures. In section 4, which constitutes the bulk of the original legal analysis, we closely evaluate the two resolutions — Resolution 2462 (2019) and Resolution 2482 (2019) — in which the Security Council urged States to take into account the effects of (certain) counterterrorism measures on humanitarian and medical activities. We set the stage by summarizing some aspects of the legal relations between acts of the Security Council and IHL provisions pertaining to humanitarian and medical activities. We then interpret the status, consequences, and content of the resolutions, exploring what they may entail for States seeking to counter terrorism and safeguard humanitarian and medical activities. Among the aspects that we evaluate are: the Security Council's new notion of a prohibited financial "benefit" for terrorists as it may relate to humanitarian and medical activities; the Council's demand that States comply with their IHL obligations while countering terrorism; and the constituent parts of the Council's notion of a "take into account" system. In section 5, we set out three sets of potential elements of an analytical framework through which a State may seek to develop and administer its "take into account" system. In section 6, we briefly conclude.

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<sup>10</sup> See, e.g., Émilie Max, *Room for Manoeuvre? Promoting International Humanitarian Law and Accountability While at the United Nations Security Council: A Reflection on the Role of Elected Members*, Geneva Academy of International Humanitarian Law and Human Rights, Briefing No. 17, October 2020, <https://www.geneva-academy.ch/joomla-tools-files/docman-files/Briefing%2017.pdf>, <https://perma.cc/2D3J-K6VP>; Dustin A. Lewis, Naz K. Modirzadeh, and Jessica S. Burniske, *The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law: Preliminary Considerations for States*, Legal Briefing, Harvard Law School Program on International Law and Armed Conflict, March 2020, <https://pilac.law.harvard.edu/cted-and-ihl-preliminary-considerations-for-states>, <https://perma.cc/4Q43-W523>.

<sup>11</sup> See, e.g., Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Legal Briefing, Harvard Law School Program on International Law and Armed Conflict, September 2015, <https://dash.harvard.edu/handle/1/22508590>, permalink: <https://perma.cc/Z48M-783M> (hereafter, Lewis et al., *Medical Care in Armed Conflict*).

## 2. FRAMING THE DETRIMENTAL EFFECTS OF COUNTERTERRORISM MEASURES ON HUMANITARIAN AND MEDICAL ACTIVITIES

In this framing section, we outline the nature, status, scope, and content of the effects of counterterrorism measures on humanitarian and medical activities. We first introduce humanitarian and medical activities in armed conflicts, then turn to counterterrorism measures. We next sketch how measures to suppress terrorism may prevent or impede humanitarian and medical activities in armed conflicts that are also considered counterterrorism contexts.

### 2.1. Humanitarian and Medical Activities

Concerning an armed conflict, humanitarian activities aim primarily to provide relief to and protection for people affected by the conflict.<sup>12</sup> In an armed conflict, the greatest and most acute unmet needs are often those of the civilian population. Yet the beneficiaries of at least some humanitarian activities may also include certain members of the armed forces and other fighters, including those who have laid down their arms or who have been placed *hors de combat* by sickness, wounds, detention, or another cause.<sup>13</sup> In practice, humanitarian activities are performed by an entity — such as a State, an international agency, or a private humanitarian organization — or by one or more unaffiliated individuals. At least two distinct types of humanitarian activities may be identified.<sup>14</sup> First, *relief activities* aim to provide supplies essential to the survival of affected persons (such as food, water, medical supplies, means of shelter, and bedding) and objects necessary for religious worship.<sup>15</sup> Second, *protection activities* may be conceptualized as encompassing actions that aim to ensure that the authorities and other relevant actors satisfy their obligations to uphold the rights — under IHL and other applicable frameworks — of the individuals concerned.<sup>16</sup>

In relation to an armed conflict, medical activities aim primarily to provide medical care and attention for the wounded and sick, whether they are members

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<sup>12</sup> See, e.g., International Committee of the Red Cross, *Commentary on GC III*, 2020 update, paras. 816–879, 1303–1363, <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>, <https://perma.cc/J6A4-SHZA> (hereafter, ICRC, *2020 GC III Commentary*).

<sup>13</sup> See, e.g., with respect to this aspect of the personal protective scope of Article 3 common to the four Geneva Conventions of 1949, id. at paras. 555–573, 773–785, especially 861.

<sup>14</sup> See, e.g., id. at paras. 844–860.

<sup>15</sup> See, e.g., id. at paras. 858–860.

<sup>16</sup> See, e.g., id. at paras. 851–857.

of armed forces or civilians.<sup>17</sup> In practice, medical activities are performed by an entity — such as the medical personnel of a party to an armed conflict or a private medical organization — or by one or more unaffiliated individuals.

In the resolutions under evaluation in this briefing, the Security Council refers to “humanitarian activities, including medical activities[...].”<sup>18</sup> The structure of that wording may initially be read to suggest that medical activities are a subset of humanitarian activities. However, in legal doctrine and practice, it is well recognized that humanitarian and medical activities may overlap or be separate. For example, one private humanitarian organization may provide a combination of relief, protection, and medical services, whereas a different organization or the medical personnel of a party to the conflict may provide only medical services. These distinctions — including in terms of beneficiaries, activities, and the people, resources, and facilities involved — may matter from a legal perspective. That is because IHL lays down a combination of general and specific rights and obligations in relation to various types of humanitarian and medical activities, the beneficiaries of those activities, and the people, objects, and facilities involved in those activities.

To effectively engage in humanitarian and medical activities, several preconditions arguably must exist. For example, humanitarian and medical actors need secure access to affected persons, including those located in territory subject to the control of a party to an armed conflict, whether it is a State party or a non-state party.<sup>19</sup> Humanitarian and medical actors must be able to take sufficient preparatory steps to offer and provide services, and they must also possess the knowledge, training, means, and facilities necessary — including in terms of personnel, finances, supplies, authorizations, and the like — to engage in humanitarian and medical services for affected persons. Further, engaging in humanitarian and medical activities must not give rise to legal endangerment for the people, means, or facilities involved in those activities.

## 2.2. Measures Taken to Counter Terrorism

For at least several decades, States have sought to prevent acts of terrorism and punish those who commit, attempt to commit, or otherwise support acts of terrorism. In doing so, States have adopted a variety of conceptual notions concerning what qualifies as an act of terrorism and other proscribed terrorism-related

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<sup>17</sup> See, e.g., *id.* at paras. 773–785.

<sup>18</sup> UNSCR 2462 (2019), OP 24; UNSCR 2482 (2019), OP 16.

<sup>19</sup> See, e.g., ICRC, *2020 GC III Commentary* (n 12), at para. 864.

conduct, including “supporting” acts of terrorism. In the absence of a general international legal definition, in several treaties States have enshrined a range of notions of prohibited terrorism-related conduct, from bombing a government facility to providing financial support to a designated terrorist group.<sup>20</sup> In practice, some conduct that is proscribed under definitions of terrorism or support-to-terrorism activities in international legal instruments or national legal systems is undertaken in connection with an armed conflict. Yet many — indeed, perhaps most — manifestations of prohibited terrorism-related conduct are not connected with an armed conflict.<sup>21</sup>

Under the rubric of countering terrorism, States have taken an increasingly broad and diverse array of actions at the global, regional, and national levels.<sup>22</sup> The expansion of the type and scale of measures taken and the actors involved in efforts to counter terrorism may be seen as a recognition by States that preventing, suppressing, and punishing terrorism-related activities constitutes a significant policy objective. The measures are typically aimed at one or more of the following purposes: condemning the means or methods involved in terrorist conduct; preventing or deterring people from joining or otherwise supporting entities involved in terrorist conduct; depriving entities involved in terrorist conduct of the means to engage in that conduct; suppressing or intercepting terrorism-related conduct that may be in progress; and prosecuting and punishing attempted or completed acts of terrorism. Counterterrorism measures may be of a political, legal, economic, social, cultural, intelligence, or other nature. In terms of their material scope, counterterrorism measures may be conceptualized as encompassing a range of activities, potentially including such steps as: conducting military operations against terrorist groups in an armed conflict; instituting criminal, civil, or administrative proceedings against terrorists and their supporters; preventing the financing of terrorism; denying “safe haven” to terrorists and their supporters; and preventing the cross-border movement of terrorists.

Several preconditions arguably must exist to counter terrorism comprehensively. For example, as a starting point, what kinds and forms of conduct are of a terrorist

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<sup>20</sup> See, e.g., International Convention on the Suppression of Financing of Terrorism (signed December 9, 1999, entered into force April 10, 2002), 2178 U.N.T.S. 197 and International Convention for the Suppression of Terrorist Bombings (signed December 15, 1997, entered into force May 23, 2001) 2149 U.N.T.S. 256.

<sup>21</sup> See, e.g., the National Consortium for the Study of Terrorism and Responses to Terrorism (START) at the University of Maryland, *Global Terrorism Database*, accessed May 2021, <https://www.start.umd.edu/gtd/>, <https://perma.cc/3AQF-S8FC>.

<sup>22</sup> See, e.g., Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders*, A/HRC/40/52, March 1, 2019.

nature or character arguably must be sufficiently well specified. Counterterrorism actors need to possess the knowledge, training, means, and facilities necessary to prevent, suppress, and punish terrorism-related conduct. Further, counterterrorism measures must pass legal muster, including by being grounded in a legal basis and being taken in a manner consistent with applicable international and national laws.

### **2.3. Effects of Counterterrorism Measures on Humanitarian and Medical Activities**

A growing body of qualitative and quantitative evidence documents how certain measures designed and applied to counter terrorism are capable of impeding or preventing humanitarian and medical activities in armed conflicts.<sup>23</sup> These effects may be traced to at least two contemporary approaches, which are often linked in practice, to countering terrorism.

First, a range of States characterize their potential or actual adversaries as terrorists or otherwise allege that those adversaries — or at least individual members of an adversary party — engage in acts of terrorism or in supporting acts of terrorism.<sup>24</sup> In turn, some States invoke such characterizations to justify depriving those deemed terrorists of certain rights and other protections, including receiving humanitarian and medical activities. Under this framing, humanitarian and medical activities are conceptualized as a form of direct support to terrorists. 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.<sup>25</sup>

Second, an array of States characterize certain aspects of humanitarian and medical activities themselves as facilitating or otherwise contributing — (in)directly, (un)intentionally, or (un)knowingly — to the objectives of terrorist entities, individual terrorists, or acts of terrorism. In turn, some of those States invoke these characterizations as grounds to prohibit or limit humanitarian and medical services. Under this framing, humanitarian and medical activities are

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<sup>23</sup> See, e.g., InterAction, *Detrimental Effects* (n 8); PILAC, *Pilot Study* (n 8); OCHA/NRC, *Study* (n 1).

<sup>24</sup> See, e.g., Dustin A. Lewis, "Criminalization" of Humanitarian Action under Counterterrorism Frameworks: Key Elements and Concerns, 112 *American Society of International Law Proceedings* 268 (2018).

<sup>25</sup> See, e.g., ICRC, *2011 Challenges Report* (n 1), p. 52.

conceptualized as a form of direct or indirect support to or benefit for terrorists. In practice, these characterizations may impede or prevent humanitarian and medical activities meant to be taken in relation to a party to an armed conflict (including, for example, a non-state party characterized as a terrorist group) or to the civilian population in the territory of, or otherwise subject to the control of, such an adversary party. Such impeded or prevented humanitarian and medical activities may involve practical measures, for example, to obtain secure access to civilians in need and fighters *hors de combat* (for instance, payment of tolls) or to provide humanitarian and medical services to the affected people.

In a nutshell, measures designed and applied to counter terrorism may give rise to diminished or complete *lack of access* by humanitarian and medical actors to the people affected by an armed conflict or may adversely affect the *scope, amount, or quality of humanitarian and medical services provided* to those people.

The diverse array of detrimental effects of certain counterterrorism measures on humanitarian and medical activities may be grouped into several cross-cutting categories, including operational, financial, security, legal, security, and reputational effects.<sup>26</sup> These detrimental impacts on humanitarian and medical activities typically arise where the rationale underlying a counterterrorism measure is rooted in one or more of the following assumptions. One assumption is that otherwise-“innocuous” assistance to a terrorist entity, including certain types of humanitarian and medical activities, can “free up” the entity’s resources to engage in terrorist conduct (the fungibility theory).<sup>27</sup> A second assumption is that a State, organization, or individual might operate under a false humanitarian or medical guise to support a terrorist entity (the false-front theory). And a third assumption is that a terrorist entity might dupe well-intentioned-but-naïve humanitarian and medical actors into serving as terrorism-support conduits (the naïve-humanitarians theory).

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<sup>26</sup> See, e.g., InterAction, *Detrimental Effects* (n 8).

<sup>27</sup> See, e.g., Charity and Security Network, *Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States*, June 2012. See also *Holder v. Humanitarian L. Project*, 561 U.S. 1, 31 (2010).



### 3. SELECT LEGAL ASPECTS CONCERNING THE TWO FIELDS

#### 3.1. Key Aspects of IHL concerning Humanitarian and Medical Activities

States have developed IHL — also known as the law of armed conflict and the *jus in bello* — as the primary body of international law applicable to acts and omissions connected with an armed conflict. 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.<sup>28</sup> Some IHL provisions are applicable in peacetime, but the bulk of them are applicable during armed conflicts. Under IHL, there are two generally recognized categories or classifications of armed conflicts: international armed conflicts (including military occupations) and non-international armed conflicts.

IHL lays down several rights and obligations relating to a broad spectrum of humanitarian and medical activities pertaining to armed conflicts. It bears emphasis that IHL rules concerning humanitarian and medical activities involve various distinctions concerning these activities. That is because IHL provides a combination of general and specific rights and obligations in relation to various aspects of humanitarian and medical activities, the beneficiaries of those activities, and the people, objects, and facilities involved in those activities.<sup>29</sup> Further, the (in)applicability of a particular provision may depend not only on the type of activity involved (be it humanitarian or medical) but also on the classification of the armed conflict (as international or non-international in character), whether a party to the conflict has agreed to be bound by a particular IHL instrument, or the status and content

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<sup>28</sup> See, e.g., Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 *Virginia Journal of International Law* 795 (2010).

<sup>29</sup> Regarding medical activities, including medical ethics, see (among other provisions) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (hereafter, GC I), Art. 24; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 (hereafter, AP I), Arts. 8 and 16; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 (hereafter, AP II), Art. 10. Regarding medical personnel and objects, see (among other provisions) GC I, Arts. 19, 24, and 35; AP I, Arts. 8, 12, and 21; AP II, Arts. 9 and 11. Regarding humanitarian activities, personnel, and objects, see (among other provisions) GC I, Arts. 3 and 9; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (hereafter, GC II), Arts. 3 and 9; Convention (III) relative to the Treatment of Prisoners of War, August 12, 1949 (hereafter, GC III), Arts. 3 and 9; Convention (IV) relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (hereafter, GC IV), Arts. 3 and 10; AP I, Art. 81.

of a rule of customary IHL.

IHL provisions pertaining to humanitarian and medical activities are too numerous to summarize here. Yet even a short outline of some of the key aspects suffices to illustrate the significant extent to which States and other international actors have developed IHL to safeguard humanitarian and medical activities in a manner that takes military considerations into account.

Foundational IHL instruments lay down rights and obligations concerning humanitarian and medical activities, including in respect of the wounded and sick in armed forces in the field;<sup>30</sup> the wounded, sick, and shipwrecked members of the armed forces at sea;<sup>31</sup> prisoners of war;<sup>32</sup> others who no longer participate actively in hostilities, including other fighters rendered *hors de combat*;<sup>33</sup> and civilians.<sup>34</sup> Regarding humanitarian activities, in broad terms IHL principles, rules, and standards concern ensuring — 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, medical supplies, means of shelter, and bedding) and objects necessary for religious worship as well as upholding the rights of those people. As for medical activities, in broad terms IHL provisions pertain to providing medical care for the wounded and sick (as defined in IHL) irrespective of the party, if any, to which the affected persons are affiliated and irrespective of whether the wounded and sick are members of an armed force, other fighters, or civilians.<sup>35</sup> As corollaries to help secure those primary sets of protections covering such humanitarian and medical activities, general and specific IHL rules provide a kind of collateral protection in respect of certain people, objects, and facilities involved in those activities.<sup>36</sup> Many of the relevant IHL provisions entail requirements or at least guidance concerning permissible and impermissible bases for the prioritization of persons for the indicated humanitarian and medical services, as well as the conditions under which those services are to be provided. For example, numerous IHL rules require that humanitarian aid and medical care be provided on an impartial basis, in the sense that the needs of the persons affected by the conflict — and not, for example, the

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<sup>30</sup> See, e.g., International Committee of the Red Cross, *Commentary on GC I*, 2016 update, paras. 1150–1152, <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> (hereafter, ICRC, *2016 GC I Commentary*).

<sup>31</sup> See, e.g., International Committee of the Red Cross, *Commentary on GC II*, 2017 update, paras. 1188–1190, <https://ihl-databases.icrc.org/ihl/full/GCII-commentary> (hereafter, ICRC, *2017 GC II Commentary*).

<sup>32</sup> ICRC, *GC III Commentary* (n 12), at paras. 1334–1335.

<sup>33</sup> See, e.g., *id.* at paras. 737–749, 822.

<sup>34</sup> See, e.g., *id.* at paras. 737–749, 822–824.

<sup>35</sup> See, e.g., above note 17.

<sup>36</sup> See, e.g., above note 29.

person's affiliation (if any) to a party to the conflict — inspire and guide the allocation and provision of services.<sup>37</sup> IHL rights and obligations also relate to allowing the passage of, searching, and prescribing technical arrangements for certain humanitarian consignments;<sup>38</sup> protecting and facilitating the distribution of certain relief consignments;<sup>39</sup> and receiving relief shipments.<sup>40</sup> Further, a major IHL treaty lays down an obligation on encouraging and facilitating effective international coordination of certain relief actions.<sup>41</sup>

Under IHL, the party concerned bears the primary responsibility for meeting the humanitarian needs of the people affected by an armed conflict and providing medical care to the wounded and sick.<sup>42</sup> Where those needs remain unmet or where such care is not provided, IHL lays down several legal bases for humanitarian and medical activities to be offered and provided by other actors. For example, each of the four Geneva Conventions of 1949 contains a provision laying down a legal basis for impartial humanitarian bodies to offer their services to the parties to a non-international armed conflict, whether the particular entity is a State party or a non-state party.<sup>43</sup> Concerning an international armed conflict, each of those four foundational IHL treaties also expressly confirms that none of its respective provisions constitutes an obstacle for any impartial humanitarian organization, subject to the consent of the parties to the conflict concerned, to undertake humanitarian activities to provide protection to and relief for the persons covered by that instrument.<sup>44</sup> Further, several IHL instruments provide a legal basis for civilians (even if they are not affiliated with either a party to the conflict or an impartial humanitarian organization) and civilian institutions (such as civilian hospitals) to undertake, or at least offer to undertake, certain humanitarian and medical activities.<sup>45</sup> In addition, IHL instruments lay down prohibitions on the punishment of people involved in certain humanitarian and medical activities.<sup>46</sup>

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<sup>37</sup> See, e.g., ICRC, *2020 Commentary on GC III* (n 13), paras. 833 and 1345.

<sup>38</sup> GC IV, Arts. 23, 59 third–fourth paras.; AP I, Art. 70(2)–(3).

<sup>39</sup> AP I, Art. 70(4).

<sup>40</sup> GC III, Art. 72.

<sup>41</sup> AP I, Art. 70(5).

<sup>42</sup> See, e.g., ICRC, *2020 Commentary on GC III* (n 13), paras. 819 and 1307.

<sup>43</sup> GCs I–IV, Art. 3. See also, with respect to non-international armed conflicts to which AP II is applicable, AP II, Art. 18(1), first sentence.

<sup>44</sup> GC I, Art. 9; GC II, Art. 9; GC III, Art. 9; GC IV, Art. 10.

<sup>45</sup> See, e.g., GC I, Art. 18 first para. and second para. first sentence; GC IV, Arts. 18, 20, 21, and 22; AP I, Arts. 17(1), second sentence and 17(2); AP II, Art. 18(1), second sentence. On the status of “civilian medical personnel” and “civilian religious personnel” under AP I, see AP I, Art. 15.

<sup>46</sup> See AP I, Arts. 16(1) and 17(1), third sentence; AP II, Art. 10(1). See also GC I, Art. 18, third para.

Depending partly on the character and content of the underlying rule, a violation of an applicable IHL provision related to humanitarian or medical activities may engage the international legal responsibility of a State or an individual.<sup>47</sup> Regarding State responsibility, in general, as explained by the International Law Commission (ILC), acts or omissions of a State that constitute a breach of an obligation of the State — including IHL obligations related to humanitarian and medical activities — entail the international legal responsibility of the State (provided that the wrongfulness of that breach is not precluded) and give rise to legal consequences.<sup>48</sup> Those consequences may include obligations on the State to cease the act, offer appropriate assurances and guarantees of non-repetition, and make full reparation for the injury caused.<sup>49</sup>

The ILC also asserts that it may be justified to treat certain IHL rules as peremptory norms of general international law<sup>50</sup> on the basis that the International Court of Justice (ICJ) described the basic rules of IHL applicable in armed conflict as “intransgressible” in character.<sup>51</sup> According to the ILC, one of the consequences flowing from a gross or systematic failure by the responsible State to fulfill an obligation arising under a peremptory norm is that other States shall cooperate to bring that breach to an end through lawful means.<sup>52</sup> As formulated by the ILC, such obligations “arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.”<sup>53</sup> In part because they are meant to address threats to the survival of people and the most basic human values, those “basic rules” may arguably be said to include IHL obligations pertaining to humanitarian and medical activities in an armed conflict.

Individual criminal responsibility may arise when an individual engages in

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<sup>47</sup> On responsibility of international organizations, see Draft Articles on Responsibility of International Organizations, with Commentary: Report of the Commission to the General Assembly on the Work of its Sixty-Third Session, 2(2) Yearbook of the International Law Commission, 2011, A/CN.4/SER.A/2011/Add.1 (Part 2). We do not address the responsibility of other entities for which international legal responsibility may arise. For example, for a recent scholarly analysis concerning the (potential) responsibility of non-state parties to armed conflict, see Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (2020).

<sup>48</sup> See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary: Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, 2(2) Yearbook of the International Law Commission, 2001, A/CN.4/SER.A/2001/Add.1 (hereafter, DARSIVA).

<sup>49</sup> *Id.*

<sup>50</sup> DARSIVA (n 48), p. 112, para. (3).

<sup>51</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 257, para. 79.

<sup>52</sup> *Id.* at Arts. 40–41.

<sup>53</sup> *Id.* at p. 113, para. (5).

conduct related to humanitarian or medical activities proscribed as an international crime. For example, the Statute of the International Criminal Court (ICC) prohibits as war crimes<sup>54</sup> acts related to depriving civilians of objects indispensable to their survival, including by willfully impeding relief supplies as provided for under the Geneva Conventions,<sup>55</sup> and intentionally directing attacks against certain people and objects involved in humanitarian and medical activities.<sup>56</sup>

### 3.2. Key International and Domestic Legal Aspects concerning Measures Taken to Counter Terrorism

At the international level, there is no single, comprehensive body of counterterrorism laws. States have developed a collection of treaties to pursue specific anti-terrorism objectives, such as suppressing the financing of terrorism and terrorist bombings. In addition to treaties open to global participation, States have also developed numerous regional instruments. However, despite decades-long efforts, States have yet to conclude a Comprehensive Convention on International Terrorism.<sup>57</sup> The extent to which customary international law governs aspects of efforts to counter terrorism, including whether a definition of international terrorism may be ascertained under customary international law, is subject to ongoing debate and legal development.<sup>58</sup>

In recent decades, the Security Council has assumed an increasingly prominent role in countering terrorism, including by adopting decisions that U.N. Member

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<sup>54</sup> Regarding other war crimes potentially pertaining to humanitarian activities, see Rome Statute of the International Criminal Court Arts. 8(2)(a)(i), 8(2)(a)(iii), 8(2)(b)(ix), 8(2)(c)(i) (adopted July 17, 1998, entered into force July 1, 2002) 2187 UNTS 3 (hereafter, ICC Statute). Regarding crimes against humanity, see, e.g., id. at Art. 7(1)(b). Regarding the crime of genocide, see, e.g., id. at Art. 6(c).

<sup>55</sup> Id. at Art. 8(2)(b)(xxv). The amendment, under Article 8(2)(e)(ix) of the ICC Statute, through which "[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies" is punishable as a war crime in non-international armed conflicts under the jurisdiction of the ICC, is not yet in force. See ICC Statute, status relating to "10. g Amendment to article 8 of the Rome Statute of the International Criminal Court (Intentionally using starvation of civilians)," Dec. 6, 2019, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10-g&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-g&chapter=18&clang=_en), <https://perma.cc/F5GH-C8NM>.

<sup>56</sup> ICC Statute, Arts. 8(2)(b)(xxiv), 8(2)(b)(iii), 8(2)(e)(ii), and 8(2)(e)(iii).

<sup>57</sup> Two of the sticking points concern who has the right to participate in armed conflict without being characterized under the Convention as a terrorist and whether (and, if so, to what extent) the Convention will overlap with IHL in governing armed conflicts.

<sup>58</sup> See, e.g., Kai Ambos and Anina Timmermann, "Terrorism and customary international law," in *Research Handbook on International Law and Terrorism* (Ben Saul ed., 2014).

States must accept and carry out under the U.N. Charter.<sup>59</sup> Two sets of Security Council acts may be relevant here.

First, the Security Council's acts under the Resolution 1267 (1999), Resolution 1989 (2011), and Resolution 2253 (2015) line of resolutions entail rights and obligations related to the imposition of sanctions measures — namely, an assets freeze, a travel ban, and an arms embargo — currently against the Islamic State in Iraq and the Levant (Da'esh), Al-Qaida, and associated individuals, groups, undertakings, and entities.<sup>60</sup> Medical activities are listed as part of the designation criteria for two people and two entities subject to those sanctions.<sup>61</sup> Further, at least in theory, the imposition of the assets freeze and travel ban in relation to certain persons and entities subject to the "1267/1989/2253" sanctions may impede or prevent humanitarian and medical activities.<sup>62</sup>

Second, the Council's acts under the Resolution 1373 (2001) line of resolutions entail rights and obligations concerning an array of measures to counter terrorism, including with respect to preventing the financing of terrorist acts and ensuring that any person who participates in supporting terrorist acts is brought to justice.<sup>63</sup> As part of that set of resolutions, the Security Council has decided that all States shall (among other actions) criminalize certain conduct related to "terrorist acts" and ensure that, in addition to any other measures against them, 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>64</sup> Notably, the Security Council has not expressly

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<sup>59</sup> U.N. Charter, Art. 25. See, e.g., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/72/495, Sept. 27, 2017, paras. 19–22; Nigel D. White, "The United Nations and Counter-Terrorism," in *Counter-Terrorism: International Law and Practice* 68–73 (Ana María Salinas de Frías, Katja Samuel, and Nigel D. White eds., 2012).

<sup>60</sup> See, most recently, UNSCR 2560 (2020).

<sup>61</sup> See Lewis et al., *Medical Care in Armed Conflict* (n 11), at pp. 109–111.

<sup>62</sup> See, e.g., Rebecca Brubaker and Sophie Huvé, *UN Sanctions and Humanitarian Action: Review of Past Research and Proposals for Future Investigation*, U.N. Univ., 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), <https://perma.cc/HUJ2-QEH9>; Alice Debarre, *Making Sanctions Smarter: Safeguarding Humanitarian Action*, Int'l Peace Inst., December 2019, [https://www.ipinst.org/wp-content/uploads/2019/12/1912\\_Making-Sanctions-Smarter.pdf](https://www.ipinst.org/wp-content/uploads/2019/12/1912_Making-Sanctions-Smarter.pdf), <https://perma.cc/JYC3-QJL2>; Katie King with Naz K. Modirzadeh and Dustin A. Lewis, *Understanding Humanitarian Exemptions: U.N. Security Council Practice and Principled Humanitarian Action*, Working Group Briefing Memorandum, Counterterrorism and Humanitarian Engagement Project, April 2016 (hereafter, King et al., *Humanitarian Exemptions*). For exemptions concerning the assets freeze, see UNSCR 2368 (2018), OPs 10, 81–82; UNSCR 1735 (2006), OPs 15–18; UNSCR 1452 (2002), OP 1.

<sup>63</sup> UNSCR 1373 (2001), OPs 1(a), 2(e).

<sup>64</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.

defined what constitutes “terrorist acts” nor what constitutes “supporting” such acts in respect of this line of resolutions.

National-level counterterrorism measures may originate in international law and policy (for example, as part of the State’s efforts to carry out a Security Council decision), in domestic law and policy, or in a combination thereof. In terms of the actors involved, a State’s national-level counterterrorism measures may be said to include the conduct of any agent of the State or State organ — whether it exercises a legislative, executive, judicial, or other function — with an object of countering terrorism. Such conduct also may include any other national-level counterterrorism measures attributable to the State, for example those measures taken by a group of persons (such as a private security contractor) who in fact act on the instructions of, or under the direction or control of, the State in carrying out a counterterrorism measure.<sup>65</sup>

National-level counterterrorism measures must be devised and implemented consistent with applicable international and national laws. For example, counterterrorism measures taken by a State in relation to an armed conflict need to be consistent at least with applicable IHL. Other fields of international law — including international human rights law — as well as constitutional provisions, domestic legislation, executive instruments, and judicially mandated parameters may also be applicable in respect of national-level counterterrorism measures.

Some counterterrorism measures are designed and applied in a manner that implicitly or expressly “carves out” a particular safeguard, such as a limited exception or exemption, for certain humanitarian and medical activities or actors.<sup>66</sup> However, most counterterrorism measures do not include such safeguards. Where they do exist, such safeguards typically fall into one of two categories. One category comprises “bad-actor carve-outs” meant to ensure that people falling under a terrorist characterization or designation are not deprived of humanitarian or medical services. The second is “humanitarian-actor carve-outs” meant to ensure that the people, means, and facilities involved in humanitarian and medical activities are not subject to a particular counterterrorism measure. Where they exist, such safeguards for humanitarian and medical actors are typically limited along one or more of the following axes:

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<sup>65</sup> See DARSIIWA (n 48), Art. 8.

<sup>66</sup> See, e.g., Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action*, Research Paper, Chatham House, August 2017; Dustin A. Lewis, *Humanitarian Exemptions from Counter-terrorism Measures: A Brief Introduction*, 47 Proceedings of the Bruges Colloquium 141 (2017); King et al., *Humanitarian Exemptions* (n 62).

- In terms of their material scope — that is, with respect to the specific *kinds of humanitarian and medical activities* that are carved out (such as safeguards that cover only relief activities but not also protection activities);
- In terms of their personal scope — that is, with respect to the specific *categories of humanitarian and medical actors* whose activities are carved out (such as safeguards that cover only certain international agencies or organizations but not also local organizations or unaffiliated individuals);
- In terms of their temporal scope — that is, with respect to the specific *period(s) of time* in which the covered humanitarian and medical activities are carved out (such as safeguards that will lapse after a year unless they are expressly renewed); and
- In terms of their geographical scope — that is, with respect to the specific *locations* in which the covered humanitarian and medical activities are carved out (such as safeguards that cover humanitarian and medical activities only in government-controlled territory but not in territory under the de-facto control of a non-state party).

States, international bodies, private humanitarian and medical actors, and scholars are actively evaluating whether “carve out” safeguards are necessary or otherwise considered prudent and, if so, what form and content they can, should, or must entail. These actors are considering, among other aspects, whether carve-out safeguards are necessary or sufficient to ensure compliance with IHL rights and obligations pertaining to humanitarian and medical activities. Some of the safeguards pertain to specific counterterrorism measures — for example, terrorism-suppression sanctions at the international or national level. Others pertain to counterterrorism frameworks more generally — for example, in relation to a potential omnibus Security Council resolution.



## **4. SELECT LEGAL ASPECTS OF RESOLUTION 2462 (2019) AND RESOLUTION 2482 (2019)**

In this section, we outline several key aspects of the Security Council's acts urging 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. We aim to identify and evaluate select legal aspects pertaining to those resolutions.

With the adoption of Resolution 2462 (2019), the Security Council raised taking into account the potential effects of certain counterterrorism measures on covered humanitarian and medical activities to an issue implicating international peace and security. Yet what it means to take such effects into account is not necessarily obvious — indeed, far from it. Some States might rush to require organizations to document determinantal effects of counterterrorism measures on humanitarian and medical activities, without first grounding those concerns in securing respect for IHL and safeguarding humanitarian and medical activities. Some States might presume that Security Council resolutions, including those entailing counterterrorism obligations, automatically prevail over possibly countervailing IHL provisions, without sufficiently exploring whether an actual normative conflict exists and without taking due account of the relations between Security Council acts and IHL rules.

In a sense, the Security Council is urging States to innovate in a high-stakes, legally complex area involving two key sets of policy objectives: safeguarding humanitarian and medical activities, on one hand, and countering terrorism, on the other. To effectively develop a “take into account” system, States may need to answer several theoretical and practical questions. Those might include how IHL protections for humanitarian and medical activities interact with Security Council-decided counterterrorism measures in general as well as whether, in particular, a new Council-mandated obligation concerning suppressing certain financial “benefit[s]” for terrorists may relate to humanitarian and medical activities. The stakes in these and related matters are high — not only for human lives in numerous armed conflicts but also, and relatedly, for international law's capacity both to protect people affected by war and to counter terrorism. In our view, it is warranted for States and other international actors to dedicate due attention and resources at this time to closely evaluating the specific provisions of the Security Council resolutions in light of wider policy trajectories, legal implications, and normative concerns.

Against that background, we first excerpt the relevant parts of Resolution 2462 (2019) and Resolution 2482 (2019). Then we frame relations between Security Council acts and IHL. Next, we analyze the legal status and consequences

of the excerpted texts. Finally, we formulate interpretations of the content of those provisions.

## 4.1. Excerpts

### 4.1.1. Resolution 2462 (2019)

On March 28, 2019, the U.N. Security Council unanimously adopted Resolution 2462 (2019) on countering the financing of terrorism. In the English text of the preamble of Resolution 2462 (2019), the Security Council “*reaffirm[s]* that terrorism constitutes one of the most serious threats to international peace and security” and expressly states that the Council is “[*a*]cting under Chapter VII of the Charter of the United Nations.”<sup>67</sup> In the English text of operative paragraph (OP) 5 of Resolution 2462 (2019), the Council “[*d*]ecides that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, establish serious criminal offenses” related to certain aspects of the financing of terrorism.<sup>68</sup> In particular, pursuant to that paragraph, the Council “[*d*]ecides” that all States shall:

[E]nsure 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[...].<sup>69</sup>

In the English text of OP 6 of Resolution 2462 (2019), the Security Council “[*d*]emands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including

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<sup>67</sup> UNSCR 2462 (2019), preamble.

<sup>68</sup> Id. at OP 5.

<sup>69</sup> Id.

international humanitarian law, international human rights law and international refugee law[...].”<sup>70</sup> And, in the English text of OP 24 of Resolution 2462 (2019), the Security Council “[u]rges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law[...].”<sup>71</sup>

#### 4.1.2. Resolution 2482 (2019)

On July 19, 2019, the Security Council unanimously adopted Resolution 2482 (2019) on linkages between international terrorism and organized crime. In adopting Resolution 2482 (2019), the Security Council did not expressly “[d]ecide” that States shall take a particular measure to counter terrorism, nor did it expressly act under Chapter VII of the U.N. Charter. Nevertheless, one operative paragraph of Resolution 2482 (2019) is relevant for our inquiry. In the English text of OP 16 of the resolution, the Security Council “[u]rges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including [IHL], international human rights law and international refugee law, and urges states to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with [IHL][...].”<sup>72</sup>

### 4.2. Relations between Acts of the Security Council and IHL in General

Both Security Council resolutions under evaluation expressly refer to compliance with IHL obligations.<sup>73</sup> Ongoing debates over the legal relations between acts of the Security Council and IHL implicate how to ascertain the applicability, scope, and content of legal rules governing aspects of efforts to safeguard humanitarian and medical activities and to counter terrorism.<sup>74</sup> It may be useful, therefore, to

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<sup>70</sup> Id. at OP 6.

<sup>71</sup> Id. at OP 24.

<sup>72</sup> UNSCR 2482 (2019), OP 16.

<sup>73</sup> UNSCR 2462 (2019), OPs 5, 6, and 24; UNSCR 2482, OP 16.

<sup>74</sup> See, e.g., David McKeever, *International Humanitarian Law and Counterterrorism: Fundamental Values*, [Footnote continued on next page]

briefly frame some basic issues concerning those legal relations. While far from comprehensive, in the following paragraphs we aim to sketch some of the fundamental contours.

In theory, where a provision of a Security Council act and a provision of IHL are both applicable and are considered to concern the same issue, one of two situations may arise: either a normative incompatibility between the provisions may arise or it may not. In instances where no potential or actual normative incompatibility arises, the provision of the Security Council act and the provision of IHL are each applied under their respective techniques and methods. Where a potential or actual normative incompatibility between the provisions may arise in a particular instance, the interpretation and application of the provisions may require bringing additional elements into consideration. Those elements may include (among others) implementing a principle laying down a presumption of normative compatibility, discerning the status of the norms at issue, and ascertaining whether or not Article 103 of the U.N. Charter — a so-called primacy clause — is brought into operation.

The principle of harmonious interpretation postulates that two norms of international law — for example, a norm entailed in an act of the Security Council and a norm from IHL — should be interpreted as compatible to the greatest possible extent.<sup>75</sup> It has been argued that this principle implies that, by default, an interpretation should be chosen “that is more likely to exclude conflicts of obligations, unless certain specific conditions are met that authorize reversing the presumption of compatibility.”<sup>76</sup> In practice, in establishing a presumption of compatibility, international actors may aim to harmonize the content of competing obligations or to avoid the application of other rules of conflict resolution (for example, by excluding the application of the primacy clause in Article 103 of the U.N. Charter).<sup>77</sup>

In addition, the relative status of the norm at issue may matter in this area. In short, some international legal norms — indeed, perhaps most norms — may be modified by the agreement of the parties concerned.<sup>78</sup> Yet norms of general

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*Conflicting Obligations*, 69 *International and Comparative Law Quarterly* 43 (2020); Lewis et al., *Medical Care in Armed Conflict* (n 11).

<sup>75</sup> See generally Luca Pasquet, “De-Fragmentation Techniques,” in *Max Planck Encyclopedia of Public International Law* para. 46 (Rüdiger Wolfrum ed., 2018).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at para. 50.

<sup>78</sup> ILC., Report of the International Law Commission, A/71/10, 68th Session, Supp. No. 10, 2016, 299; ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, in Report of the Commission to the General Assembly [Footnote continued on next page]

international law that are considered peremptory may not be derogated and may be modified only by a subsequent norm having the same character.<sup>79</sup>

Article 103 of the U.N. Charter lays down that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the [...] Charter and their obligations under any other international agreement, their obligations under the [...] Charter shall prevail.”<sup>80</sup> According to certain commentators, “it is commonly accepted that obligations under secondary norms derived from the Charter, in particular binding decisions of the [Security Council], are covered by Art. 103.”<sup>81</sup> If that is the case, then under Article 103 a binding decision of the Security Council involving counterterrorism measures shall prevail in the event of a conflict between the obligations of the Members of the United Nations under that decision and their obligations under any other international agreement. However, it has been asserted that “[o]nly in the case of a *clear contradiction that cannot be solved by interpretation* shall Art. 103 apply,”<sup>82</sup> and “any abrogation of existing treaty law by the [Security Council] *must be expressed explicitly or implicitly, in particular with regard to treaties codifying community interests [that is, the interests of the international community as a whole].*”<sup>83</sup> It may be argued that IHL instruments laying down rights and obligations concerning humanitarian and medical activities in relation to armed conflict may be characterized as codifying community interests in the sense of the interests of the international community as a whole.<sup>84</sup>

With these elements in view, a few general assertions may be put forward. First, it seems that a norm entailed in an act of the Security Council and a norm from IHL should be interpreted as compatible to the greatest possible extent. Second, it may be important to ascertain whether relevant counterterrorism norms and IHL norms are of a peremptory character. And third, the conditions to bring the Charter’s primacy clause into operation are relatively strict.

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on the work of its fifty-eighth session, Y.B. Int’l L. Comm., vol. II, part two, 2006, A/CN.4/SER.A/2006/Add.1 (Part 2), 178.

<sup>79</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Art. 53, second sentence.

<sup>80</sup> U.N. Charter, Art. 103.

<sup>81</sup> Johann Ruben Leixæ and Andreas Paulus, “Article 103,” in II *The Charter of the United Nations: A Commentary* 2124 (Bruno Simma et al., 3rd ed., 2012).

<sup>82</sup> Id. at 2123 (emphasis added).

<sup>83</sup> Id. at 2120 (emphasis added).

<sup>84</sup> See above notes 50–53 and accompanying text.

### 4.3. An Analysis of the Legal Status and Consequences of the Excerpted Texts

#### 4.3.1. Framing: Security Council Acts in General

Pursuant to Article 25 of the U.N. Charter, “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the [...] Charter.”<sup>85</sup> According to the ICJ, determining whether a particular text adopted by the Security Council is a “decision” in the sense of Article 25 requires a case-specific assessment. In an advisory opinion, the ICJ referred to certain criteria to make that assessment: specifically, the act’s wording, its genesis, its legal basis, and the context of its adoption.<sup>86</sup> Also in that advisory opinion, the Court formulated the position that “Article 25 is not confined to decisions in regard to enforcement action but applies to ‘the decisions of the Security Council’ adopted in accordance with the Charter.”<sup>87</sup> In line with that reasoning, according to scholarly writings, the Security Council may make decisions in the sense of Article 25 in respect of at least Chapter VI (concerning peaceful settlement of disputes) and Chapter VII (concerning action with respect to threats to the peace, breaches of the peace, and acts of aggression). Under this set of understandings, both consensus procedures and formal voting procedures can lead to a binding decision in the sense of Article 25.<sup>88</sup> Further, it has been said that it is “typical[.]” for different types of legal acts — both decisions and recommendations — to be contained side by side in a single Security Council resolution.<sup>89</sup> In other words, a decision entailed in one paragraph may immediately be followed by a recommendation set out in another paragraph, or vice versa.

In terms of legal consequences, all Member States are obliged to carry out a decision adopted by the Security Council under Article 25 in accordance with the Charter.<sup>90</sup> In contrast, the legal effect of a Council recommendation has been said to be that Member States retain discretion whether or not to act, but they must exercise

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<sup>85</sup> U.N. Charter, Art. 25.

<sup>86</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 16, 53.

<sup>87</sup> *Id.*

<sup>88</sup> See Anne Peters, “Article 25,” in *The Charter of the United Nations: A Commentary* 793–94 (Bruno Simma et al. eds., 3rd ed. 2012) (hereafter, Peters, *Article 25*).

<sup>89</sup> *Id.* at 793.

<sup>90</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 16, 54.

that discretion in good faith and consider the recommendation in that sense.<sup>91</sup>

#### 4.3.2. OP 5 of Resolution 2462 (2019)

In OP 5 of Resolution 2462 (2019), the Security Council “[d]ecides that all States shall, in a manner consistent with their obligations under international law, including [IHL...], establish serious criminal offenses” related to certain aspects of the financing of terrorism.<sup>92</sup> Three elements of the text — the express invocation in the preamble that the Council is acting under Chapter VII of the Charter alongside the express uses in OP 5 of the terms “[d]ecides” and “shall” — combine to provide a strong basis to assert that the paragraph contains a decision in the sense of Article 25 of the U.N. Charter. If that interpretation is accurate and the Council adopted OP 5 in accordance with the Charter, Member States are mandated to carry out the decision by taking — in a manner consistent with their obligations under international law, including IHL — the action prescribed relating to the establishment of the indicated serious criminal offenses concerning countering the financing of terrorism.

#### 4.3.3. OP 6 of Resolution 2462 (2019)

In OP 6 of Resolution 2462 (2019), the Security Council “[d]emands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including [IHL], international human rights law and international refugee law[...].”<sup>93</sup> States may face challenges in interpreting what precisely this “demand[]” means from a legal perspective. On one hand, a general international legal principle already mandates performance of legal obligations in good faith.<sup>94</sup> That principle encompasses obligations originating in applicable treaties and rules of customary international law, and the principle extends to such obligations arising under the fields of law referred to by the Security Council, including IHL. In other words, irrespective of OP 6 of Resolution

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<sup>91</sup> See Peters, *Article 25* (n 88), 793 (citing Jochen A. Frowein, “Implementation of Security Council Resolutions Taken under Chapter VII in Germany,” in *United Nations Sanctions and International Law* 253, 263 (Vera Gowlland-Debbas ed., 2001).

<sup>92</sup> UNSCR 2462 (2019), OP 5.

<sup>93</sup> *Id.* at OP 6.

<sup>94</sup> See, e.g., Markus Kotzur, “Good Faith (*Bona fide*),” in *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum ed., 2009).

2462 (2019), Member States are already mandated to perform their legal obligations, including those arising under IHL, in good faith.

On the other hand, by “[d]emand[ing] that Member States ensure that all measures taken to counter terrorism[...] comply with their obligations under international law, including [IHL],” the Security Council may arguably be seeking to express its view that compliance by Member States with their obligations under international law, including IHL, with respect to counterterrorism measures constitutes a matter of international peace and security.<sup>95</sup> OP 6 may thus be understood as entailing a decision under Article 25 of the Charter through which the Council is mandating compliance by Member States with their respective IHL obligations. A legal effect of such an interpretation is that non-compliance by a Member State with their IHL obligations in relation to counterterrorism measures will constitute not only a violation of applicable IHL (under the general principle mandating performance of legal obligations in good faith) but also a violation of the U.N. Charter (for not carrying out a Security Council decision made in accordance with the Charter).

#### 4.3.4. *OP 24 of Resolution 2462 (2019) and the Second Part of OP 16 of Resolution 2482 (2019)*

In OP 24 of Resolution 2462 (2019), the Security Council “[u]rges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with [IHL][...].”<sup>96</sup> And, in the second part of OP 16 of Resolution 2482 (2019), the Security 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[...].”<sup>97</sup>

Both sets of excerpted provisions are arguably of a hortatory character. In other words, in these paragraphs the Security Council seems to *exhort or encourage* States

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<sup>95</sup> As a point of comparison, regarding UNSCR 1004 (1995), in which the Security Council “[d]emands” five sets of actions, see, e.g., Emilie Ellen Kuyt, *Humanitarian Assistance and State Sovereignty in International Law: Towards a Comprehensive Framework* 328 (2015), PhD dissertation, Leiden Univ., <https://scholarlypublications.universiteitleiden.nl/access/item%3A3076673/view>, <https://perma.cc/2MVK-7BQS> (arguing that “[d]emanding compliance from parties to a conflict, whilst operating under the binding cloak of Chapter VII places a duty under international law upon the addressees of this resolution.”) (emphasis original).

<sup>96</sup> UNSCR 2462 (2019), OP 24.

<sup>97</sup> UNSCR 2482 (2019), OP 16.



to act, but the Council does not necessarily also *oblige* States to take the concerned action. A characterization of these paragraphs as hortatory is grounded partly in the wording employed by the Council.<sup>98</sup> Notably, the Security Council, in the English texts, “[u]rges” States to take the prescribed action.<sup>99</sup> By way of contradistinction, the Council does not, for example, “[d]ecide” that States “shall” take such action.<sup>100</sup> According to this interpretation, the “take into account” provisions of OP 24 of Resolution 2462 (2019) and OP 16 of Resolution 2482 (2019) do not appear to entail binding decisions in the sense of Article 25 of the U.N. Charter. That evaluation is drawn on the basis that exhorting or encouraging States to act is distinguishable from legally obliging States to act. Under this interpretation, the “take into account” provisions of OP 24 of Resolution 2462 (2019) and OP 16 of Resolution 2482 (2019) arguably entail an intensive encouragement or exhortation — or, at least, an earnest request or recommendation — from the Security Council for States to take the prescribed action.

If the preceding analysis is accurate, then from an international legal perspective Member States arguably retain discretion, at least under OP 24 of Resolution 2462 (2019) and the second part of OP 16 of Resolution 2482 (2019), whether or not 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. However, even assuming the validity of that legal interpretation, Member States are nevertheless at least arguably obliged, with respect to each of the provisions under consideration, to exercise that discretion in good faith and consider these exhortations from the Security Council in that sense.<sup>101</sup> Nevertheless, it merits emphasis that IHL rights and obligations related to humanitarian and medical activities continue to be applicable irrespective of whether or not the “take into account” provisions in these resolutions are interpreted to constitute a binding decision under Article 25 of the U.N. Charter.

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<sup>98</sup> See ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 16, 53.

<sup>99</sup> UNSCR 2462 (2019), OP 24; UNSCR 2482 (2019), OP 16.

<sup>100</sup> See Security Council Report, *Security Council Action Under Chapter VII: Myths and Realities*, Special Research Report No. 1, June 23, 2008, <https://www.securitycouncilreport.org/research-reports/lookup-c-glK-WLeMTIsG-b-4202671.php#Whatmakesacouncildecision>, <https://perma.cc/P4LQ-HSU3> (arguing that “it should be noted that, in most cases, the Council does use relatively clear language in its operative paragraphs. For example, it can be clearly established that by using ‘urges’ and ‘invites,’ as opposed to ‘decides,’ the paragraph is intended to be exhortatory and not binding. [¶] But some cases are unclear. This is particularly true when the Council adopts paragraphs beginning with words such as ‘calls upon’ and ‘endorses.’”).

<sup>101</sup> See above note 91 and accompanying text.

## 4.4. An Analysis of the Content of the Excerpted Texts

### 4.4.1. *An Interpretation of the Notion of the Prohibited "Benefit" in OP 5 of Resolution 2462 (2019)*

The counterterrorism obligation laid down in OP 5 of Resolution 2462 (2019) concerns a particular notion of a proscribed "benefit" for certain terrorists:

[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[...].<sup>102</sup>

States may wish to pay close attention to how to interpret this notion of "benefit," especially with respect to whether the notion may implicate humanitarian and medical activities that are compatible with IHL. That is because, under certain counterterrorism rationales and corresponding implementation regimes, some humanitarian and medical activities have been conceptualized as resulting — intentionally or not, and knowingly or not — in a purported financial or economic "benefit" for "terrorist organizations or individual terrorists."<sup>103</sup>

Suppose, for example, that a State, 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

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<sup>102</sup> UNSCR 2462 (2019), OP 5 (emphasis added).

<sup>103</sup> *Id.*

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 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 OP 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.” For the reasons set out below, in light of the limited existing practice so far, in our view the interpretation that reflects the most salient considerations is likely one that excludes from the notion of prohibited “benefit” at least those humanitarian and medical activities that are consistent with IHL. (Recall that IHL rules structure and cover humanitarian and medical activities, including in respect of the wounded and sick in armed forces in the field; the wounded, sick, and shipwrecked members of the armed forces at sea; prisoners of war; other fighters who no longer actively participate in hostilities, including those *hors de combat*; and civilians.<sup>104</sup>)

On one hand, the terminology of OP 5 concerns “the wilful provision or collection of” certain financial and economic assets, resources, or services “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*, [...], even in the absence of a link to a specific terrorist act [...].”<sup>105</sup> An emphasis on the phrase “for any purpose” may arguably support an interpretation that includes humanitarian and medical activities protected under IHL within the material scope of activities proscribed in OP 5 as giving rise to a purported financial or economic “benefit” for “terrorist organizations and individual terrorists.” Yet, on

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<sup>104</sup> See above notes 30–34.

<sup>105</sup> UNSCR 2462 (2019), OP 5 (emphasis added).

the other hand, additional relevant elements provide strong support for a different conclusion. Recall that, in the introductory clause of the paragraph in which the Security Council lays down the specific obligation to counter the financing of terrorism under review, the Council decides that all States shall carry out the obligation “*in a manner consistent with their obligations under [...] international humanitarian law[...]*.”<sup>106</sup> Further, in the next paragraph of the same resolution, the Security Council “[*d*]emands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law[...].” Also in that resolution, the Council “[*u*]rges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with [IHL].”<sup>107</sup>

These elements of Resolution 2462 (2019) offer strong grounds to interpret the counterterrorism obligation laid down in OP 5 as excluding financial or economic “benefit[s]” for “terrorist organizations and individual terrorists” that may ostensibly arise in relation at least to humanitarian and medical activities that are compatible with IHL. This conclusion is further supported by the argument that Article 103 of the U.N. Charter is not applicable in respect of OP 5 of Resolution 2462 (2019) because the conditions to bring the primacy clause into operation are not met. That argument is grounded partly in the assertion that there is not necessarily a “clear contradiction” between the obligation to counter the financing of terrorism, as laid down in OP 5 of Resolution 2462 (2019), and one or more IHL obligations concerning humanitarian and medical activities under any other international agreement.<sup>108</sup> Further, even if such a contradiction exists, the existence of that contradiction is not necessarily determinative. Recall that it has been asserted that any abrogation of existing treaty law by the Security Council “must be expressed explicitly or implicitly, in particular with regard to treaties codifying community interests [that is, the interests of the international community as a whole].”<sup>109</sup> As also noted above, IHL instruments containing provisions concerning humanitarian and medical activities arguably may be characterized as codifying such community interests.<sup>110</sup> It is difficult indeed to read OP 5 of Resolution 2462

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<sup>106</sup> Id. (emphasis added).

<sup>107</sup> Id. at OPs 6 and 24.

<sup>108</sup> See above note 82.

<sup>109</sup> See above note 83.

<sup>110</sup> See above note 84.

(2019) as an attempt by the Council to abrogate those IHL instruments implicitly, not least because in that paragraph the Council *expressly* decides that States shall perform this new counterterrorism obligation *in a manner consistent with their respective IHL obligations*.

In light of the above analysis, there are strong bases to assert that, in OP 5 of Resolution 2462 (2019), the Council did not seek to abrogate any existing IHL treaty, including IHL instruments laying down provisions concerning humanitarian and medical activities in relation to armed conflicts. That argument gains additional force when the other express references by the Security Council to respect for IHL — namely, regarding States' compliance with their respective IHL obligations while taking counterterrorism measures in relevant contexts (in OP 6) and States taking into account the potential effect of measures to counter terrorism financing on covered humanitarian and medical activities carried out consistent with IHL (in OP 24) — are considered.

In sum, it may be argued that the following is excluded from the scope of the financial or economic "benefit" for "terrorist organizations and individual terrorists" proscribed in OP 5 of Resolution 2462 (2019): such a "benefit" that may be conceptualized as arising in respect of humanitarian or medical activities compatible with IHL.

#### 4.4.2. *An Interpretation of the Notion of "Ensuring" that All State Counterterrorism Measures Comply with the State's IHL Obligations*

In OP 6 of Resolution 2462 (2019), the Security Council "[d]emands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including [IHL]."<sup>111</sup> It may be argued that this notion of "ensur[ing]" encompasses the State engaging in the conduct necessary — including at least by all relevant State organs as well as others whose conduct is attributable to the State — to make certain that all measures taken by the State to counter terrorism are compatible with the State's IHL obligations, including those pertaining to humanitarian and medical activities. In other words, under this interpretation, a State must take the necessary and sufficient steps to ensure that (among other elements) its national laws, executive instruments, prosecutorial practices, and humanitarian-donor policies do not impair or prevent

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<sup>111</sup> UNSCR 2462 (2019), OP 6.

the performance by the State of its IHL obligations in this area.

Consider two examples. One relates to a State fighting a non-state party, and another relates to a humanitarian-donor State. Both examples concern obligations related to linked IHL provisions concerning a subset of humanitarian and medical activities — namely, IHL rules concerning the provision of medical care, to the fullest extent practicable and with the least possible delay, to the wounded and sick with no distinction founded on grounds other than medical ones,<sup>112</sup> as well as the prohibition under IHL on punishment of people who provide ethically sound medical care.<sup>113</sup> Suppose for both examples the existence of a non-international armed conflict in State A involving State A's armed forces against a non-state party characterized as a terrorist organization under State A's national law.

In the first example, State A adopts counterterrorism measures either that permit the punishment of persons involved in ethically sound medical care provided to a wounded and sick fighter qualifying as a terrorist under State A's national law or that otherwise impair the provision of impartial medical care as permitted or required under IHL. The adoption of such measures precludes State A from performing its obligations under IHL and is therefore incompatible with the State's IHL obligations. Consequently, the adoption of those measures is also at variance with the Security Council's decision entailed in OP 6 of Resolution 2462 (2019) to the extent that State A failed thereby to "ensur[e]" that the measures it took to counter terrorism comply with the State's IHL obligations.

In the second example, a second State (State B) provides monetary support to an impartial humanitarian organization to provide medical care to wounded and sick fighters and civilians in the armed conflict involving State A's armed forces against the non-state party characterized as a terrorist organization under State A's national law. Suppose, as well, that the non-state party is characterized as a terrorist organization also under State B's national law, which applies extraterritorially and which prohibits the provision of support to terrorists. Through donor restrictions attached as a condition for receipt of funds, State B imposes counterterrorism measures that prevent or impair the humanitarian organization from engaging in the provision of medical care to wounded and sick fighters and civilians designated terrorists under State B's counterterrorism laws.

The imposition of such counterterrorism measures is arguably incompatible

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<sup>112</sup> See International Committee of the Red Cross, "Rule 110. Treatment and Care of the Wounded, Sick and Shipwrecked," in *Customary International Humanitarian Law* (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005), [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule110](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule110), <https://perma.cc/7G9W-SWS5> (hereafter, ICRC, *Customary IHL Study*).

<sup>113</sup> AP I, Art. 16(1); AP II, Art. 10(1). See also GC I, Art. 18, third para; AP I, Art. 17(1), second sentence.

with State B's IHL obligations. In particular, in light of the control and influence that State B exercises in relation to the humanitarian organization through funding-related conditions, the imposition of such counterterrorism measures may be incompatible with State B's obligation to respect and ensure respect for certain IHL provisions pertaining to the humanitarian organization. Those provisions might include, for instance, IHL rules permitting an impartial humanitarian organization to offer its services to all parties,<sup>114</sup> those permitting civilians to offer to collect and care for the wounded and sick,<sup>115</sup> and those obliging that the wounded and sick be collected and cared for.<sup>116</sup> Further, to the extent that non-compliance with the donor restrictions may give rise to a punishment, the funding-relating conditions may be incompatible with the prohibition in IHL on punishment of people involved in certain humanitarian and medical activities.<sup>117</sup>

#### 4.4.3. *An Interpretation of the Terminology in the "Take into Account" Provisions of Resolution 2462 (2019) and Resolution 2482 (2019)*

The Security Council did not define the key terms and concepts related to the "take into account" provisions of Resolution 2462 (2019) and Resolution 2482 (2019). In this section, we offer interpretations concerning the content and scope of those terms.

##### 4.4.3.1. "Counterterrorism Measures" and "Measures to Counter the Financing of Terrorism"

In both resolutions, the Security Council was concerned with State measures to counter terrorism. However, the specificity of measures at issue varied. OP 16 of Resolution 2482 (2019) concerns "counterterrorism measures [...]."<sup>118</sup> OP 24 of Resolution 2462 (2019) pertains to "measures to counter the financing of terrorism [...]."<sup>119</sup> In terms of their material scope, we interpret these notions — "counterterrorism measures" and "measures to counter the financing of terrorism" — as

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<sup>114</sup> GC I, Arts. 3 and 9; GC II, Arts. 3 and 9; GC III, Arts. 3 and 9; GC IV, Arts. 3 and 10; see also AP I, Art. 70(1); AP II, Art. 18(1).

<sup>115</sup> See, e.g., GC I, Art. 18, second para.; AP II, Art. 18(1), second sentence.

<sup>116</sup> See, e.g., ICRC, *Customary IHL Study* (n 112), at Rules 109–111.

<sup>117</sup> See AP I, Arts. 16(1) and 17(1), third sentence; AP II, Art. 10(1). See also GC I, Art. 18, third para.

<sup>118</sup> UNSCR 2482 (2019), OP 16.

<sup>119</sup> UNSCR 2462 (2019), OP 24.

encompassing all actions taken by a State to achieve a relevant counterterrorism purpose.<sup>120</sup> Regarding OP 16 of Resolution 2482 (2019), we interpret such purposes as including at least the prevention, suppression, penalization, prosecution, and punishment of acts of terrorism.<sup>121</sup> With respect to OP 24 of Resolution 2462 (2019), we interpret such purposes as including at least the prevention, suppression, penalization, prosecution, and punishment of the provision or collection of funds, financial assets, economic resources, or financial or other related services for the benefit of organizations designated under an applicable regime as terrorist organizations or of individuals designated under an applicable regime as terrorists.<sup>122</sup>

As for the legal source or origin of salient counterterrorism measures, we interpret the notion as encompassing at least the measures taken by a State as part of its efforts to accept and carry out counterterrorism-related decisions or recommendations of the Security Council.<sup>123</sup> That said, because the Security Council did not expressly limit the material scope of pertinent counterterrorism measures only to such measures related to Council-mandated obligations or Council-issued recommendations, the relevant concepts arguably could be said to cover *all* measures taken by a State to counter terrorism (Resolution 2482 (2019)) or to counter the financing of terrorism (Resolution 2462 (2019)), irrespective of the legal provenance of the measures. In terms of personal scope, we interpret these notions — of “counterterrorism measures” and “measures to counter the financing of terrorism” — as encompassing all conduct involved in, or otherwise integral to, designing and applying these measures, whether those acts are conducted by an agent or organ of the State — including those agents and organs exercising a legislative, executive, judicial, or other function — or by any other person or entity whose conduct is attributable to the State.

#### 4.4.3.2. “Designing and Applying”

OP 24 of Resolution 2462 (2019) pertains in part to States’ “designing and applying measures to counter the financing of terrorism[...].”<sup>124</sup> In terms of these

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<sup>120</sup> See OED, *measure*, n., 19.a. (2021).

<sup>121</sup> This approach draws from a wide range of certain counterterrorism measures set out by the Security Council, including in UNSCR 1373 (2001), UNSCR 1624 (2005), UNSCR 2178 (2014), and UNSCR 2396 (2017).

<sup>122</sup> This definition of the financing of terrorism is drawn from the portion of Resolution 2462 (2019) laying down obligations on States to establish certain serious criminal offenses related to the financing of terrorism. See UNSCR 2462 (2019), OP 5.

<sup>123</sup> See, e.g., certain counterterrorism measures set out by the Security Council in UNSCR 1373 (2001), UNSCR 1624 (2005), UNSCR 2178 (2014), and UNSCR 2396 (2017).

<sup>124</sup> UNSCR 2462 (2019), OP 24.



notions' material scope, we interpret this notion of "designing" such counterterrorism measures as encompassing all conduct of a State involved in, or otherwise integral to, conceiving, devising, or planning those measures.<sup>125</sup> And we interpret this notion of "applying" such counterterrorism measures as encompassing all conduct of a State involved in, or otherwise integral to, bringing those measures into practical operation or otherwise employing them.<sup>126</sup> In terms of the notions' personal scope, we interpret these notions as encompassing all conduct involved in, or otherwise integral to, "designing" or "applying" those measures, whether the acts are conducted by an agent or organ of the State — including those agents and organs exercising a legislative, executive, judicial, or other function — or by any other person or entity whose conduct is attributable to the State.

4.4.3.3. "Exclusively Humanitarian Activities, including  
Medical Activities, that are Carried Out by  
Impartial Humanitarian Actors in a Manner  
Consistent with International Humanitarian Law"

Understanding the phrase "exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law"<sup>127</sup> — which the Security Council employed in both resolutions — is central to a considered, good-faith interpretation and application of the "take into account" provisions of Resolution 2462 (2019) and Resolution 2482 (2019). However, at the outset, it may be emphasized that, depending on how it is interpreted, the phrase may not necessarily encompass all humanitarian and medical activities that are compatible with IHL. If it is interpreted in that restrictive manner, the phrase may set a floor of what humanitarian and medical activities are covered for purposes of a "take into account" system. States may nevertheless wish to decide whether to widen the set of activities covered by its "take into account" system to include *all* humanitarian and medical activities compatible with IHL.

We interpret the phrase "humanitarian activities, including medical activities" as encompassing at least all activities involved in, or otherwise integral to, the provision of relief, protection, or medical services (or a combination thereof) compatible with IHL, including in relation to an armed conflict that also qualifies as a

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<sup>125</sup> See OED, *design*, v., 15.a (2021).

<sup>126</sup> See *id.*, at *apply*, v., 6.a, 9 (2021).

<sup>127</sup> As set out in OP 24 of Resolution 2462 (2019) and OP 16 of Resolution 2482 (2019).

counterterrorism context. As we mentioned above, the structure of the wording in the resolutions — “humanitarian activities, including medical activities[...]” — may initially be read to suggest that medical activities are a subset of humanitarian activities. Yet in legal doctrine and practice, it is well recognized that humanitarian and medical activities may overlap or be separate.<sup>128</sup> In terms of potential beneficiaries, as we also noted above, IHL rules structure and cover numerous humanitarian and medical activities, including in respect of the wounded and sick in armed forces in the field; the wounded, sick, and shipwrecked members of the armed forces at sea; prisoners of war; other fighters who no longer take an active part in hostilities, such as those *hors de combat*, and civilians.<sup>129</sup>

Additionally, in our view, due to the adverb “exclusively,” the phrase encompasses only activities that are of an entirely “humanitarian” character. According to that approach, activities that constitute, for example, “development” or “peace” activities that fall outside of this definition of “humanitarian activities, including medical activities” — even where those “development” and “peace” activities may be carried out consistent with another field of international law, such as international human rights law — are not covered by the terms in OP 24 of Resolution 2462 (2019) and OP 16 of Resolution 2482 (2019).

Regarding the actors involved in such humanitarian and medical activities, we interpret the phrase to cover situations where exclusively humanitarian or medical activities are carried out by a subset of humanitarian actors — namely, *impartial humanitarian actors* — in a manner consistent with IHL. We interpret the term “humanitarian actors” here as encompassing at least entities (such as a State, an international organization, or a private humanitarian organization) or individuals that seek to carry out, or that actually carry out, exclusively humanitarian or medical activities compatible with IHL.

We interpret the term “impartial,” as set out in Resolution 2462 (2019) and Resolution 2482 (2019) as an adjective modifying the phrase “humanitarian actors,” as distinguishable from *neutral* humanitarian actors. That is because, at least with respect to humanitarian activities as contemplated under IHL, “impartiality” and “neutrality” are not synonymous in terms of the character of the actors involved. For example, with respect to the provision in Common Article 3 of the four Geneva Conventions of 1949 stipulating that “[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the

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<sup>128</sup> See, e.g., above note 29.

<sup>129</sup> See above notes 30–34.

Parties to the conflict,"<sup>130</sup> in the view of the ICRC, *impartial* "refers to the attitude to be adopted vis-à-vis the persons affected by the armed conflict when planning and implementing the proposed humanitarian activities."<sup>131</sup> Contrariwise, in relation to humanitarian activities, the ICRC has formed the position that *neutral* "refers to the attitude to be adopted towards the Parties to the armed conflict."<sup>132</sup> If that distinguishing approach is adopted here, the upshot is that, to qualify as an "impartial humanitarian actor[]" in respect of OP 24 of Resolution 2462 (2019) and the second part of OP 16 of Resolution 2482 (2019), arguably *only the humanitarian or medical needs of the persons affected by an armed conflict* may inspire the proposals, priorities, and decisions of an entity or individual when determining which activities to undertake and where and how to implement them.<sup>133</sup> In other words, while the "impartial humanitarian actors" must be impartial in the sense of being motivated by the needs of the affected persons, they need not additionally be neutral in the sense of refraining from taking sides in hostilities or engaging in controversies of a political, racial, religious, or ideological nature.<sup>134</sup> It may be noted that not only private humanitarian organizations (such as Médecins Sans Frontières) but also State actors (such as medical personnel of an armed force) and others, including unaffiliated individuals, may arguably fall into this definition of "impartial humanitarian actors."

Finally, OP 24 of Resolution 2462 (2019) and the second part of OP 16 of Resolution 2482 (2019) concern "exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors *in a manner consistent with international humanitarian law* [...]"<sup>135</sup> We interpret the phrase "in a manner consistent with international humanitarian law" to mean that the relevant humanitarian and medical activities are those that the covered humanitarian actors carry out in relation to a potential or existing armed conflict in a way that is compatible with IHL. In practice, most of the relevant humanitarian and medical activities will be carried out by the covered humanitarian actors concerning an *existing* armed conflict. However, we think there may be value in interpreting the phrase "in a manner consistent with international humanitarian law" as also encompassing relevant humanitarian and medical activities carried out by the covered humanitarian actors in relation to a *potential* armed conflict in a way that is compatible with IHL. The

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<sup>130</sup> GC I, Art. 3; GC II, Art. 3; GC III, Art. 3; GC IV, Art. 3.

<sup>131</sup> ICRC, *2020 GC III Commentary* (n 12), at para. 831.

<sup>132</sup> *Id.* at para. 835.

<sup>133</sup> *See id.* at para. 833.

<sup>134</sup> *See id.* at para. 835.

<sup>135</sup> UNSCR 2462 (2019), OP 24 (emphasis added); UNSCR 2482 (2019), OP 16 (emphasis added).

distinction between existing and potential armed conflicts may be subtle but, in our view, may nevertheless be significant. Humanitarian actors regularly take steps to prepare to offer and provide humanitarian services in ways that are compatible with IHL, including, for example, in anticipation that a new armed conflict may emerge. Limiting the interpretation of the phrase to humanitarian and medical activities carried out in relation to an extant armed conflict may exclude from the scope of activities covered by the phrase in these Security Council resolutions the activities that humanitarian actors may take to prepare to offer and provide humanitarian and medical services if and when it is warranted to do so in order to meet unaddressed needs.

What it may mean for humanitarian and medical activities to be carried out by the covered humanitarian actors concerning a potential or existing armed conflict in a way that is compatible with IHL is likely to depend in part on the nature, scope, and content of the IHL provision(s) potentially or actually applicable to the anticipated or existing circumstances involving those activities. Consider two sets of examples — one for an existing armed conflict and another for an anticipated armed conflict. Regarding an existing armed conflict, an impartial humanitarian actor may need, in certain contexts, to obtain the consent of the State concerned in order for the actor's activities to be carried out in a manner consistent with IHL.<sup>136</sup> Regarding an anticipated armed conflict, suppose that an impartial humanitarian actor expects that an armed conflict is likely to break out soon and, if it does, the conflict will give rise to significant medical needs of civilians and fighters *hors de combat* that the party concerned will likely not be able to meet. At least where certain IHL instruments are applicable, humanitarian actors involved in the provision of medical care may not make any distinction among the wounded and sick — including fighters *hors de combat* characterized as terrorists — founded on any grounds other than medical ones.<sup>137</sup> Counterterrorism measures that penalize the provision of medical care compatible with IHL would impair humanitarian actors from preparing to carry out, let alone actually carrying out, such care.

#### 4.4.3.4. "Potential Effects"

In OP 24 of Resolution 2462 (2019), the Security Council speaks of taking into account "the potential effect" of measures to counter the financing of terrorism.<sup>138</sup> The second part of OP 16 of Resolution 2482 (2019) pertains to taking into

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<sup>136</sup> Id. at paras. 866–878, 1348–1363.

<sup>137</sup> See (among other provisions) AP I, Arts. 10(2), second sentence and 15(3), second sentence; AP II, Art. 7(2), second sentence.

<sup>138</sup> UNSCR 2462 (2019), OP 24.

account “the potential effects of counterterrorism measures [...]”<sup>139</sup> As noted above, the range of potential and actual detrimental effects of counterterrorism measures on humanitarian and medical activities, in particular, has been extensively documented.<sup>140</sup> We interpret the Security Council’s notion of “potential effect[s]” as encompassing all of the possible detrimental effects — whether flowing from measures to counter the financing of terrorism (under OP 24 of Resolution 2462 (2019)) or from counterterrorism measures (under the second part of OP 16 of Resolution 2482 (2019)) — on covered humanitarian and medical activities. The effect may be of an operational, financial, security, legal, security, reputational, or other nature.<sup>141</sup> To fall under this notion of “potential effect[s],” it is not necessary for the effect to have actually materialized; rather, the effect needs to be only of a potential character, in the sense of being possible, prospective, or latent.<sup>142</sup>

#### 4.4.3.5. “To Take into Account”

In OP 24 of Resolution 2462 (2019), the Security Council “[u]rges States, when designing and applying measures to counter the financing of terrorism, *to take into account* the potential effect of those measures on” certain humanitarian and medical activities.<sup>143</sup> In the second part of OP 16 of Resolution 2482 (2019), the Security Council “urges states *to take into account* the potential effects of counterterrorism measures on” certain humanitarian and medical activities.<sup>144</sup> We interpret the notion of “to take into account” in these resolutions as encompassing at least the identification of those potential effects and taking the action necessary to ensure that the indicated measures reflect respect for or are otherwise compatible with potentially or actually applicable IHL rights and obligations concerning humanitarian and medical activities.

To address these issues comprehensively, a State may decide to evaluate the counterterrorism-related conduct of all of its organs and agents as well as others whose conduct is attributable to the State, whether the entity or person exercises a legislative, judicial, executive, or other function. A core State objective here might be framed in terms of implementing a sufficiently vast and detailed program to ensure compliance by the State’s counterterrorism-related authorities with the

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<sup>139</sup> UNSCR 2482 (2019), OP 16.

<sup>140</sup> See, e.g., InterAction, *Detrimental Effects* (n 8); PILAC, *Pilot Study* (n 8).

<sup>141</sup> See above note 26.

<sup>142</sup> See OED, *potential*, adj., A.1 (2021).

<sup>143</sup> UNSCR 2462 (2019), OP 24 (emphasis added).

<sup>144</sup> UNSCR 2482 (2019), OP 16 (emphasis added).

State's IHL rights and obligations pertaining to humanitarian and medical activities. For example, a State may decide to review whether its relevant legislative, regulatory, or donor texts run counter to IHL provisions permitting humanitarian and medical actors to engage in their respective activities in armed conflicts, including conflicts that also qualify as counterterrorism contexts. If, for instance, a counterterrorism-related legislative act is deemed incompatible with IHL rights and obligations, the State may repeal the act or otherwise render it ineffective. Numerous other potential examples may arise across the diverse range of potentially relevant counterterrorism measures.

## 5. ELEMENTS OF AN ANALYTICAL FRAMEWORK TO DEVELOP AND ADMINISTER A “TAKE INTO ACCOUNT” SYSTEM

In this section, building on the evaluations above, we sketch possible elements of an analytical framework through which a State may seek to develop and administer a “take into account” system. We begin by discussing a potential object and purpose of the system. We next discuss elements arguably necessary for a State to anticipate and address relevant potential effects. Finally, we identify some of the attributes that a “take into account” system may need to embody to achieve the indicated object and purpose. The analysis in this section is not meant to canvass potential elements comprehensively but rather to raise some initial considerations in this area.

### 5.1. Object and Purpose

In our view, it may be argued that the object and purpose of a “take into account” system can be at least two-fold.

The system may aim to *secure respect for international law*, notably the U.N. Charter and IHL pertaining to humanitarian and medical activities. As explained above, under the Charter Member States are obliged to accept and carry out decisions of the Security Council, including as related to both counterterrorism measures and humanitarian and medical activities, and IHL contains an array of rights and obligations concerning humanitarian and medical activities. A “take into account” system may be devised and executed in a manner that aims to secure respect for these parts of international law by at least two sets of actors. The first set relates to the *State itself* and includes at least all of the agents and organs of the State involved in designing and applying counterterrorism measures and any other person or entity involved in conduct concerning counterterrorism measures attributable to the State. In short, the State may seek to ensure — through all relevant people and entities — that the State’s counterterrorism measures are designed and applied in a way that reflects respect both for the U.N. Charter and for IHL pertaining to humanitarian and medical activities. For example, the “take into account” system may aim to ensure that none of the State’s counterterrorism laws may be interpreted or applied in a manner that prevents or impairs the State’s agents or organs from engaging in humanitarian and medical activities subject to IHL protection — for instance, the provision of impartial medical care by the medical personnel of the State’s armed forces to wounded and sick adversary fighters.

A second set of actors comprises *other actors* whose respect for one or more of these areas of international law that the State devising and administering the “take

into account" system may be in a position to influence through the system. Those other actors may include States, international agencies, private humanitarian organizations, and unaffiliated individuals. For example, the State may fund humanitarian and medical activities by a private humanitarian organization operating in a foreign armed conflict. The funding State's "take into account" system may be devised and executed in a way that helps ensure that those private humanitarian organization will be in a position to respect IHL pertaining to those humanitarian and medical activities — for instance, by designing and applying counterterrorism measures in a way that facilitates, or at least does not prevent or impede, the private humanitarian organization from offering and providing its humanitarian and medical services in relation to a non-state party to an armed conflict characterized as a terrorist group. (That characterization may arise under the State's (extraterritorial) counterterrorism legislative framework; a Security Council decision; another State's counterterrorism legislative framework, such as the State in whose territory the armed conflict takes place; or another source.)

The "take into account" system may also aim *to safeguard humanitarian and medical activities in armed conflicts characterized as counterterrorism contexts*. As noted above, not all acts of terrorism are legally connected to armed conflicts. Nevertheless, recent decades have witnessed an apparent increase in the number of armed conflicts characterized (also) as counterterrorism contexts.<sup>145</sup> Keeping in view the recognition by the Security Council that the potential effects of (certain) counterterrorism measures on covered humanitarian and medical activities are relevant to international peace and security, each State may seek — including through its "take into account" system — to safeguard humanitarian and medical activities in "joint" armed-conflict-and-counterterrorism contexts.

## 5.2. Preconditions

At least two sets of preconditions are arguably necessary for a State to anticipate and address relevant potential effects through the development and execution of its "take into account" system.

The first category concerns the preconditions arguably necessary for the State *to identify and evaluate the potential effects* of (certain) counterterrorism measures on covered humanitarian and medical activities. Before a State can

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<sup>145</sup> See, e.g., International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, October 2019, p. 59 (stating that "[s]ome States are dehumanizing adversaries and employing rhetoric to indicate that actors designated as 'terrorist' are undeserving of the protection of international law, including IHL: this is an alarming trend, and the ICRC has been following it closely.").



take such a potential effect into account, it must first create an inventory of those potential effects. In establishing and maintaining such an inventory, a State may refer to the extensive research and analysis published on such effects.<sup>146</sup> A State may (also) engage in discussions and information-gathering with a variety of humanitarian and medical actors involved in relevant activities. Having created the inventory, the State needs to ascertain how, to what extent, and under what circumstances and conditions those effects may arise.

The second category relates to the preconditions arguably necessary for the State *to address potential effects* consistent with the object and purpose of its "take into account" system. Suppose that a State adopts the two-fold object and purpose set out above: namely, to secure respect for international law, notably the U.N. Charter and IHL pertaining to humanitarian and medical activities, and to safeguard humanitarian and medical activities in armed conflicts characterized as counterterrorism contexts. Having identified and evaluated relevant potential effects, the State may need to (re)design and (re)apply — or, perhaps, even suspend or terminate — some of its counterterrorism measures to achieve that object and purpose.

### 5.3. System Attributes

To achieve the object and purpose set out above, a "take into account" system may need to embody at least three attributes. First, the system may need to be developed and administered in a way that reflects a *State-wide approach*, in the sense that all relevant agents and organs of the State, as well as other people and entities whose relevant conduct is attributable to the State or over whom the State otherwise exercises sufficient control or influence, are included in the relevant aspects of the system. Second, the system arguably needs to *focus on the potential effects* of counterterrorism measures on covered humanitarian and medical activities — not on effects that have already occurred. In other words, an effect does not have to be qualitatively or quantitatively validated for it to be considered relevant for the system. Third, the system arguably should include *default principles and rules* that guide those tasked with devising and implementing the system. For example, the system may be devised to default to adopting laws, policies, and regulations that are more likely to achieve the object and purpose of the system, including safeguarding humanitarian and medical activities in armed conflicts also characterized as counterterrorism contexts.

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<sup>146</sup> See, e.g., InterAction, *Detrimental Effects* (n 8); PILAC, *Pilot Study* (n 8).

## 6. CONCLUSION

Jointly pursuing the policy objectives of countering terrorism and safeguarding humanitarian and medical activities presents several opportunities, challenges, and complexities. In this briefing, we have sought to shed light on some of the key legal aspects. In our view, an evaluation of the legal issues in their wider context is a constitutive element underlying the creation and implementation of an effective “take into account” system.

Before the adoption of Resolution 2462 (2019), States were already required to comply with an array of counterterrorism laws and respect IHL rights and obligations concerning humanitarian and medical activities. The growth in the number and range of armed conflicts characterized as counterterrorism contexts has given rise to more encounters between these frameworks. Those encounters often entail significant stakes regarding whether and how international law can both protect people affected by war and counter terrorism. With the adoption of Resolution 2462 (2019) and 2482 (2019), the Security Council has at least intensively encouraged States to take into account the potential effects of their respective counterterrorism measures on a subset of humanitarian and medical activities.

International law does not necessarily provide ready-made answers to all of the difficult questions in this area. Yet devising and executing a “take into account” system provides a State significant opportunities to safeguard humanitarian and medical activities and counter terrorism while securing greater respect for international law.

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