"Criminalization" of Humanitarian Action Under Counterterrorism Frameworks: Key Elements and Concerns

de facto controlling the area benefitting from a relief operation is irrelevant for the said obligation not to prevent humanitarian relief. The basic needs of a population are not less urgent because that population has the bad luck of living under a government that other states do not like, perhaps with good reasons. To make the political qualification of a regime, even the qualification as "terrorist," the yardstick of a humanitarian duty in relation to a population which suffers is incompatible with the spirit of international humanitarian law. Preventing a humanitarian relief operation fulfilling the conditions of impartiality and neutrality constitutes a violation of international humanitarian law.

"Criminalization" of Humanitarian Action Under Counterterrorism Frameworks: Key Elements and Concerns

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Of the diverse array of contemporary challenges around humanitarian access in armed conflict, a particular set of issues concerns the so-called "criminalization" of humanitarian action under counterterrorism frameworks. This presentation raises some key elements of that set of issues.

To set the stage, we might recall that at the root of law is a power to define. The word *jurisdiction*, for instance, derives in part from the Latin for "the authority to say what the law is." That authority matters here because humanitarian action fits within a broader normative regime where the power to *legally define* violence as legitimate or not is largely delegated to states. In elaborating these definitions, states face a difficult and enduring challenge: to calibrate a legal framework in which to take the measures warranted to ensure the security of their populations while safeguarding human life and dignity. In seeking to strike that balance, states have characterized certain acts as so-called "ordinary" crimes, as terrorist acts, as part of the conduct of hostilities of an armed conflict, or as war crimes (some may meet multiple definitions).

Two distinct conceptual approaches underpin these definitional variations. On one hand, states have fashioned international humanitarian law (IHL) to permit—or at least not to prohibit—some violence, as long as the rules are adhered to. In comparison, states have defined a terrorist act as one that is never legitimate and that is never permissible.

IHL presumes a distinction between war and peace and is applicable only in relation to armed conflict. Counterterrorism frameworks often blur the lines between war and peace by combining elements related to armed conflict with elements connected with the resort to force and with law enforcement.

Where counterterrorism framings dominate, the legitimacy of humanitarian action may be contested because many counterterrorism framings reject at least two premises underlying principled humanitarian action.

First, IHL sees humanitarian assistance and protection to fighters *hors de combat* and to civilian populations—even, perhaps especially, purported *enemy* civilian populations—as legitimate. Yet under a counterterrorism framework, such support may be primarily perceived as dangerous because it can help free up the resources of the terrorist group. A 2015 International Committee of the Red Cross report (32IC/15/11) laid bare this normative conflict: "The potential criminalization of humanitarian engagement with non-State armed groups designated as 'terrorist

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organizations' may be said to reflect a non-acceptance of the notion of neutral, independent and impartial humanitarian action … ."

Second, IHL considers that some forms of violence—irrespective of who undertakes them—are not unlawful as long as those acts comport with the rules. The basic impetus here is to help encourage all armed actors to adhere to the law and to leave a space for reconciliation and negotiating an end to the conflict. Meanwhile, counterterrorism approaches conceptualize any act of terrorism as always unlawful. Under this rationale, some states have enacted legislative frameworks that penalize as terrorism certain acts that constitute forms of humanitarian assistance and protection that are foreseen in IHL.

Against that backdrop, some humanitarian stakeholders are increasingly concerned about "criminalization" or other forms of express or implied prohibition of, or illegitimate restrictions on, humanitarian action through counterterrorism laws. The chief concern is that counterterrorism measures may be interpreted or applied in ways that could impede humanitarian action, including obtaining and maintaining humanitarian access. That concern is articulated perhaps most sharply in relation to situations of armed conflict where designated terrorist entities effectively control access to, or otherwise exercise power over, civilian populations in need. In recent years, such areas have included parts of Afghanistan, Colombia, Gaza, Iraq, Mali, Nigeria, Somalia, Syria, and Yemen (among others).

One set of examples of relevant legislation concerns states where civilian populations are in dire need of humanitarian assistance and protection and where the states have instituted internal legislative frameworks that in effect criminalize forms of humanitarian action, such as impartial medical care to wounded and sick fighters *hors de combat*. A prominent current example is Syria: a 2013 report (A/HRC/24/CRP.2) of the UN Human Rights Council stated, for example, that "[a]nti-terrorism laws issued on 2 July 2012 effectively criminalised medical aid to the opposition."

In addition, some states that fund humanitarian action or in which humanitarian NGOs may be based—such as the United States and Australia—have enacted anti-terrorism frameworks that may be interpreted as "criminalizing" certain forms of humanitarian assistance and protection as well. Many of these laws are designed to apply extraterritorially and irrespective of the nationality of the wrongdoer or of the victims. These laws typically prohibit various forms of direct or indirect support to a terrorist organization. Some provisions of these legislative frameworks contain limited exemptions for certain forms of humanitarian action, while other provisions do not.

In certain respects, those domestic anti-terrorism legislative frameworks may find normative support in aspects of the UN Security Council's attempts to suppress terrorism. For example, alongside more traditional grounds for a "terrorist" designation—such as attacks against civilians—the UN Security Council's ISIL and Al Qaeda Sanctions Committee has referenced certain medical activities as a part of a basis for listing two individuals and two entities.

In this context, it is important to recall that various obligations entailed in IHL lay down extensive protections for principled humanitarian action and that those obligations apply irrespective of whether or not such action is undertaken in relation to designated "terrorists." Common Article 3 of the 1949 Geneva Conventions, for instance, in providing that "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict," establishes an important aspect of the so-called humanitarian "right of initiative." Building on a provision in Article 18 of Geneva Convention I of 1949, according to which, "[n]o one may ever be molested or convicted for having nursed the wounded or sick," a provision mirrored verbatim in the Additional Protocols of 1977 (in Article 16(1) of Additional Protocol I and Article 10(1) of Additional Protocol II) provides that: "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of

the person benefiting therefrom." (These provisions, it should be emphasized, are far from the only examples.)

Zooming out, it appears that the ethical values and normative commitments entailed in these regimes—IHL, on one hand, and counterterrorism frameworks, on the other—are different in certain important respects.

Perhaps especially over the last five years, humanitarians have been increasingly concerned that counterterrorism framings have the capacity to interfere with obtaining humanitarian access and providing assistance and protection, as well as disseminating IHL. Until relatively recently, much of that discussion was abstract and couched in technical legal terms. Yet there is growing evidence—not only anecdotal but now also increasingly empirical—that at least some counterterrorism measures may interfere, intentionally or unintentionally, with the effective functioning of principled humanitarian organizations. Such interference raises a conflict of normative commitments. It would therefore seem important to ask how best to address that interference and the corresponding conflict, including whether humanitarians should seek exemptions from counterterrorism measures.

A sectoral humanitarian exemption would preclude counterterrorism-based liabilities from attaching to principled humanitarian action. Whether to pursue "humanitarian exemptions" is not necessarily an easy "yes" or "no." In any event, such exemptions are under active consideration in diverse forums. For example, the overarching relationship between IHL and counterterrorism frameworks and the narrower issue of the impact of counterterrorism measures on humanitarian action are being deliberated in negotiations regarding the draft Comprehensive Convention on International Terrorism. Many related debates have occurred in various national and multinational venues, and it seems likely that these debates will emerge in additional contexts as well.

Against this complex set of concerns, three points should be borne in mind.

First, we all have a significant interest in helping states strike a legitimate balance between security and dignity. In many diverse contemporary contexts, counterterrorism framings are increasingly dominating other frameworks, such as IHL, that have a claim to help calibrate that balance.

Second, it is vital to educate ourselves and others about the values, commitments, and interests underlying principled humanitarian action. That is because the persuasiveness of arguments in support of protections for principled humanitarian action, perhaps especially where those protections may narrow the latitude allocated to states to suppress terrorism, will likely turn in large part on the perceived legitimacy of those fundamental values, interests, and commitments.

Finally, normative commitments concerning impartial medical care—that is, for all wounded and sick who are out of the fight, including, and indeed especially, the adversary—are at the root of the protective regime established in IHL. Where such care is in effect prohibited, directly or indirectly, under counterterrorism measures, a key pillar of the normative framework of humanitarian access—and, to be sure, principled humanitarian action and IHL more generally—is at risk of erosion.