

The interrelationship between counter-terrorism frameworks and international humanitarian law

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I. Introduction

The present study was prepared by the Counter-Terrorism Committee Executive Directorate (CTED)¹ in accordance with Security Council resolution 2617 (2021), which reaffirms the essential role of CTED within the United Nations to identify and assess issues, trends and developments relating to the implementation of Council resolutions 1373 (2001), 1624 (2005) and 2178 (2014), 2396 (2017), 2462 (2019), 2482 (2019), and other relevant resolutions.

CTED is grateful to Switzerland for its generous financial contribution, which made the preparation of this study possible. CTED also wishes to thank the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) for its invaluable contribution in providing background information for the study.

The present study has been prepared for informational purposes only. Its content does not necessarily represent the views or official positions of the Counter-Terrorism Committee or any Committee member. It aims to explore the intersection between counter-terrorism frameworks and international humanitarian law with the aim of looking into existing practices, challenges, and policy options for States to implement counter-terrorism measures in compliance with international humanitarian law. It does not propose to provide an exhaustive analysis of the issues addressed, but rather intends to help strengthen counter-terrorism stakeholders' understanding of the interrelationship between counter-terrorism norms and standards and international humanitarian law, serve as a basis for discussion, and illustrate the issues that will need to be comprehensively addressed by Member States at the domestic level. CTED will build on the present analysis with the aim of supporting the Committee's work to promote the implementation of the relevant Security Council resolutions in accordance with international humanitarian law.

The study maps the references to international humanitarian law contained in Council resolutions addressing threats to international peace and security caused by terrorist acts. Based on this mapping, the study explores two pertinent issues repeatedly addressed in the relevant resolutions: (i) the impact of counter-terrorism measures on humanitarian action carried out in armed conflict contexts in a manner consistent with international law; and (ii) the linkages between terrorism and serious violations of international humanitarian law, with a view to promoting comprehensive accountability for terrorist conduct.

¹ Guided by Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2396 (2017), 2462 (2019), 2482 (2019), and other resolutions, the Counter-Terrorism Committee works to strengthen the capacity of United Nations Member States to prevent terrorist acts, both within their borders and across regions. The Committee was established in the wake of the 11 September 2001 terrorist attacks carried out in the United States. It is assisted by the Counter-Terrorism Committee Executive Directorate (CTED), which carries out the policy decisions of the Committee, conducts expert assessments of Member States, and facilitates the delivery of counter-terrorism-related technical assistance.

II. Context: the intersection between terrorism and armed conflict

The number of armed groups designated as terrorist organizations engaged in non-international armed conflicts has increased in recent years. In consequence, there has been an increase in conflict-related violence in several regions, including the Middle East, South and South-East Asia, the Sahel, the Lake Chad Basin, and Southern and Eastern Africa. Some of these groups are well-armed and resourced and show relatively high levels of organization, enabling them to carry out sustained and concerted operations and thus trigger an escalation of violence that is difficult for the relevant authorities to curb.

In particular, affiliates of the Islamic State in Iraq and the Levant (ISIL), also known as Daesh, continue to pose a significant threat that affects numerous States and regions. The transnational nature of operations conducted by ISIL and its affiliates highlights the limitations of localized responses and the need for meaningful international cooperation to address the security threat in a manner that also facilitates long-term conflict resolution and peacebuilding.

Devising and implementing measures aimed at preventing and countering terrorism in an armed conflict context confronts Member States with a series of challenges.² Armed conflicts – in particular those of a protracted nature – and the resulting violence, instability, and breakdown of rule-of-law institutions, act as drivers of violent extremism that may lead to terrorism. Such conditions render individuals and communities vulnerable to recruitment, including through the exploitation of deep-rooted grievances caused by the conflict and the oft-associated governance and accountability gap.³

Moreover, conflict-related institutional, social and economic vulnerabilities may also significantly undermine counter-terrorism efforts and impair their long-term sustainability. Shortcomings are especially common in the area of accountability. The combination of weakened, insufficient, or non-existent rule-of-law institutions and the widespread nature of violence and criminality commonly lead to impunity for abuses and violations perpetrated by State or non-State actors, at odds with States' obligations under international law and the requirements of Security Council resolutions to bring perpetrators of terrorist offences to justice, including those amounting to serious violations of international humanitarian law and gross violations or abuses of human rights.⁴

As the impact of complex crises involving terrorist activity in armed conflict contexts frequently extends across borders, it also negatively affects peace and security at the regional or international levels and may risk engulfing whole regions in armed violence. Effectively ensuring, in accordance with applicable international law, the protection of

² See also Counter-Terrorism Committee, *Global survey of the implementation of Security Council resolution 1373 (2001) and other relevant resolutions by Member States (S/2021/972)*, paras. 709-710.

³ See e.g., A/70/674, para. 30.

⁴ See e.g., S/RES/2170 (2014), S/RES/2249 (2015), S/RES/2322 (2016), S/RES/2396 (2017).

civilians, in particular individuals rendered vulnerable by the situation, including children, internally displaced persons and refugees, persons with disabilities and survivors of sexual and gender-based violence (SGBV), as well as minorities potentially targeted by a party to the conflict, is imperative.⁵ Such protection activities commonly require international cooperation, including in relation to the carrying out of humanitarian activities and the delivery of humanitarian aid.

III. Security Council resolutions and international humanitarian law

The Security Council first made an explicit reference to international humanitarian law in a counter-terrorism resolution in the annex to its resolution 1456 (2003).⁶ In recent years, especially in response to the increased use of terrorist tactics by ISIL, Boko Haram, and other groups, including in the context of their involvement as Parties to armed conflicts, the number of references to armed conflict and international humanitarian law in the Council's relevant resolutions has increased. Council resolutions on counter-terrorism consistently require Member States to implement counter-terrorism measures in accordance with international law, including international humanitarian law.⁷ In its relevant resolutions, the Council also reaffirms that those responsible for terrorist acts and for violations of international humanitarian law or violations or abuses of human rights must be held accountable.⁸

Council resolution 2178 (2014) requires Member States to prevent and suppress the recruiting, organizing, transporting, or equipping of foreign terrorist fighters (FTFs) and the financing of their travel and of their activities, consistent with international human rights law, international refugee law, and international humanitarian law. In the same resolution, the Council further urges States to develop and implement, in accordance with applicable international human rights law and international humanitarian law, appropriate investigative and prosecutorial strategies regarding "those suspected of the foreign terrorist fighter-related offenses".⁹ Moreover, Member States are called upon to implement effective prosecution, rehabilitation and reintegration (PRR) strategies, as set forth in Council resolution 2396 (2017), in the context of, or in relation to, armed conflicts. Council resolutions 2462 (2019) and 2482 (2019) delve further into the interrelationship between counter-terrorism and international humanitarian law by addressing the impact of counter-terrorism measures on humanitarian action and by urging States to take into account the potential effect of measures aimed at countering terrorism, including its financing, on "exclusively humanitarian activities, including medical activities, that are

⁵ A/RES/72/284, para. 80.

⁶ In para. 6 of the annex to the resolution, the Council notes that States "must ensure that any measure taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".

⁷ See e.g., S/RES/1456 (2003), annex, para. 6; S/RES/1624, para. 4; S/RES/2178, para. 5; S/RES/2309, para. 2; S/RES/2322, para. 2; S/RES/2341, preamble; S/RES/2354, para. 2(e); S/RES/2396, para. 4 (see also paras. 18, 19, 34, 40); S/RES/2462, para. 6 (see also paras. 5, 20, 24); S/RES/2482, para. 16.

⁸ See e.g., S/RES/2170 (2014), S/RES/2249 (2015), S/RES/2322 (2016), S/RES/2396 (2017).

⁹ S/RES/2396 (2017), para. 18.

carried out by impartial humanitarian actors in a manner consistent with international humanitarian law”.¹⁰

IV. Addressing the impact of terrorism and counter-terrorism measures on humanitarian action

1. Terrorism and humanitarian emergencies

Armed conflicts often lead to humanitarian consequences and constitute drivers of complex emergencies resulting from a combination of natural and man-made elements. In this context, acts of violence committed by parties to a conflict, including by terrorist groups, in violation of international humanitarian law, are both a contributing factor to humanitarian crises and one that undermines humanitarian action by endangering humanitarian actors and impeding the delivery of their activities.¹¹

Recent years have brought attacks perpetrated against humanitarian workers and medical personnel by terrorist groups, including kidnapping and hostage-taking, unlawful detention, and arbitrary killings. Groups like ISIL and its affiliates have declared aid workers “legitimate targets” and encouraged acts of violence against humanitarian actors.

The Security Council has repeatedly condemned attacks on medical and humanitarian personnel, their means of transport and equipment, hospitals, and other medical facilities entitled to protection under international humanitarian law¹² and expressed concern about the “adverse impact of such violence, including on humanitarian access”¹³ as well as the “long-term consequences of such attacks for the civilian population and the health-care systems of the countries concerned”.¹⁴ It has consequently demanded that all Parties to armed conflict fully comply with their obligations under international humanitarian law to respect and protect humanitarian personnel and consignments used for humanitarian relief operations.¹⁵

Humanitarian emergencies require a swift and effective humanitarian response, delivered in a neutral, independent, and impartial manner. However, in armed-conflict contexts involving terrorist groups, counter-terrorism measures may negatively impact on the ability of humanitarian actors to operate and, by extension, on persons in need of humanitarian assistance. United Nations humanitarian agencies and other humanitarian actors report that relevant measures have, inter alia, restricted humanitarian access to

¹⁰ S/RES/2462, para. 24; S/RES/2482, para. 16.

¹¹ See also *Global survey of the implementation of Security Council resolution 1373 (2001) and other relevant resolutions by Member States* (S/2021/972), para. 713 ff.

¹² See e.g., S/RES/1502 (2003); S/RES/1674 (2006); S/RES/1894 (2009); S/RES/2175 (2014); S/RES/2286 (2016); S/RES/2573 (2021); S/PRST/2019/8; S/PV.7779.

¹³ S/RES/2175 (2014).

¹⁴ S/RES/2286 (2016), para. 1.

¹⁵ See e.g., S/RES/1502 (2003); S/RES/1674 (2006); S/RES/1894 (2009); S/RES/2175 (2014); S/RES/2286 (2016); S/RES/2573 (2021); S/PRST/2019/8; S/PV.7779.

populations in areas where non-State armed groups designated as terrorist organizations operate and hampered the delivery of medical aid and other forms of humanitarian assistance. In certain circumstances, domestic counter-terrorism laws have either criminalized such activities as support for terrorism or introduced legal uncertainty as to their scope. In this context, humanitarian organizations such as the International Committee of the Red Cross (ICRC) have warned of a chilling effect “which disincentivizes or prevents frontline responders from reaching populations in need”.¹⁶ Such restrictions may impact the delivery of humanitarian assistance to persons who have been victims of armed conflict, terrorism, and other gross abuses or violations of human rights or serious violations of international humanitarian law.

2. The protection of humanitarian and medical activities and personnel under international humanitarian law

International humanitarian law regulates the conduct of Parties to armed conflicts, including with respect to the protection of persons and restrictions on means and methods of warfare.¹⁷

International humanitarian law recognizes two types of armed conflict: international and non-international. International armed conflicts encompass any use of force between two or more States within the meaning of article 2 common to the four Geneva Conventions,¹⁸ as well as all situations of declared war and occupation.¹⁹

¹⁶ International Committee of the Red Cross. Statement at Security Council debate: *Threats to international peace and security caused by terrorist acts: International cooperation in combating terrorism 20 years after the adoption of resolution 1373 (2001)*, 12 January 2021, available at

<https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations>.

¹⁷ International humanitarian law norms and rules result from a balancing of the fundamental principles of military necessity and elementary considerations of humanity. As such (unlike a number of rights protected under international human rights law instruments) they are in principle not subject to emergency-linked derogations or limitations in cases of public emergency, since they were designed for situations characterized by emergency. See M. N. Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, 50 *Virginia Journal of International Law* 795 (2010), R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008); G. Draper, ‘Military Necessity and Humanitarian Imperatives’, 12 *Revue de Droit Pénal Militaire et de Droit de la Guerre* 129 (1973); M. Sassòli, A. Bouvier, A. Quintin (eds), *How Does Law Protect in War?*, Vol. I-III (3rd ed., Geneva: ICRC, 2011). See also online casebook available at <https://casebook.icrc.org>.

¹⁸ See *Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949 (hereinafter First Geneva Convention); *Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, (hereinafter Second Geneva Convention); *Convention [No. III] relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949 (hereinafter Third Geneva Convention); *Convention [No. IV] relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, (hereinafter Fourth Geneva Convention). Additional Protocol I, adopted in 1977, extended the scope of application of the law of international armed conflict to “armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. See Art. 1(4), *Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, Geneva, 8 June 1977 (hereinafter Additional Protocol I).

¹⁹ International humanitarian law is applicable even if the occupation does not meet with resistance. See art. 2(2) common to the Geneva Conventions.

Non-international armed conflicts, on the other hand, are conflicts between governmental forces and non-State armed groups or between such groups only.²⁰ Rules of international humanitarian law governing non-international armed conflict include article 3 common to the 1949 Geneva Conventions and relevant rules of customary international law applicable in non-international armed conflict. Common article 3 applies to all non-international armed conflicts (i.e., all situations of armed violence of some intensity where at least one of the Parties involved is a non-State actor presenting a certain degree of organization).

Additional Protocol II to the 1949 Geneva Conventions applies to a subcategory of non-international armed conflicts which take place between government armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the State's territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.²¹

Most armed conflicts that include the involvement of non-State armed groups designated as terrorist organizations are of a non-international character.

As such, international humanitarian law also contains a set of rules and protections relating to humanitarian and medical activities carried out in armed-conflict contexts. These activities are undertaken to the benefit of persons in need of humanitarian or medical assistance who are not, or no longer, taking direct part in hostilities. The beneficiaries²² of such activities include civilians and, under certain circumstances, also combatants or fighters²³ who have been rendered *hors de combat* due to wounds, sickness, shipwreck, or having fallen in the power of the adverse party for example through capture or surrender.²⁴ Humanitarian and medical activities may be carried out by a variety of actors, including entities belonging to a Party to the armed conflict,

²⁰ See common article 3 to the four Geneva Conventions. Please note that non-international armed conflicts are defined in a negative manner by common article 3 in the sense that the concept encompasses all conflicts that are "not of an international character".

²¹ Art. 1, *Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, Geneva, 8 June 1977 (hereinafter Additional Protocol II).

²² Please note that for persons to benefit from humanitarian activities, it is not required that they be the victims of a violation of an applicable legal standard. See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed. (Geneva, 2016) (hereinafter: *ICRC Commentary on the First Geneva Convention*), para. 1152; ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, 2nd ed. (Geneva, 2020) (hereinafter: *ICRC Commentary on the Third Geneva Convention*), para. 1335.

²³ Combatant status exists only in international armed conflicts (as conclusively regulated under international humanitarian law, in particular art. 13 common to the First and Second Geneva Conventions; art. 4 of the Third Geneva Convention, and arts. 43-44 of Additional Protocol I. In non-international armed conflicts, international humanitarian law practitioners commonly use the term *fighters* to refer to members of armed groups with a combat function. See *How Does Law Protect in War?*, Online Casebook at <https://casebook.icrc.org/glossary/fighters>.

²⁴ E.g., sick or wounded fighters/combatants may be beneficiaries of medical aid or interned fighters/ prisoners of war may be provided humanitarian relief items or benefit from protection activities, if in need. See e.g., art. 3 common to the Geneva Conventions; arts. 12 and 15, First Geneva Convention; arts. 12 and 18, Second Geneva Convention; arts. 13, 30-31, 72-73, Third Geneva Convention; art. 10, Additional Protocol I; arts. 7-8, Additional Protocol II.

international or regional organizations, non-governmental humanitarian entities, or even individuals not affiliated to any of the earlier mentioned stakeholders.²⁵

In particular, international humanitarian law contains rules on the following:

- The role of humanitarian organizations (impartial humanitarian bodies),²⁷ including their right to offer their services to Parties to the conflict (right of initiative)²⁸
- The protection of humanitarian relief personnel and objects,²⁹ as well as that of medical personnel, units and transports³⁰
- Allowing and facilitating the passage of humanitarian relief to civilians, provided such action is impartial, conducted without adverse distinction, and subject to control by Parties to the conflict.³¹

Note: Treaty rules governing situations of international armed conflict are more detailed than those regulating non-international armed conflict, with respect both to the role of impartial humanitarian bodies and humanitarian activities carried out by such bodies. The somewhat rudimentary set of treaty provisions governing non-international armed conflicts are supplemented by customary rules of international law applicable to such situations.²⁶

²⁵ See e.g., art. 18(2) Additional Protocol II, which provides that “[t]he civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked”.

²⁶ See e.g., Henckaerts, J-M and Doswald-Beck, L., *Customary International Humanitarian Law*, (Geneva/Cambridge: ICRC/Cambridge University Press, 2005). See also the ICRC’s Customary IHL Database, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docindex/home>.

²⁷ The Geneva Conventions refer to “impartial humanitarian bodies”. Such bodies include ICRC, national Red Cross and Red Crescent societies, as well as other actors whose operations abide by humanitarian principles. See e.g., ICRC, *The Fundamental Principles of the International Red Cross and Red Crescent Movement*, at https://www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf; OCHA, *What Are Humanitarian Principles?* (2012) at https://www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf. See also annex to General Assembly resolution 46/182 (1991) on Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations, as well as General Assembly resolution 58/114 (2003) setting out the guiding principles for the provision of humanitarian assistance.

²⁸ Arts. 9/9/9/10 and 10/10/10/11 common to the four Geneva Conventions; art. 3(2) common to the four Geneva Conventions; arts. 5 and 81(1) Additional Protocol I, art. 18, Additional Protocol II.

²⁹ Arts. 23 and 59, Fourth Geneva Convention; arts. 70-71, Additional Protocol I; Art. 18 Additional Protocol II.

³⁰ See arts. 24-25, First Geneva Convention; arts. 36-37 Second Geneva Convention; arts. 15-16 Additional Protocol I; art. 9 Additional Protocol II.

³¹ See arts. 23, 55 and 59, Fourth Geneva Convention; art. 70(2), Additional Protocol I; art. 18(2), Additional Protocol II. The Security Council has also repeatedly called for securing unimpeded access for humanitarian assistance in relation to, inter alia, armed conflicts in Afghanistan, Bosnia and Herzegovina, Burundi, Democratic Republic of the Congo, Georgia, Kosovo, Liberia, Somalia, Syrian Arab Republic, and Yemen. It has also made similar calls in resolutions on children and armed conflict and the protection of civilians. See e.g., S/RES/2573 (2021); S/RES/2475 (2019); S/RES/2474 (2019); S/RES/2417 (2018); S/RES/2427 (2018); S/RES/2143 (2014).

a. Humanitarian relief personnel, objects and activities

i. The right of initiative

In international armed conflicts, Parties to the conflict “shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it [...]”³² Moreover, “[t]he High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar [...] available to the other humanitarian organizations [...] which are duly authorized by the respective Parties to the conflict [...]”³³

In non-international armed conflicts, international humanitarian law confers a right of initiative on humanitarian actors. Common article 3 to the Geneva Conventions, applicable to all non-international armed conflicts,³⁴ provides 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.”³⁵

As common article 3 refers to Parties to the conflict (as opposed to High Contracting Parties), humanitarian organizations may offer services to both State and non-State actors that are involved in the armed conflict.³⁶ At the same time, humanitarian actors are not required to accept an invitation to provide services. In this respect, humanitarian actors should be guided by humanitarian considerations and the existing and foreseeable humanitarian needs of the civilian population in question.³⁷

ii. Scope of humanitarian activities under international humanitarian law³⁸

Common article 9/9/9/10 to the Geneva Conventions mentions two categories of “humanitarian activities”: (i) activities “undertaken for the protection” of persons protected under these instruments; and (ii) activities undertaken for their “relief”.³⁹ Security Council resolutions 2462 (2019) and 2482 (2019) similarly use the term “humanitarian activities (...) carried out in a manner consistent with international

³² Art. 81(1), Additional Protocol I.

³³ Art. 81(4), Additional Protocol I.

³⁴ Common article 3 to the 1949 Geneva Conventions applies to all non-international armed conflicts (i.e., all situations of armed violence of some intensity where at least one of the Parties involved is a non-State actor presenting a certain degree of organization).

³⁵ Art. 18(1) of Additional Protocol II supplementing common article 3 to the Geneva Conventions provides that “[r]elief societies located in the territory of the High Contracting Party (...) may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict”.

³⁶ See e.g., *ICRC Commentary on the First Geneva Convention*, paras. 803-806; *ICRC Commentary on the Third Geneva Convention*, paras. 840-843.

³⁷ *Ibid.*

³⁸ The present study focuses on humanitarian activities carried out in armed contexts where terrorist groups are also active. Note that the scope of humanitarian activities conducted by humanitarian organizations goes beyond such contexts. Importantly, humanitarian activities will be conducted in other situations of crisis, emergency or disaster caused by natural or man-made hazards, or a combination thereof, to prevent and mitigate the impact of such events on affected populations and communities.

³⁹ Note that the terms *relief* and *assistance* are used interchangeably by the Conventions and their Protocols. Art. 81 of Additional Protocol I refers to ensuring “protection and assistance” to the victims of conflict. See also *ICRC Commentary on the First Geneva Convention*, para. 808ff; *ICRC Commentary on the Third Geneva Convention*, para. 845ff.

humanitarian law.”⁴⁰ The Fundamental Principles of the Red Cross⁴¹ proclaim that the humanitarian aim is to “prevent and alleviate humanitarian suffering wherever it may be found” and “to protect life and health and to ensure respect for the human being”. Therefore, humanitarian activities have been interpreted to encompass those efforts that are undertaken with the aim of fulfilling this humanitarian purpose.⁴² Humanitarian activities are further guided by the principles of neutrality, impartiality, and independence. This has been set forth in, inter alia, the Annex to General Assembly resolution 46/182 (1991), on strengthening the coordination of humanitarian emergency assistance of the United Nations, which establishes the current United Nations-coordinated humanitarian system, and Assembly resolution 58/114 (2004).⁴³ Respect for the principle of impartiality conditions the obligation of Parties to conflict to allow and facilitate relief operations and is also explicitly highlighted by the Council in its resolutions 2462 (2019) and 2482 (2019).

Although the Geneva Conventions and their Protocols do not provide for an exhaustive list of humanitarian activities,⁴⁴ various provisions offer guidance on the types of activities encompassed within this notion. “Relief” or “assistance” refers to all activities, services and the delivery of goods aimed at ensuring that an individual, household or community “is able to cover its essential needs and unavoidable expenditures in a sustainable manner” and seeking to ensure that “persons caught up in an armed conflict can survive and live in dignity”.⁴⁵ Although the type of relief activities will differ depending on who the beneficiaries are and the nature of their needs, the Conventions and their Protocols explicitly mention delivering “consignments of medical and hospital stores”,⁴⁶ providing “food and medical supplies”, “clothing, bedding, means of shelter, [and] other

⁴⁰ S/RES/2462 (2019), para 2424; S/RES/2482, para. 16.

⁴¹ The *ICRC Commentaries on the First Geneva Convention* state the following: “The Fundamental Principles are listed in the preamble to the Statutes of the Movement, adopted by the International Conference of the Red Cross and Red Crescent, which brings together the States party to the 1949 Geneva Conventions, as well as the components of the Movement, and can therefore be considered authoritative.”, *ICRC Commentary on the First Geneva Convention*, para. 1124. Note that the Fundamental Principles have also been relied on by the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* in defining the scope of humanitarian activities. See ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (Merits), 27 June 1986, § 242. See also Jean S. Pictet, “Commentary on the Fundamental Principles of the Red Cross (I)”, *19 International Review of the Red Cross* 210 (1979).

⁴² See also OCHA, *What Are Humanitarian Principles?* (2012) available at https://www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf

⁴³ An integral part of the Fundamental Principles of the Red Cross, the principle of independence was included in the principles guiding the provision of humanitarian assistance in General Assembly resolution 58/114 (2004).

⁴⁴ The reason for the lack of a restrictive definition lies in the difficulty of anticipating the humanitarian needs that might arise as a result of a particular armed conflict. Moreover, “as the nature of armed conflicts may change, so may the humanitarian needs that they engender, and hence also the services that may be offered”. See *ICRC Commentary on the First Geneva Convention*, para. 813; *ICRC Commentary on the Third Geneva Convention*, para. 850.

⁴⁵ ICRC Assistance Policy, adopted by the Assembly of the ICRC on 29 April 2004 and reproduced in the *International Review of the Red Cross*. See *86 International Review of the Red Cross* 855 (2004), pp. 677–693. As noted, the broader term *assistance* used in Article 81(1), Additional Protocol I, has been interpreted to cover longer-term, as well as recurrent and even chronic needs. See *ICRC Commentary on the First Geneva Convention*, para. 819; *ICRC Commentary on the Third Geneva Convention*, para. 858.

⁴⁶ Art. 23, Fourth Geneva Convention.

supplies essential to the survival of the civilian population”,⁴⁷ as well as “objects necessary for religious worship”.⁴⁸

Protection activities have been defined by ICRC and the Inter-Agency Standing Committee (IASC) as encompassing “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, including international humanitarian law, international human rights and refugee law”.⁴⁹ As such, protection activities encompass efforts aimed at preventing or addressing the occurrence of violations of international humanitarian law and monitoring of compliance with relevant obligations. Examples include visits to persons deprived of their liberty and engaging in an informed, confidential dialogue with the authorities on their obligations, as well as dissemination and awareness-raising of obligations under humanitarian law.

Humanitarian relief personnel and objects used for humanitarian relief operations enjoy the protection accorded to civilians and civilian objects under international humanitarian law. Such persons or objects lose protection when they engage in direct participation in hostilities or are used to make an effective contribution to military action.

iii. The obligation to allow and facilitate the passage of humanitarian relief

International armed conflicts

Article 23 of the Fourth Geneva Convention and Article 70 of Additional Protocol I relating to the Protection of Victims of International Armed Conflicts provide that Parties to the conflict and High Contracting Parties shall allow and facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel, even when such assistance is intended for the civilian population of the adverse Party, in case the population is not adequately provided with supplies to meet basic needs.⁵⁰ The Third Geneva Convention

⁴⁷ Art. 69, Additional Protocol I. A case-by-case assessment is required in order to determine that which qualifies as other supplies that are essential for the survival of the civilian population, as this depends to a large extent on the “local conditions”. E.g., the Commentaries to Additional Protocol I mention that fuel might amount to such a basic supply in a very cold region. See Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva/The Hague: ICRC/Martinus Nijhoff, 1987), para. 2780.

⁴⁸ Art. 23, Fourth Geneva Convention; art. 69, Additional Protocol I.

⁴⁹ See ICRC, *Professional Standards for Protection Work carried out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, 3rd ed. (ICRC: Geneva, 2018), p. 11. See also Inter-Agency Standing Committee, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (The Brookings – Bern Project on Internal Displacement: Bern, 2011), p. 5.

⁵⁰ Note that the wording of art. 23 of the Fourth Geneva Convention is more restrictive, encompassing only the passage of “all consignments of medical and hospital stores”, “objects necessary for religious worship”, “essential foodstuffs, clothing and tonics”. Art. 23 distinguishes between those items that may be provided “only for civilians of another High Contracting Party, even if the latter is its adversary” and the broader category of items that come to the benefit of “children under fifteen, expectant mothers and maternity cases” belonging to the civilian population of another High Contracting Party. It should be underlined that this provision excludes the own civilian population by referring to “another High Contracting Party”. See J. Pictet *et al.* (eds.), *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War: Commentary* (Geneva, ICRC, 1958) p. 180.

Note that relief actions for the benefit of civilians in occupied territory are governed by arts. 59-62, 108-111, Fourth Geneva Convention.

similarly allows for individual or collective relief shipments for prisoners of war.⁵¹ Moreover, “consignments of medical and hospital stores” and “objects necessary for religious worship” shall also be available to wounded, sick or shipwrecked members of armed forces.⁵²

Non-international armed conflicts

Common article 3 to the Geneva Conventions sets out the right of initiative of impartial humanitarian bodies and establishes a set of basic guarantees,⁵³ including that the wounded and sick shall be collected and cared for. Common article 3 is supplemented by Additional Protocol II relating to the Protection of Victims of Non- International Armed Conflicts, which is applicable to a subset of non-international armed conflicts.⁵⁴ Article 18(2) of Additional Protocol II requires that “relief actions for the civilian population which are on an exclusively humanitarian and impartial nature and which are conducted without adverse distinction” be undertaken, subject to the consent of the High Contracting Party concerned, in case “the civilian population is suffering from undue hardship owing to a lack of the supplies essential for its survival such as foodstuffs and medical supplies”.

In addition to the above-mentioned treaty provisions, customary international law applicable in non-international armed conflicts similarly requires Parties to the conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.⁵⁵

iv. Consent and right of control

Humanitarian relief activities are subject to consent and control by the Parties to the armed conflict, but consent should not be arbitrarily withheld and the activities of relief personnel, as well as their movements, should not be unduly restricted. This means that in cases where the civilian population is in need of supplies that are essential to its survival but which the Party to the conflict in question is not in a position to provide, it should agree to such assistance being provided by a humanitarian organization acting in accordance with the principles of impartiality, independence and neutrality. Such assistance must be permitted even if it benefits the civilian population of the adverse party, including persons and groups who profess allegiance to a non-State armed group.

⁵¹ Arts. 72-73, Third Geneva Convention.

⁵² See art. 12 common to the First and Second Geneva Conventions.

⁵³ These guarantees have been recognized as reflecting elementary consideration of humanity by the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*. See ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (Merits), § 218.

⁵⁴ As noted above: although common article 3 applies to all non-international armed conflicts, the Additional Protocol applies only to a subcategory of such conflicts which take place between government armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the State's territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. See Art. 1, Additional Protocol II.

⁵⁵ Henckaerts, J-M and Doswald-Beck, L., *Customary International Humanitarian Law* (Geneva/Cambridge: ICRC/Cambridge University Press, 2005), Rule 55. See also ICRC's Customary IHL Database at https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule55.

Consent

However, humanitarian activities carried out during armed conflict contexts are subject to the consent of the Parties concerned.⁵⁶ Although, unlike relevant provisions applicable in international armed conflict, common article 3 does not explicitly mention consent as a requirement for the engagement of humanitarian actors, it is understood that the agreement of the Parties to the conflict is a prerequisite for such actors carrying out humanitarian activities.⁵⁷ The updated authoritative ICRC Commentaries to common article 3 note that there are no formal requirements for providing consent in this context and that, as a result, consent may be given via various means, including through a written reply to the organization or conveyed orally. The Commentaries further highlight that, in the absence of a clearly communicated approval, the organization can make sure that “the Party to the conflict concerned consents at least implicitly, by acquiescence, to the proposed humanitarian activities duly notified to that Party in advance”.⁵⁸

At the same time, acceptance must not be refused on arbitrary grounds. This means that in cases where (i) the civilian population is in demonstrated need of humanitarian assistance; and (ii) the actor in question conducts its operations of a humanitarian nature in accordance with the principles of impartiality, independence and neutrality, Parties to the conflict should not withhold consent. Refusing the services of an impartial humanitarian body in such situations may amount to a violation of international humanitarian law, in particular as the primary responsibility for the well-being of the civilian population rests with States and Parties to the conflict.⁵⁹

Article 18(2) of Additional Protocol II requires that “relief actions for the civilian population which are on an exclusively humanitarian and impartial nature and which are conducted without adverse distinction” be undertaken, subject to the consent of the High Contracting Party concerned, in case “the civilian population is suffering from undue hardship owing to a lack of the supplies essential for its survival such as foodstuffs and medical supplies”. Additional Protocol II thus only explicitly requires the consent of the

⁵⁶ See arts. 23 and 59, Fourth Geneva Convention; art. 70, Additional Protocol I.

⁵⁷ This has been reflected in numerous agreements relating to the delivery of humanitarian aid in non-international armed conflicts. See e.g., Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia, § 9; Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, § 2.6; Bahir Dar Agreement, § 2; Agreement on a Cease-fire in the Republic of Yemen, § 3; Agreement on the Protection and Provision of Humanitarian Assistance in Sudan, § 1. See also ICRC’s Customary IHL Database at https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule55.

⁵⁸ *ICRC Commentary on the First Geneva Convention*, paras. 827 ff.

⁵⁹ See e.g., *ICRC Protection Policy* available at <https://international-review.icrc.org/sites/default/files/irrc-871-icrc-protection-policy.pdf>; ICRC, “ICRC Q&A and lexicon on humanitarian access 96”, *International Review of the Red Cross* 893 (2014), pp. 359–375; art. 1 common to the four Geneva Conventions; A/RES/72/284, para. 80; A/RES/75/291, para. 110. Such refusal, in addition to possibly amounting to a violation of international humanitarian law, may also constitute a violation of human rights law flowing from States’ obligation to guarantee human rights to persons within their jurisdiction. Moreover, denial of humanitarian aid may, under certain circumstances, amount to a war crime. Starvation as a method of warfare is a serious violation of international humanitarian law that is a war crime in international armed conflicts. The 18th Assembly of State Parties to the Rome Statute of the International Criminal Court unanimously voted to extend it to non-international armed conflicts. See section V.1 of the present report.

State when it comes to relief actions. However, in practice, humanitarian organizations will need the agreement or acquiescence of the non-State actors Party to the conflict as well, to ensure that activities can be carried out in a safe manner.⁶⁰

Right of control

Conducting relief actions requires passage of relief consignments, equipment, and personnel, as well as access to populations in need of assistance. Whereas the law of non-international armed conflict does not explicitly address the types of control measures States/ Parties to the conflict may take in this respect, the measures specified in the Fourth Geneva Convention and Additional Protocol I can be referenced by analogy.⁶¹ These include the following:

- The right to prescribe technical arrangements under which the passage of consignments, equipment and personnel is permitted, including search of consignments aimed at ensuring that its contents are restricted to permitted humanitarian supplies
- The right to have an impartial actor oversee the distribution of humanitarian assistance. Such impartial actors would include ICRC or OCHA.

Parties to the armed conflict are, however, prohibited from diverting relief consignments from the purpose for which they are intended or from delaying them. Any such changes in timing or itinerary must be in the interest of the civilian population concerned.⁶²

Beyond the right of consent and control of States/ Parties to the conflict, additional limitations on humanitarian activities can be only exceptionally imposed. In particular, Parties to the conflict may temporarily restrict the movement and activities of humanitarian relief personnel in case this is required by “imperative military necessity”.⁶³

v. Negotiating humanitarian access with non-State armed groups Parties to the conflict

As noted above, a humanitarian body may offer its services to Parties to an armed conflict or receive a request to provide its services by such Parties. Moreover, carrying out humanitarian activities in principle requires the consent of, and is subject to, the control of Parties to the conflict.⁶⁴ Thus, in practice, humanitarian organizations need to engage with non-State actors with the aim of ensuring the safety of humanitarian personnel and consignments, as well as securing access to affected populations, in particular if the non-State actor in question exercises control over territory or carries out Government-like

⁶⁰ Although relief personnel and objects are protected under international humanitarian law and attacking personnel or destroying or misappropriating objects would amount to a violation, humanitarian organizations will in practice require additional assurances regarding the safety of their staff, facilities and equipment.

⁶¹ See arts. 23 and 59, Fourth Geneva Convention; arts. 70-71, Additional Protocol I; ICRC Customary IHL Database, Rule 55.

⁶² See e.g., art. 60, Fourth Geneva Convention.

⁶³ Art. 71, Additional Protocol I.

⁶⁴ Note the difference between the wording of the relevant provisions of the four Geneva Conventions and Additional Protocol I relating to international armed conflicts, common article 3 and art. 18 of Additional Protocol II.

functions. Entities such as ICRC or OCHA (in its role as coordinator of humanitarian activities) will regularly engage with all relevant stakeholders in humanitarian emergency contexts.⁶⁵ In the event that non-State Parties to armed conflicts are designated terrorist groups, relevant engagements may fall within the scope of counter-terrorism frameworks.

Against this background, it is imperative to distinguish engagement with the aim of securing humanitarian access and other types of engagement, including political negotiations. Common article 3 to the Geneva Conventions unequivocally states that the application of the provision shall not affect the legal status of the Parties to the conflict. Furthermore, humanitarian activities that are compliant with the humanitarian principles of neutrality, impartiality and independence “shall not be regarded as interference in the armed conflict or as unfriendly acts” nor as an unlawful interference in a State’s domestic affairs in general or in the conflict in particular or as recognition of, or support to, a Party to the conflict.⁶⁶ As engagement for humanitarian purposes, consistent with humanitarian principles and with international humanitarian law, does not undermine legitimate counter-terrorism action, it should be treated separately from the question of engagement with terrorist groups for political and other ends.⁶⁷

b. Medical personnel, units, transports and activities

Pursuant to international humanitarian law, personnel exclusively assigned to medical duties shall be respected and protected,⁶⁸ with the protection also extending to medical units and transports.⁶⁹ Such personnel and objects will lose their protection if they are used to commit, “outside their humanitarian function,⁷⁰ acts harmful to the enemy”.⁷¹ Their humanitarian function will, however, include the provision of medical care for the

⁶⁵ Pursuant to para. 35 (d) of the annex to General Assembly resolution 46/182 (1991), the mandate of the Emergency Relief Coordinator includes “actively facilitating, including through negotiation if needed, the access by the operational organizations to emergency areas for the rapid provision of emergency assistance by obtaining the consent of all parties concerned [...]”. In practice, this mandate is carried out by delegation from the Emergency Relief Coordinator by OCHA, Humanitarian Coordinators, and their staff.

⁶⁶ See e.g., art. 71, Additional Protocol I; “ICRC Q&A and lexicon on humanitarian access 96”, *International Review of the Red Cross* 893 (2014); *ICRC Commentary on the Third Geneva Convention*, para. 841. See also, ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (Merits), 27 June 1986, § 242 where the ICJ stated the following: “There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law”.

⁶⁷ It should be noted, however, that humanitarian and other stakeholders have at times expressed concerns about the “politicization of humanitarian aid” owing to, inter alia, certain international operations having followed “integrated” or “comprehensive” approaches combining political, military and humanitarian objectives. Concerns have also been expressed regarding the use of terms such as “humanitarian interventions”, which are distinct and separate from humanitarian activities and unrelated to them. The lack of consensus at the international level in relation to humanitarian intervention compounds the challenges posed by their conflation with humanitarian action.

⁶⁸ See e.g., arts. 19 and 24ff, First Geneva Convention; art. 20, Fourth Geneva Convention; art. 8, 12, 15, 21, Additional Protocol I; arts. 9-11, Additional Protocol II.

⁶⁹ See e.g., art. 35ff, First Geneva Convention; art. 18ff, Fourth Geneva Convention; art. 12 and 21ff, Additional Protocol I; art. 11, Additional Protocol II.

⁷⁰ This humanitarian function includes providing medical care for the wounded and sick (as defined under international humanitarian law) irrespective of the party, if any, to which the affected persons are affiliated and irrespective of whether the wounded and sick are combatants/ members of an armed force, fighters, or civilians.

⁷¹ See e.g., art. 21, First Geneva Convention; art. 19, Fourth Geneva Convention; art. 13, Additional Protocol I; art. 11(2), Additional Protocol II.

wounded and sick, in an impartial manner, based on needs and guided by medical ethics, independently of the person's status or qualification as a combatant, fighter, or civilian, as well as their affiliation with any of the Parties to the conflict.⁷² International humanitarian law prohibits the punishment of persons performing medical activities compatible with medical ethics, regardless of the person benefitting therefrom.⁷³ Rules relating to the non-punishment of persons carrying out medical activities in accordance with medical ethics have also been noted by the Security Council.⁷⁴

3. Impact of counter-terrorism measures on humanitarian activities

In armed conflict contexts involving terrorist groups, broadly conceived or improperly applied counter-terrorism measures can negatively impact on the ability of humanitarian actors to operate and, by extension, on persons in need of humanitarian protection and assistance. Such measures have, in some cases, affected the scope, quality, cost, and timeliness of humanitarian services provided and resulted, among others, in restricting access to humanitarian assistance by populations in or from areas where non-State armed groups designated as terrorist organizations have significant presence and influence; in obstacles for humanitarian organizations to engage in dialogue with such groups with the exclusive aim of ensuring the delivery of humanitarian services; or in security and legal threats to humanitarian actors.

In preparing the present study, CTED sought assistance from OCHA in collecting, coordinating and analysing inputs from the humanitarian community on the impact of counter-terrorism measures on humanitarian operations conducted in situations of armed conflict where terrorist groups are active.

OCHA, in partnership with a range of organizations (including CTED, the Office of the United Nations High Commissioner for Refugees (UNHCR), the World Food Programme (WFP), the United Nations Children's Fund (UNICEF), ICRC, and civil society organizations (including Interaction, the Norwegian Refugee Council, and Save the Children)), developed a questionnaire to serve as a guide for the collection of information.⁷⁵ OCHA, working in close collaboration with key IASC partners, led consultations involving OCHA's and partners' field presences.⁷⁶ OCHA also leveraged its longstanding involvement on the

⁷² Regarding medical activities, including medical ethics, see (among other provisions) arts. 8 and 16, Additional Protocol I; art. 10, Additional Protocol II.

Article 13(2) of Additional Protocol I provides for a list of acts or circumstances that should not be considered as acts harmful to the enemy, such as personnel being equipped with light individual weapons for their own defence or the defence of the sick and wounded in their charge; or the presence of combatants in the unit for medical reasons. See also art. 22, First Geneva Convention. Furthermore, both Additional Protocols I (art. 13(1)) and II (art. 11(2)) indicate that protection should not cease before warning has been given and remained unheeded.

⁷³ See art. 18, First Geneva Convention; arts. 10, 16 and 17(1), Additional Protocol I; ICRC, Customary IHL Database, Rule 26. These provisions similarly prohibit compelling a person engaged in medical activities to perform acts contrary to medical ethics. See also S/RES/2286 (2016).

⁷⁴ See S/RES/2286 (2016).

⁷⁵ The questionnaire provided background, reassurances on the confidentiality of any information shared with OCHA, definitions of key terms, and guiding questions based on previously identified forms of impact of counter-terrorism measures on humanitarian operations.

⁷⁶ OCHA conducted the questionnaire through a series of webinars with dedicated focal points in the field. Questionnaire-based consultations were complemented by in-depth interviews with key humanitarian stakeholders.

issue at the policy level and in support of humanitarian operations, and also benefited from a comprehensive review of relevant literature issued by Interaction.⁷⁷

The consultations sought input on the impact of counter-terrorism related measures taken by (a) host States; (b) States of registration of humanitarian organizations; (c) States of nationality of staff of humanitarian organizations; and (d) donor States. Pursuant to the consultation, OCHA submitted a contribution containing an anonymized analysis and synthesis of the information collected in the context of the exercise, the main findings of which are set out below.

The information received during the OCHA-led consultations showed that, in a number of contexts, humanitarian organizations saw their operations being routinely affected by counter-terrorism measures. Organizations reported that counter-terrorism measures had an important overall impact on the humanitarian response in practically all contexts where non-State armed groups designated as terrorist organizations by the host State or third States (e.g., key donors) had significant presence or influence.⁷⁸ Humanitarian organizations noted that counter-terrorism laws, policies, and measures affected the way in which humanitarian operations were scoped, designed, and carried out in the field. Included in that context were measures that might expose humanitarian actors and organizations, as well as their service providers and suppliers, to heavy fines and other types of sanctions or even criminal prosecution in case humanitarian activities benefit, even incidentally, groups designated as terrorist.

According to the humanitarian organizations consulted by OCHA, these laws, policies and measures were at times interpreted in such a way as to hinder the ability of humanitarian organizations to carry out humanitarian activities efficiently and based on needs alone as foreseen by international humanitarian law and in accordance with humanitarian principles. Practices of concern noted by humanitarian organizations included donor policies and decisions privileging risk-management considerations over a strictly needs-based humanitarian response. Humanitarian organizations also expressed concern that sharing information on the topic might expose them to legal, reputational and/ or financial risks (including withdrawal of donor funding). The consultations documented reports that, in some cases, counter-terrorism measures adopted by Member States had affected the scope or quality of humanitarian programming and activities.

[Direct restrictions](#)

Humanitarian organizations informed OCHA about direct restrictions on humanitarian activities in certain areas or for certain populations, originating from (a) host Governments, through national rules or practices; (b) donor agencies, through funding

⁷⁷ <https://www.interaction.org/wp-content/uploads/2021/04/Detrimental-Impacts-CT-Measures-Humanitarian-Action-InterAction-April-2021.pdf>.

⁷⁸ In the one context where such an impact was not reported, partners noted that the designation of a locally influential non-State armed group as terrorist by one jurisdiction had occurred only weeks before the OCHA-led consultations ended and expressed concern at the potential future impact of the designation.

conditionality or unilateral decisions or policies; and (c) jurisdictions other than the host or donor States, through various laws and sanctions regulations.

National rules and practices

OCHA's consultations revealed that, in certain contexts, host States had restricted access to areas beyond their effective control and/ or prohibited humanitarian actors from engaging with non-State armed groups operating or exercising territorial control in those areas. These decisions were linked to the groups in question having been designated domestically and/ or by the Security Council.

In some cases, humanitarian organizations reported to OCHA that processes relating to the control and monitoring of humanitarian operations with the aim of preventing aid diversion considerably affected the speed and efficiency with which humanitarian action could be undertaken, leading to items being damaged or spoiled, as well as to increased costs to implementing organizations. In some cases, States at times imposed restrictions on the quantity of certain items, such as fuel. The consequences can be devastating for populations in need. In one case, such restrictions had led to the temporary closure of a hospital due to the inability to obtain sufficient fuel supplies.

In some contexts, humanitarian personnel had also experienced decreased freedom of movement, at times paired with increased scrutiny of local staff, partners, and other persons associated with humanitarian organizations.

Donor requirements

According to the consulted organizations, counter-terrorism-related donor conditionality increasingly included direct restrictions on the ability of funding-recipient humanitarian organizations to engage with specific groups through "no-contact policies". In some cases, such policies did not implement clear domestic legal prohibitions or constitute formal, whole-of-Government policies; rather, they took the form of verbal instructions by donors' representations at the country level, out of concern of running afoul of existing counter-terrorism legislation. Restrictions may also relate to the provision of assistance to certain categories of persons or to certain areas, implemented through beneficiary vetting processes,⁷⁹ pre-approval requests, funding allocation policies, or specific counter-terrorism clauses. Humanitarian organizations noted that some of those practices, in addition to affecting programme planning and implementation, also decreased humanitarian actors' acceptance by local communities.⁸⁰ Moreover, humanitarian organizations noted that vetting and pre-approval related practices or

⁷⁹ Requirements that funds be used only to assist pre-registered, vetted beneficiaries seem to relate to certain types of programmes, in particular cash-based assistance and programmes categorized by donors as development programmes.

⁸⁰ In some cases, the vetting process extended to local public authorities (a requirement that was perceived as problematic by the implementing humanitarian organizations, on the grounds that it would damage their perception as neutral and impartial). Moreover, humanitarian organizations noted that it was not possible in practice to avoid interaction with public officials in the context of project implementation. Humanitarian organizations also expressed concern that reduced acceptance by local populations may increase staff exposure to security risks.

broadly defined counter-terrorism clauses may lead to the denial of humanitarian assistance to persons who would be entitled to such assistance in accordance with international humanitarian law.⁸¹

Obstacles to access to services

Humanitarian organizations expressed concern at difficulties encountered in accessing quality services from the private sector in multiple contexts. Legal and reputational risks, added to poor rentability, had led private entities that were necessary to the aid-delivery chain (e.g., banks, suppliers, manufacturers, transportation and insurance companies) to refuse to procure goods or cease providing services for operations in high-risk contexts (even under a specific or general licence).

Consulted organizations reported that bank de-risking (in the form of closure of, or refusal to open, accounts; refusal or unusual delays in performing operations such as money transfers;⁸² unusual requests for information-sharing; or fee increases)⁸³ was a major operational issue.⁸⁴ As a result, some humanitarian organizations had explored, at times risky, alternative options such as carrying cash or resorting to hawala providers. Humanitarian organizations further noted that donors' counter-terrorism-related risk-management requirements and clearance processes can result in a significant narrowing of the pool of eligible local contractors and service providers. In some cases, the Government may discourage local vendors or service providers from providing supplies or services to humanitarian organizations operating in areas where designated non-State armed groups have a significant presence and influence.

Organizations engaged in the consultation reported to OCHA that humanitarian operations had been affected in several ways:

- **Programme design:** due to stringent requirements from donors and financial institutions, some humanitarian organizations had adapted their programming in ways that further limited the risk of aid diversion but no longer ensured prioritization of the response based on needs alone, as independently assessed.
- **Programme implementation:** counter-terrorism-related restrictions had at times resulted in delays in implementation or the cancellation of programmes. The amount and proportion of resources (financial and staff time) allocated to procurement and risk management and the proportion of overhead costs in programme budgets had reportedly seen a steady increase in recent years.

⁸¹ Humanitarian organizations stated that, although in some cases there was a possibility of adjusting requirements to ensure that they did not interfere with humanitarian principles, in other instances organizations were not in a position to accept, or to apply for, grants, owing to concerns of incompatibility with the principles governing humanitarian action.

⁸² In one example, banks in the host State's capital refused to transfer funds to areas under the influence of a non-State armed group designated as terrorist by the host State or bring cash to their branches in those areas, out of concern that the cash might fall into the hands of the groups in question.

⁸³ In some cases, financial institutions are required to pay a "risk surcharge" for transactions deemed especially high-risk (such as transactions involving jurisdictions where designated terrorists may be present). This practice was described by one humanitarian organization as being prohibitively expensive.

⁸⁴ Such practices are reported to affect mainly international NGOs and their local implementing partners (the United Nations and ICRC are usually able to secure stable and reliable financial transfer channels).

Partner-vetting obligations and partner-selection criteria had meant that interaction with local implementing partners had become increasingly difficult, frustrating the localization agenda and the advancement of locally led humanitarian action.

- **Security and financial/legal liability:** humanitarian organizations expressed concern at the possibility that they might face prosecution, fines or loss of funding, and that staff might face harassment, arrest, detention and prosecution if they were accused of support for non-State armed groups designated as terrorist organizations. They noted that such claims had at times been made based solely on the humanitarian activities carried out by the respective organization or individual. Although only few actual cases of prosecution had been reported, some well-publicized cases had caused a chilling effect and concerns within the humanitarian community. At the same time, the implementation of counter-terrorism-related due diligence (and, more broadly, the influence of States' counter-terrorism objectives on programme design and delivery) could generate the perception that humanitarian organizations were not neutral and were implementing a political agenda, resulting in security implications materializing in the form of threats, attacks, and access restrictions by non-State armed groups designated as terrorist organizations.

As the international community continues to face a series of complex crises (many linked to protracted armed conflicts or other types of violence), the focus of relevant actors has shifted towards a sustainable approach requiring comprehensive efforts that coherently address people's vulnerability before, during and after crises. In this context, humanitarian actors have also warned of a "politicization of humanitarian aid" that has been linked to international operations' having followed "integrated" or "comprehensive" approaches combining political, military, and humanitarian objectives.

In the context of humanitarian programming, challenges reported by the consulted organizations included the increasing involvement of States' development agencies in the financing of humanitarian programmes carried out in situations of armed conflict, where such agencies lacked sufficient knowledge of the basic tenets of humanitarian action or would not consider adjustment of their standard conditionality (a means originally designed to apply to capacity-building activities in support of State institutions which is often difficult to reconcile with principled humanitarian action).⁸⁵

In order to address these challenges and operationalize the language on humanitarian issues set forth in Security Council resolutions 2462 (2019) and 2482 (2019), while also ensuring that the humanitarian activities of impartial humanitarian organizations conducted in accordance with international humanitarian law are not criminalized and

⁸⁵ Education programmes are a typical example. In the context of the consultations conducted by OCHA it was reported that, in 2020, a development agency had requested the vetting of parents of children enrolled in such a programme in an area under the influence of a non-State armed group designated as terrorist, which the grantee had refused. In another context, humanitarian organizations have reported that explicit instructions from a donor prevented them from addressing the needs of vulnerable children whose families were perceived to be affiliated with a non-State armed group designated as terrorist by the donor in question.

do not expose relevant organizations and their staff to legal action under existing counter-terrorism laws and regulations, OCHA and the consulted organizations have offered a number of possible solutions for consideration:

Humanitarian organizations noted that there was a need for more clarity as to the scope and implications of existing restrictive measures relating to counter-terrorism, as those measures may intersect with principled humanitarian action. Among possible measures to mitigate the negative impact of counter-terrorism efforts on humanitarian activities, they highlighted provisions excluding principled humanitarian activities carried out in accordance with international humanitarian law from the scope of prohibited conduct in relevant legal and policy frameworks. Where such exemptions existed, there was a need for clarity as to the scope and implications of exemptions relevant to principled humanitarian action.

Humanitarian organizations further proposed the authorization of relevant activities by way of humanitarian derogations.⁸⁶ They also recommended that explicit policies be implemented that would not seek enforcement of existing laws and policies that might result in the imposition of legal penalties on humanitarian organizations and their staff in cases of incidental aid diversion for the benefit of non-State armed groups designated as terrorist in the context of humanitarian operations undertaken in full compliance with the humanitarian principles and in accordance with international humanitarian law.

Humanitarian organizations have further stressed the importance that Member States actively engage with the private sector to encourage and facilitate the provision of services as necessary to humanitarian operations, including through explicit reassurances (e.g., through the granting of comfort letters) and the need to clarify expectations in terms of risk management, compliance and “know-your-customer” procedures.

Humanitarian organizations recommended that Member States consider the establishment of permanent structures for dialogue at the national level between Governments, their law enforcement and humanitarian agencies, the private sector, and humanitarian organizations, on country-specific issues relating to the implementation of counter-terrorism measures, including risk-management procedures and due diligences that would be both acceptable and manageable from the humanitarian perspective and satisfactory from the counter-terrorism perspective.

⁸⁶ “Humanitarian derogations” mean that the prohibitions set in sanctions regimes can be derogated if the action falling within the scope of the sanctions regime is necessary for the purpose of providing humanitarian aid. In such cases, an otherwise restricted or prohibited action can be carried out only after authorization has been granted by a competent national authority.

4. “Taking into account” the potential impact of counter-terrorism measures on impartial humanitarian action

As noted above, measures aimed at preventing or countering terrorism, including its financing, have at times affected humanitarian actors and their operations and resulted in restrictions in humanitarian access, access to funding, financial and other services, and resources needed to carry out activities, as well as to security, legal, and reputational consequences. Humanitarian organizations also expressed concerns about certain measures impacting their ability to design and implement programmes and activities that are needs-based and in accordance with the principles of humanity, neutrality, impartiality, and independence. They further noted limitations to engagement with all Parties to the conflict and the effect of such measures on their perception as impartial and neutral actors with an exclusively humanitarian mandate.

In light of the growing body of evidence of such impacts, the Security Council has urged States to take into account the potential effect of measures aimed at countering terrorism, including its financing, on “exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law”.⁸⁷

a. Elements of the recommendations included in resolution 2462 (2019), paragraph 24, and resolution 2482 (2019), paragraph 16

This subsection addresses the elements of the recommendations included in resolution 2462 (2019), paragraph 24, and resolution 2482 (2019), paragraph 16, while also addressing the interpretation of those elements in international humanitarian law.⁸⁸ In this respect, it will consider the following aspects: the scope and nature of activities that fall within the ambit of the provisions; the actors covered; and the modalities in which relevant activities must be carried out for the purposes of the above-mentioned paragraphs. It also explores the content of the recommendation to “take into account the potential effect” of relevant measures on the activities covered by the examined provisions.

i. “Exclusively humanitarian activities, including medical activities”

The two above-mentioned resolutions refer to “exclusively humanitarian activities, including medical activities”. Drawing on the definition of humanitarian activities as set out under international humanitarian law instruments, the scope of the provisions would encompass (i) humanitarian activities “undertaken for the protection” of persons protected under international humanitarian law; and (ii) activities undertaken for their “relief”. It would further encompass medical care for the wounded and sick, provided in an impartial manner, based on medical needs, and guided by medical ethics. Such

⁸⁷ S/RES/2462, para. 24; S/RES/2482, para. 16.

⁸⁸ This subsection draws on provisions of the Geneva Conventions and their Additional Protocols, as well as the ICRC Commentaries to these instruments.

activities must be of an “exclusively” humanitarian nature. For the above categories of activities to comply with that requirement, they must be carried out in accordance with the core principles of humanity, neutrality, impartiality, and independence.⁸⁹

ii. “Carried out by impartial humanitarian actors”

As noted above, the provisions in question cover activities carried out in accordance with the core humanitarian principles. The authoritative ICRC Commentaries on common article 3 describe impartial humanitarian bodies as entities with at least a minimum organizational structure that offer their services in the sense provided by common article 3. There is, however, no requirement that the scope of the respective entity’s activities be limited to humanitarian activities⁹⁰ as long as the organization is, at all times, “capable of complying with professional standards for humanitarian activities” both at the planning and implementation stages.⁹¹ Moreover, financial or economic relationships are not incompatible with the principle of impartiality as long as the organization continues to abide by the humanitarian principles in their operations. Establishing such relationships is frequently necessary when seeking funding or securing services, equipment, or facilities needed for the delivery of humanitarian activities.

Impartiality, as referenced in common article 3 to the Geneva Conventions, pertains to the “attitude to be adopted vis-à-vis the persons affected by the armed conflict when planning and implementing the proposed humanitarian activities”⁹² requiring that humanitarian actors avoid any “discrimination as to nationality, race, religious beliefs, class or political opinions” or any other similar criteria” and act to “relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress”.⁹³

As noted above, such impartial humanitarian actors may encompass entities belonging to a Party to the armed conflict, international or regional organizations, or non-governmental humanitarian entities.⁹⁴

⁸⁹ See OCHA, *What Are Humanitarian Principles?* (2012).

⁹⁰ Hence, an organization that focused “solely on development activities prior to the outbreak of the armed conflict may subsequently become, for the purposes of common article 3, a humanitarian organization, without prejudice to the possibility of the organization concurrently pursuing activities of a different nature elsewhere.” See *ICRC Commentary on the First Geneva Convention*, para. 1157; *ICRC Commentary on the Third Geneva Convention*; paras. 827-828.

⁹¹ *ICRC Commentary on the First Geneva Convention*, para. 1157; *ICRC Commentary on the Third Geneva Convention*, para. 828.

⁹² *ICRC Commentary on the Third Geneva Convention*, para. 831 ff.

⁹³ *Ibid.*, para. 831. See also Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, 4th ed. (Geneva: Switzerland, 2018), available at <https://spherestandards.org/wp-content/uploads/Sphere-Handbook-2018-EN.pdf>; ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (Merits), § 242.

⁹⁴ However, they could not be unaffiliated individuals or a loose association of individuals, as a minimum structure is required for the “body” to be able to function as a humanitarian organization. See *ICRC Commentary on the Third Geneva Convention*, para. 828.

iii. “In a manner consistent with international humanitarian law”

For humanitarian activities to be consistent with international humanitarian law, they need to be impartial; needs-based; provided without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria; and carried out subject to consent and control by the Parties to the conflict (and other High Contracting Parties if relevant).⁹⁵

The language “consistent with” (as opposed to other language choices such as “in compliance with”) may suggest the relevance of the provision to humanitarian activities carried out outside armed-conflict contexts as long as they are conducted with respect for the humanitarian principles, on a needs-based and impartial basis, and with the consent of relevant authorities.

iv. “Take into account the potential effect of measures”

The Security Council urges States to “take into account” the “potential effect” that measures aimed to counter terrorism and its financing may have on humanitarian activities. Policy guidance developed by the Security Council and the Counter-Terrorism Committee indicates that the language “counter-terrorism measures” or “measures taken to counter terrorism” include a broad range of legislative and regulatory, policy and strategic, enforcement, as well as programmatic measures and activities.⁹⁶ Therefore, counter-terrorism measures referred to in resolution 2482 (2019), paragraph 16, similarly encompass relevant actions taken by States (and/ or attributable to them) aimed at preventing and countering terrorism, including ensuring accountability and redress for terrorist acts. Measures to address terrorism financing addressed in resolution 2462 (2019), paragraph 24, would similarly encompass the above-mentioned broad range of activities attributable to States and taken with the aim of preventing, suppressing, countering, and ensure accountability for the financing of terrorism.

The “potential effect” of such measures may include an array of operational, financial, legal, security and reputational consequences that may affect humanitarian activities or actors such as those set out above and documented in the context of the above-mentioned OCHA-led consultations.⁹⁷

The Security Council notably urges States to focus on “potential” effects in this respect (i.e., to expand attention beyond concrete, documented effects and explore the possible impact that relevant laws, policies, practices and other measures may have on humanitarian action). The wording encourages States to exercise due diligence in designing, implementing, monitoring, and evaluating counter-terrorism measures with due consideration for their potential implications on humanitarian action, with the aim of

⁹⁵ For a more detailed analysis, see section IV.2 of the present survey.

⁹⁶ See e.g., *Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions (S/2019/998)*.

⁹⁷ See section IV.3 of the present study.

reconciling two areas of prime importance for sustainable peace and security (i.e., effective countering terrorism and sustainably addressing humanitarian crises).

Although the Council does not provide an explicit interpretation of the meaning of “taking into account” in this context, relevant guidance is to be found in both resolutions. In paragraph 6 of its resolution 2462 (2019), the Council “demands” that Member States “ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law”. Paragraph 16 of resolution 2482 (2019) contains similar wording.⁹⁸ The Council thereby stipulates ensuring compliance with relevant international law norms and standards as the minimum threshold to guide States in taking into account the effect of their counter-terrorism, including counter-financing, measures on humanitarian action.

Ways in which measures negatively impacting humanitarian activities can amount to a violation of international humanitarian law have already attracted attention and expert commentary.⁹⁹ In this respect, undue obstruction of humanitarian activities, including through the arbitrary refusal of consent to the conduct of humanitarian relief activities in accordance with applicable international humanitarian law, among others, may amount to a violation of international humanitarian law. Some violations of international humanitarian law may also trigger individual criminal responsibility. These include using starvation as a method of warfare by depriving civilians of objects indispensable to their survival, including by wilfully impeding relief supplies as provided for under the Geneva Conventions, and intentionally directing attacks against personnel and objects involved in humanitarian assistance and the provision of medical activities.¹⁰⁰

However, the scope of the international humanitarian law obligations of Member States depends on the role they play in the particular context (including whether they qualify as Parties to the armed conflict). It should be noted here that, although the gist of the relevant obligations relates to Parties to the armed conflict, under certain circumstances international humanitarian law also imposes certain requirements and obligations on all High Contracting Parties, regardless their involvement in the conflict as Parties thereto. Most importantly, article 1 common to the Geneva Conventions establishes an obligation

⁹⁸ The language of resolution 2482 (2019), paragraph 16, is as follows: “Urges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law”.

⁹⁹ See e.g., K. Mackintosh and P. Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (2013). The study was commissioned by OCHA and the Norwegian Refugee Council. See also, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (32IC/15/11). See also A/75/337.

¹⁰⁰ See Rome Statute of the International Criminal Court (hereinafter: ICC Statute), art. 8(2)(b)(xxv). In December 2019, the Assembly of State Parties to the Rome Statute unanimously adopted an amendment to Article 8 in order to include intentional use of starvation as a method of warfare as a war crime also when committed in non-international armed conflicts. See Resolution ICC-ASP/18/Res.5 of 6 December 2019. The amendment has thus far been ratified by six States Parties. On the rules governing entry into force of amendments, see art. 121 of the ICC Statute, esp. paras. 4 and 5.

on all High Contacting Parties “to respect and ensure respect” for the Conventions “in all circumstances”.¹⁰¹

Complementary to the need for States to conduct counter-terrorism in compliance with international humanitarian law, the Council further highlights the need for such measures to be in accordance with obligations under international human rights law and refugee law. When States exercise their due diligence aimed at taking into account potential effects of counter-terrorism on humanitarian action, it is therefore recommended that they take a comprehensive approach that considers the totality of their obligations under international law, applicable to this context.

b. Trends, developments and needs relating to the implementation of resolution 2462 (2019), paragraph 24, and resolution 2482 (2019), paragraph 16

As highlighted in this study, the relevant Security Council resolutions, in particular those passed pursuant to the rise of ISIL and its affiliates, repeatedly reiterate the need to ensure compliance with international humanitarian law in countering terrorism. The Council and its subsidiary bodies, including the Counter-Terrorism Committee, have, in multiple contexts been confronted with addressing the challenges emanating from terrorist groups operating in armed conflict.

Against this background, any measures taken to address the threat of terrorism must also be in compliance with other applicable international law norms and standards (which would, in an armed conflict context, include international humanitarian law). A comprehensive approach that takes into account the full spectrum of the State’s relevant international obligations at the design and implementation stage would facilitate counter-terrorism responses that are consistent with international humanitarian law and uphold the protections afforded to civilians and persons *hors de combat*. Such an approach would also help ensure that any counter-terrorism-related limitations on humanitarian activities or measures that affect humanitarian actors are in accordance with international humanitarian law (see the relevant rules set forth in section IV.2, above).

The recommendation that States take into account the potential effect of counter-terrorism, including counter-financing, measures on exclusively humanitarian activities was only explicitly included in resolutions 2462 (2019) and 2482 (2019). Paragraph 24 of resolution 2462 (2019) and paragraph 16 of resolution 2482 (2019) encourage States to consider the “potential effects” of such measures and thus suggest that such consideration be undertaken in a comprehensive manner, going beyond the well-established obligation to ensure that such effects do not amount to infringements of international humanitarian law (which is already implicit in the requirement that all counter-terrorism measures be consistent with international humanitarian law).

¹⁰¹ For a discussion of the scope of the obligation included in common article 1, see e.g., E. Massingham and A. McConnachie (eds.), *Ensuring Respect for International Humanitarian Law* (Routledge, 2021).

Pursuant to resolutions 2462 (2019) and 2482 (2019), the Counter-Terrorism Committee and its Executive Directorate have taken steps to duly reflect new and amended requirements and recommendations in their relevant assessment tools. The recommendation to take into account the potential effect of the measures taken on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law, has been notably incorporated in the revised “Framework document for Counter-Terrorism Committee visits to Member States aimed at monitoring, promoting and facilitating the implementation of Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2396 (2017), 2462 (2019) and 2482 (2019) and other relevant Council resolutions” (S/2020/731)¹⁰² and the updated “Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions” (S/2019/998).¹⁰³

Related developments are also reflected in the recently developed electronic Detailed Implementation Survey (e-DIS), which includes dedicated questions reflecting language from resolutions 2462 (2019), paragraph 24 and resolution 2482 (2019), paragraph 16. The revised Overview of Implementation Assessment (OIA) will further allow CTED to include information and analysis pertaining to international humanitarian law as relevant to the implementation of counter-terrorism measures, for the Committee’s consideration.

CTED has stepped up its efforts to integrate these elements into the country visits conducted on behalf of the Counter-Terrorism Committee, with the aim of ensuring that pertinent issues are duly raised with Member States and that any technical assistance needs are identified. As a result of the COVID-19 pandemic and related travel restrictions, a number of visits have been postponed and hybrid assessment visits have been conducted *pro tempore* so that the Committee and CTED can, to the extent possible, continue to carry out one of the core activities entrusted to them by the Security Council.

The recently adopted “Global survey of the implementation of Security Council resolution 1373 (2001) and other relevant resolutions by Member States” (S/2019/972) includes, for the first time, a dedicated thematic chapter focused on counter-terrorism and international humanitarian law. The chapter in question addresses (i) the intersection between terrorism and armed conflict; (ii) Security Council resolution language promoting respect for international humanitarian law; (iii) counter-terrorism and humanitarian action; and (iv) accountability for terrorist offences that amount to serious violations of international humanitarian law.¹⁰⁴

Moreover, under the umbrella of the United Nations Global Counter-Terrorism Coordination Compact, CTED is leading an initiative aimed at producing a guidance document to support Member States in their efforts to implement measures to counter the financing of terrorism, including in accordance with the provisions of resolution

¹⁰² See S/2020/731, annex.

¹⁰³ See S/2019/998, esp. paras. 29, 122-123, 423. Note that the references contained in the *Technical Guide* relate to resolution 2462 (2019), paragraph 24.

¹⁰⁴ See esp. paras. 709-718.

2462 (2019), in compliance with international human rights law.¹⁰⁵ CTED was also part of the dialogue conducted in the context of the Global Counterterrorism Forum (GCTF) initiative on “Ensuring Implementation of Countering the Financing of Terrorism Measures While Safeguarding Civic Space”, which resulted in a Good Practices Memorandum on this topic.¹⁰⁶ CTED also contributes to a project launched by the Financial Action Task Force (FATF) “to study and mitigate the unintended consequences resulting from the incorrect implementation of the FATF Standards”.¹⁰⁷

The quantitative and qualitative data collected by CTED through its assessment tools remains incomplete, owing to a combination of the relatively short time that has passed since the adoption of resolutions 2462 (2019) and 2482 (2019), the impact of the COVID-19 pandemic on the on-site assessment visits, and the often sparse nature of the information available on relevant measures taken by Member States. However, the above-mentioned tools and processes will assist CTED and the Committee to ensure the comprehensive nature of their assessment work and support the development and promotion of well-informed counter-terrorism responses in relation to facilitating the unobstructed conduct of humanitarian activities in accordance with international humanitarian law.

CTED’s engagement with Member States indicates that only a few States have implemented specific measures aimed at mitigating the impact of counter-terrorism, including counter-financing, measures on principled humanitarian action. In relation to the implementation of resolution 2462 (2019), the “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)” (S/2020/493) highlighted that forty-five per cent of States that had responded to the dedicated question included in the “Questionnaire regarding measures adopted by Member States to disrupt terrorism financing”¹⁰⁸ lacked an institutional framework to consider the effects of counter-financing measures on humanitarian activities. Thirty-five per cent of responding States had adopted measures in this area but many of the reported measures were of a general nature. Only a handful of States had established permanent national forums that bring together relevant government agencies with representatives of the non-profit and

¹⁰⁵ The guidance document is being developed pursuant to a joint initiative of the Global Coordination Compact Working Groups on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism and Supporting Victims of Terrorism and on Criminal Justice, Legal Responses and Countering the Financing of Terrorism.

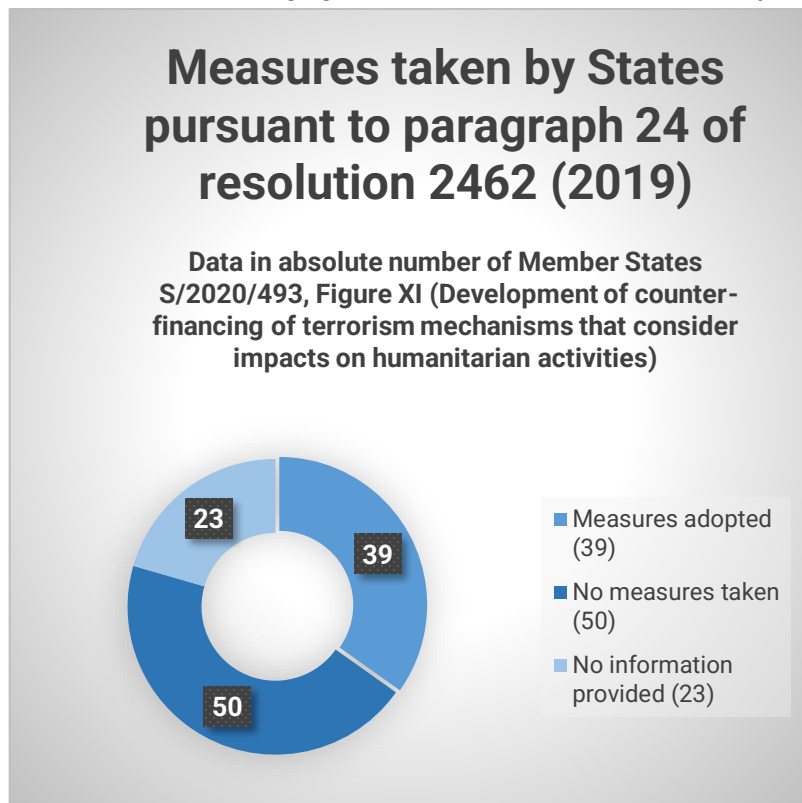
¹⁰⁶ GCTF, *Good Practices Memorandum for the Implementation of Countering the Financing of Terrorism Measures While Safeguarding Civic Space* (2021).

¹⁰⁷ FATF, *Mitigating the Unintended Consequences of the FATF Standards*, available at <https://www.fatf-gafi.org/publications/financialinclusionandnpoissues/documents/unintended-consequences-project.html>.

¹⁰⁸ See S/2020/493, annex. The report’s analysis is based on information received from 112 Member States pursuant to a questionnaire, including with respect to laws, policies or practical measures taken to ensure compliance with resolution 2462 (2019), paragraph 24. Question 36 contained the following wording: “Has your State developed counter-financing of terrorism mechanisms, laws or policies regarding non-profit organizations that take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law, in accordance with resolution 2462 (2019)?”

private sectors (including the financial sector) to discuss issues relating to humanitarian activities in high-risk jurisdictions.¹⁰⁹ At least three responding States had introduced humanitarian exemptions into their counter-financing of terrorism legislation.¹¹⁰ Several States stressed the need for inter-State dialogue to mitigate the impact on legitimate humanitarian actors and further sensitize the not-for-profit sector.

The responses provided by Member States and the fact that the majority of responding States did not take measures to implement resolution 2462 (2019), paragraph 24, or did not provide information about such measures, indicates the need for awareness-raising and guidance on designing and implementing counter-terrorism measures without unduly obstructing humanitarian activities. CTED's engagement in the context of country-specific assessments confirms that several States may benefit from support in addressing implementation-related challenges. However, a small number of Member States assessed since the adoption of resolutions 2462 (2019) and 2482 (2019) have provided information on relevant practices aimed at improving information-sharing and dialogue with relevant stakeholders and mitigating the impact of counter-terrorism efforts on humanitarian action. These will be referenced below, as relevant.



Awareness-raising and information-sharing arrangements and mechanisms

Meaningful domestic implementation of paragraphs 6 and 24 of resolution 2462 (2019) and paragraph 16 of resolution 2482 (2019) requires tailored and context-specific approaches and solutions entailing an effective combination of measures responding both to the potential security threats faced by States, as well as the humanitarian needs that arise, with full regard for corresponding responsibilities under international law, including international humanitarian law. Context-specific approaches would depend on

¹⁰⁹ The scope of discussions in this context included best practices in avoiding unnecessary de-risking and strengthening the transparency of licensing and exemption measures.

¹¹⁰ S/2020/493, annex. See esp. paras. 83-85.

the capacity in which the State might need to address the impact of counter-terrorism measures on humanitarian action. Some States may be Parties to an armed conflict involving a non-State armed group designated as a terrorist organization which may result in, or contribute to, a humanitarian crisis on their territory. Other States may financially support humanitarian activities or have humanitarian organizations registered in the State which provide such services abroad, including in high-risk jurisdictions. The impact of related counter-terrorism measures on humanitarian activities may differ and mitigating measures must similarly take these differences into consideration.

Against this background, finding effective ways to mitigate the impact of counter-terrorism on humanitarian activities requires awareness of the relevant impact. CTED has found that such awareness is at times missing or insufficiently established among counter-terrorism actors. The domestic implementation of resolution 2462 (2019), paragraphs 6 and 24, and resolution 2482 (2019), paragraph 16, may be facilitated through domestic authorities' monitoring of the impact of counter-terrorism measures on humanitarian action and medical activities. Such mapping and monitoring may take multiple forms and be incorporated as a component of the monitoring and evaluation of policies and programmatic activities aimed at preventing and countering terrorism. The resulting information and analysis may further complement information collected and shared by humanitarian actors in this respect.

CTED, in its dialogue with Member States and other relevant stakeholders, has found that such mapping and monitoring is at times inhibited by a number of factors. First, lines of communication among the different governmental authorities within a jurisdiction are frequently siloed, leading to insufficient information flow between the different authorities in charge of devising and implementing humanitarian and security/counter-terrorism policies. Second, the non-governmental sector (including both non-profit and private-sector entities, in particular financial institutions) have at times expressed reluctance to engage in frank exchanges with authorities, for fear of potential consequences.

To address these challenges, Governments would benefit from improved communication and information-sharing, as needed, both among public authorities as well as between government actors and relevant non-governmental stakeholders. This could be facilitated by ensuring that the different sectors within the Government responsible for humanitarian affairs, on the one hand, and national security, including counter-terrorism responses, on the other, are duly sensitized to the potential issues that may arise in relation to the counter-terrorism/humanitarian affairs intersection, including the relevant international and domestic legal and policy frameworks governing these issues. Both counter-terrorism and humanitarian authorities within the Government could benefit from established channels of communication and exchange, including standing internal forums or mechanisms to facilitate information-sharing.

In addition, practices implemented in some jurisdictions demonstrate that States might benefit from establishing inclusive awareness-raising and information-sharing processes

that involve stakeholders from the humanitarian sector and the private (particularly, the financial) sector. Some States have established national forums or mechanisms that bring together government agencies, non-profit organizations, and financial services firms with the aim of exchanging information and views and exploring good practices relating to the transparency of relevant measures, including licensing and exemption processes, avoiding de-risking and other manifestations of overcompliance. Some jurisdictions have also established a designated authority that serves as focal point in this respect. Such an approach would also be consistent with recommendations to duly involve the non-profit sector in the development of risk-based targeted measures to prevent abuse for terrorism-financing purposes.¹¹¹

As well as serving as information-sharing tools, these forums and mechanisms can also serve as a channel for Governments to share guidance on the interpretation and implementation of counter-terrorism measures that may impact the activities of humanitarian or other actors, such as financial institutions. Some jurisdictions have developed, at times in the context of partnerships with the non-profit and private sector, dedicated guidance on a series of relevant topics including, inter alia, risk communication and engagement of the financial sector with NPOs (including those that operate in high-risk jurisdictions). At the international level, the Good Humanitarian Donorship (GHD) initiative has developed a set of relevant principles and good practice¹¹², which provides for an informal forum facilitating relevant exchanges and engagement.

Relevant stakeholders in all sectors have noted the need for open dialogue and the willingness to explore good faith solutions to the problems at hand. At the same time, humanitarian organizations have repeatedly described current arrangements as the equivalent of a de facto “don’t ask, don’t tell” policy characterized by a lack of openness and deficiency of trust, leading humanitarian organizations to “self-censor” both in the context of their engagement with government authorities and in their humanitarian programming. These concerns further highlight the imperative nature of constructive, inclusive, and solution-focused exchange of information between Governments and humanitarian actors (including civil society organizations (CSOs), the private sector, and other stakeholders).

Beyond multisector engagements at the domestic level, certain situations characterized by humanitarian crisis requiring an international response also benefit from dedicated engagement that brings together all relevant stakeholders at the international level (including States, international and regional organizations, non-governmental humanitarian entities, and relevant service-providers such as financial institutions) to develop tailored country or situation-specific approaches that meet the dual target of effective counter-terrorism and neutral, independent and impartial humanitarian activities.

¹¹¹ See e.g., S/2020/493, annex; S/2019/998; Financial Action Task Force, *Best Practices Paper on Combating the Abuse of Non-Profit Organisations* (Recommendation 8).

¹¹² See GHD, Principles and Good Practice of Good Humanitarian Donorship, available at <https://www.ghdinitiative.org/ghd/gns/principles-good-practice-of-ghd/principles-good-practice-ghd.html>. The initiative currently has 42 members.

Ensuring the clarity and foreseeability of the legal and policy framework

Although international counter-terrorism instruments and international humanitarian law do not conflict with respect to allowing for principled humanitarian activities to be carried out in a manner consistent with international humanitarian law, domestic laws and policies implementing counter-terrorism obligations and other standards have at times been shown to encroach on protections under international humanitarian law, in particular through the adoption of broad definitions of terrorism-related offences such as support for terrorism. Criminalizing conduct that may bring within its scope the activities of humanitarian actors without including a dedicated exemption for principled humanitarian action has also been noted as a concern.¹¹³

In their engagement with CTED, Member States have consistently emphasized that they have no intention of bringing humanitarian actors and their activities, within the scope of their criminal law, as long as those activities are carried out in a principled manner. States have noted the importance of prosecutorial discretion in this respect in order to ensure that prosecutions are pursued only in appropriate cases where such steps are in the public interest. In practice, the exercise of prosecutorial discretion can mitigate the effects of counter-terrorism laws on impartial humanitarian action. At the same time, the principle of legality in criminal law requires that legislation be sufficiently foreseeable in its application and impact. This requires sufficient clarity and precision to allow those affected by the law to foresee the consequences of their conduct and to provide effective safeguards against arbitrary prosecution and punishment. In this respect, the Counter-Terrorism Committee has consistently emphasized the need for States to “adopt a clear and precise definition of terrorism that corresponds to the requirements of the international counter-terrorism instruments to which they are Parties, the relevant resolutions of the Security Council, and other applicable international law norms and standards, including international human rights law” and to ensure compliance with the principle of legality.¹¹⁴

Against this background, a number of jurisdictions have included armed conflict or humanitarian exemption clauses in their domestic laws, including penal codes, with the aim of mitigating tensions that might arise between international humanitarian law and domestic counter-terrorism frameworks. Some States have included clauses exempting from the scope of terrorism-related offences conduct that is perpetrated in an armed conflict context and is compliant with applicable international humanitarian law. Other jurisdictions have exempted principled humanitarian activities carried out in accordance with applicable international humanitarian law from the scope of terrorism-related offences.

¹¹³ An example would be the criminalization of entering or remaining in a designated area where a terrorist organization operates or exercises control, without devising exemption clauses to ensure that legitimate activities are not incidentally criminalized.

¹¹⁴ See *Global survey of the implementation of Security Council resolution 1373 (2001) and other relevant resolutions by Member States (S/2021/972)*, paras 686 ff; 779-780. See also priority recommendations in the chapter on Regional Outlook (see e.g. sections on the implementation of resolution 1373 (2001) in Central, East, and West Africa, East, South, South-East, and Western Asia, Central Asia and South Caucasus, South America, Eastern and South-East Europe).

Tailored and well-defined exemptions can enhance the clarity and foreseeability of the domestic legal and policy framework. Such measures would also help address the shortcomings caused by de facto “don’t ask, don’t tell” approaches and provide much-needed legal certainty for humanitarian actors and their operations.

V. Meaningful accountability for the conduct of terrorist groups: Linkages between terrorism and serious violations of international humanitarian law

The Security Council has consistently denounced systematic and widespread abuses and violations of human rights and violations of international humanitarian law, including when perpetrated by terrorist groups. For example, in the context of the armed conflict in Iraq and the Syrian Arab Republic, the Council condemned atrocities perpetrated by terrorist groups such as:

- The indiscriminate killing and deliberate targeting of civilians
- Mass executions and extrajudicial killings, including of children
- Kidnapping of civilians and arbitrary detention
- Recruitment and use of children in hostilities
- Rape and other forms of sexual violence that has at times been tactically used by terrorist groups
- Attacks on, and destruction of, protected objects such as schools, hospitals, and cultural and religious sites.

Terrorist groups involved in armed conflicts have commonly carried out military operations without regard for applicable norms and principles of international humanitarian law, in particular the principles of distinction, proportionality, and precautions. Similarly, such groups also commonly violate the protections applicable to civilians and persons *hors de combat*.

The prohibition of terrorist offences has been clearly set forth by the Council in its relevant resolutions and in numerous international and regional instruments.¹¹⁵ Although relevant international humanitarian law instruments do not define terrorism, they outlaw “measures” or “acts” of terrorism committed against civilians and persons not, or no longer, taking active part in hostilities, as well as “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”,¹¹⁶ in both international and non-international armed conflicts.

A series of acts that may fall within the scope of the international counter-terrorism instruments and relevant Council resolutions (including resolution 1566 (2004), paragraph 3) are likewise prohibited under international humanitarian law. Furthermore,

¹¹⁵ See e.g., the 19 international counter-terrorism instruments adopted under the aegis of the United Nations: <https://www.un.org/securitycouncil/ctc/content/international-legal-instruments>.

¹¹⁶ Art. 33, Fourth Geneva Convention; art. 51(2), Additional Protocol I; art. 4(2), Additional Protocol II.

international humanitarian law prohibits certain criminal conduct perpetrated by terrorist groups that may point beyond the scope of applicable [domestic] definitions of terrorism.¹¹⁷

1. Linkages between conduct perpetrated by members of terrorist groups and serious violations of international humanitarian law

The following is a list of patterns of conduct have been perpetrated by members of terrorist groups involved in armed conflicts, in violation of applicable international humanitarian law.¹¹⁸ The list is not intended to be exhaustive but rather to demonstrate the extent of the linkages between the conduct of such groups and their members and serious violations of international humanitarian law that may amount to war crimes.

a. Treatment of persons not taking direct part in hostilities, including persons *hors de combat*

i. Violence to life and person

International humanitarian law prohibits violence to life and person, as well as outrages upon personal dignity when committed against civilians and persons who are not, or no longer, taking active part in the hostilities, including combatants or fighters who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.¹¹⁹ This includes prohibitions on murder and extrajudicial killings;¹²⁰ torture, cruel, inhuman and degrading treatment;¹²¹ and sexual violence, including rape, sexual slavery, enforced prostitution or forced pregnancy.¹²²

Particular concerns have been raised about the use of SGBV and related coercive acts by some terrorist groups. In multiple contexts, conflict-related sexual violence¹²³ has been

¹¹⁷ E.g., certain crimes relating to sexual exploitation may not fall within domestic definitions of terrorism but would constitute serious violations of international humanitarian law amounting to war crimes (as well as, under certain circumstances, crimes against humanity or genocide).

¹¹⁸ In the overwhelming majority of cases, terrorist groups would be Parties to non-international armed conflicts.

¹¹⁹ See common article 3 to the Geneva Conventions applicable to non-international armed conflicts, which sets out the minimum conditions relating to the treatment of persons applicable in all armed conflicts and reflects "elementary considerations of humanity".

¹²⁰ Common article 3 to the four Geneva Conventions; art. 50, First Geneva Convention; art. 51, Second Geneva Convention; art. 130, Third Geneva Convention; art. 147, Fourth Geneva Convention; art. 75(2)(a), Additional Protocol I; art. 4(2)(a), Additional Protocol II. See also ICC Statute, art. 8(2)(a)(i), (b)(vi) and (c)(i). Relevant conduct has also been criminalized under the statutes of the international criminal tribunals, including the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY), the International Criminal Tribunal for Rwanda (hereinafter ICTR), and the Special Court for Sierra Leone (hereinafter SCSL).

¹²¹ Common article 3 to the Geneva Conventions; arts. 12(2) and 50/51 common to the First and Second Geneva Conventions; arts. 17(4), 87(3), 89 and 130, Third Geneva Convention; arts. 32 and 147, Fourth Geneva Convention; art. 75(2), Additional Protocol I art. 4(2), Additional Protocol II; art. 8(2)(a)(ii) and (iii), (c)(i) and (ii), ICC Statute. See also art. 2(b) and (c), ICTY Statute, art. 4(a) and (e), ICTR Statute; Article 3(a) and (e), Statute of the SCSL.

¹²² Common article 3 to the Geneva Conventions; art. 14(1), Third Geneva Convention; art. 27(2), Fourth Geneva Convention; arts. 75(2), 76-77; Additional Protocol I; art. 4(2), Additional Protocol II. See also art. 8(2)(b)(xxii) and (e)(vi), ICC Statute. Relevant conduct has also been criminalized under the statutes of the international criminal tribunals. See arts. 2(b) and (c) and 5(g), ICTY Statute; arts. 3(g) and 4(e), ICTR Statute.

¹²³ Conflict-related sexual violence has been defined to include rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and other forms of sexual violence of comparable gravity against

linked to abductions and trafficking in persons and, in some cases, has been suspected to contribute to financial flows contributing to the funding of terrorist activities.¹²⁴ Terrorist groups have also employed such acts to drive recruitment and as a tactic to spread terror and thereby control affected groups and communities.¹²⁵ For example, ISIL has used such violence to dehumanize religious and ethnic minorities, notably through the perpetration of sexual slavery practices.¹²⁶ United Nations accountability mechanisms and factfinding missions have collected information and evidence relating to ISIL's slavery practices, including sexual slavery and slave trade.¹²⁷ In this context, relevant United Nations mechanisms found "clear and convincing evidence" that attacks against the Yazidi community in Sinjar, including slavery practices and SGBV, have been perpetrated with the intent of destroying the group, and as such amounted to genocide.¹²⁸ A German court recently handed down a landmark genocide conviction of an ISIL member in relation to the treatment of Yazidis held as slaves that resulted in the death of a five-year-old girl.¹²⁹

ii. Taking of hostages

International humanitarian law prohibits the taking of hostages in both international and non-international armed conflicts,¹³⁰ with such conduct also amounting to a war crime under the Rome Statute of the International Criminal Court and the statutes of international criminal tribunals prosecuting violations of the laws and customs of war. Hostage-taking is frequently perpetrated in connection with other violations of international law triggering individual criminal responsibility, including arbitrary deprivation of liberty and enforced disappearances.

b. Violations of international humanitarian law relating to means and methods of warfare

i. Attacks on persons or objects protected under international humanitarian law

International humanitarian law rules governing the conduct of hostilities provide for the obligation of Parties to the conflict to distinguish between civilians not taking direct part in the hostilities, on the one hand, and combatants or persons taking direct part in

any person (women, men or children). See e.g., S/2021/312. See also, ICRC, *Checklist: Domestic Implementation of International Humanitarian Law Prohibiting Sexual Violence* (2020), available at <https://www.icrc.org/en/document/checklist-domestic-implementation-international-humanitarian-law-prohibiting-sexual>.

¹²⁴ CTED, *Identifying and Exploring the Nexus Between Human Trafficking, Terrorism, and Terrorism Financing*.

¹²⁵ Related acts of violence and coercion include rape, sexual slavery, forced marriages, executions on charges of adultery or of sexual minorities, corporal punishments, etc. See e.g., A/HRC/46/54; A/HRC/37/CRP.3.

¹²⁶ See e.g., A/HRC/28/18; A/HRC/32/CRP.2; A/HRC/46/54; 2/2020/1107; S/2021/419.

¹²⁷ S/2019/878.

¹²⁸ See e.g., A/HRC/28/18, A/HRC/32/CRP.2, S/2021/419. See also <https://www.un.org/press/en/2021/sc14514.doc.htm>.

¹²⁹ Higher regional Court (OLG) Frankfurt, judgement of 30 November 2021, 5-3 StE 1/20 - 4 - 1/20. See <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/higher-regional-court-frankfurt-main-sentences-taha-al-j-to-lifelong-imprisonment>. His wife was also recently convicted for crimes against humanity and attempted war crimes. See <https://www.washingtonpost.com/world/2021/10/25/germany-isis-bride-yazidi-court-case/>.

¹³⁰ Common article 3 to the Geneva Conventions; arts. 34 and 147; Fourth Geneva Convention; art. 75(2)(c), Additional Protocol I; art. 4(2)(c), Additional Protocol II. See also art. 8(2)(a)(viii) and (c)(iii), ICC Statute; art. 2(h), ICTY Statute; art. 4(c), ICTR Statute; art. 3(c), Statute of the SCSL.

hostilities, on the other. As an extension of this rule, they must also distinguish between civilian and military objects. Furthermore, even attacks directed against a lawful military target must comply with the principle of proportionality (meaning that the expected incidental loss of civilian life, injury to civilians, damage to protected objects or a combination thereof cannot be excessive in relation to the concrete and direct military advantage anticipated).¹³¹

Hence, the direct targeting of civilians not taking direct part in hostilities and indiscriminate attacks that fail to target an identifiable military objective are prohibited.¹³² The act of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities has been recognized as a war crime triggering individual criminal responsibility in both international and non-international armed conflicts.¹³³

Operations by terrorist groups have commonly been indiscriminate or have even targeted civilians directly including through suicide attacks, roadside bombs and improvised explosive devices (IEDs) employed in populated or busy areas for maximum lethality and disruption.

ii. Persons and objects benefitting from special protection

Certain persons and objects (including, inter alia, humanitarian, medical and religious objects and personnel, cultural property, works and installations containing dangerous forces) benefit from special protection under international humanitarian law. Although these protections and related prohibitions may all be relevant to the conduct of terrorist groups and their members, this section will address the protection of humanitarian and medical objects and personnel, as well as that of cultural property.

Humanitarian objects and personnel

Parties to an armed conflict are required to respect and protect humanitarian personnel. This requirement is set out as an explicit obligation in Additional Protocol I in relation to international armed conflicts.¹³⁴ Although treaty law of non-international armed conflict does not explicitly provide for a similar obligation, it is accepted that the requirement that relief action be undertaken if the civilian population is suffering undue hardship due to a lack of basic supplies cannot be fulfilled without protecting personnel and objects

¹³¹ Art. 51(5)(b), Additional Protocol I.

¹³² Articles 51.2 of Additional Protocol I and 13.2 of Additional Protocol II.

¹³³ Art. 8(2)(b)(i) and 8(2)(e)(i), ICC Statute. See also ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR72), 2 October 1995, § 134; *Kupreškić* (IT-95-16-T), Trial Chamber, 14 January 2000, § 137. Note that the jurisprudence of international criminal tribunals has stated that, under certain circumstances, indiscriminate attacks may qualify as direct attacks against civilians. See ICTY, *Galić*, (IT-98-29-T), Trial Chamber, 5 December 2003. The International Court of Justice, in the “Nuclear Weapons” case, linked the prohibition of indiscriminate attacks to attacks against the civilian population by stating that “States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.” See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, § 78. See also, A/HRC/30.CRP.2, paras. 1153 ff.

¹³⁴ Arts. 70(4) and 71(2) of Additional Protocol I. See also art. 59, Fourth Geneva Convention.

involved in such operations.¹³⁵ In this sense, the Rome Statute of the International Criminal Court criminalizes, as a war crime, both in international and non-international armed conflicts, intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance provided such personnel or objects are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.¹³⁶

Medical objects and personnel

International humanitarian law requires Parties to the armed conflict to respect and protect medical personnel, units¹³⁷ and transports¹³⁸ exclusively assigned to medical purposes. Such personnel or objects may be civilian or military. They lose their protection if they commit or are used to commit acts harmful to the enemy, outside their humanitarian function.¹³⁹

Against this background, the Rome Statute criminalizes intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law, as well as hospitals and places where the sick and wounded are collected, provided they are not military objectives.¹⁴⁰ Such acts amount to war crimes in both international and non-international armed conflicts.

Cultural property

International law instruments applicable to armed conflict provide for the obligation of Parties to the conflict to respect and protect cultural objects and places of worship. They therefore prohibit the commission of acts of hostility directed against “historic monuments, works of art or places of worship” which constitute the “cultural or spiritual heritage of peoples” and the use of such objects in support of the military effort, both in international and non-international armed conflicts.¹⁴¹ Consequently, intentionally

¹³⁵ Art. 18(2), Additional Protocol II.

¹³⁶ See Arts. 8(2)(b)(iii) and 8(2)(e)(iii), ICC Statute. The protection also extends to peacekeeping missions conducted in accordance with the Charter of the United Nations.

¹³⁷ Medical units include hospitals and other similar units, including medical or pharmaceutical stores, both civilian and military, whether permanent or temporary. See art. 19, First Geneva Convention; art. 18, Fourth Geneva Convention; art. 8(e), Additional Protocol I.

¹³⁸ Medical transports include means of transportation by land, water or air, such as ambulances, hospital ships and medical aircraft, both civilian and military, whether permanent or temporary.

¹³⁹ See e.g., art. 13, Additional Protocol I; art. 11, Additional Protocol II. It must be noted that international humanitarian law instruments provide for a list of acts or circumstances that should not be considered as acts harmful to the enemy and indicates that protection should not cease before warning has been given.

¹⁴⁰ Arts. 8(2)(b)(ix) and 8(2)(e)(iv), ICC Statute.

¹⁴¹ Art. 53, Additional Protocol I; art. 16, Additional Protocol II. See also Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol. The ICRC highlighted that statements at the Diplomatic Conference leading to the adoption of the Additional Protocols indicate that the scope of the Additional Protocols and that of the Hague Convention are somewhat different, with the Additional Protocols referring only to a more narrow category of cultural property, “namely that which forms part of the cultural or spiritual heritage of ‘peoples’ (i.e., mankind), while the scope of the Hague Convention is broader and covers property which forms part of the cultural heritage of ‘every people’”. See ICRC, Customary IHL Database, Rule 39, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule39. At the same time, the Hague Convention and its Protocol provide for an exception to the prohibitions contained therein in case of “imperative military necessity” (which its Protocol describes as an exception that

directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, and historic monuments that are not military objectives amounts to a war crime provided the conduct has a nexus with an armed conflict.¹⁴²

iii. Conscription of children

International humanitarian law prohibits conscripting or recruiting children under the age of 15 years into armed forces or armed groups or using them to take direct part in hostilities.¹⁴³ Violating this prohibition amounts to a war crime in both international and non-international armed conflicts.¹⁴⁴ Furthermore, the Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict, provides that non-State armed groups “should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years”.¹⁴⁵

It should be noted that terrorist groups frequently recruit children for exploitation other than their use in hostilities. For example, such groups have used children in a variety of support roles such as cooks, porters or messengers, with girls in particular also having been subject to sexual slavery and forced marriage.¹⁴⁶ Such exploitation of children would cumulatively fulfil the *actus reus* of other war crimes, in particular violence to life and person and outrages upon personal dignity.

iv. Starvation as a method of warfare

International humanitarian law provides for safeguards aimed at protecting civilians and those *hors de combat* and mitigating the negative humanitarian impact of the armed conflict on the civilian population (see section IV.2, above). Hence, unduly refusing to allow and facilitate or otherwise obstructing the delivery of humanitarian relief may amount to a violation of international humanitarian law. To the extent that such obstruction amounts to intentionally using starvation of civilians as a method of warfare in an international armed conflict, the conduct qualifies, in accordance with Additional Protocol I¹⁴⁷ and the Rome Statute,¹⁴⁸ as a serious violation of international humanitarian law that triggers individual criminal responsibility as a war crime.

can be invoked only if the cultural property has, by its function, been made into a military objective and there is no feasible alternative available to obtain a similar military advantage to that resulting from targeting the cultural property object). See Art. 6 of the Protocol to the Hague Convention. The prohibition in the Additional Protocols does not provide for a similar exception.

¹⁴²Arts. 8(2)(b)(ix) and (e)(iv), ICC Statute.

¹⁴³ See art. 77(2), Additional Protocol I; art. 4(3)(c), Additional Protocol II. In addition to the Geneva Conventions and their Additional Protocols, relevant prohibitions are also included in the Convention on the Rights of the Child (art. 38(3)); the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, esp. its articles 1-4; and the Convention on the Worst Forms of Child Labour (arts. 1 and 3).

¹⁴⁴ Art. 8(2)(b)(xxvi) and 8(2)(e)(vii), ICC Statute. A similar prohibition was included in the Statute of the SCSL (art. 4(c)).

¹⁴⁵ Art. 4, Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict.

¹⁴⁶ See also the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (“Paris Principles”), as well as relevant Security Council resolutions on children and armed conflict, including S/RES/2427 (2018); S/RES/1998 (2011) and its precursor resolutions.

¹⁴⁷ Art. 54(1), Additional Protocol I.

¹⁴⁸ Art. 8(2)(b)(xxv), ICC Statute.

Although these provisions are specific to international armed conflicts, a study on customary international law conducted by ICRC found that State practice established the prohibition as a norm of customary international law in both international and non-international armed conflicts. Moreover, in December 2019, the Assembly of State Parties to the Rome Statute unanimously adopted an Amendment to Article 8 in order to include intentional use of starvation as a method of warfare as a war crime also when committed in non-international armed conflicts.¹⁴⁹

v. Pillage

Pillage is the “systematic and violent appropriation” of movable public or private property that belongs to civilians, persons *hors de combat* (including the wounded, sick, shipwrecked and prisoners of war), or to a State.¹⁵⁰ International humanitarian law prohibits pillage in both international and non-international armed conflicts.¹⁵¹ Consequently, pillage is a war crime when perpetrated with a nexus to an armed conflict.¹⁵²

2. Accountability for serious violations of international humanitarian law

In its relevant resolutions, the Security Council has repeatedly affirmed that those responsible for terrorist acts, and violations of international humanitarian law or of human rights law must be held accountable.¹⁵³ Lack of accountability in armed conflict contexts may undermine conflict mediation and resolution efforts, including political transitions, and have a long-term negative impact on peace and security. In its resolution 2396 (2017), the Council urges States to develop and implement, in accordance with international humanitarian law, appropriate investigative and prosecutorial strategies regarding FTFs.

However, Member States have faced considerable challenges, including in the context of the FTF phenomenon, in ensuring that terrorist acts and related violations of international humanitarian law are duly investigated and prosecuted and that States assist one another in connection with terrorism-related criminal investigations and criminal justice proceedings, including in obtaining necessary evidence.

¹⁴⁹ Resolution ICC-ASP/18/Res.5 of 6 December 2019. The text of the amendment reads as follows: “Amendment to be inserted as article 8-2-e)-xix) of the Rome Statute: Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.” See <https://treaties.un.org/doc/Publication/CN/2020/CN.394.2020-Eng.pdf>. Thus far, the amendment has been ratified by six States Parties. See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-g&chapter=18&clang=en. On the rules governing entry into force of amendments, see art. 121 of the ICC Statute, esp. paras. 4 and 5.

¹⁵⁰ See *How Does Law Protect in War?*, Online Casebook at <https://casebook.icrc.org/glossary/pillage>

¹⁵¹ See arts. 28 and 47, Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War (the Hague, 18 October 1907); art. 15, First Geneva Convention; art. 18, Second Geneva Convention; arts. 16 and 33; Fourth Geneva Convention; art. 4(2)(g), Additional Protocol II. See also art. 4(3), Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

¹⁵² Arts. 8(2)(b)(xvi) and 8(2)(e)(v), ICC Statute. The crime of pillage has also been included in the statutes of international criminal tribunals prosecuting violations of the laws and customs of war. See art. 3(e), ICTY Statute; art. 4(f), ICTR Statute; art. 3(f), Statute of the SCSL.

¹⁵³ See e.g., S/RES/2170 (2014), S/RES/2249 (2015), S/RES/2322 (2016), S/RES/2396 (2017).

In the context of efforts aimed at guaranteeing the criminal accountability of FTFs, criminal justice systems across the world have been confronted with investigating and prosecuting conduct that has been perpetrated thousands of miles away, often in zones ridden by armed conflict, experiencing a breakdown of rule of law, and the proliferation of armed non-State actors.

Effectively prosecuting related conduct perpetrated in conflict zones requires the use, in accordance with internationally recognized fair trial standards, of non-traditional types of information and evidence, including e-evidence, open source and social media intelligence, as well as information collected or obtained from conflict zones, including by military actors.¹⁵⁴ Relevant investigation and prosecutions may also require financial information tying individual perpetrators to criminal conduct, such as the online digital footprints of those facilitating the financing of terrorism or transaction data from banks and financial institutions, with the aim of providing information on wealth and income generated through pillage, trafficking in persons, cultural property and artefacts; and other war crimes.

Difficulties in collecting or securing information that can be used as evidence, in accordance with relevant international law standards, has at times led to prosecutorial approaches focusing on ancillary or derivative offences, without pursuing specific charges for serious violations of international humanitarian law that may have been committed by the persons subject to the criminal justice process. At times, gaps in available information that can be transformed into evidence may result in reluctance to allow relocations of FTFs and other persons who may have committed terrorism or related offences owing to fears that such persons cannot adequately be brought to justice.

These challenges, if left unaddressed, may lead to gaps in accountability or, under certain circumstances, even impunity. They may also contribute to lack of justice and redress for victims of terrorism and of crimes under international law committed by members of terrorist groups. Such developments may have far-reaching societal implications by weakening the rule of law and trust in governmental institutions, including the justice sector, thereby contributing to conditions conducive to radicalization to violence.

The violations of international humanitarian law set forth in section V.1, above, entail, under international law, the individual criminal responsibility of the perpetrators.¹⁵⁵

¹⁵⁴ CTED led the development, within the framework of the Global Counter-Terrorism Coordination Compact, of the “Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences”, available at https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jan/cted_military_evidence_guidelines.pdf.

¹⁵⁵ The violations are criminalized under the Rome Statute of the International Criminal Court. See also the “*Tadić* conditions” setting out the circumstances under which violations of international humanitarian law are prosecutable as war crimes: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be “serious” (that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim); and (iv) the violation must entail, under customary or conventional law, the individual criminal

Emerging practices in some jurisdictions¹⁵⁶ illustrate ways in which addressing the acts of members of terrorist groups through the prism of international humanitarian law and international criminal law can (i) support more comprehensive accountability; (ii) deliver sentences that are commensurate to the criminal conduct perpetrated; and (iii) more effectively provide justice for survivors and impacted communities. At the same time, obligations deriving from counter-terrorism instruments, in particular those relating to countering the financing of terrorism, can also facilitate the prosecution of war crimes and other core crimes under international law, notably in relation to obtaining testimonial, documentary and digital evidence capable of directly connecting persons of interest to specific geographic locations and criminal acts. Such holistic approaches to prosecuting the conduct of members of terrorist groups are best situated to facilitate comprehensive accountability in accordance with international norms and standards.

VI. Conclusions and possible next steps

The present study is intended to serve as a basis for the discussion of issues relating to the intersection between counter-terrorism frameworks and international humanitarian law and ways to support Member States to implement Security Council resolutions on counter-terrorism in compliance with international humanitarian law, as highlighted by the Council.

The study therefore explores, without providing an exhaustive analysis, a series of questions relating to (i) the impact of counter-terrorism measures on humanitarian action carried out in armed conflict contexts in a manner consistent with international law; and (ii) the linkages between terrorism and serious violations of international humanitarian law, with a view to promote comprehensive accountability for terrorist conduct, without providing an exhaustive analysis in this respect.

The study builds on CTED's engagement with Member States and other relevant stakeholders, including in the context of the country assessment visits conducted on behalf of the Counter-Terrorism Committee. The present study further benefitted from a contribution by OCHA, which provided an anonymized analysis and synthesis of information collected from the humanitarian community on the impact of counter-terrorism measures on humanitarian operations conducted in situations of armed conflict where terrorist groups are active.

Related engagement demonstrates the clear need to continue to gather comprehensive information in a systematic manner on ways in which Member States take into account

responsibility of the person breaching the rule). See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR72), 2 October 1995, § 94.

¹⁵⁶ European Union Agency for Criminal Justice Cooperation (Eurojust)/European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences* (The Hague, 2020), available at https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF.

the potential effects of counter-terrorism, including counter-financing, measures, on principled humanitarian action, and to map and analyse related responses and the level of awareness of individual Member States, with the aim of identifying gaps, technical assistance needs, and existing positive practices.

In this respect, relevant elements have already been incorporated in Committee and CTED assessment tools. The newly developed e-DIS contains dedicated questions reflecting language from resolution 2462 (2019), paragraph 24, and resolution 2482 (2019), paragraph 16, focused on States' efforts to take into account the potential effects of counter-terrorism measures, including measures aimed at countering the financing of terrorism, on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law. CTED has also incorporated relevant elements into the country assessment visits conducted on the Committee's behalf.

The study has further explored ways in which patterns of conduct perpetrated by members of terrorist groups involved in armed conflicts amount to serious violations of applicable international humanitarian law which entail, under international law, the individual criminal responsibility of the perpetrators. Through its engagement with Member States and other stakeholders, CTED has documented emerging good practices in some jurisdictions that take comprehensive approaches to addressing the acts of members of terrorist groups through the prism of counter-terrorism frameworks, as well as international humanitarian law and international criminal law. Such approaches have demonstrated their added value through their potential to support more comprehensive accountability, deliver sentences that are commensurate to the criminal conduct perpetrated, and more effectively provide justice for survivors and impacted communities.

CTED will build on the present analysis with the aim of supporting the Committee's work to promote the implementation of the relevant Council resolutions in accordance with international humanitarian law. In this respect, CTED is committed to:

- Explore ways to continue to expand its dialogue within the United Nations system and with international and regional humanitarian actors on the interrelationship between counter-terrorism and international humanitarian law and on ways to ensure that all measures taken to counter terrorism comply with international law, including international humanitarian law
- Make full use of the Committee's assessment and stocktaking tools and its dialogue with Member States in order to further its assessment and thematic analysis, as well as to identify and promote relevant good practices
- Continue its mainstreaming of international humanitarian law, as applicable and appropriate, into its assessment tools and thematic analysis, and facilitate the delivery of relevant technical assistance by United Nations entities
- Continue to identify and assess issues, trends, and developments relating to the implementation of the relevant Council resolutions.

Member States and other relevant stakeholders may wish to consider the following recommendations for strengthening efforts to address the intersection between counter-terrorism frameworks and international humanitarian law:

- Continue efforts aimed at ensuring that all counter-terrorism measures are implemented in compliance with international law, including international human rights law, international humanitarian law, and international refugee law.
- Raise awareness of the potential effect of counter-terrorism, including counter-financing, measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law, in accordance with Council resolutions 2462 (2019) and 2482 (2019).
- Support CTED's efforts to map and analyse the impact of counter-terrorism, including counter-financing, measures on principled humanitarian action, including medical activities carried out in a manner consistent with international humanitarian law, with the aim of informing the design and implementation of relevant mitigating measures.
- Consider taking steps to improve communication and information-sharing, as needed, both among public authorities, as well as between government actors and relevant non-governmental stakeholders.
- Consider ensuring that relevant stakeholders are duly sensitized to the potential issues that may arise in relation to the counter-terrorism/humanitarian affairs intersection, including the relevant international and domestic legal and policy frameworks governing these issues and consider establishing effective channels of communication and exchange in this area.
- When necessary and appropriate, consider bringing together relevant stakeholders at the international level to develop tailored country- or situation-specific approaches that meet the dual target of effective counter-terrorism and neutral, independent, and impartial humanitarian activities.
- Take steps towards ensuring that relevant domestic frameworks are sufficiently clear and foreseeable and provide effective safeguards against arbitrary implementation.
- Take measures to ensure that those who have committed violations of international humanitarian law are brought to justice in accordance with applicable international law and the relevant Council resolutions.
- Consider taking comprehensive approaches to prosecuting the conduct of members of terrorist groups that incorporate counter-terrorism norms and standards, as well as relevant considerations of international humanitarian law and international criminal law, in accountability strategies.