

## EDITORIAL

# COUNTERTERRORISM, SANCTIONS AND WAR

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As in the past, terrorism is a live threat in today's world – and one that causes immeasurable human suffering. The International Committee of the Red Cross (ICRC) unequivocally condemns terrorism of all forms, no matter the perpetrator and no matter whether it occurs during or outside of armed conflict. Without exception, terrorism runs counter to the principle of humanity and fundamentally undermines efforts to make the world a safer place for its citizens. States likewise condemn terrorism and have made countering terrorism a high priority individually and as an international community.

Despite the broad consensus that tackling terrorism should be a high priority, the question of how that threat should be tackled remains an area of real controversy. In part because of this divisiveness, the international community has addressed the threat of terrorism in a piecemeal fashion, with a constellation of nineteen partially overlapping international treaties, dozens of United Nations (UN) Security Council resolutions, and countless national-level laws aiming to address the phenomenon. The result is a complex patchwork of law and policy that collectively fails both to establish a clear, universally accepted definition of terrorism and to set clear and common standards for how to counter terrorism. Meanwhile, the law and policy framework has yet to earnestly and comprehensively address the risks that countering terrorism can bring.

Common to much of this law and policy patchwork is an effort to stymie all possible avenues of direct and indirect support for individuals, groups and organizations labelled as terrorist. These counterterrorism measures have taken many forms, including, most notably, sanctions and efforts to criminalize terrorists and their actions. Generally, this project has led to increased controls over and constraints on activities seen as providing support to groups or individuals designated as terrorist.

To be sure, this effort is not without a fair foundation. In attempting to cut off lines of support to terrorists and terrorist organizations, States aim to confront a real and pressing threat to themselves and their people.

## When countering terrorism causes harm

Despite their fundamental legitimacy in theory, efforts to cut off all sources of direct and indirect support to terrorists and terrorist organizations have quickly – and

predictably – generated a new set of humanitarian challenges. In working to control and constrain activities seen as providing support to terrorists, States and the international community have often been overly broad, at times sweeping humanitarian activities under the same umbrella – and the harm caused by this is real. As the ICRC has long highlighted, areas with severe terrorist threats are frequently the very same areas in which civilians are most urgently in need of humanitarian support. That support is often slowed or even impeded entirely by counterterrorism measures that aim to keep funds, supplies and other forms of aid out of the hands of terrorists – and this is particularly true where the relevant sanctions or criminal law provisions have failed to include a well-crafted exemption for humanitarian activities. The result: preventable civilian suffering.

Since 2011, the ICRC has worked to alert States and the international community to this problem.<sup>1</sup> The ICRC was the first humanitarian organization to publicize its stance that counterterrorism measures can negatively affect the provision of humanitarian aid, harming both intended beneficiaries and humanitarian workers. In the intervening decade, the ICRC has repeatedly noted its concern that sanctions and criminalization, when not designed and implemented carefully, have the potential to meaningfully impede humanitarian aid, often in violation of international humanitarian law (IHL).

In tandem, the ICRC has advocated for clear steps that would help to tackle this challenge and bring counterterrorism efforts back into balance with States' other international commitments. First, States should protect the space for neutral and impartial humanitarian action, ensuring that humanitarian organizations like the ICRC can maintain their physical proximity to populations in need of assistance – and to parties to armed conflict. Second, States should ensure that IHL is respected and fully implemented in all armed conflicts, including the elements of treaties and customary international law that ensure and regulate speedy humanitarian access. And third, States and the international community should put in place standing, well-crafted exemptions that protect humanitarian activities of all forms from otherwise restrictive counterterrorism measures.

The past year brought with it an important step in this direction. In December 2021, the UN Security Council unanimously adopted Resolution 2615, with a view to ensuring the provision of humanitarian assistance and other activities to support basic human needs in Afghanistan in the wake of the changes in governmental authorities in 2021, including listed Taliban members, and the spiralling economic and humanitarian crisis on the ground. In response to important humanitarian needs, the Security Council decided that such activities would not constitute violations of earlier resolutions that aimed to limit

1 See, for example, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, pp. 51–53, available at: [www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf](https://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf) (accessed in December 2021).

contact with and support to certain members of the Taliban and the Haqqani Network, among others, in the 1988 Afghanistan sanctions regime.<sup>2</sup> As a whole, Resolution 2615 and the unanimous support for it marked an important step in ensuring that counterterrorism and sanctions measures do not harm or undermine vital humanitarian work.

## Tackling the overlap

The ICRC is not the only actor that has been working to bring attention to the overlap and interaction between counterterrorism measures and humanitarian action for the past decade. Others have been central to these conversations, too.

Two UN Special Rapporteurs work on related topics: Fionnuala D. Ní Aoláin is the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, and Alena Douhan is the UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights. Each has participated in this issue of the *Review* by engaging in substantive conversations on their mandates and their perspectives on how counterterrorism measures of various kinds affect human rights and humanitarian action.<sup>3</sup>

State officials, including diplomats, are of course central to these conversations as well. The past several years have seen numerous States make efforts to address the effects of counterterrorism measures on humanitarian action. There is no better demonstration of this than the increasing mention of the importance of protecting humanitarian access in law and policy developed in recent years – perhaps most notable are UN Security Council Resolutions 2462 and 2482, both from 2019. With that in mind, the *Review* has also engaged in conversations with diplomats and high-level officials from the European Union,<sup>4</sup> Canada<sup>5</sup> and the Russian Federation<sup>6</sup> in order to include their important perspectives on these issues and this work.

## Topics in counterterrorism, sanctions and war

When designing and curating this double issue on “Counterterrorism, Sanctions and War”, it became clear that this was a broad topic with many sub-themes.

2 UNSC Res. 2615, 22 December 2021, op. para. 1.

3 See the interviews with Fionnuala D. Ní Aoláin and Alena Douhan in this issue of the *Review*.

4 See the interviews with Janez Lenarčič, EU Commissioner for Crisis Management, and Gilles de Kerchove, EU Counter-Terrorism Coordinator, in this issue.

5 See the interview with Elissa Golberg, Assistant Deputy Minister for Strategic Policy at Global Affairs Canada, in this issue.

6 See the interview with H. E. Ambassador Vladimir Tarabrin, Special Representative of the Minister of Foreign Affairs of the Russian Federation, in this issue.

## Counterterrorism law and international humanitarian law

A long source of confusion and debate has been the relationship between international law on counterterrorism, on the one hand, and international humanitarian law, on the other. How do—and how should—international counterterrorism law and IHL interact? The co-application of these distinct areas of law raises both advantages and disadvantages that require careful assessment and understanding. To be sure, both fields of law pursue legitimate interests—but at the same time, each field of law may, at times, negatively impact the other.<sup>7</sup>

A particular area of interaction between these two fields of law is that of classification of situations of armed violence where terrorism and terrorist groups may play a role. Without a universally accepted standard for classifying individuals or groups as terrorist, States are left largely to their own devices and to rely on their own discretion in applying the terrorist label. This, at times, leads to a domino effect whereby States then view violence carried out by those classified as terrorists as meeting the threshold for armed conflict under IHL—even when that threshold has arguably not been met. Given the derogation of various human rights and the additional powers that States may exercise during armed conflict, the risks associated with over-classification are grave.<sup>8</sup>

Because both counterterrorism measures and IHL can result in criminal charges, yet another area of overlap involves how prosecutors pursue individuals or groups who may have run afoul of both fields of law. Prioritizing the prosecution of individuals either for war crimes or for offences that constitute terrorism, when each is done to the exclusion of the other, may reflect relevant trends, interests or prejudices in justice systems—or may simply reflect how the laws themselves are written.<sup>9</sup>

The criminal law aspects of counterterrorism measures also raise additional concerns when those measures are written so broadly as to criminalize as terrorist activities those that are otherwise lawful under IHL. This broad criminalization is often responsive to both the nineteen counterterrorism treaties and the wide array of UN Security Council resolutions that have proliferated over the past twenty years, many of which do not explicitly mention compliance with IHL or humanitarian exemptions.<sup>10</sup> This overlap causes friction which could be dissipated with the help of creative solutions such as the inclusion of clauses in

7 See Ben Saul, “From Conflict to Complementarity: Reconciling International Counterterrorism Law and International Humanitarian Law”, in this issue, for a discussion on the actual and optimal interactions between these two fields of law.

8 See Gloria Gaggioli and Pavle Kilibarda, “Counterterrorism and the Risk of Over-Classification of Situations of Violence”, in this issue, for a comprehensive overview of these risks and how they grow out of counterterrorism law and policy.

9 See Kelisiana Thynne, “Better a War Criminal or a Terrorist? A Comparative Study of War Crimes and Counterterrorism Legislation”, in this issue, for an exploration of prosecutorial decision-making in this area.

10 See Agathe Sarfati, “International Humanitarian Law and the Criminal Justice Response to Terrorism: From the UN Security Council to the National Courts”, in this issue, which delves into the implications of the non-inclusion of humanitarian exemptions in these sources of international law and policy.

laws criminalizing terrorist activity that explicitly exclude activities governed by IHL.<sup>11</sup>

Another challenge arises when considering “dual-nature groups” – groups that can simultaneously be understood as non-State armed groups engaged in non-international armed conflict, on one hand, and as terrorist organizations, on the other hand. It is clear, of course, that both IHL and counter-terrorism law share applicability to these groups and their activities – though it seems that counter-terrorism law has, at times, edged out IHL as the predominant framework when addressing these groups and prosecuting members for wrongdoing.<sup>12</sup>

### Evolving concepts of terrorism

Though processes exist at the international level, including at the UN, for identifying and designating individuals or groups as terrorist, those designation processes rely heavily on information from States. At the same time, the practical effects of designation at the UN level play out only once States choose what to transpose into their own domestic legislation. In both international and domestic processes for designating individuals or groups as terrorist, then, State discretion reigns supreme. This raises numerous challenges.

One area of concern relates to the “foreign terrorist fighters” phenomenon. States and the international community have struggled to tackle this particular issue. One area of contention arises around the return of foreign terrorist fighters: should States focus on punishment, exclusion or reintegration?<sup>13</sup> These problems are also complicated when foreign terrorist fighters’ States of origin move to strip the fighters of their citizenship. This citizenship stripping has largely been discussed in the context of international human rights law and its protections, but may carry serious implications in the IHL context as well – despite the safety net of humane treatment that IHL guarantees to all people, regardless of their nationality.<sup>14</sup>

On a related note, there may be particular risks associated with highly militarized responses when confronting a terrorist opponent<sup>15</sup> – in other words,

11 See Thomas Van Poecke, Frank Verbruggen and Ward Yperman, “Terrorist Offences and International Humanitarian Law: The Armed Conflict Exclusion Clause”, in this issue, for a discussion of the potential of excluding IHL-governed activities from counterterrorism criminal law.

12 See Hanne Cuyckens, “Foreign Fighters and the Tension between Counterterrorism and International Humanitarian Law: A Case for Cumulative Prosecution Where Possible”, in this issue, for a discussion of the overlap of counterterrorism law and IHL as applied to dual-nature groups.

13 See Carlota Rigotti and Júlia Zomignani Barboza, “Unfolding the Case of Returnees: How the European Union and Its Member States Are Addressing the Return of Foreign Fighters and Their Families”, in this issue, for an exploration of which methods of handling returnees lead to the best and most desirable outcomes.

14 See Christophe Paulussen, “Stripping Foreign Fighters of their Citizenship: International Human Rights and Humanitarian Law Considerations”, in this issue, for a discussion of citizenship stripping of foreign terrorist fighters and how it may be incompatible with IHL.

15 See Dina Mansour-Ille, “Counterterrorism Policies in the Middle East and North Africa: A Regional Perspective”, in this issue, for a discussion of securitized responses to terrorism in the Middle East and an evaluation of their success.

risks that may be realized when a State's escalation of violence converts a terrorist group into a dual-nature group. These risks may include tit-for-tat violent escalation that could result in undermining (rather than supporting) a State's security objectives.

Yet another challenge relates to States' detention and data collection practices in relation to terrorism and armed conflict. So-called "administrative detention" of (suspected) terrorists remains a highly controversial practice, but one defended by several States. Meanwhile, other administrative measures short of detention may be worth exploring moving forward.<sup>16</sup> On the data collection front, States are increasingly turning to the collection and use of biometric data – despite the risks that such data may entail.<sup>17</sup>

## Effects of counterterrorism on the humanitarian space

As noted above, one of the central issues in the intersection between counterterrorism law and IHL relates to the effects of counterterrorism measures on humanitarian action and the humanitarian space, and by extension on the people who need protection and assistance. In a general sense, the past two decades have seen counterterrorism measures elevated over and above the humanitarian imperative in much of the law- and policy-making in this area, meaningfully undermining humanitarian activities.<sup>18</sup>

In particular, counterterrorism measures have at times proven detrimental to the provision of impartial medical care to the sick and wounded during non-international armed conflicts, particularly when non-State armed groups are labelled as criminal or terrorist, whether through the criminalization of the provision of that care, through legitimizing attacks on medical facilities, or through overlooking the protections that IHL affords to the sick and wounded and those who care for them.<sup>19</sup>

Meanwhile, the extent and punitive nature of counterterrorism measures has generated growing, understandable risk aversion among donors, humanitarian organizations and other actors (banks/financial institutions, suppliers etc.) in this

16 See Lawrence Hill-Cawthorne, "Detention in the Context of Counterterrorism and Armed Conflict: Continuities and New Challenges", in this issue, for a discussion of administrative detention practices and forward-looking alternatives.

17 See Katja Lindskov Jacobsen, "Biometric Data Flows and Unintended Consequences of Counterterrorism", in this issue, for a discussion of the collection and use of biometric data and the risks that this entails.

18 See Naz K. Modirzadeh and Dustin A. Lewis, "Humanitarian Values in a Counterterrorism Era", in this issue, for reflections on this phenomenon and how the international community might explore avenues to better respect impartial humanitarian values. See also Sherine El Taraboulsi-McCarthy, "Whose Risk? Bank De-Risking and the Politics of Interpretation and Vulnerability in the Middle East and North Africa", in this issue, for a discussion on the use of counterterrorism measures to foreclose the space for civil society organizations, especially where the communities they assist are particularly vulnerable.

19 See Françoise Bouchet-Saulnier, "How Counterterrorism Throws Back Wartime Medical Assistance and Care to Pre-Solferino Times", in this issue, for a discussion of how counterterrorism measures have harmed the medical mission and how clear exemptions in counterterrorism measures to protect humanitarian and medical assistance would limit the impact of counterterrorism on IHL in general – and on the medical mission in particular.

area, for fear of running afoul of the law.<sup>20</sup> But the risk that humanitarian action will intersect with counterterrorism measures simply cannot be eliminated – in part because of the reality that people living where threats of terrorism are real and prevalent are often those most in need of humanitarian aid. Instead, as noted elsewhere, policy change may be needed to protect humanitarian action and exempt it from counterterrorism measures.<sup>21</sup>

One phenomenon that has fuelled the foreclosure of the humanitarian space (and that connects to shifting understandings of terrorism) is the reality that some actors have used geographical proximity or common social, ethnic and religious backgrounds to justify associating civilians with terrorist groups – and stigmatizing them accordingly. This has, in turn, undermined the impartial delivery of aid to all affected populations.<sup>22</sup>

In a forward-looking sense, there are numerous proposals and approaches for beginning to reverse the foreclosure of the humanitarian space that results from de-risking measures. One such approach already being implemented in certain contexts is the promotion of multi-stakeholder dialogues at the national level. This proposal aims to address the remarkable diversity of relevant actors when dealing with counterterrorism measures and their effects on humanitarian activities, including regulatory officials, diplomats, civil society, banks and private citizens.<sup>23</sup>

## Law and policy debates regarding counterterrorism measures

The ICRC has long been engaged in the difficult law and policy debates around IHL, principled humanitarian action and counterterrorism measures. How does IHL apply to counterterrorism measures and operations? Where IHL and counterterrorism law are co-applicable, how can we best preserve the integrity and purposes of IHL without compromising the objectives of counterterrorism work? How can we best protect humanitarian action, as mandated by IHL, in the context of counterterrorism measures?<sup>24</sup>

- 20 See Justine Walker, “The Public Policy of Sanctions Compliance: A Need for Collective and Coordinated International Action”, in this issue, for a discussion of the financial impediments that sanctions pose to actors carrying out humanitarian work. See also Emanuela-Chiara Gillard, Sangeeta Goswami and Fulco van Deventer, “Screening of Final Beneficiaries – a Red Line in Humanitarian Operations. An Emerging Concern in Development Work”, in this issue, for a discussion on one particular expression of donors’ risk aversion – screening of final beneficiaries – and how it has harmed humanitarian work.
- 21 See Emma O’Leary, “Politics and Principles: The Impact of Counterterrorism Measures and Sanctions on Principled Humanitarian Action”, in this issue, for a broad discussion of the need for policy change to protect principled humanitarian action given this growing risk aversion.
- 22 See Alejandro Pozo Marín and Rabia Ben Ali, “Guilt by Association: Restricting Humanitarian Assistance in the Name of Counterterrorism”, in this issue, for a discussion of this phenomenon and real-world examples thereof.
- 23 See Lia van Broekhoven and Sangeeta Goswami, “Can Stakeholder Dialogues Help Solve Financial Access Restrictions Faced by Nonprofit Organizations that Stem from Countering Terrorism Financing Standards and International Sanctions?”, in this issue, for a discussion of the power and potential of multi-stakeholder dialogues in bridging these gaps.
- 24 See Tristan Ferraro, “International Humanitarian Law, Principled Humanitarian Action, Counterterrorism and Sanctions: Some Perspectives on Selected Issues”, in this issue, for a comprehensive discussion of these and other questions.

As States, organizations and the international community have worked to tackle these difficult issues, law and policy debates have begun to shift. One of those shifts has been through language added to recent UN Security Council resolutions in recognition of IHL and humanitarian action. In particular, Resolutions 2462 and 2482 of 2019 may serve as a starting point as States and the international community work to establish standing and comprehensive exemptions that exclude humanitarian activities from the scope of application of counterterrorism measures.<sup>25</sup>

Still, those shifts may not be enough, in and of themselves. Even if law and policy language moving forward better accounts for the protection of the humanitarian space, restrictive measures that are already in place at the international and national levels foreclose much of that space. With that in mind, considering meaningful reform to the existing counterterrorism infrastructure in order to better protect humanitarian action may prove crucial moving forward.<sup>26</sup> Likewise, because sanctions are enacted in many armed conflict scenarios that do not directly involve terrorism or implicate counterterrorism law, the importance of assessing the compatibility of sanctions regimes with IHL extends beyond the counterterrorism space.<sup>27</sup>

## Looking ahead

Given the timeliness of this topic and the richness of ongoing debates, the ICRC is proud to present this double issue of the *Review* on “Counterterrorism, Sanctions and War”. In soliciting submissions and selecting articles for this issue, the *Review* asked authors to take a forward-looking perspective wherever possible, first diagnosing the problems we currently face and then developing recommendations for how the international community can and should move forward. It is our distinct hope that the proposals and recommendations put forth in this issue will resonate with scholars, policy-makers, diplomats and humanitarians, and will help foster the very conversations that can help remedy the challenges we face, as a global community, in countering terrorism and recognizing States’ security needs while protecting and encouraging humanitarian action.

25 See Nathalie Weizmann, “Respecting International Humanitarian Law and Safeguarding Humanitarian Action in Counterterrorism Measures: United Nations Security Council Resolutions 2462 and 2482 Point the Way”, in this issue, for a discussion of how recent UN Security Council resolutions may help the shift toward humanitarian exemptions in counterterrorism measures.

26 See Sue E. Eckert, “Financial Access Challenges for Humanitarian Actors: Impacts of Counterterrorism Measures and Sanctions and Ways to Address Them”, in this issue, for a comprehensive set of recommendations for improving existing and future counterterrorism measures.

27 See Kosuke Onishi, “The Relationship between International Humanitarian Law and Asset Freeze Obligations under United Nations Sanctions”, in this issue, for a discussion of the importance of clarifying the relationship between sanctions provisions and IHL. See also Rebecca Brubaker and Sophie Huvé, “Conflict-Related UN Sanctions Regimes and Humanitarian Action: A Policy Research Overview”, in this issue, for a broad discussion of conflict-related sanctions and their effects on the humanitarian space and IHL.

The reality is that counterterrorism measures, including sanctions, are unlikely to disappear from the international policy- and law-making toolkits in the near future. But as the authors who have contributed to this issue have demonstrated so deftly, the current tension between those measures and the urgent need to deliver critical humanitarian aid around the world is too great to be ignored. We must find and maintain a balance between these priorities, and we hope this issue has a real impact in helping us move closer to that balance.