PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH
HARVARD UNIVERSITY

HPCR Working Paper

Humanitarian Action under Scrutiny: Criminalizing Humanitarian Engagement

February 2011

HPCR AND PROJECT BACKGROUND INFORMATION

The Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) is a research and policy program based at the Harvard School of Public Health in Cambridge, Massachusetts. The Program is engaged in research and advisory services on humanitarian operations and the protection of civilians in conflict areas. The Program advises organizations such as the United Nations, governments, and non-governmental actors, and focuses on the protection of vulnerable groups, conflict prevention, strategic planning for human security, and the role of information technology in emergency response. The Program was established in August 2000 in close cooperation with the Government of Switzerland and the United Nations.

This Working Paper presents HPCR's research to date on dilemmas arising from the intersection between, on the one hand, counterterrorism laws and policies prohibiting engagement with certain non-state entities and, on the other, humanitarian access and protection of civilians in armed conflict. This Working Paper aims to provide HPCR's initial analysis of these dilemmas and to suggest key areas for future research and policy engagement.

HPCR initiated the "Criminalizing Humanitarian Engagement" Project after recognizing that the humanitarian community faced increasingly difficult challenges based on the proliferation of counterterrorism laws and regulations that have a capacity to affect the delivery of humanitarian assistance. The "Criminalizing Humanitarian Engagement" Project aims, at the outset, to more fully identify the trajectories underlying these challenges through scientific research, policy assessments, and multilateral engagements. HPCR hosted a Senior Law and Policy Workshop on the topic in November 2010, and has constituted a Working Group of select practitioners and scholars to provide a platform for information sharing and informal discussion of challenges and opportunities.

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I. EXECUTIVE SUMMARY

This Working Paper presents HPCR's research to date on dilemmas arising from the intersection between, on the one hand, counterterrorism laws and policies prohibiting engagement with certain non-state entities (NSEs)[1] and, on the other, humanitarian access and protection of civilians in armed conflict. This Working Paper aims to provide HPCR's initial analysis of these dilemmas and to suggest key areas for future research and policy engagement.

HPCR's research indicates that two trajectories may be emerging. The first increasingly recognizes the importance of NSEs in terms of ensuring humanitarian access and promoting adherence to international norms. The second aims to restrict various forms of engagement with certain NSEs through counterterrorism laws and policies.

After introducing the topic, the Paper outlines the international legal framework pertaining to humanitarian engagement. The legal and policy bases on which humanitarian organizations may offer and provide services in a range of situations are examined, all with a view toward placing these recent trajectories in a broader context.

Next, the Paper notes that provisions of international law and policy:

- Allow humanitarian organizations to offer their services to NSEs;
- Promote humanitarian access and assistance;
- Encourage NSEs to comply with international norms; and
- Recognize the centrality of engagement and negotiation with NSEs to promote protection of civilians.

The Paper next sketches developments in international law and policy promoting humanitarian engagement with NSEs. These developments—including a mechanism called for by the UN Security Council to monitor violations against children in armed conflict—suggest an increased recognition that NSEs play a key role in ensuring the welfare of the civilian population.

Yet a seemingly countervailing trajectory is also apparent in international law and policy. Counterterrorism laws and policies at the UN—and in the domestic jurisdictions of such major donors as the United States, the United Kingdom, Canada, and Australia—may significantly restrict some of the fundamental operations at the core of humanitarian engagement by limiting interactions between humanitarian actors and certain NSEs. In particular, the Paper analyzes various international and domestic "listing" mechanisms that regulate or in some cases prohibit

[1] This Working Paper employs the term non-state entities (NSEs) to designate collections of individuals that are not generally recognized as acting in a state capacity, but that operate in armed conflicts and other situations of violence and that are subject to domestic or international legal counterterrorism sanctions or other prohibitions. NSEs may include armed opposition groups, criminal factions, and other entities (an individual person, however, cannot constitute an NSE). The Working Paper does not mean to impute a legal status as such to any of the NSEs under review.

various forms of humanitarian engagement with such "listed" NSEs, including the UNSCR 1267 (1999) regime, the UNSCR 1373 (2001) regime, and domestic criminal laws prohibiting "material" or other forms of support of terrorism.

The Paper next assesses what conflicts may emerge between a state's international legal obligations and its domestic counterterrorism laws.

The Paper then presents ***four explanatory frameworks*** through which to interpret government policies, as well as potential responses from the humanitarian community. The first explanation sees the ultimate goal of states' behavior as ***total prohibition*** of any benefit to, assistance for, or coordination with listed NSEs, *even if* that prohibition risks the loss of humanitarian services to civilian populations or the disbanding of major humanitarian operations in territories controlled by these entities. In response to total prohibition, the humanitarian community may pursue a range of options, including complying with detailed anti-terrorism certifications, halting humanitarian activities, cutting off relationship with certain donors, or evading and concealing certain contacts.

The second possible explanation is that states are interested in engaging in ***mitigation***. Under this theory, states both aim to use domestic laws and international and donor policies to rein in humanitarian actors' interactions with NSEs, and attempt to limit the perceived threats that this interaction presents to security by making humanitarian organizations more accountable for their activities. Mitigation may result in the humanitarian community developing community-wide reporting standards, obfuscating or denying accountability, or providing the least possible information on their activities.

A third explanation—***fragmentation***—suggests a lack of integration of internal policies, with some state organs supporting strong counterterrorism efforts and others promoting robust humanitarian access. Here, the humanitarian community may elect to take advantage of contradictory policies in the short term; exploit policy ambiguities to maximize access and activities; or decrease transparency, coordination, and information sharing between humanitarian organizations.

Under the final explanation, states see the two countervailing trajectories as a basis for ***cooptation*** of humanitarianism into the security machinery of the state. The humanitarian community may respond to cooptation in a range of ways, including by conceding their incorporation into security and political approaches through compromising the principle of neutrality, halting activities, or re-prioritizing humanitarian principles.

The Paper ends by presenting several important questions and challenges posed by these developments—ranging from how counterterrorism developments may affect donor decision-making to discerning how the humanitarian community may conceptualize potential pathways forward. Key priorities for research and policy engagement are also raised.

As an attempt to provide an initial analysis of the challenges under review, this Working Paper focuses primarily on the role of international humanitarian law (IHL)—which is applicable only

during situations of armed conflict—when discussing international legal norms pertaining to humanitarian engagement with NSEs. Of course, domestic and international counterterrorism restrictions on certain forms of engagement have effects far beyond situations of armed conflict. Indeed, a significant portion of the tension between counterterrorism laws and international norms brings into sharp relief states' obligations under international human rights law, including due process, freedom of speech and assembly, and detention standards. However, this Paper focuses on international norms regarding humanitarian engagement—especially obtaining and maintaining humanitarian access, providing humanitarian assistance, and promoting compliance with norms applicable to all parties to a conflict—in order to identify and analyze how counterterrorism regulations may affect humanitarian actors in particular. IHL provides perhaps the most detailed basis on which to engage with NSEs. The concerns for human rights, development, and other actors affected by counterterrorism regulations are also significant—and there may, indeed, be powerful legal and policy arguments to promote engagement with NSEs arising from such areas—but those concerns fall outside the purview of this Paper. HPCR looks forward to incorporating additional legal and policy frameworks into its future analysis on this topic.

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II. INTRODUCTION

The tension between protecting a state's security and ensuring its inhabitants' freedoms has underpinned the development of most domestic and international rights regimes since their inception. During armed conflict, the tension is expressed in a slightly narrower sense, as between maintaining a state's security while protecting civilians and others *hors de combat*. In armed conflict, the tension raises the question of how should states and their militaries balance the imperative to win wars with the obligations to spare civilian lives and property and to avoid unnecessary suffering. International humanitarian law (IHL) provides one framework to answer that question. The Geneva Conventions of 1949 and the Additional Protocols thereto of 1977 reflect the solutions negotiated by states on how to achieve this delicate balance, and how to ensure some minimal protection for those not participating in armed conflict even in the midst of ongoing warfare.

In the past decade, as states have allocated additional resources to responding to global terrorism, the debate surrounding the tension between national security and individuals' rights and liberties reignited. A number of states and commentators noted that the world was fighting a "new type of war." Many argued that this situation affected the traditional IHL balance of interests, implying that classical conceptions of "humanitarianism" would also need to come under review. While the debate often focused on technical legal aspects—such as the applicability of the laws of armed conflict to a given situation or the rules applicable to certain detainees—a quieter response emerged: counterterrorism laws and policies having a direct impact on the nature and objectives of humanitarian action.

As mentioned in the Executive Summary, this Working Paper focuses primarily on IHL when discussing international norms pertaining to humanitarian engagement with NSEs. While counterterrorism restrictions on certain forms of engagement have effects far beyond situations of armed conflict, this Paper focuses on international norms regarding humanitarian engagement in order to identify and analyze how counterterrorism regulations may affect humanitarian actors in particular. The Paper therefore looks especially at the normative framework for obtaining and maintaining humanitarian access, providing humanitarian assistance, and promoting compliance with norms applicable to all parties to a conflict. IHL provides perhaps the most detailed basis on which to promote engagement with NSEs in armed conflict. The concerns for human rights, development, and other actors affected by counterterrorism regulations are also significant, but those concerns fall outside the purview of this initial, more narrowly focused assessment. HPCR anticipates incorporating additional legal and policy frameworks, including international human rights law (IHRL), into its future analysis on this topic.

A. Two Trajectories: Countervailing Norms relating to Humanitarian Engagement and Counterterrorism

This section identifies and sketches two seemingly countervailing trajectories that have gained momentum in the past decade. These trajectories present challenges to individuals and

organizations involved in providing and coordinating humanitarian assistance especially, but not exclusively, in situations of armed conflict. In particular, those involved in humanitarian action where certain non-state entities (NSEs) operate face increased scrutiny and may be subject to legal sanctions based on their interactions with those NSEs due to domestic and international counterterrorism regulations.

Examining the relationship between counterterrorism responses and humanitarian principles almost a decade after the attacks of September 11th, two countervailing developments appear. On the one hand, the international community and multilateral institutions are more invested than ever in recognizing the importance of humanitarian access and closely coordinated engagement with NSEs, as well as those NSEs adhering to normative principles in their own conduct. The insistence, from many corners, on the crystallization of a right of humanitarian access has gone beyond existing rules in IHL, suggesting an appetite on the part of multilateral bodies to require more than the traditional consent-based model to access as reflected in the strict confines of international law. In a series of developments discussed below, HPCR has observed a decade-long trajectory toward a more potent interpretation of international law for purposes of humanitarian access and engagement in situations of armed conflict.

Similarly, the international community, individual states, and multilateral institutions alike seem to have recognized that a critical aspect of protection of civilians and assurance of meaningful humanitarian dialogue and access (particularly in situations of non-international armed conflict where an NSE controls territory or access to the population) involves negotiation and strategic engagement with NSEs. Alongside indications of the ripening of a right of humanitarian access within international law beyond the existing black-letter rules of IHL, policies and professional practices have developed regarding how to realize such access vis-à-vis the NSEs that may make the difference in terms of humanitarian assistance actually reaching civilians in need.

On the other hand, a series of legal and policy developments seem to point in the opposite direction. This converse trajectory, rooted in multilateral and domestic counterterrorism strategies, sees humanitarian dialogue and assistance as similar to any other form of support that could fall into the hands of, and therefore benefit, terrorist organizations. While humanitarian action continues to enjoy sustained donor support as a first response to crises affecting civilian populations, the deployment of independent humanitarian agencies in unstable environments has stirred growing political and security concerns among governments. These humanitarian organizations—by mandate and professional culture—often deal directly with NSEs in order to secure access to populations in need. This concern has manifested in a variety of laws, administrative regulations, and organizational policies restricting, limiting, and in some cases criminalizing activities that may be seen as central to the humanitarian enterprise as currently understood.

Many major donor governments list specific NSEs as "terrorist organizations" and prohibit the provision of support to these groups. Beyond direct travel bans, sanctions, and asset freezes, governments may further tighten the restraints on proscribed groups by criminalizing

"material" support to the groups by private individuals, charities, and humanitarian organizations anywhere in the world.

For both states and NSEs, the stakes may be the most visible when an NSE controls territory. An NSE in control of territory typically presents a greater security threat to states: it can launch attacks from the territory, train new recruits, gain the support of the civilian population, and build a political base. At the same time, the territory-controlling NSE is at the core of humanitarian access and the survival of the civilian population under the NSE's control: groups that control territory are critical for reaching the population, negotiating distributions, and protecting staff. The placement of such NSEs on counterterrorism lists thereby further complicates the environment for humanitarian organizations involved in obtaining access to civilians in areas controlled by NSEs.

B. The *Holder v. HLP* Decision

The sense of expanding restrictions on humanitarian actors vis-à-vis specific NSEs received renewed attention and caused increased concern when, on June 21, 2010, the United States Supreme Court decided *Holder v Humanitarian Law Project* (*Holder v. HLP*). In *Holder v. HLP*, the Supreme Court upheld the constitutionality of a federal statute criminalizing a very broad range of engagements with and assistance to "foreign terrorist organizations" (FTOs).[2] The Court noted that to be found guilty an individual (which can be either a person or an entity under the statute) need not have intended to further the FTO's terrorist aims, but rather that the individual merely needed to know that the organization was listed by the U.S. government or that the organization had committed acts of terrorism.

In the weeks that followed the decision, many realized that the criminal statute and the Court's broad interpretation of its applicability would encompass some activities associated with the work of international humanitarian organizations. The statute (18 USC 2339) states that individuals who provide training to (including on human rights and humanitarian law), provide support or resources to (including food, water, or shelter),[3] or provide expert advice or assistance to FTOs could be fined and face up to fifteen years in prison. Under the statute, individuals may be held accountable in U.S. courts for material support provided to listed NSEs for acts conducted anywhere in the world.

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[2] A designation determined by the Secretary of State. For a list of designated organizations and a summary of designation criteria, please see, Office of the Coordinator for Counterterrorism, U.S. State Department, "Foreign Terrorist Organizations," November 4, 2010, available at: http://www.state.gov/s/ct/rls/other/des/123085.htm

[3] The statute provides an exemption for "religious materials" and "medicine." It is not clear, however, whether the "medicine" exemption would extend to the actual provision of medical services to administer medicine. Charity and Security Network, "Material Support and the Need for a Sensible Humanitarian Exemption," July 7, 2010 (noting that "Laws that prohibit 'material support' to listed terrorist organizations only exempt religious materials and medicine, even when some form of contact or coordination with the listed group is necessary to reach non-combatants in need. That means that in conflict zones or natural disaster areas where listed groups are active medical services or non-medicinal necessities such as clean water, tents, blankets, food and more can be prohibited.").

The case caused a "shockwave" in the humanitarian community in its far-reaching terms and its extraterritorial applicability. Yet *Holder v. HLP* is but one example of a larger and more significant trajectory. HPCR has identified similar criminal laws in national jurisdictions around the world (including in a number of leading humanitarian donor countries), as well as national and international policies that restrict the scope of engagement between humanitarian actors and NSEs. A complex and overlapping web of domestic laws (many with extraterritorial reach), Security Council resolutions requiring stricter counterterrorism regimes, administrative regulations, agency policies, and contract-based donor requirements (such as anti-terror certifications or complex beneficiary vetting requirements, cross-check databases, or "no contact" policies) are serving to create a difficult-to-understand and far-reaching regulatory environment for humanitarian actors.

III. Summary of International Law relating to Humanitarian Access and Engagement in Armed Conflict

A. Background

Recent laws and policies on counterterrorism and humanitarian engagement enter a well-developed field of norms. Indeed, for decades IHL has served as the framework regulating the roles and definitions of humanitarian actors in armed conflict. For instance, IHL provides the legal and historical framework within which humanitarian organizations operating in these environments may request access to vulnerable populations. IHL provides specific provisions for "relief actions which are humanitarian and impartial in character and conducted without any adverse distinction."[4] Under IHL, humanitarian actors must always act in accordance with the principles of impartiality, independence, and humanity, regardless of the qualification of the conflict as international or non-international. However, a state's obligation to provide humanitarian access to these groups varies based on the qualification of the conflict. In addition, states are under an obligation to respect and ensure respect of the Geneva Conventions, which entails disseminating IHL to all parties. Humanitarian organizations, including but not limited to the ICRC, have played an important role in ensuring that all to parties an armed conflict understand IHL through such dissemination efforts.

The IHL provisions concerning humanitarian operations in non-international armed conflict demonstrate that more recent domestic regulations and donor policies constraining engagement with NSEs are not written on a blank slate. Humanitarian organizations satisfying the IHL criteria of delivering relief to the civilian population in an armed conflict may rely on more than moralistic or pragmatic claims regarding their role. Indeed, the drafters of IHL (states) anticipated humanitarian organizations' presence on the battlefield and their negotiations with

[4] Article 70(1) of Additional Protocol I (1977), which is applicable to international armed conflicts. For its part, Article 18(2) of Additional Protocol II (1977), applicable in non-international armed conflicts, employs a similar formulation: "relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction".

armed actors as early as 1949, reinforced that recognition in the Additional Protocols of 1977, and recalled the importance of their presence in recent UN General Assembly and Security Council resolutions.[5] While specific IHL regulations on the legal obligations of NSEs are certainly limited, IHL recognizes that these actors are often critical to protection of civilians, and anticipates that they may enter into "special agreements" in order to ensure limitation of the impact of conflict on those not involved in fighting.[6]

Humanitarian access is often shaped by interconnecting institutional policies and practices affecting the roles and responsibilities of humanitarian actors in any given conflict environment. The requirement of negotiating with NSEs to seek access to vulnerable populations, albeit not formally recognized by States, is for all practical matters a necessity. For most humanitarian actors on the ground, the humanitarian mandate and the real operational necessity of dealing with whatever party to the conflict controls access to the civilian population have shaped their decisions around engagement. The notion that humanitarian interaction with NSEs is distasteful to states is certainly not a new phenomenon. Humanitarian actors have long had to balance the wishes of host states (with whom they often have agreements and close negotiations) with the requirement of working with whomever affects the survival and basic protections of the civilian population in order to achieve their goals.

Criminalization regimes and restrictions on engagement with NSEs in armed conflict should thus be seen in light of existing international legal frameworks on humanitarian assistance, as well as within the operational strategies developed by humanitarian actors in a variety of contexts.

B. International Law Bases for Humanitarian Access

In an international armed conflict (which has been generally defined as "all cases of declared war or of any other armed conflict which may arise between two or more [states], even if the state of war is not recognized by one of them"[7]):

- "Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians (…). It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers

[5] See, for example, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, "Practice relating to Rule 55. Access for Humanitarian Relief to Civilians in Need," available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule55

[6] See Article 3, common to Geneva Conventions I-IV (1949): "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention," which refers specifically to conflicts not of an international character. See generally Sandesh Sivakumaran, "Binding Armed Opposition Groups," *International & Comparative Law Quarterly*, Vol. 55, pp. 369-394 (2006); LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW (2002).

[7] Geneva Conventions I-IV (1949), Art. 2.

and maternity cases. The obligation (…) to allow the free passage of the consignments (…) is subject to (…) condition[s] (…)." (*Article 23, Geneva Convention IV, 1949*)

- "[R]elief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions." (*Article 70(1), Additional Protocol I, 1977*)

A situation of occupation (as a sub-category of international armed conflict) is unique insofar as IHL puts the survival of the civilian population, and the responsibility for the occupied population's welfare, entirely within the responsibility of the occupying power. In occupation, given the degree of control over the protected population by the occupying power, humanitarian organizations have a particularly strong argument for access. Relevant articles state in part:

- "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes (…)." (*Article 59, Geneva Convention IV, 1949*)

- "[T]he Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship." (*Article 69(1), Additional Protocol I, 1977*)

In a non-international armed conflict (which has been defined as an "armed conflict not of an international character occurring in the territory of one [state]"[8]):

- "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." (*Article 3, common to Geneva Conventions I-IV, 1949*)

In a non-international armed conflict where an organized NSE controls territory:[9]

- "[R]elief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned." (*Article 18(2), Additional Protocol II, 1977*)

[8] *Id.*, Art. 3.

[9] More specifically, this standard applies to armed conflicts "which take place in the territory of a [state] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [AP II]"). Additional Protocol II (1977), Art. 1(1).

In situations short of an armed conflict, IHL is not applicable. However, an argument emerges under IHRL that where a state is unwilling or unable to ensure an adequate standard of living for its population, then organizations may offer assistance. For example, states party to the International Covenant on Economic, Social and Cultural Rights of 1966 "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions".[10] To give effect to this right, state parties undertake to "take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[11]

C. International Law Bases for Disseminating IHL

Under Article 1 of the Geneva Conventions, states undertake to respect and to ensure respect for the Conventions "in all circumstances."[12] In order to give effect to this obligation, states are required to disseminate the Geneva Conventions in their countries, including to their militaries and, where possible, to civilians, so that the principles entailed in the Convention may become known "to the entire population".[13]

Similarly, Article 19 of AP II (which applies in certain non-international armed conflicts) states that the Protocol "shall be disseminated as widely as possible."[14] The Commentary on AP II explains that "[i]n case of an armed conflict which meets the criteria of Article 1 of the Protocol (…), it will be up to both the government authorities *and those responsible in the insurgent party*, to take all necessary measures for disseminating the contents of the instrument to those carrying responsibility under their authority, military personnel as well as civilians."[15]

In its 2005 study, the ICRC identified two rules of customary international law pertaining to the dissemination of IHL. Rule 142 provides that "States and parties to the conflict must provide instruction in international humanitarian law to their armed forces,"[16] while Rule 143 provides that "States must encourage the teaching of international humanitarian law to the civilian

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[10] International Covenant on Economic, Social and Cultural Rights, art. 11(1). See also Universal Declaration of Human Rights, art. 25; International Covenant on Civil and Political Rights, art. 6.

[11] International Covenant on Economic, Social and Cultural Rights, art. 11(1).

[12] Geneva Conventions I-IV (1949), Art. 1.

[13] Geneva Convention I (1949), Art. 47; Geneva Convention II (1949), Art. 48; Geneva Convention III (1949), Art. 127; Geneva Convention IV (1949), Art. 144.

[14] Additional Protocol II (1977), Art. 19. See also Additional Protocol I (1977), Art. 83(1) (indicating that in international armed conflicts state parties "undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.").

[15] YVES SANDOZ, CHRISTOPHE SWINARSKI, AND BRUNO ZIMMERMANN (EDS.), COMMENTARY ON THE ADDITIONAL PROTOCOLS, ICRC, Geneva, 1987, § 4909 (internal footnote omitted but emphasis added).

[16] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK (EDS.), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, VOL. II, ICRC, Cambridge University Press, 2005, p. 501 (emphasis added).

population."[17] In discussing Rule 142, ICRC commentators stated that "[a]rmed opposition groups must respect and ensure respect for international humanitarian law (…), and dissemination is generally seen as an indispensable tool in this respect."[18]

IV. First Trajectory: International Laws and Policies Promoting Humanitarian Engagement with NSEs in Armed Conflict

This section identifies a range of international laws and policies promoting humanitarian access and supporting engagement with NSEs. The section first discusses the international law basis for a right of humanitarian initiative, demonstrating how states have long recognized the importance of including NSEs within the legal framework applicable to situations of humanitarian concern. Next, the section summarizes a collection of developments—including at the level of the Security Council—that indicate the extent to which international organizations and states recognize the importance of NSEs in the protection of civilians.

A. IHL-Based "Rights of Initiative" to Engage with NSEs to Provide Humanitarian Assistance?

As the provisions excerpted above indicate, the international legal framework for engagement with NSEs in armed conflict has been left purposefully vague. IHL does not expressly mention a right of humanitarian organizations to engage or negotiate with NSEs as such. Common Article 3 to the four Geneva Conventions, however, does provide legal grounds for impartial humanitarian organizations such as the ICRC to offer their services to the parties, including NSEs.[19] Similarly, in international armed conflicts Article 10 of Geneva Convention IV (1949) provides a basis for impartial humanitarian organizations to undertake, "subject to the consent of the Parties to the conflict," activities for the protection of civilians and for their relief.[20]

Such a reference to humanitarian organizations offering their services to all parties is not found in Article 18(2) of Additional Protocol II. The text of Article 18(2) indicates that only *states* may control humanitarian access. Accordingly, under this treaty humanitarian organizations should seek only the state's consent to operate in such situations. There is no mention of the need to

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[17] *Id.*, p. 505.

[18] *Id.*, p. 505 (internal citation omitted).

[19] Jean S. Pictet (ed.), Commentary I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1952), p. 58 (stating that, "Although the International Committee of the Red Cross has been able to do a considerable amount of humanitarian work in certain civil wars, in others the doors have been churlishly closed against it, the mere offer of charitable services being regarded as an unfriendly act -- an inadmissible attempt to interfere in the internal affairs of the State. The adoption of Article 3 has placed matters on a different footing, an impartial humanitarian organization now being legally entitled to offer its services. The Parties to the conflict can, of course, decline the offer if they can do without it. But they can no longer look upon it as an unfriendly act, nor resent the fact that the organization making the offer has tried to come to the aid of the victims of the conflict.").

[20] Geneva Convention IV (1949), Art. 10; see also *id.*, Art. 23.

seek the consent of NSEs as parties to the conflict.[21] Nonetheless, while not getting bogged down in a technical review of the relationship between the treaties, Additional Protocol II "develops and supplements" Common Article 3—it does not replace it.[22]

In 2005, the ICRC's study on *Customary International Humanitarian Law* identified a customary rule that imposes on both states and NSEs (as "parties to the conflicts") a unilateral obligation to "allow and facilitate rapid and unimpeded passage of humanitarian relief (…) subject to their right of control."[23] While the ICRC's study recognizes as "self-evident" the *practical* requirement of seeking the consent of all parties involved including NSEs, it observes that most of the practice collected does not mention the necessity of negotiating this access, leaving the terms of humanitarian engagement and negotiations largely undefined.[24] As a result, IHL provides little ground for defining and authorizing humanitarian engagements with NSEs, beyond noting that access must not be arbitrarily withheld.

B. Recent Developments supporting Engagement with NSEs to Promote Protection of Civilians

States, as the parties to IHL treaties, have not given the power to restrict or grant humanitarian access during armed conflict. As such, the tools within classical IHL for framing an access argument vis-à-vis NSEs are limited (though not nugatory).[25] However, a number of more

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[21] The ICRC's Commentary on the Additional Protocols states that "Article 18, paragraph 2, does not in any way reduces the ICRC's right of initiative, as laid down in common Article 3 [of the Geneva Conventions] since the conditions of application of the latter remain unchanged. (…) Consequently the ICRC continues to be entitled to offer its services to each party without such a step being considered as interference in the internal affairs of the State or as infringing its sovereignty, whether or not the offer is accepted." YVES SANDOZ, CHRISTOPHE SWINARSKI, AND BRUNO ZIMMERMANN (EDS.), COMMENTARY ON THE ADDITIONAL PROTOCOLS, ICRC, Geneva, 1987, §§ 4891-4892 (footnotes omitted).

[22] Additional Protocol II (1977), Art. 1(1).

[23] See ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, "Rule 55. Access for Humanitarian Relief to Civilians in Need," available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55.

[24] See ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, "Rule 55. Access for Humanitarian Relief to Civilians in Need," available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55 (noting that "Both Additional Protocols I and II require the consent of the parties concerned for relief actions to take place. Most of the practice collected does not mention this requirement. It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent.") (footnotes omitted).

[25] For instance, for states party to Additional Protocol II (1977), which is applicable in certain non-international armed conflicts, "[s]tarvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works." Additional Protocol II (1977), Art. 14. For its part, the Rome Statute of the International Criminal Court makes it a war crime for individuals under the Court's jurisdiction to "[i]ntentionally us[e] starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva

recent legal and policy innovations build on the existing IHL foundation to promote (and in some cases seemingly require) engagement with NSEs in order to provide humanitarian access, to refrain from obstructing humanitarian assistance, or to promote compliance with fundamental IHL norms.

1. Security Council Practice promoting the Facilitation of Humanitarian Access by "All Parties" to an Armed Conflict

In recent years, the Security Council has increasingly called attention to the importance of allowing and maintaining humanitarian access by "all parties" to an armed conflict. The Council has spotlighted, for instance, the significance of all parties agreeing to and facilitating relief operations that are humanitarian and impartial in character, as well as allowing and facilitating rapid and unimpeded passage of relief consignments, equipment, and personnel.[26] In Resolution 1894 (2009), the Council "[*s*]*tresse[d]* the importance for all parties to armed conflict to cooperate with humanitarian personnel in order to allow and facilitate access to civilian populations affected by armed conflict."[27] Along the same lines, the Council has condemned attacks on humanitarian workers and facilities, regardless of who may have committed such attacks.[28]

2. UN Security Council Resolutions regarding Child Protection and Associated Mechanisms

UNSCR 1612[29] and UNSCR 1882[30] provide a platform for UN and certain civil society actors to engage with NSEs and states in order to implement a "listing" mechanism aimed at halting six

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Conventions" in international armed conflicts; however, the statute does not make the same actions a war crime in non-international armed conflicts. Rome Statute of the International Criminal Court (1998), Art. 8(2)(b)(xxv).

[26] See, for example, S/RES/1923 (2010), para. 22 ("*Reaffirms* the obligation of all parties to implement fully the rules and principles of international humanitarian law, particularly those regarding the protection of humanitarian personnel, and furthermore requests all the parties involved to provide humanitarian personnel with immediate, free and unimpeded access to all persons in need of assistance, in accordance with applicable international law"); S/RES/1889 (2009), para. 12 ("*Calls upon* all parties to armed conflicts to respect the civilian and humanitarian character of refugee camps and settlements, and ensure the protection of all civilians inhabiting such camps, in particular women and girls, from all forms of violence, including rape and other sexual violence, and to ensure full, unimpeded and secure humanitarian access to them"); S/RES/1674 (2006), para. 11 ("*Calls upon* all parties concerned to ensure that all peace processes, peace agreements and post-conflict recovery and reconstruction planning (…) include specific measures for the protection of civilians including (…) the facilitation of the provision of humanitarian assistance").

[27] S/RES/1894 (2009), para. 14.

[28] See, for example, S/RES/1892 (2009), para. 14 ("*Condemns* any attack against personnel or facilities from [the mission] and demands that no acts of intimidation or violence be directed against the United Nations and associated personnel or facilities or other actors engaged in humanitarian, development or peacekeeping work"); S/RES/1906 (2009), preamble ("*[C]ondemning* all attacks against United Nations peacekeepers and humanitarian personnel, regardless of their perpetrators, and *emphasizing* that those responsible for such attacks must be brought to justice").

[29] S/RES/1612 (2005).

"grave" violations against children in armed conflict. One of these six violations is denial of humanitarian access for children. The Security Council has requested that the Secretary-General report on parties to armed conflict that engage in a pattern of killing or maiming of children, raping or otherwise sexually violating children, or recruiting or using child soldiers. Such parties are listed in an annex to a Secretary-General's report, and that annex provides information on all six grave violations, including the denial of humanitarian access for children in contravention of international law.

UNSCRs 1612 and 1882 call upon listed entities to halt violations. The Special Representative of the Secretary-General on Children in Armed Conflict is authorized to monitor and report on listed parties, and to assist parties in preparing and implementing concrete, time-bound "action plans" to halt violations. In August 2010, the Special Representative emphasized that it was her "long-held position (…) that the international community must seek to engage all parties to conflict in dialogue for the purpose of eliciting concrete child protection commitments and to ensure that parties prepare and implement action plans to both prevent and address grave violations for which they have been cited."[31]

3. UN Security Council Resolutions regarding Sexual Violence and Associated Mechanisms

In recent years, the Security Council has increasingly spotlighted the importance of halting sexual violence against men, women, and children in armed conflict, not only when it is committed by a state's armed forces, but also by any other party to an armed conflict. For example, in UNSCR 1888 the Security Council requested that the "[UN] Secretary-General appoint a Special Representative (…) to engage in advocacy efforts, inter alia (…) with all parties to armed conflict (…) in order to address, at both headquarters and country level, sexual violence in armed conflict."[32] In UNSCR 1960, the Security Council encouraged "the Secretary-General to include in his annual reports (…) detailed information on parties to armed conflict that are credibly suspected of committing or being responsible for acts of rape or other forms of sexual violence, and to list in an annex to these annual reports the parties that are credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda."[33] At the same time, the Security Council called upon "parties to armed conflict to make and implement specific and time-bound commitments to combat sexual violence," and requested that the Secretary-General "track and monitor implementation of these commitments by parties to armed conflict on the Security Council's agenda."[34]

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[30] S/RES/1882 (2009).

[31] UN Doc. A/65/219, para. 41, p. 11 (2010).

[32] S/RES/1888 (2009), para. 4.

[33] S/RES/1960 (2010), para. 3.

[34] *Id.*, paras. 5 and 6.

4. UN Secretary-General's Reports on Protection of Civilians

In a 2009 report, the UN Secretary-General listed "[e]nhancing compliance by non-State armed groups" as one of the five key challenges to protection of civilians. The Secretary-General explained that, "In order to spare civilians the effects of hostilities, obtain access to those in need and ensure that aid workers can operate safely, humanitarian actors must have consistent and sustained dialogue with all parties to conflict, State and non-State."[35]

In language that seems aimed directly at domestic counterterrorism laws criminalizing engagement with certain NSEs, in his 2009 report the Secretary-General stressed that, "At the absolute minimum, it is critical that Member States support, or at least do not impede, efforts by humanitarian organizations to engage armed groups in order to seek improved protection for civilians — even those groups that are proscribed in some national legislation."[36] In 2010, the Secretary-General more fully articulated his position:

> I am encouraged that the ongoing discussions on this issue during the Security Council's biannual open debates on the protection of civilians reveals an increasing appreciation by Member States of the importance of engagement for humanitarian purposes. This is yet to translate, however, into broad acceptance of such engagement or, moreover, into a willingness to refrain from adopting measures that impede or, in some cases, criminalize engagement with non-State armed groups.[37]

The Secretary-General went on to identify examples of situations of concern regarding the criminalization of humanitarian engagement:

> [I]n Somalia concerns exist that some donor States, particularly those that have designated Al-Shabaab as a terrorist organization, have introduced conditions into their funding agreements with humanitarian organizations that impose limits on operations in Al-Shabaab-controlled areas. In Gaza, the humanitarian funding policies of some donor States have sought to limit contact with Hamas by the humanitarian organizations they fund, even though Hamas exercises effective control over Gaza and is thus a key interlocutor in ensuring that aid reaches those who need it. Humanitarian agencies also voiced concerns over the possible humanitarian impact of domestic legislation, such as that in the United States, which criminalizes various forms of material support to prohibited groups.[38]

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[35] S/2009/277, para. 40 (and further explaining that, "while engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts." (*id.*)).

[36] S/2009/277, para. 45.

[37] S/2010/579, para. 55.

[38] *Id*.

These statements demonstrate the Secretary-General's awareness of the potential effects efforts to criminalize humanitarian engagement could have on the delivery of humanitarian aid to civilians in need.

In the same vein, the Emergency Relief Coordinator/Under-Secretary-General for Humanitarian Affairs raised concerns about "the growing body of national legislation and policies relating to humanitarian funding which limit humanitarian engagement with non-State armed groups that have been designated as terrorist organizations," mentioning the U.S. material-support statute in particular.[39] After noting that "[h]umanitarian actors face potential criminal liability and prosecution for engaging with designated terrorist organizations in the course of, for example, securing the release of child soldiers or for simply delivering aid to civilian populations in an area controlled by such an organization," the ERC concluded that "[m]easures of this sort can take us further, rather than nearer, to our goal of protecting civilians."[40]

5. Kampala Convention

In 2009, over two dozen African states signed the Kampala Convention,[41] which aims to protect Internally Displaced Persons (IDPs). While the Convention is yet to go into effect (it requires 15 states to become a party before it is operational, and only three have done so to date), the drafting and signing of the Convention lend further credence to the notion that states increasingly realize that NSEs are important actors in ensuring humanitarian assistance. The Convention, which will become binding on contracting states once it goes into effect, implicitly recognizes both the role of NSEs in ensuring humanitarian access and the need for humanitarian organizations to operate in areas under NSEs' influence: "Members of armed groups shall be prohibited from: (...) (g) Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons[; and] (h) Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials (...)."[42]

6. UN Practice regarding Human Rights Obligations of NSEs

The extent to and practical modes by which international human rights law applies alongside IHL during armed conflict remains contested, as does the extent to which IHRL obligations apply extraterritorially. Nonetheless, recently UN bodies such as the Security Council and certain Special Rapporteurs have evinced a tendency to call upon NSEs—and not just states—to

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[39] Valerie Amos, "Statement by Ms. Valerie Amos, Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs," Security Council Open Debate on the Protection of Civilians in Armed Conflict, November 22, 2010. See also UN doc. S/PV.6427.

[40] *Id.*

[41] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009).

[42] *Id.*, Art. 7(5)(g-h).

ensure that a population's basic rights are protected and fulfilled.[43] For example, the Security Council has "*demand*[*ed*] that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law, as well as to implement all relevant decisions of the Security Council and in this regard, *urge[d]* them to take all required measures to respect and protect the civilian population and meet its basic needs."[44]

V. SECOND TRAJECTORY: COUNTER-TERRORISM LAWS, REGULATIONS, AND POLICIES RESTRICTING ENGAGEMENT WITH NSES IN ARMED CONFLICT

This section outlines counter-terrorism regulations that may affect humanitarian engagement with NSEs. After noting the renewed attention to this area of law and policy brought about by the *Holder v. HLP* decision, the section identifies two Security Council counter-terrorism regimes, discussing what those regimes each regulate, as well as responses to those resolutions' purported implementation. Next, the section examines domestic counter-terrorism laws criminalizing or otherwise regulating certain forms of engagement with listed NSEs, looking first at the United States, and then at the United Kingdom, Canada, and Australia.

A. Background

Despite indications that states and international institutions increasingly recognize the importance of engaging with NSEs to promote civilian protection, a countervailing trajectory is also apparent. That trajectory suggests that states will strictly limit individuals and organizations from "supporting" terrorism, regardless of whether such "support" is facilitated in compliance with humanitarian principles long recognized in international law.

While the *Holder v. HLP* decision represents an important recent instance of a judicial body upholding counterterrorism regulations with significant implications for humanitarian assistance, the material-support statute underlying the case is not the only one of that kind. Nor are such restrictions limited to criminal laws alone. Nonetheless, due to the duration and complexity of the litigation involved in *Holder v. HLP*, it provides a rare glimpse into the debate over restrictions on speech and behavior when listed NSEs are involved: the vexing balance between civil liberties, human rights, and national security.

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[43] S/RES/1417 (2002), para. 5: "call[ed] on the de facto authorities in [the Ituri region and in South Kivu] to ensure the protection of civilians and the rule of law;" S//RES/1564 (2004), preamble: "*stressing* that the Sudanese rebel groups, particularly the Justice and Equality Movement and the Sudanese Liberation Army/Movement, must also take all necessary steps to respect international humanitarian law and human rights law;" Commission on Human Rights, Situation of Human Rights in the Sudan, Report of the Special Rapporteur, Gerhart Baum (E/CN.4/2002/46), para. 91: "The Special Rapporteur also urged the SPLM to actively take responsibility to meet the needs of the people living in areas under its control, including in terms of health and education, particularly where peace has been established."

[44] S/RES/1894 (2009), para. 1. See generally Aristotle Constantinides, "Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council," *Human Rights and International Legal Discourse,* Vol. 4, No. 1, pp. 89-110 (2010).

Although the broad range of agencies and individuals potentially affected by the U.S. material-support law must pay attention to *Holder v. HLP*, the ultimate significance of Supreme Court's decision for humanitarian organizations may be to cast focused attention on similar laws and policies in other countries and jurisdictions. Indeed, outside the domestic U.S. context, a plethora of international and domestic counterterrorism instruments, regulations, and mechanisms also have the potential to significantly shape—and restrict—humanitarian engagement.

B. International Laws and Policies

Various terrorist acts have been prohibited through a series of international conventions and treaties for decades. Yet only since 1999 have UN member states been required to take certain domestic legal actions against individuals listed by the Security Council. At the international level, two sets of counterterrorism-related Security Council resolutions are particularly significant for humanitarian organizations. Determining the extent to which a particular state uses these resolutions to supplement or modify existing domestic counterterrorism laws would require an individualized analysis. In any event, under the UN Charter member states must implement both sets of resolutions.

1. Resolution 1267 (1999) *et seq*. and Resolution 1373 (2001) *et seq*.

With Resolution 1267 (1999), acting under Chapter VII the Security Council created a mechanism to combat terrorism through a sanctions regime targeted at members of the Taliban and, later, of al-Qaeda.[45] Resolution 1267 and its progeny[46] require all UN member states to, among other things, freeze the funds and other financial assets of the individuals and entities designated on the Consolidated List. In addition, under this collection of resolutions member states must prevent the entry into or transit through their territories of individuals designated on the Consolidated List. The 1267 Committee oversees the implementation of the sanctions, considers names submitted for listing and de-listing, and considers exemptions to sanctions measures. The 1267 regime does not provide a humanitarian exemption that is applicable in all circumstances, but it does provide a basis on which a listed entity may apply for a limited form of humanitarian exemption. As of January 2011, the Consolidated List included 393 individuals and 92 entities and other groups associated with al-Qaeda.[47]

After the September 11, 2001 attacks in the US, the Security Council enacted another counter-terrorism regime under its Chapter VII powers. Resolution 1373—which is not aimed at a specific group, but rather casts a much wider net by providing only a baseline from which states may expand their counterterrorism laws—requires member states to prevent and suppress the financing of terrorist acts. For instance, the resolution requires states to:

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[45] S/RES/1267 (1999), *et seq*.

[46] S/RES/1333 (2000); S/RES/1390 (2002); S/RES/1455 (2002); S/RES/1526 (2004); S/RES/1617 (2005); S/RES/1735 (2006); S/RES/1822 (2008); and S/RES/1822 (2009).

[47] See http://www.un.org/sc/committees/1267/consolist.shtml

> [p]rohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.[48]

At the same time, UNSCR 1373 also requires member states to "[*r*]*efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts*, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists."[49] Resolution 1373 established the Counter-Terrorism Committee (CTC) to monitor implementation and to provide technical assistance to member states. Later, the Security Council established the Counter-Terrorism Committee Executive Directorate through Resolution 1535 (2004).

2. Responses to Implementation

Resolution 1267 and Resolution 1373 have been sharply criticized. The substantial focus of the criticism has been the alleged denial of due process pertaining to the mechanisms for listing and de-listing. Legal actions challenging aspects of either resolution's implementation at the domestic level have appeared in a range of venues,[50] including the courts of the European Community,[51] the Federal Court of Canada,[52] the Turkish Council of State,[53] the UK Supreme Court,[54] Pakistani courts,[55] U.S. Federal District Courts,[56] and the Swiss Federal Tribunal,[57] as well as the UN's Human Rights Committee.[58]

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[48] S/RES/1373 (2001), para. 1(d).

[49] *Id.*, para. 2(a) (emphasis added).

[50] See generally Antonios Tzanakopoulos, "United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in Abdelrazik v. Canada," 8 *Journal of International Criminal Justice* No. 1, 249 (2010); Yvonne Terlingen, "The United States and the UN's Targeted Sanctions of Suspected Terrorists: What Role for Human Rights?," *Ethics & International Affairs*, 24, No. 2 (2010).

[51] Joined C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat Foundation v. Council of the European Union and Commission of the European Communities [2008] ECR I-6351; T-318/01 Omar Mohammed Othman v. Council of the European Union and Commission of the European Communities [2009] ECR II-0000 (June 11, 2009).

[52] Abousfian Abdelrazik v. Minister of Foreign Affairs and Attorney General of Canada, 2009 FC 580, June 4, 2009.

[53] Al-Qadi v. The State, first instance judgment by the Tenth Division of the Council of State mentioned in UN Doc. S/2006/750 at 49 , para. 11; UN Doc. S/2007/132 at pp. 39-40, para. 8; and UN Doc. S/2007/677 at 41, para. 6; Kadi v. The State (TK 2007) ILDC 311 (reversing decision of the Tenth Division).

[54] HM Treasury v. Mohammed Jabar Ahmed and others (FC); HM Treasury v. Mohammed al-Ghabra (FC); R (on the application of Hani El Sayed Sabaei Youssef) v. HM Treasury [2010] UKSC 2.

[55] UN Doc. S/2009/24 ("The action brought by the Al Rashid Trust (QE.A.5.01) remains pending in the Supreme Court of Pakistan on the Government's appeal from a 2003 adverse decision. The challenge brought by Al-

The UN Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights has stated that Resolution 1373's "continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. The implementation of resolution 1373 (2001) goes beyond the powers conferred on the [Security] Council and continues to pose risks to the protection of a number of international human rights standards."[59] He also noted during a press conference that there was a feeling within the humanitarian field that Resolution 1267 had a "chilling effect" on humanitarian aid, due to the risk that charity aid would be identified as indirectly funding terrorist organizations.[60]

In the UN Counter-Terrorism Strategy, which was adopted by the General Assembly in 2006, member states resolved to "reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law."[61] Similar language appears in the Annex to Resolution 1456 (2003)[62] and the preamble to Resolution 1535 (2004),[63] as well as in the Council of Europe's "Guidelines on human rights and the fight against terrorism."[64] (For their part,

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Akhtar Trust International (QE.A.121.05) remains pending before a lower court.") (internal citations omitted).

[56] E.g., Al-Aqeel v. Paulson, 568 F. Supp. 2d 64, 72 (D.D.C. 2008).

[57] Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs (CH 2007), Case No. 1A.48/2007 (Swiss Federal Tribunal), decision of April 22, 2008. See also Nada v. Switzerland (application no. 10593/08), October 20, 2010 (Chamber of the European Court of Human Rights relinquishing jurisdiction in favor of the Grand Chamber).

[58] UN Human Rights Committee, "Views," Communication no. 1472/2006, adopted at its 94th Session, CCPR/C/94/D/1472/2006, October 2008.

[59] Sixth Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN General Assembly, A/65/258, August 6, 2010), para. 39.

[60] UN Department of Public Information, "Press Conference by Special Rapporteur on Protecting Human Rights While Countering Terrorism," October 26, 2010, available at http://www.un.org/News/briefings/docs/2010/101026_Scheinin.doc.htm

[61] Counter-Terrorism Strategy, 2006, art. IV(2). See also UN General Assembly Resolution 64/297, "The United Nations Global Counter-Terrorism Strategy," UN Doc. A/RES/64/297, October 13, 2010 ("*Recognizing* that international cooperation and any measures undertaken by Member States to prevent and combat terrorism must fully comply with their obligations under international law, including the Charter of the United Nations, in particular the purposes and principles thereof, and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law").

[62] S/RES/1456 (2004), Annex, para. 6 (the Security Council calls for the following steps to be taken: "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").

[63] S/RES/1535 (2004), preamble ("*Reminding* States that they must ensure that any measures 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").

[64] Council of Europe, "Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies," 2002, article XVI ("Respect for peremptory norms of international law and for international humanitarian law": "In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of

European Union institutions have enacted regulations against making funds, financial assets, and other materials available to listed individuals or entities.[65])

Legal commentators have recently suggested that as a matter of policy, "In the exercise of their discretion in the choice of methods of implementation, [member states implementing Security Council resolutions] should ensure conformity with human rights, international humanitarian law and other relevant bodies of international law," and that, "Where Security Council resolutions are unclear, there should be a presumption that the Security Council does not intend that actions taken pursuant to its resolutions should violate international human rights and international humanitarian law."[66]

C. Domestic Laws, Regulations, and Policies of Prominent Donor Countries

At the domestic level, government actors have amassed a variety of legal and policy tools to fight terrorism, and many of these tools have the capacity to affect humanitarian assistance. It is critical to understand that counterterrorism legislation affecting NGOs and other agencies is not an outcome of 9/11 alone. In preceding years, a number of states enacted counterterrorism laws with significant effects on human rights and humanitarian groups. Nonetheless, post-9/11, as major humanitarian donor states began to augment counterterrorism legislation, these domestic regulations interacted with international restrictions to create a significant impact on humanitarian action. The following examples—which reflect a range of substantive crimes, standards of intentionality, and jurisdictional scopes—sketch the wide-ranging and broadly written laws and regulations that may touch upon humanitarian engagement. The examples are not meant to be comprehensive with regard to the legal situation in each state, but rather indicative of the steps taken by some prominent donor countries.

1. United States

a. Material Support Statute

In its 6-3 decision in the *Holder v. HLP* case, on June 21, 2010 the Supreme Court upheld the constitutionality of a federal statute that makes it a crime to knowingly provide "material support" to a designated foreign terrorist organization (FTO). As defined in the statute, the term "material support" is broad, referring to, among other things, "property," "services," "training," "expert advice or assistance," and "personnel." By ruling constitutional Congress's attempt to make even non-violent advocacy in coordination with or directed by designated terrorist groups a crime punishable by up to 15 years in prison, this decision has the capacity to significantly affect humanitarian, research, policy, and advocacy organizations around the world.

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international humanitarian law, where applicable").

[65] Council Regulation (EC) No 2580/2001, December 27, 2001, *et seq*. See also Council Decision 2010/386/CFSP, July 12, 2010, for the most recent list of individuals and entities subject to Council Common Position 2001/931/CFSP, December 27, 2001.

[66] Nico Schrijver and Larissa van den Herik, "Leiden Policy Recommendations on Count-terrorism and International Law," April 1, 2010, paras. 83 and 84, available at http://bit.ly/LeidenCT.

The statute at issue in *Holder v. HLP* is 18 U.S.C. 2339(B), which, in relevant part, provides:

> (a) Prohibited Activities.—
>
> (1) Unlawful conduct.— Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (…), or that the organization has engaged or engages in terrorism (…).
>
> (…)
>
> (d) Extraterritorial Jurisdiction.—
>
> (1) In general.— There is jurisdiction over an offense under subsection (a) if—
>
> (A) an offender is a national of the United States (…) or an alien lawfully admitted for permanent residence in the United States (…);
>
> (B) an offender is a stateless person whose habitual residence is in the United States;
>
> (C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;
>
> (D) the offense occurs in whole or in part within the United States;
>
> (E) the offense occurs in or affects interstate or foreign commerce; or
>
> (F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).
>
> (2) Extraterritorial jurisdiction.— There is extraterritorial Federal jurisdiction over an offense under this section.

Chief Justice Roberts, writing on behalf of the majority, ruled that the "material support" law neither violates the First Amendment nor is unconstitutionally vague. A majority in the Supreme Court ruled that the material support law was constitutional as applied: each of these activities under review fell within the statute's prohibitions and could therefore be punishable by fines and up to 15 years in prison.

The Court held that while some FTOs engage in political and humanitarian activities, such organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." The Court decided the case solely on a constitutional analysis, effectively concluding that Congress enacted a specific enough law regarding what constitutes "material support," and that fighting terrorism was an important enough matter to warrant criminal sanction even for forms of speech that would otherwise appear to fall under First Amendment protection.

According to the majority, FTOs do not maintain organizational firewalls between social, political, and terrorist operations, nor do they maintain financial firewalls between funds raised

for humanitarian activities and those used to carry out terrorist attacks. The majority reasoned that training groups who use humanitarian and international law to resolve disputes would provide such groups with techniques that could be used as part of a broader strategy to promote terrorism. Similarly, the majority reasoned that human rights training to designated terrorists could potentially free up resources for terrorist acts. Beyond these three specific activities (teaching members to use international law to resolve disputes peacefully, teaching members to petition the UN and other representative bodies, and engaging in political advocacy on behalf of members), *the majority declined to say what other humanitarian activities would violate the material support law*. Holding that "perfect clarity" was not required of regulations that restrict expressive activity, the majority found that the statute gave a "person of ordinary intelligence" sufficient fair notice of prohibited activities under the statute.

The majority attempted to assure the public that the material support law will not apply to "independent advocacy," which was defined as advocacy not directed by or coordinated with FTOs. Yet in doing so, the majority ambiguously limited free speech and association and declined to distinguish between material support for FTOs' violent activities and nonviolent activities. For example, the Supreme Court gives little guidance about teaching that imparts a "specific skill," which is prohibited, as opposed to "general knowledge," which is not. Similarly, *Holder v. HLP* does not comprehensively define what constitutes "specialized knowledge" under the statutory definition of "expert advice."

The intent required under the material support law is that a person "knowingly" provides material support. Under U.S. law, this means that a person knew (or at least had the awareness of a high likelihood) that the organization was listed or that the organization had committed acts of terrorism.[67] An appeal is currently under review in federal court, following the criminal conviction of leaders of a U.S. organization for, among other things, allegedly providing support to a non-designated organization that was purportedly controlled by a designated organization. One issue on appeal is whether an individual may be convicted without sufficient proof that he or she *knowingly* provided aid to a designated group, and what the standard for such knowledge is.[68]

The material-support statute provides a basis for U.S. prosecutors to exercise jurisdiction over any person—regardless of whether he or she is a U.S. national—who is brought into or found in the U.S. for acts committed entirely outside the US, so long as those acts constitute one of the prohibited activities (e.g., "training," "services," "personnel," or "expert advice and assistance"). Under U.S. law, "brought into" the country can mean detained and forcibly transferred to the U.S. by U.S. agents without any legal process in the country of origin.

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[67] The statute does not expressly indicate whether actual or constructive knowledge is required.

[68] See Charity and Security Network, "Brief Argues Material Support Conviction Should Require Knowledge of Terror Conviction," October 26, 2010, available at http://www.charityandsecurity.org/news/Brief_Argues_Material_Support_Conviction_Should_Require_Knowledge_of_Terror_Connection

Prosecutors need not prove that the person intended to further a proscribed group's terrorist activities, but rather that the person knew that the group was listed or that the group had committed acts of terrorism. The material-support law criminalizes not only the direct commission of material support, but also conspiracy to provide material support as well as aiding or abetting someone who provides material support.

There is an exemption for medicine and religious materials under 2339B.[69] This carve-out is significantly narrower than that included in an earlier definition of "material support" that exempted "humanitarian assistance to persons not directly involved in such violations" from the definition of material support.[70] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which narrowed the exemption in the definition, was accompanied by a number of Congressional findings, though none addressed explicitly the basis on which the carve-out for humanitarian assistance was narrowed.[71] The Supreme Court cited to congressional findings that FTOs "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[72] The somewhat illogical operational reality of this limited exemption is that "it [would be] legal to give someone a pill, but illegal to provide clean water for swallowing it."[73]

The statute also provides a basis on which humanitarian organizations may apply to be exempted from prosecution: "No person may be prosecuted under this section in connection with the term 'personnel', 'training', or 'expert advice or assistance' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General."[74] However, the statute states that the "Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and

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[69] 18 U.S.C. § 2339A(b)(1). Medicine is defined as "limited to the medicine itself, and does not include the vast array of medical supplies." Religious materials are defined as "those religious articles typically used during rituals or teachings of a particular faith, denomination or sect," and does not include "anything that could be used to cause physical injury to any person." 5 H.Rept. 104-383, sec 103 (1995).

[70] 110 Stat. 1214 title III, subtitle B sec. 323 (April 24, 1996).

[71] *Id*.

[72] 130 S. Ct. 2705, 2712 (citing Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose)). See also 5 H. Rept. 104-383, sec 102 (1995) stating "[t]his section [2339B] recognizes the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups that draw significant funding from the main organization's treasury, helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities."

[73] Charity and Security Network, "Material Support and the Need for a Sensible Humanitarian Exemption," July 7, 2010 available at: http://www.charityandsecurity.org/analysis/PATRIOT_Act_Material_Support_Humanitarian_Exemption

[74] 18 U.S.C. § 2339B(j).

Nationality Act)."[75] While theoretically available, such an exemption may prove elusive to obtain or practically infeasible to implement.

b. International Emergency Economic Powers Act (IEEPA) and Executive Order 13224

Another U.S. counterterrorism law that may affect humanitarian assistance is the International Emergency Economic Powers Act (IEEPA) and Executive Order 13224, which the President issued pursuant to IEEPA. Executive Order 13224 allows the President to list "specially designated global terrorists" (SDGTs). Upon being listed, the designated group or individual will have its U.S. assets frozen, and it will become a crime for anyone to enter into a financial transaction with that group or individual. EO 13224 allows the Secretary of the Treasury to add others to the SDGT list—currently, the list includes hundreds of groups and individuals—after finding that the group or individual provided services of any kind to, or was "otherwise associated" with, the designated group or individual.[76] The Office of Foreign Assets Control (OFAC) administers the listing process.[77]

In the U.S., while the Department of Justice prosecutes federal crimes, the Treasury Department is authorized to enforce civil sanctions and emergency powers-based measures aimed at countering terrorism. In a question-and-answer publication, the U.S. Treasury stated that, "It is the policy of the Treasury Department not to designate or take civil enforcement action against donors where the donor has no knowledge or reason to know that the charity that is subsequently designated was engaged in supporting terrorist activity or a terrorist group." It bears emphasis that the footnote accompanying the Treasury statement indicates that, "This statement of policy is not, nor is it intended to be, a waiver of civil or criminal liability or grant of immunity and does not create any rights or obligations whatsoever."[78]

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[75] *Id.*

[76] For a discussion of the potential violation of the U.S.'s international obligations entailed in IEEPA, see Jennifer R. White, "Note: IEEPA's Override Authority: Potential for a Violation of the Geneva Conventions' Right to Access for Humanitarian Organizations," 104 *Michigan Law Review* 2019 (August 2006).

[77] According to its website, the "Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States. OFAC acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under US jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments." See http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx

[78] U.S. Department of the Treasury: Protecting Charitable Giving Frequently Asked Questions, June 4, 2010: http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/Treasury%20Charity%20FAQs%206-4-2010%20FINAL.pdf

c. Terror Exclusion Lists (Immigration and Removal)

U.S. counterterrorism laws also affect humanitarian organizations' personnel who may attempt to visit, reside in, or immigrate into the U.S. Under the terror exclusion lists, an alien may be denied admission or deported for, among other things, "engage[ing] in terrorist activity." To "engage in terrorist activity," an alien must:

> commit an act that the individual knows, or reasonably should know, provides material support to (…) (2) an individual or organization that the individual knows or should reasonably know has committed or plans to commit a terrorist activity, (3) a designated terrorist organization or member of such an organization, or (4) a non-designated terrorist organization or a member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.[79]

Accordingly, non-U.S. humanitarian professionals who engage with proscribed NSEs in a prohibited manner may be denied admission to, or deported from, the U.S.

d. USAID Partner Vetting System

In August 2009, the United States Agency for International Development was allowed to start implementing a "Partner Vetting System" (PVS). The PVS collects information on certain employees of non-governmental organizations (NGOs) who apply for various forms of USAID funding, as well as of NGOs applying to become USAID Private Voluntary Organizations, in order to vet links to terrorist organizations. In addition to certain USAID personnel, individuals in law enforcement, the intelligence community, and the Department of State have access to the information. InterAction has criticized the database because the "PVS would create the perception that NGOs are serving as intelligence sources for the U.S. government" and because "USAID has not established a clear definition of individuals to be vetted," among other reasons.[80]

2. United Kingdom

The United Kingdom has implemented a range of counterterrorism laws that may affect humanitarian engagement. As in the U.S., the UK government administers a counterterrorism listing mechanism. However, the UK listing mechanism focuses on prohibiting listed organizations from operating *within* the UK.[81] Organizations proscribed by the UK government

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[79] INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B)(iv)). See generally Michael John Garcia and Ruth Ellen Wasem, "Immigration: Terrorist Grounds for Exclusion and Removal of Aliens," Congressional Research Service, January 12, 2010, available at http://www.fas.org/sgp/crs/homesec/RL32564.pdf

[80] InterAction, "Partner Vetting System," October 2009, available at http://www.interaction.org/partner-vetting-system

[81] United Kingdom Home Office, "Proscribed terrorist groups," May 7, 2010, available at http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/

include the Abu Sayyaf Group, Al Shabaab, Hamas Izz al-Din al-Qassem Brigades, and Jeemah Islamiyah.

An individual found guilty of supporting one of these proscribed organizations in the UK may face up to ten years' imprisonment; the Act defines "support" broadly to include "invit[ing] support" for a proscribed organization beyond providing money or other property.[82] In addition, "support" may include "addressing" a meeting where the purpose of the address is "to encourage support for [the organization] or to further [the organization's] activities."[83]

In January 2010, the UK Supreme Court ruled that executive orders implementing Security Council Resolution 1267—allowing the government to freeze suspected terrorists' assets—were unlawful.[84] Lord Hope of Craighead (with whom Lord Walker and Lady Hale agreed) described the powers contained in two asset-freezing orders as "paralysing" and "draconian," rendering designated persons "effectively prisoners of the state."[85] Justices found that such powers fell outside the legal authority of executive orders and would require, among other things, Parliament's approval. (Currently, Parliament is considering whether to pass a similar law.) Lord Hope held that the introduction of an Ombudsperson (through Security Council Resolution 1904 (2009)) to review petitions by individuals listed under the Security Council Resolution 1267's regime was "welcomed" but was ultimately insufficient to allay the court's concerns.[86]

3. Canada

Canadian law also has the capacity to affect humanitarian engagement. The federal government maintains a list of individuals and groups identified as being associated with terrorism.[87] Canadian law makes it an offence to knowingly participate in or contribute to, directly or indirectly, any activities of a terrorist group. Unlike in some other jurisdictions, however, in Canada such participation may be considered an offence only if its purpose is to enhance the ability of the terrorist group to facilitate terrorist activity.[88] Currently, the list includes NSEs operating in areas where there is also humanitarian engagement, such as Abu Sayyaf Group, Hamas, Fuerzas Armadas Revolucionarias de Colombia (FARC), and the Kurdistan Workers Party (PKK).[89]

In addition, financial regulations require charities transferring money, including to conflict areas, to comply with due diligence and compliance vetting procedures. Such vetting

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[82] Terrorism Act, 2000, s.12(1).

[83] *Id.*, s.12(3).

[84] *A v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534 (SC).

[85] *Id.*, at [4], [38] (Lord Hope of Craighead DPSC).

[86] *Id.*, at [78] (Lord Hope of Craighead DPSC); [239] (Lord Mance JSC).

[87] Criminal Code, R.S.C. 1985, c. C-46 (Can.), sections 83.03 to 83.07.

[88] *Id.*, sections 83.18 to 83.19.

[89] Public Safety Canada, "Currently Listed Entities," viewed January 12, 2011, available at http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx

procedures reportedly extend not only to a recipient organization, but also to its directors and officers, to financial institutions, and to information about the location in which the recipient organization carries out its operations.[90]

In 2009, the Federal Court of Canada held that the government violated the right of a dual Canadian-Sudanese national to enter Canada.[91] The individual was subject to the 1267 sanctions regime, including a travel ban. The government argued that the 1267 Committee, and not the state of Canada as such, impeded the individual's return. The judge decided that the individual was entitled to an effective remedy for the breach of Canadian law, and required the government to take the steps necessary for him to return to Canada. In doing so, the judge stated that the "1267 Committee regime is (…) a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime."[92] The judge retained jurisdiction over the case until the individual was presented in court.[93]

4. Australia

Under Australian law, a group may be designated a "terrorist organisation" by a court following a prosecution or upon being listed by the federal government.[94] It is unlawful to intentionally provide training to a terrorist organization.[95] The law also prohibits intentionally making funds available, or providing other support or resources, to help such an organization engage in terrorist activity.[96] Australian law further prohibits intentionally associating with a person who is a member, or who promotes or directs the activities, of a terrorist organization, where such an association provides support helping the organization to continue to exist. However, an exemption exists if the "association is only for the purpose of providing aid of a humanitarian nature."[97] As of November 2010, the list of terrorist organizations includes groups operating in areas where humanitarian engagement takes place, including the Abu Sayyaf Group, Al-Shabaab, the Kurdistan Workers Party (PKK), and Lashkar-e-Tayyiba.

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[90] See generally Terrance S. Carter and Sean S. Carter, "New Anti-Terrorist Financial Law Has Direct Impact for Charities," *Anti-Terrorism and Charity Law Alert No. 12,* January 24, 2007.

[91] Abousfian Abdelrazik v. Minister of Foreign Affairs and Attorney General of Canada, 2009 FC 580, June 4, 2009.

[92] *Id.*, para. 53.

[93] See generally Antonios Tzanakopoulos, "United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in *Abdelrazik v. Canada," Journal of International Criminal Justice,* Vol. 8, No. 1, pp. 249-267 (2010).

[94] Australian Government, "Listing of Terrorist Organizations," November 29, 2010, available at http://www.ag.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD

[95] Criminal Code Act 12 of 1995, as amended (taking into account amendments up to Act No. 127 of 2010), section 102.5(1).

[96] *Id.,* sections 102.6 and 102.7.

[97] *Id.,* section 102.8(4)(c).

VI. POTENTIAL CONFLICTS ARISING BETWEEN INTERNATIONAL AND DOMESTIC LAWS

Given the discussion up to this point involving, on the one hand, laws promoting humanitarian access and, on the other, laws prohibiting certain forms of engagement with NSEs, the question arises as to what mechanisms exist to resolve legal or normative conflicts. This section outlines principles and mechanisms aimed at resolving conflicts between international law and domestic law.[98]

A. International Law pertaining to Conflicts arising between a State's International Obligations and Its Domestic Law

According to the Vienna Convention on the Law of Treaties, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[99] Under international law, a state that commits an internationally wrongful act is under an obligation to cease and to provide reparation for those injured.[100] In the case of an internationally wrongful act resulting from the promulgation of a domestic statute, the state may repeal the violative law and cease any prosecutions in order to terminate the wrongful act.[101]

As noted above, under Article 1 of the four Geneva Conventions High Contracting Parties "undertake to respect and to ensure respect for the present Convention *in all circumstances*."[102] The ICRC has "repeatedly stated that the obligation to 'ensure respect' is *not limited to behaviour by parties to a conflict*, but includes the requirement that States do all in their power to ensure that international humanitarian law is respected universally."[103] As also examined above, IHL allows humanitarian organizations to offer their services to parties to armed conflict, whether the conflict is international or non-international in character. States are required to disseminate the Geneva Conventions in their countries, including to their militaries and, where possible, to civilians, so that the principles entailed in the Convention may become known "to the entire population."[104] The ICRC has found that there is a rule of customary international law—applicable in both international and non-international armed conflicts—requiring that "States

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[98] For a recent discussion of norm conflicts at international law, see Marko Milanović, "Norm Conflict in International Law: Whither Human Rights?," 20 *Duke Journal of International & Comparative Law* 69 (2009).

[99] Vienna Convention on the Law of Treaties (1969), Art. 27. While the U.S. is not a party to this treaty, the U.S. "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." U.S. State Department, "Vienna Convention on the Law of Treaties," available at http://www.state.gov/s/l/treaty/faqs/70139.htm

[100] Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2001), Arts. 29 and 30.

[101] *Id.*, Arts. 3, 30, and 32.

[102] Geneva Conventions I-IV (1949), Art. 1 (emphasis added).

[103] ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, "Rule 144 – Practice," available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144 (citation omitted and emphasis added).

[104] Geneva Convention I (1949), Art. 47; Geneva Convention II (1949), Art. 48; Geneva Convention III (1949), Art. 127; Geneva Convention IV (1949), Art. 144.

and parties to the conflict must provide instruction in international humanitarian law to their armed forces."[105] As explained by the ICRC, "[a]rmed opposition groups must respect and ensure respect for international humanitarian law (…), and dissemination is generally seen as an indispensable tool in this respect."[106]

Read together, these provisions and assessments could be seen to indicate that states have a duty, absent a sufficient justification, neither to impede dissemination of IHL to NSEs, nor to impede the offer of services to NSEs by an independent and impartial humanitarian organization. Put another way, by penalizing either dissemination of IHL to NSEs or the offer of services by a humanitarian organization to NSEs, a domestic counterterrorism statute could in principle bring a state into breach of its obligations under IHL, though a case-by-case analysis would be necessary to determine the existence of such a breach.

Assuming that a state may breach its international law obligations under these circumstances, a related question arises regarding whether the *enactment* itself of a domestic counterterrorism statute penalizing either dissemination of IHL to NSEs or the offer of services to NSEs by a humanitarian organization would be sufficient to constitute a violation of the state's duty to respect and to ensure respect of IHL in all circumstances. Alternatively, would the state need to *prosecute* someone under the statute for a violation to occur? Once again, a case-by-case analysis would need to be performed, but a potentially useful analogy could be considered from questions regarding standing or victim status under human rights treaties. Some human rights bodies have held that the existence of a domestic statute criminalizing certain conduct—even without an attendant prosecution—could provide a sufficient "chilling effect" against the protected act in question in order to bring the state into breach of its international obligations.

In short, a state that enacts domestic legislation regulating or prohibiting humanitarian engagement with certain NSEs operating in armed conflict may be violating the Geneva Conventions. Determining the extent, if any, of such a violation would require a detailed case-by-case analysis. It is currently unclear how states interpret domestic regulations and donor restrictions in light of their international legal commitments.

VII. EXPLANATORY FRAMEWORKS: INTERPRETING THE BEHAVIOR OF STATES

In viewing these trajectories side by side, how should one understand the seemingly contradictory behavior of states? HPCR has identified a number of potential explanations, focusing on the motivations of states, but also on how those motivations might affect the behavior and standpoint of the humanitarian community. To the extent that these explanations prove useful for understanding the contradictory trajectories of strengthening access and criminalizing humanitarian engagement over the last decade, the debate will be further affected by the question of the interaction between these counterterrorism laws and policies and state

[105] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK (EDS.), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, VOL. II, ICRC, Cambridge University Press, 2005, p. 501.

[106] *Id.*, p. 505 (internal citation omitted).

obligations under IHL and IHRL. Thus far, there has been little discussion of this question at the global level, and HPCR has found minimal academic and analytical research on the topic. The dilemmas presented below are legally and politically complex, but also present a critical pragmatic challenge to the ways in which those involved in protection of civilians will define and value humanitarian engagement in future conflicts.

Underlying Government Policies	Potential Humanitarian Community Response
Total prohibition of engagement with NSEs	• Compliance with detailed anti-terrorism certifications • Cessation of activity • Cutting off relationships with certain donors • Evasion and concealment of contacts
Mitigation of interactions with NSEs	• Development of community-wide reporting standards • Obfuscation and denial of accountability • Provision of minimal information
Fragmentation of law and policy	• Take advantage of contradictory policies in the short term • Exploit policy ambiguities to maximize access and activities • Breakdown in coherence of the humanitarian community • Decrease in transparency, coordination, and information-sharing between humanitarian organizations
Cooptation into security schemes	• Concede incorporation into security and political approaches: compromising the principle of neutrality • Cessation of activities • Re-prioritize humanitarian principles

A. Total Prohibition

The first possible explanation sees the ultimate goal of the state as ***total prohibition*** of any benefit to, assistance for, or coordination with listed NSEs, *even if* that prohibition risks the loss of humanitarian services to civilian populations or the disbanding of major humanitarian operations in territories controlled by these entities. This understanding sees the state as coherent and strategic in its thinking. The state is making a clear choice to favor security interests over humanitarian principles or humanitarian rationales for engagement with NSEs.

Indeed, in this mode states may even see humanitarian organizations as naïve "soft spots" in counterterrorism efforts, unthinkingly and unknowingly providing succor and political legitimacy to dangerous militant groups. An example of this may be seen in recent U.S. criminal cases (most of them still working through the legal system on appeals), sentencing staff of charity and humanitarian organizations to up to sixty years in prison for providing assistance to groups in the OPT that were not actually listed by any U.S. government authority, but were construed by prosecutors to be providing support for a Hamas hearts-and-minds campaign.[107]

[107] United States v. Mohammad El-Mezain; Ghassan Elashi; Shukri Abu Baker; Mufid Abdulqader;

Should governments take the approach of prohibition of any engagement with listed NSEs or any provision of assistance that risks falling into their hands or emboldening their cause, a possible result is that humanitarian organizations will engage in *evasion and concealment of contacts with NSEs*, risking violation of the law on the assumption that it is unlikely that individuals working for well-regarded humanitarian organizations could actually be prosecuted. In this result, the humanitarian community might decide to simply move forward with its actions, coordinate as required by their professional standards, engage and negotiate with NSEs as they determine necessary for the timely and safe delivery of assistance, and choose to simply take the risk of major negative consequences.

An approach to prohibition short of prosecution may be the imposition of costly donor and regulatory compliance schemes, such as anti-terrorism certifications or requirements to specifically document who did and did not benefit from relief activities. One can imagine a range of responses to such an approach. Some organizations may accept stricter funding conditions, and increase resources to manage and comply with such conditions. Such organizations may decide to provide an unprecedented level of detail in their reporting. Other organizations may accept the risk of continuing their activities and assume a higher potential risk of prosecution. Such organizations may coordinate their activities according to long-recognized humanitarian principles on negotiating access to NSEs and providing relief to civilians in territories under NSEs' control. Yet others may respond to total prohibition by cutting off their ties to certain donors, perhaps moving to non-traditional donors.

For governments, these potential results may produce a very negative outcome, wherein they must continuously "up the ante" in order to affect the behavior of humanitarian groups: facing the difficult political choice to actually prosecute professionals from well-known organizations or enacting even stricter legislation in order to ensure that they are able to change actions on the ground.

B. Mitigation

The second possible explanation for these countervailing regulatory trajectories is that states seek ***mitigation*** of benefits to NSEs. Under this model, states wish to utilize domestic laws and international and donor policies to rein in humanitarian actors' interactions with NSEs, and that they wish to limit the threats that this interaction presents to security by making humanitarian organizations more accountable. This explanation holds that rather than being contradictory, the two trajectories are meant to signal to humanitarians that they will be held responsible, absent taking certain prescribed steps, for their engagement with listed NSEs.

Abdulrahman Odeh; Holy Land Foundation for Relief and Development, also known as HLF, No. 09-10560 (Judgment on appeal from the United States District Court for the Northern District of Texas). See Jason Trahan, "5 decry jail terms in Holy Land case," The Dallas Morning News, May 28, 2009, available at http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-holyland_28met.ART.State.Edition2.50a92b2.html

Here, one might point to UNSCR 1916, which, in providing a humanitarian carve-out to an otherwise extensive sanctions regime, demands that the humanitarian community as a whole report every three months on its efforts to limit and *mitigate* diversion of humanitarian goods to Al-Shabaab and associated individuals.[108]

While a policy of *mitigation* may be rational for individual states, and may indeed serve as part of a coherent approach to making humanitarian organizations more accountable, taken as a whole, it may be virtually impossible for any global humanitarian actor to satisfy the mitigation and accountability standards of various individual donors, states, and multilateral agencies. For humanitarian organizations, satisfying multiple reporting requirements simultaneously could significantly affect operations and necessitate internally re-allocating resources.

In this case, humanitarian organizations may react in a variety of ways. Some, assuming that the risk stemming from non-compliance will be low, may deny accountability and obfuscate the realities of engagement on the ground. Others, recognizing states' desire for increased accountability, may seek out community-wide efforts to devise reporting or due diligence standards. Yet others may chose to provide information of relatively less utility for states, assuming that accountability and mitigation are merely an administrative matter—a box to be checked. In a number of these reactions, minimal information about the scope and type of on-the-ground operational challenges faced by humanitarian organizations is provided to states.

In this sense, the response to overlapping and irreconcilable mitigation efforts may be to provide the least possible information or enough information to mask what is actually happening on the ground in order to avoid paralyzing state measures and continue to meet urgent humanitarian needs. Under this model, because the effort to hold humanitarian organizations accountable is not currently coherent or taking place within a broader debate about the real challenges faced by humanitarian professionals working in complex emergencies, the response from the humanitarian community may be to see accountability as an annoyance to be managed through limited reporting of vague information.

C. Fragmentation

A third explanation—***fragmentation***—suggests a lack of integration of internal policies, with some state organs supporting counterterrorism measures and others promoting protection of civilians. In some ways the opposite of prohibition of engagement with NSEs, fragmentation holds that the seemingly incoherent and confusing nature of these trajectories are just that: incoherent and confusing. The fragmentation model proposes that states lack internal consistency, with counterterrorism and humanitarian competing for normative supremacy. The uncertainty resulting from fragmentation may be international or unintentional, but this model holds that there is no over-arching state policy to be identified.

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[108] See S/RES/1916, paras, 4-5 and 11; see also UN Doc. S/2010/372, "Enclosure: Report of the United Nations Resident and Humanitarian Coordinator for Somalia," July 13, 2010, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20372.pdf

Under this theory, states would be seen as internally divided, and lacking in proper channels of communication within their own government agencies. For example, the Ministries of Defense and Justice may be developing and enforcing counterterrorism laws and policies (intending largely to capture violent or violently minded individuals who actually offer militant support to terrorist groups) with a broad brushstroke, not considering the impact on humanitarianism. Meanwhile, the Ministries of Foreign Affairs and Development Cooperation are developing principles, policies, and statements on protection of civilians through increased access and negotiation with NSEs. In this understanding, it may be the case that the state, writ large, is not fully aware of the functional impact of its counterterrorism laws and policies on international aid and assistance. Indeed, the state may lack a grand strategy for how the two trajectories should be harmonized. Of course, it may be the case that counterterrorism laws and policies reflect states' desire to keep multiple political and security objectives in play, and that this approach to foreign policy may allow the state to keep humanitarian actors in a defensive posture.

Examples of this are many, but perhaps the most striking is the comparison between the organizations listed under UN Security Council Resolution 1612 MRM and the domestic terrorist lists of a number of P-5 states that supported the resolution. As noted above, under the UNSCR 1612 MRM, the Security Council calls upon NSEs in certain conflicts to engage with UN actors to devise and implement time-bound, concrete "action plans" to halt abuses against children. Yet at least some of these NSEs are also listed by the U.S. and other countries in their domestic counterterrorism laws, which *prohibit* certain forms of engagement with these NSEs.

UNSCR 1916 may also evince fragmentation. Under UNSCR 1916, the Humanitarian Coordinator is required to report every three months on certain aspects of relief activities in Somalia in order to ensure continued humanitarian access. Yet, at the same time, the information collected by the Humanitarian Coordinator could in principle be used as incriminating evidence against the individuals supplying humanitarian aid to the NSEs listed in domestic criminal laws.

Fragmentation on the part of states may be mirrored in the lack of a coherent strategy or response to counterterrorism policies within the humanitarian community. To some extent, this can be seen as a structural characteristic of the humanitarian "community," comprised of a diverse array of organization types and approaches to assistance. Indeed, there has been tremendous debate within the humanitarian community in recent years regarding the very definition and scope of humanitarianism. More specifically, however, fragmentation and confusion in government/donor policies and regulations may (intentionally or unintentionally) cause a lack of coherence, strategic communication, and unified decision-making on the part of the humanitarian community. Counterterrorism policies may result in some organizations perceiving a license or "immunity" to engage with NSEs, while others feel very vulnerable to state scrutiny or even prosecution. Some organizations may decide to cooperate closely with government policies, recognizing the risk to traditional humanitarian principles, while others may draw stricter lines around their "humanitarian" activities, and may decide to limit their relationship with more restrictive donors. Amidst these varying approaches, fragmentation on

the part of states may seem to create a disincentive for transparency and information-sharing between humanitarian organizations, as they each must weigh costs and benefits in isolation.

As contradictory policies become entrenched and are better understood over time, humanitarian organizations may see themselves as having little choice but to manipulate them, locating the softest spot in regulation to exploit, or reflecting the confusion in government policies by developing incoherent approaches that satisfy the regulations of individual agencies, donors, or ministries but that together do not represent a thoughtful approach to humanitarianism. In this sense, long-term fragmentation on the part of states may result in *disintegration* and *deprofessionalization* of the humanitarian community. Humanitarian standards and operational methods may backslide as individual organizations find that their interests are better served by avoiding coordination, transparency, and communication with other organizations or donors, and by limiting the extent to which they make information about their methods public. To the extent this occurs, two decades of donor-supported and encouraged professionalization and increased standardization of the humanitarian field may lapse into more ad hoc, insular, and poorly coordinated aid. Paradoxically, such a response may also mean that humanitarian organizations are less open to sharing critical information and reflections that could be highly useful for security-related decision-making.

D. Cooptation

The final explanation for the behavior of states is that rather than seeking to engage in a "course correction" by making humanitarian organizations more accountable, or rather than wishing to limit what they see as the excesses of humanitarian willingness to bend to the wishes of armed actors, states instead see the two countervailing trajectories as a basis for ***cooptation*** of humanitarianism into the security and political objectives of the state. In this mode, governments may be seen as responding to the diversion of humanitarian assistance and the potential legitimization of terrorist groups not by engaging in regulation to mitigate this harmful effect, but rather by structuring regulation so that humanitarian organizations are increasingly incorporated into the aid, reconstruction, and national security agenda of the state. This approach sees humanitarianism and the access of the humanitarian community to the "hearts and minds" of the civilian population as central to contemporary counter-insurgency and counterterrorism efforts.

There are numerous and much-discussed examples of this approach in recent history. Consider the development of ORHA in the aftermath of the 2004 invasion of Iraq, the rise of Provincial Reconstruction Teams in Afghanistan, the move towards UN integrated missions, the use of NATO military materiel in the delivery of humanitarian aid in Pakistan, civil-military cooperation in a number of contexts, and donor policies encouraging humanitarian organizations to work directly with or subcontract from state-based aid organizations.[109]

[109] Two vivid examples illustrate aspects of these developments: U.S. Secretary of State Colin Powell describing NGOs as "force multiplier[s]," and Ambassador Richard Holbrooke stating that international NGOs are an "important source" of intelligence and that most of the U.S. Government's information about Afghanistan and

The humanitarian community may response to cooptation in a variety of ways. Cooptation may involve explicitly associating humanitarian activities and traditionally neutral humanitarian actors with the military and foreign policy goals of various states. Many of HPCR's interlocutors have noted that humanitarian activity has been perceived as moving closer to the security sector in recent years, as military and peacekeeping forces have increasingly engaged in relief and development activities. If cooptation into the security sector—especially to promote counterterrorism objectives—becomes a condition of funding, some organizations may decide to cease humanitarian operations as currently defined. At the other end of the spectrum, some organizations may agree to integrate their activities into a security agenda at the cost of the traditional humanitarian identity, privileging access and delivery of services over the principles of neutrality and independence. Yet other organizations may attempt to re-prioritize humanitarian principles, or significantly narrow the scope of their activities, to avoid perceptions of overlap with security operations. As with fragmentation, cooptation may result in operational and principles-based ruptures in the humanitarian community.

VIII. KEY QUESTIONS AND CHALLENGES

This section highlights key challenges and questions for the field that are raised by HPCR's research and its discussions with senior humanitarian practitioners, policymakers, and scholars in the course of its work on this topic. Building on the earlier portions of the Working Paper, this section sets out areas for future discussion, research, and policymaking.

A. How can humanitarian organizations plan and prepare for operations in light of potential criminal or administrative sanctions?

For many organizations, the interlacing web of national criminal laws limiting engagement with listed NSEs, organizational policies on engagement, and donor contracting restrictions on support to or engagement with specific NSEs raises significant operational risks and liabilities. A number of interlocutors have noted to HPCR that while field staff and country offices must regularly engage with NSEs in order to ensure delivery of humanitarian assistance (particularly in territories controlled by NSEs) and achieve protection goals, headquarters and policy staff are increasingly unsure of what guidance to provide in light of shifting norms and policies.

In any given armed conflict context where listed entities are active, humanitarian actors may be faced with one donor imposing highly tailored legal language requiring all staff to sign affidavits denying support for terrorism,[110] another imposing more vague vetting requirements, and still other states demanding monitoring of the supply chain to areas controlled by NSEs.[111]

Pakistan comes from aid organizations. David Rieff, "How NGOs Became Pawns in the War on Terrorism," *The New Republic*, Blog, August 3, 2010, available at http://www.tnr.com/blog/foreign-policy/76752/war-terrorism-ngo-perversion

[110] See USAID Office of the Inspector General, "Audit of the Adequacy of USAID's Antiterrorism Vetting Procedures," Audit Report No. 9-000-08-001-P, November 6, 2007.

[111] See UN Doc. S/2010/372, "Enclosure: Report of the United Nations Resident and Humanitarian Coordinator

For senior management in a given agency, the question arises as to how should they instruct in-country staff in terms of meeting humanitarian objectives and carrying out the day-to-day tasks of protection and assistance? In Somalia, for instance, the reporting requirements entailed in UNSCR 1916 may function ultimately as an effective waiver of the right against self-incrimination in domestic jurisdictions where engagement with Al Shabaab is prohibited.

HPCR has observed a variety of reactions to the *Holder v. HLP* decision, ranging from a sense that it would be highly unlikely for the U.S. to actually initiate prosecutions against well-known humanitarian organizations, to a concern that organizations may need to employ criminal defense counsel to assist them in preparing and planning operations in complex emergencies where listed NSEs are active. While at this stage the practical implications of specific criminal legislation may be difficult to measure, a number of interlocutors expressed a concern that humanitarian actors would find it increasingly difficult to engage in meaningful needs-based assessments in armed conflicts, rather being forced to engage in a "constraints-based" assessment of their ability to operate within far more limited parameters. For many, the conception of communities containing both beneficiaries and terrorists creates limited space for humanitarian actors to carry out their mandates.

B. How will counterterrorism-related legal and policy developments affect donor decision-making?

A number of interlocutors have noted to HPCR that they have observed shifts in contract language, vetting requirements, and technical restrictions in their engagement with major donors. While at this stage most interlocutors sensed that these types of restrictions are only affecting their organizations and field staff in particular locations (most commonly citing the Gaza Strip as the key example), the extent to which such shifts are being instituted more broadly is unclear.

In addition to potential changes in contracting, proposal procedures, and donor requirements in particular field contexts, many interlocutors have raised questions about how counterterrorism policies, sanctions on specific groups and individuals, and laws on material support will affect funding and long-term donor support for assistance in complex emergencies. There are a number of questions around how donor states with restrictive domestic policies or legislative oversight can continue to provide financial or diplomatic support to humanitarian actors. Policymakers and practitioners have raised concerns around whether there will be an overall shift in support for assistance operations in areas where proscribed entities are active, from traditional donor states to those without domestic restrictions on engagement with specific entities. In addition, interlocutors have discussed the potential for organizations to focus on operations that do not risk engagement with NSEs, even if doing so may decrease aid to those most in need.

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for Somalia," July 13, 2010, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20372.pdf

Another question here is how humanitarian actors should approach their negotiations with donor states: will traditional appeals for support for humanitarian assistance give way to instrumental or strategically framed claims about humanitarian action? Will humanitarian organizations consider presenting their work as central to protecting security, or relevant to gaining "hearts and minds"?

C. What is the relationship between domestic regulations and international law in this context?

For many policymakers and professionals, the *Holder v. HLP* decision and many national donor policies regarding listing, vetting, and other restrictions on humanitarian engagement with specific NSEs raises questions about the relationship between these laws and policies and states' commitments under international law. As noted above, states party to armed conflict have obligations under IHL to at the very least not arbitrarily withhold access for humanitarian organizations to provide lifesaving assistance for civilian populations. In addition, neutral states may have obligations not to actively hinder humanitarian efforts to populations caught up in conflict. And, as referenced above, according to the Vienna Convention on the Law of Treaties, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[112]

In short, humanitarian organizations *offering their services* to NSEs in line with the provisions of international law may be engaging in criminal activities under national counterterrorism legislation. Reconciling core international law rules and values with national counterterrorism legislation may be at the center of humanitarian organizations' legal and policy concerns for years to come. Such reconciliation efforts will most likely differ among national legal systems, depending on the modalities through which international law is incorporated at the domestic level.

D. What impact may exemptions have regarding enforcement of domestic material-support statutes?

As examined above, the U.S. material-support statute exempts the provision of religious materials and medicine to FTOs from the activities it prohibits, and also provides a basis on which humanitarian organizations may be exempted from prosecution by obtaining the Secretary of State's approval with the concurrence of the Attorney General. While theoretically available, these exemptions may prove elusive to obtain or practically infeasible to implement. Nonetheless, these exemptions may provide a useful starting point for discussions regarding potential pathways forward.

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[112] Vienna Convention on the Law of Treaties, Art. 27. As noted above, while the U.S. is not a party to this treaty, the U.S. "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." U.S. State Department, "Vienna Convention on the Law of Treaties," available at http://www.state.gov/s/l/treaty/faqs/70139.htm

E. What is the relationship between criminalization and UNSC resolutions requiring reporting and monitoring of NSEs activities, such as UNSCR 1612?

A number of policymakers and humanitarian actors have raised questions about the relationship between "material support" laws and states' commitments under UN Security Council resolutions. A number of UNSCRs, including UNSCRs 1612 and 1882, envision humanitarian organizations working closely with NSEs in particular conflicts in order to negotiate cessation of grave violations, to establish and secure meaningful humanitarian access, or to craft strategies for protection.

Yet the legal weight of many Security Council resolutions is unclear in light of potentially conflicting domestic laws and policies, and there has been limited discussion to date on the implication of listing and restriction regimes on compliance with these UNSCRs. By way of example, at the time of this writing, there are seven NSEs listed both in the 1612 MRM and the U.S. Department of State Foreign Terrorist Organization list.[113]

F. How are different organizations affected differently?

HPCR's engagements with practitioners and policymakers indicate that the laws and policies discussed in this Working Paper may have widely different impacts on various groups involved in protection of civilians. UN agencies may take bolder positions, relying on certain immunities and privileges for UN officials. The ICRC and other long-standing humanitarian organizations may be able to perceive their risk as comparatively lower based on reputation and the sheer scope of their operations. For smaller, local implementing partners, the threat of prosecution or discontinuance of funding may be more palpable. Human rights organizations and organizations involved in development in non-armed conflict situations may need to access arguments rooted in international law and policy different than the scope discussed here. A mapping of the types of humanitarian and human rights organizations potentially affected by counterterrorism laws and policies may be crucial to formulating effective policy solutions and developing strategies moving forward.

G. Is self-regulation by the humanitarian community a potential pathway forward?

In its discussions with interlocutors, HPCR has noticed that despite the antagonistic nature of this debate, many leaders of humanitarian organizations recognize the threat presented by misappropriation of humanitarian supplies by listed entities, and understand the concern underlying the actions of states. In this light, some humanitarian actors may argue that an opportunity has arisen to reevaluate modalities and conceptions underlying protection of civilians and accountability mechanisms. For these actors, now may be a time to usefully assess whether to pursue regulation within the humanitarian community in order to prevent disintegration and rupture. Indeed, for many organizations the threats posed by certain listed NSEs necessitate proposals for self-regulation and reform of the humanitarian community and

[113] These are: Abu Sayyaf Group (Philippines), Al-Shabaab (Somalia), New People's Army (Nepal), National Liberation Army (ELN-Colombia), al-Qai'da in Iraq (Iraq), Revolutionary Armed Forces of Colombia (Colombia), and Harakat-ul Jihad Islami (Bangladesh).

its modes of operation, regardless of state counterterrorism policies. Others, however, have voiced concern about formulating responses to illegitimate and potentially unlawful counterterrorism regulations.

H. How would additional empirical data assist in formulating policy responses?

HPCR's research indicates a lack of empirical data on the actual effects that counterterrorism laws and policies have or may have on the provision of humanitarian assistance. This paucity of information makes it more difficult to devise evidence-based policy solutions to the challenges that have been identified here. Given the limited number of listed entities with a nexus to humanitarian operations, it may be feasible to conduct assessments of individual field missions and complex cases in order to better understand how the laws and policies discussed here impact humanitarian strategy and operations. The compilation of empirical data could help the humanitarian community to more accurately pinpoint key challenges, while also providing a more comprehensive basis on which to engage key stakeholders in formulating responses.

ACKNOWLEDGMENTS

This paper was researched, drafted, and edited by Claude Bruderlein, Elizabeth Holland, Dustin Lewis, and Naz Modirzadeh. HPCR expresses its gratitude for the extensive comments on an earlier draft from the HPCR Working Group on "Criminalizing Humanitarian Engagement," as well as insights shared at the Senior Law and Policy Workshop on "Humanitarian Action under Scrutiny: Criminalizing Engagement with Non-State Armed Groups," in Cambridge, Massachusetts on November 11-12, 2010. Nothing in this Working Paper should be construed in any way as constituting legal advice.

Suggested citation: Harvard Program on Humanitarian Policy and Conflict Research, "Humanitarian Action under Scrutiny: Criminalizing Humanitarian Engagement," *HPCR Working Paper*, February 2011.

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