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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, submitted in accordance with General Assembly resolution [72/180](#) and Human Rights Council resolution [40/16](#).

* [A/75/150](#).

** The present report was submitted after the deadline as a result of consultations with Member States and other relevant stakeholders.



Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin

Summary

In the present report, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, addresses the interface between international human rights law and international humanitarian law in counter-terrorism contexts. She affirms the interdependent and intersectional nature of the relationship between both legal regimes, which is all the more pronounced in counter-terrorism contexts. She acknowledges the persistent and unequivocal affirmation by the Security Council and other bodies that any counter-terrorism measures must always and fully comply with, *inter alia*, the overarching norms of international human rights law, international humanitarian law and refugee law. This is a key basis on which the Special Rapporteur makes the recommendations set out in the report. She affirms that counter-terrorism operations and measures are frequently undertaken in the context of non-international armed conflicts in which international humanitarian law applies and which involve non-State armed groups, including actors subject to terrorist designation by the United Nations and its targeted sanctions regime or those included on regional and national terrorist designation lists.

The Special Rapporteur reiterates her concern about the lack of sufficient consideration regarding the interaction between international humanitarian law and the norms and standards relevant to countering terrorism, leading to a troubling conflation of the two. She is likewise deeply concerned that such conflation leads to the weakening of human rights protection in fragile, conflict and post-conflict settings. She makes recommendations to prevent such weakening, which does not serve the interests of justice or security. She underscores that failure to take due account of both international humanitarian law and international human rights law results in counter-terrorism practice that fails to protect the most vulnerable, including persons deprived of their liberty, persons with disabilities, older persons, persons in need of medical care, women and children. She sets out the costs of the failure to systematically apply humanitarian exemptions for activities that are humanitarian and impartial in nature and are absolutely essential for the protection of the most vulnerable persons in society. She makes specific recommendations to augment the due process protections applied in sanctions regimes, thereby ensuring the optimal application of convergent judicial guarantees under both legal regimes. She addresses the application of the principle of equality across both legal regimes and with regard to foreign terrorist fighters and other regulatory arenas, providing clear guidance to States on what the import of that principle requires in practice. She applauds the work of humanitarian organizations, including the contributions that many make as guarantors and enablers of civic space in many of the most fragile and contested areas in the world. She denounces attacks on the integrity, independence and operational capacity of such organizations, whether directly or indirectly, by States through the prism of counter-terrorism rhetoric or regulation, and underscores that the organizations are critical to the protection of humanity and the dignity of the most vulnerable and, thus, to conflict resolution.

I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, pursuant to Assembly resolution 72/180 and Human Rights Council resolution 40/16. In the report, she analyses the interface between human rights and international humanitarian law in counter-terrorism contexts, with a particular focus on counter-terrorism practices that are inconsistent with or undermine the integrity of fundamental rights, duties and protections under those legal regimes.

2. A report on the work undertaken by the Special Rapporteur in fulfilment of her mandate in the period since her previous report to the General Assembly is provided below.

II. Activities of the Special Rapporteur

3. The Special Rapporteur had a fruitful year, advancing sustained dialogue with States on the protection and promotion of human rights. She presented a report to the Human Rights Council in March 2020 on the productive visit that she undertook to Kazakhstan. She noted the positive leadership of Kazakhstan in ensuring the return of over 500 nationals, primarily women and children, from the north-east of the Syrian Arab Republic (see A/HRC/43/46/Add.1, paras. 60–61, for her recommendations). She accepted a country visit to Maldives, which was temporarily postponed owing to the coronavirus disease (COVID-19) pandemic. She conducted a working-level visit to the European Union in January, and appreciates the ongoing dialogue with its institutions.

4. In her thematic report on the human rights impact of policies and practices aimed at preventing and countering violent extremism (A/HRC/43/46), the Special Rapporteur acknowledged the social and political imperatives of addressing violent extremism, but underscored that only rights-affirming and rights-focused policies would have long-term success in preventing violence. She highlighted the lack of a robust scientific basis for the current policies and practices and the complete absence of human rights-based monitoring and evaluation, including by United Nations entities.

5. The Special Rapporteur has made it a priority to provide technical assistance and views concerning counter-terrorism legislation to States.¹ In the past year, she provided reviews of legislation or legislative developments to Cambodia, China, Egypt, France, India, Kyrgyzstan, Peru, the Philippines, Switzerland, Turkey and the United Kingdom of Great Britain and Northern Ireland.

6. The Special Rapporteur is a signatory of the United Nations Global Counter-Terrorism Coordination Compact and an active member of its working groups. In February, she participated in the regional high-level conference on the theme “Foreign terrorist fighters: addressing current challenges”, held in Vienna. She also participated as a speaker in Counter-Terrorism Week, which was held online from 6 to 10 July.

7. In July, the Special Rapporteur published a study on the human rights implications of the use of biometric tools and data in the counter-terrorism arena,² and a multi-stakeholder consultation is planned. She produced draft principles on

¹ See www.ohchr.org/EN/Issues/Terrorism/Pages/LegislationPolicy.aspx.

² Krisztina Huszti-Orbán and Fionnuala Ní Aoláin, “Use of biometric data to identify terrorists: best practice or risky business?”, 2020.

human rights-compliant watch listing to inform, inter alia, the Global Counterterrorism Forum joint initiative aimed at developing a watch-listing guidance manual.³

8. The Special Rapporteur continued her engagement with non-governmental organizations (NGOs), human rights defenders and civil society. Meetings were held in Belfast (United Kingdom), Brussels, Dublin, Geneva, Minneapolis (United States of America), New York, Paris and Washington, D.C. She prioritized meeting with NGOs remotely during the COVID-19 pandemic, including those in the Philippines and Turkey. She participated in the high-level meeting on global counter-terrorism and human rights, organized online by 11 NGOs on 11 June.⁴ She met regularly with victims of terrorism and their representative organizations and worked closely with women's organizations that address the negative effects of counter-terrorism practices on women and girls. She also met regularly with humanitarian organizations and remained deeply concerned about the challenges that civil society actors face in their day-to-day work owing to the adverse and nefarious use of counter-terrorism and extremism laws.

9. The Special Rapporteur issued several communications, including joint communications, on the use of legislation framed as national security and counter-terrorism against civil society actors. She submitted amicus briefs to the Court of Appeal of England and Wales (in the case relating to Shamima Begum) and the European Court of Human Rights (in the case *Mohammad and Mohammad v. Romania*).⁵

10. The Special Rapporteur had sustained positive working relationships with the Office of Counter-Terrorism and the Counter-Terrorism Committee Executive Directorate. She continued her positive engagement with the Financial Action Task Force and engaged with the Global Counterterrorism Forum, the Global Internet Forum to Counter Terrorism, Tech Against Terrorism, the European External Action Service and the European Union Special Representative for Human Rights.

III. Advancing human rights through the positive interplay between human rights and international humanitarian law in the context of counter-terrorism

11. When establishing the mandate of the Special Rapporteur in its resolution 2005/80, the Commission on Human Rights noted that the work of the mandate holder was contextualized by State “obligations under international law, ... in particular international human rights, refugee and humanitarian law”, and reaffirmed in paragraph 1 of the resolution that “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law”. Previous mandate holders and the current mandate holder have confirmed the necessary intersections of human rights law with other bodies of international law, including international humanitarian law. All have emphasized the ways in which treaty and customary law in areas including international criminal law, rules governing conflict of laws, diplomatic and consular relations, extradition and international administrative law should function to augment the protection of the individual under international law and advance the optimal rights-based intersections of international law regarding terrorism-related regulation. That position follows on from an ever-increasing emphasis on the function

³ Available at www.ohchr.org/EN/Issues/Terrorism/Pages/Research-papers-and-Inputs.aspx.

⁴ Yasmine Ahmed, “United Nations ‘Counter-Terrorism Week’ misses the mark in marginalizing civil society”, July 2020.

⁵ European Court of Human Rights, First Section, *Mikolaj Pietrzak v. Poland*, application No. 72038/17, and *Dominika Bychawska Siniarska and Others v. Poland*, application No. 25237/18 (pending).

of international law as a mechanism to protect the fundamental rights of the person. The present report is framed by the high crossover between the application of certain fundamental human rights norms in the context of human rights-compliant counter-terrorism measures and certain fundamental norms of international humanitarian law.

12. The importance of that overlap was noted by the Special Rapporteur in her report to the General Assembly at its seventy-third session (A/73/361), in which she observed that counter-terrorism measures were frequently taken in the context of armed conflict in which international humanitarian law applied. That reality is further illustrated by the number of non-international armed conflicts involving non-State armed groups subject to terrorist designation by the United Nations and its targeted sanctions regime or included on regional and national terrorist sanctions lists. The widespread resort by a range of non-State actor groups to acts of terrorism raises legitimate concern and responsiveness from States and the United Nations; in addition, the absence of agreement to conclude a comprehensive multilateral convention has resulted in the expansion of existing counter-terrorism measures and the introduction of new ones.⁶ Against that background, the International Committee of the Red Cross (ICRC) and other stakeholders have rightly warned that the lack of sufficient consideration regarding the interaction between international humanitarian law and the norms and standards relevant to countering terrorism is leading to a troubling conflation of the two.⁷ The Special Rapporteur is deeply concerned that such conflation serves to weaken human rights protection in fragile, conflict and post-conflict settings.

13. In line with an expansionist and securitizing trend, there is an evidenced tendency to consider any act of violence and many non-violent acts carried out by a non-State armed group in a non-international armed conflict as being “terrorist” by definition, sidestepping assessment of lawfulness under international humanitarian law as well as addressing the legal and political significance of non-international armed conflicts on the territories of States. Such practices have gone hand in hand with expansive militarism and security sector bloating justified by counter-terrorism discourse and Security Council resolutions.⁸ They are accompanied by rhetoric including the now maligned terminology of a “war on terror” that deliberately conflates armed conflict and terrorism as a means of weakening the application of norms of both international humanitarian law and international human rights law. The qualifier “terrorism”, which should be applied to the most serious and violent acts defined by international law, has regrettably been embraced with enthusiasm to legitimize a range of State action, in some contexts precisely, it would appear, to justify the exclusion of the protective norms of both international humanitarian law and international human rights law. Such political moves have downstream and specific effects on the protection of individual and group rights. Moreover, the pace and scale of growth in counter-terrorism institutions and norms nationally and internationally may, intentionally or not, obscure and undermine the specific customary and treaty law obligations of States derived from the application of human rights law and international humanitarian law, respectively. Human rights and humanitarian law have distinct points of divergence in both counter-terrorism and armed conflict contexts. However, these bodies of law operate – whether sequentially or in tandem – to ensure the protection of individuals and optimize the rights of individuals by specifying the duties of States (and non-State armed groups under

⁶ International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32IC/15/11 (2015), p. 17.

⁷ Ibid.

⁸ Rémi Carayol, Florent Geel and Antonin Rabecq, *In Central Mali, Civilian Populations are Caught between Terrorism and Counter-Terrorism: Fact-Finding Mission Report* (Paris, International Federation for Human Rights, 2018).

international humanitarian law) in the most precarious and fraught of circumstances. For these reasons, the optimization of both bodies of law is critical to advancing their separate spheres of effectiveness. Undermining one body of legal norms has significant consequences and implications for the effectiveness of the other.

14. It is well understood that human rights law and humanitarian law have different historical origins, and codification has followed different paths.⁹ However, there has been convergence and overlap between both legal regimes since the adoption of the Universal Declaration of Human Rights in 1948.¹⁰ Crossover was first validated at the International Conference on Human Rights, held in Tehran in 1968,¹¹ affirming the growing use of humanitarian law by the United Nations during its examination of human rights situations in certain countries during thematic studies. Since then, the influence of human rights norms has been evident in the codification found in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II),¹² in the development of national military manuals¹³ and in the jurisprudence of national, regional and specialized criminal tribunals.¹⁴

15. Without oversimplifying the differences between international humanitarian law and international human rights law,¹⁵ conceptual and practical overlap between these legal regimes is found in the designation of duties and obligations for key actors (noting in particular the obligations of States under both regimes), the centrality of protection as a norm and a practice, the convergence of certain fundamental prohibitions (such as torture and arbitrary detention),¹⁶ the common expression of essential judicial guarantees, the criminalization of breaches, the presumption that both regimes provide sufficient normative content so that no person is left without the coverage of legal norms and the shared core Grundnorm of non-discrimination.¹⁷ In his commentary on the Geneva Convention relative to the Protection of Civilian

⁹ Louise Doswald-Beck and Sylvain Vité, "International humanitarian law and human rights law", *International Review of the Red Cross*, vol. 33, No. 293 (1993).

¹⁰ Robert Kolb, "The relationship between international humanitarian law and human rights law: a brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions", *International Review of the Red Cross*, vol. 38, No. 324 (1998), p. 409; and *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II, sect. A (Berne, 1949), see remarks of Max Petitpierre, p. 536.

¹¹ See resolution XXIII on human rights in armed conflicts, adopted by the International Conference on Human Rights, Tehran, 12 May 1968 (A/CONF.32/41, chap. III).

¹² See, for example, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 54, para. 1, on the prohibition of civilian starvation.

¹³ Peter Rowe, *The Impact of Human Rights on Armed Forces* (Cambridge, Cambridge University Press, 2005).

¹⁴ It is also evident in the standard-setting and monitoring practices of the Human Rights Council, United Nations treaty bodies, the General Assembly and the Security Council.

¹⁵ For example, the genealogy of norms related to military necessity, the principle of distinction, unnecessary suffering and points of clear legal distinction. Marco Sassóli and Laura M. Olson, "The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts", *International Review of the Red Cross*, vol. 90, No. 871 (2008).

¹⁶ Common article 3 of the Geneva Conventions; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 32; the International Covenant on Civil and Political Rights; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; see also Andrea Bianchi, "Terrorism and armed conflict", *Leiden Journal of International Law*, vol. 24, No. 1 (March 2011).

¹⁷ Charter of the United Nations; Fourth Geneva Convention, art. 27; and ICRC, Customary International Humanitarian Law, rule 88 on non-discrimination.

Persons in Time of War (Fourth Geneva Convention), Jean Pictet notes specific overlap between the protections afforded by the Convention, which are applicable to civilians in international armed conflicts, and the inalienability of rights, the general treatment of protected persons, penal procedure, civil capacity and remedies for internees.¹⁸ The influence of human rights norms on the normative content of Additional Protocols I and II is well documented, deepening the protective obligations that flow in armed conflict, including those that are non-international in nature.¹⁹ There is now a broad consensus that certain fundamental norms that can be derived from both human rights law and international humanitarian law, specifically norms that protect persons from arbitrary deprivations of life, liberty and property, as well as hostage-taking, at the hands of State actors, apply at all times during an armed conflict, including in conflicts in which acts of terrorism occur.²⁰ The complementarities between those legal regimes affirm that the implementation of international humanitarian law operates as a gateway, in specific contexts, to the meaningful protection of certain human rights, and that the overlap between the legal regimes serves to deepen the obligations of States with regard to certain inalienable rights.²¹ This position holds true in the view of the Special Rapporteur, even as international humanitarian law constitutes *lex specialis* in certain matters, such as the conduct of hostilities in armed conflict. She defends the position that there are no gaps in coverage between these legal regimes, meaning that one or both apply to any situation in which counter-terrorism measures are taken. She notes that the selective invocation or non-invocation of these overarching regimes would constitute the validation of legal “black holes”,²² undermine the Charter of the United Nations, serve the unilateral interests of particular States over the common good and corrode the integrity of the global legal order. The basis for the application of these legal regimes singly, sequentially or in tandem is not set by counter-terrorism law and practice but rather by the treaty-based agreements and long-standing customary practice in the application of international human rights law and international humanitarian law, respectively, as affirmed by the Charter itself and rooted in objective facts on the ground and not merely on the political preferences of States.²³

16. The Special Rapporteur acknowledges the distinct stratification of humanitarian law norms in international and non-international armed conflicts. She affirms that a more extensive body of treaty obligations has been agreed upon and applied by States in international armed conflicts. Notwithstanding this, the augmentation of legal obligations in non-international armed conflicts has flourished, through the jurisprudence of ad hoc criminal tribunals and with the adoption of the Statute of the International Criminal Court and the consolidation of the Court’s docket. As a result, international humanitarian law is particularly relevant to the protection of individuals and the enforcement of duties in non-international armed conflicts, and it is essential that observance by State and non-State armed groups of the norms of international

¹⁸ Jean S. Pictet and others, *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War: Commentary* (Geneva, ICRC, 1958), arts. 7, 27, 80, 99 and 101.

¹⁹ Marco Sassóli and others, *How does Law Protect in War?*, vols. I and II, 2nd ed. (Geneva, ICRC, 2006).

²⁰ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I (New York, Cambridge University Press, 2005); see also Human Rights Committee, general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 13, concerning regime overlaps.

²¹ Theodor Meron, “The humanization of humanitarian law”, *American Journal of International Law*, vol. 94, No. 2 (April 2000).

²² Johan Steyn, “Guantanamo Bay: the legal black hole”, *International and Comparative Legal Quarterly*, vol. 53, No. 1 (January 2004).

²³ The Special Rapporteur notes that counter-terrorism resolutions of the Security Council should be consistent with the other treaty obligations of States, and affirms the general presumption of regulation consistent with other obligations (Vienna Convention on the Law of Treaties, art. 5).

humanitarian law is sustained in these contexts. Given the current proliferation of such conflicts and the historical unwillingness of States to acknowledge the full applicability of international humanitarian law to them,²⁴ including common article 3 of the Geneva Conventions, it is precisely in such a context that the categorization of acts as “terrorism” may be seen as a means to displace the applicability of essentially protective legal norms. The dangers of such displacement are not merely formalistic, but have tangible effects on humanitarian action, the provision of humanitarian assistance, the protection of humanitarian personnel, the protection of non-derogable rights and essential judicial guarantees, as well as the principle of non-discrimination. It is imperative that the humanitarian law norms applicable to non-international armed conflicts are robustly defended, that they are applied in practice and that the misuse of counter-terrorism discourse and norms to avoid the application of customary and treaty rules applicable to armed conflict is challenged. This means explicitly defining the appropriate legal limits of counter-terrorism regulation, both normatively and institutionally, and prohibiting overreach by States, counter-terrorism institutions and non-State actors engaged in implementing counter-terrorism measures, including corporate entities.²⁵

17. In its jurisprudence, the International Court of Justice has reflected on the respective scope of application of international humanitarian law and international human rights law, including in contexts in which acts of terrorism have been at issue. The Special Rapporteur draws three broad conclusions from the Court’s significant jurisprudence relevant to the present report. First, human rights norms continue to apply in situations of armed conflict, albeit modified to the extent that international humanitarian law is *lex specialis* on a particular issue and to the extent that a State has lawfully derogated from specific norms of human rights law where the armed conflict constitutes a public emergency threatening the life of the nation, as recognized by international humanitarian law.²⁶ This underscores the essential necessity of adherence to human rights norms by States, including in contexts in which terrorism occurs. Second, States continue to validate the applicability of international humanitarian law and international human rights law as the non-negotiable legal norms of relevance specifically in contexts in which acts of terrorism are committed.²⁷ Third, States broadly seek balance and wish to avoid the distortion of applicable and long-standing international law.²⁸ This confirms the clear need to ensure that counter-terrorism regulation and practice do not produce unintended consequences by undermining the overarching legal regimes of human rights and international humanitarian law, weakening the overall checks and balances that maintain the stability of international law regimes.

18. The Special Rapporteur affirms the critical and essential interdependence of human rights and humanitarian law. She notes their normative convergence in key rights-weighted areas.²⁹ She accepts the distinct value of diverse rules, such as distinction, proportionality, necessity, combatant and prisoner of war status, limitation clauses and derogations (noting that some have distinctive meanings in

²⁴ Including in conflicts involving groups designated as “terrorist”.

²⁵ Ronald C. Slye, “Corporations, veils and international criminal liability”, *Brooklyn Journal of International Law*, vol. 33, No. 3 (2008).

²⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, paras. 24 and 25; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, paras. 105 and 106.

²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986*, paras. 115, 116, 218 and 220.

²⁸ See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6.

²⁹ See the restrictions placed on the death penalty under articles 68 and 75 of the Fourth Geneva Convention.

each regime) and the interplay between international humanitarian law and international human rights law in challenging legal and political contexts. She believes it to be both necessary and practical to acknowledge fluidity and movement between human rights and humanitarian law regimes in highly fraught violent contexts that experience changeability in the intensity of violence over time, as well as the range of actors and groups engaged in such violence.³⁰ Specifically, in contexts of fragility and sustained violence, moves between intense or group-based violence, permanent emergencies, low-intensity conflict, terrorism and armed conflict are expected. In parallel, the role of each regime through such shifting factual situations on the ground means that the rules of each regime are indispensable on their own terms and imperative to the optimization of the other. Acts of terrorism pose profound challenges to States and the individuals and groups harmed by them. The robustness of international humanitarian law and human rights are absolutely essential to addressing the conditions conducive to such violence, holding perpetrators duly responsible and holding States to account for the measures that they take to respond to violence.

A. Terrorism and international humanitarian law

19. International humanitarian law shares common ground with counter-terrorism regulation, as it expressly prohibits most acts that are criminalized as “terrorist” under national law, with the inherent presumption that such acts comport with the existent international legal provisions for terrorism.³¹

20. Core differences are necessary, however, to assess the interrelationship between the two regimes. Specifically, in legal terms, “armed conflict is a situation in which certain acts of violence are allowed (lawful) and others prohibited (unlawful)”.³² International humanitarian law permits (or does not prohibit) attacks on military objectives, whether inflicted by State or non-State parties to the conflict. Critically, acts of violence against civilians not taking a direct part in hostilities or civilian objects are unlawful, unless they result from a proportionate attack on a military objective.³³ International humanitarian law is the only body of international law addressing the protection of persons to take this dichotomous approach.³⁴

21. As a regulatory matter, international humanitarian law, on the one hand, prohibits and regards as war crimes specific acts of terrorism perpetrated in armed conflict³⁵ and, on the other hand, prohibits and usually regards as war crimes a range of other acts that would commonly be deemed “terrorist” if committed outside an

³⁰ Moreover, the Special Rapporteur holds this view because of the somewhat unsettled interplay between international humanitarian law and international human rights law rules in particular areas, including as a result of different conceptions of *lex specialis* (weak or strong), whether human rights law can be *lex specialis* in some areas or whether silence in international humanitarian law is deliberate and thus, as *lex specialis*, excludes higher human rights law standards (such as detention in non-international armed conflicts).

³¹ Ben Saul, “Order from chaos: the optimal relationship between international counter-terrorism law and international humanitarian law”, submission to the Special Rapporteur.

³² Jelena Pejic, “Armed conflict and terrorism: there is a (big) difference”, in Ana Maria Salinas de Frías, Katja Samuel and Nigel D. White, eds., *Counter-Terrorism: International Law and Practice* (Oxford University Press, 2012).

³³ The Special Rapporteur notes that both deliberate and indiscriminate attacks on civilians are war crimes.

³⁴ Acts not prohibited under international humanitarian law in non-international armed conflicts may still be considered criminal under national law when committed by non-State armed groups.

³⁵ Fourth Geneva Convention, art. 33, applicable to international armed conflicts; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), art. 4 (2) (d), applicable to non-international armed conflicts.

armed conflict. In article 51 (2) of Additional Protocol I and article 13 (2) of Additional Protocol II, acts of terrorism are specifically prohibited in the conduct of hostilities, providing that “acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. The prohibition has been deemed customary international law in the decision of the International Tribunal for the former Yugoslavia.³⁶ The Special Rapporteur discerns a distinct and unfortunate failure to properly address certain violent acts as “war crimes” or other international crimes, such as crimes against humanity,³⁷ with State preferences to use the nomenclature of terrorism to hazily characterize such harms.³⁸ Given the sustained lack of accountability for serious violations of international law, and specifically international humanitarian law, in contexts as diverse as Iraq, Libya, Somalia and the Syrian Arab Republic, and the emergent pattern of relying on terrorism membership, support and travel prosecutions as the “fallback” criminal measures, a deep disservice is done to victims of terrorism and to the responsibility to respect and ensure the enforcement of rights in failing to appropriately harness the legal regime best equipped to regulate and prosecute the perpetrators of such crimes and to symbolically reflect the gravity ascribed to such acts. The Special Rapporteur highlights the specific prohibitions applicable in non-international armed conflicts, including prohibiting attacks against the civilian population with the primary purpose of spreading terror (Additional Protocol II, art. 13.3), and the prohibition of actions that terrorize the population (*ibid.*, art. 4 (2) (d)).³⁹ She notes the significant capacity in national and international legal systems to pursue prosecutions for war crimes and laments the failure to optimize their use for terrorism crimes committed in armed conflicts.

22. Of the 19 conventions on terrorism adopted under the auspices of the United Nations since 1963, international humanitarian law was addressed in only 1 (on hostage-taking) prior to 1997, whereas since 1997 it has been addressed in all instruments: a limited exception in the International Convention for the Suppression of the Financing of Terrorism of 1999, and a common exclusion of the acts of armed forces (State and non-State) in armed conflict in six other instruments.⁴⁰ In parallel, the regulation of terrorism has intensified in numerous legal and policy dimensions since the terrorist attacks of 11 September 2001. In her previous reports, the Special Rapporteur has addressed the human rights dimensions of “quasi-legislative” regulation through Security Council resolutions (see [A/73/361](#)) and the increasing encroachment of soft law norms (see [A/74/335](#)) on binding treaty law and institutional balance within the United Nations. With regard to international humanitarian law, the adoption of treaties on terrorism concerning specific types of terrorist acts, as well as the adoption of terrorism-oriented legislation nationally, has expanded to overlap with areas traditionally covered by international humanitarian law.⁴¹ Positively, treaties and Security Council resolutions on terrorism have filled gaps, created stronger or special investigative and law enforcement powers and imposed more specific duties of suppression and prevention on States; where war crimes and terrorism offences

³⁶ International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Stanislav Galić*, case No. IT-98-29-A, Judgment, 30 November 2006, paras. 87 and 91.

³⁷ The Special Rapporteur notes the comprehensiveness of the sanctioning of civilian participation in hostilities ensured by the interplay between international and national law.

³⁸ The Special Rapporteur notes a small number of war crimes charges being brought against persons categorized as terrorists, including in Germany.

³⁹ For example, perfidy (suicide or other attacks by persons dressed as civilians).

⁴⁰ Conventions on terrorism apply only if an offence has a transnational element and exclude purely national acts in non-international armed conflicts.

⁴¹ Some treaties on terrorism expressly protect specific human rights, such as the International Convention for the Suppression of Terrorist Bombings on 1997 and the International Convention for the Suppression of the Financing of Terrorism of 1999 (providing that detainees have the right to be informed of the right to contact a consular representative).

apply to the same conduct, the elements of some terrorism offences may be more specific. More challenging, as is set out below, have been the expansion of counter-terrorism into the realm of preventative and anticipatory criminal regulation, the lack of agreed definitions of the core prohibitions under counter-terrorism measures globally and nationally and the corresponding carte blanche for State overreach and systematic human rights violations in the name of countering terrorism and the targeting of dissenters, minorities, humanitarian workers and civil society under the rubric of countering terrorism.

B. Security Council engagement on human rights and humanitarian law in counter-terrorism contexts

23. Counter-terrorism law and practice by States has treaty, customary law, Security Council resolution and soft law aspects. The terrorism suppression conventions play an important role in the suppression of certain kinds of violence not specifically addressed, or addressed in a more limited fashion, by international humanitarian law. These prohibitions are complemented by the general customary international law norms prohibiting acts of terrorism that target civilians.⁴² The Special Rapporteur maintains that either human rights or humanitarian law will constitute the baseline legal regime in situations in which terrorism occurs. She recognizes that, on occasion, disputes arise concerning the primacy of one of these two fundamental regimes over the other, but such tension should never be accepted as the basis for limiting the fundamental human rights of those who are most vulnerable as a result of the conflict. Treaty and customary norms aside, the Security Council has played an increasingly visible and central role in the regulation of counter-terrorism. As the Special Rapporteur has documented, the Council, in its resolution [1373 \(2001\)](#), requires all States to criminalize terrorist acts and various preparatory acts (including terrorist financing), while subsequent resolutions have shifted the legal scope of the Council's action by moving into both pre-emptive legal regulation and criminal law mandates for States. In that context, it is important to consider what the Council has had to say about the obligations of States with regard to both human rights and humanitarian law.

24. Since 2001, the Security Council has passed 34 resolutions related to the regulation of counter-terrorism, in which the obligations of States in relation to human rights and humanitarian law have been explicitly acknowledged and addressed. The Council's position is also consistent with the repeated affirmation of this by the General Assembly. The Council's foundational resolution (resolution [1373 \(2001\)](#)) regrettably contains only a narrow reference to international law, specifically human rights and refugee law in paragraph 3 (f) and (g), while in paragraph 8 States' obligations are affirmed in line with the Charter (an implicit recognition also of Article 1 (3) of the Charter, affirming "human rights and fundamental freedoms for all"). Positively, a key motif in subsequent resolutions has been the consistent affirmation that States "must comply with all their obligations under international law", including humanitarian law and human rights law (see resolutions [2178 \(2014\)](#), [2396 \(2017\)](#) and [2462 \(2019\)](#)). In a previous report ([A/73/361](#)), the Special Rapporteur documented the human rights references in those resolutions. There are

⁴² Some issues are solely regulated by counter-terrorism provisions with no functional equivalent in international humanitarian law, such as nuclear material offences. The Special Rapporteur accepts that counter-terrorism law may give greater specificity to certain offences generally found in international humanitarian law, such as aircraft hijacking. See www.un.org/counterterrorism/international-legal-instruments.

many specific references to international humanitarian law.⁴³ Several preliminary observations follow. First, the underlying theme of the present report is affirmed, namely the intertwined nature of States' obligations to protect human rights and equally respect their humanitarian law obligations. There is thus de facto recognition in the Council's resolutions of the necessary and connected observance of these two legal regimes in the context of countering terrorism. Second, these two legal regimes have equal standing (along with refugee law), and no justification therefore exists for the demotion of one regime directly or indirectly vis-à-vis the other in the advancement of counter-terrorism regulation. Third, most references to the legal regimes are generic and lack the specificity required to ensure their observance in practice. The Special Rapporteur highlights the same gap that she has identified in the need to provide specific human rights guidance and refer to existing specific normative standards and obligations in counter-terrorism resolutions as being equally relevant to international humanitarian law. Fourth, it is patently clear that the Council has not, either directly or indirectly, indicated any intention to displace either human rights or international humanitarian law treaty rules. Not even a whisper of such an approach has been articulated through, for example, an expansive reading of Article 103 of the Charter. The Special Rapporteur repeats what is widely understood by stating that, even if such a (problematic) move were contemplated, any such positioning would not affect the application of customary international law. In sum, the Council has consistently affirmed the continued and incontrovertible applicability of both international humanitarian law and international human rights law, and it appears to accept that counter-terrorism measures will be read in the context of the *lex specialis* of international humanitarian law in the event of an armed conflict, as supplemented by international human rights law, and that human rights law maintains regime primacy in the peace-time assessment of the application of counter-terrorism regulation (see Council resolutions [2462 \(2019\)](#) and [2482 \(2019\)](#)).

C. Contemporary challenges to international humanitarian law and international human rights law resulting from counter-terrorism regulation

25. The Special Rapporteur has consistently documented the ongoing, pernicious and sustained challenges to the protection of human rights resulting from national, regional and global counter-terrorism regulation. In the present section, she highlights the negative effects of counter-terrorism regulation on international humanitarian law and humanitarian action, with consequent and relational effects on the enjoyment of human rights.

26. First, the blurring of legal regimes and the explicit unwillingness to apply, and the sometimes outright denial of the application of, international humanitarian law by States in favour of counter-terrorism regulation has produced inconsistencies in the identification and prosecution of war crimes. This undermines the shared goal of human rights and humanitarian law in preventing unlawful conduct in armed conflict and ensuring accountability for serious violations of international law (see General Assembly resolution [73/305](#)). Second, the functional interplay between international humanitarian law and substantive national counter-terrorism regulation produces the outcome that members of non-State armed groups in contexts that meet the criteria for the application of international humanitarian law will face more serious penalties

⁴³ See Security Council resolutions [1456 \(2003\)](#), [1535 \(2004\)](#), [1566 \(2004\)](#), [1624 \(2005\)](#), [1963 \(2010\)](#), [2129 \(2013\)](#), [2170 \(2014\)](#), [2178 \(2014\)](#), [2341 \(2017\)](#), [2354 \(2017\)](#), [2368 \(2017\)](#), [2380 \(2017\)](#), [2395 \(2017\)](#), [2396 \(2017\)](#), [2462 \(2019\)](#) and [2482 \(2019\)](#).

under national law for acts of violence that are not prohibited by humanitarian law.⁴⁴ The Special Rapporteur notes a clear distinction between the permitted criminalization of insurgent violence in non-international armed conflicts for a range of crimes (consistent with international human rights law) and equating direct participation in hostilities with terrorism that includes the criminalization of preparatory acts and aggravated penalties and may implicate both the political offence exception and double criminality. This obvious contradiction results in fewer incentives for non-State armed groups to comply with international humanitarian law,⁴⁵ the exclusion of certain provisions (including amnesty for lawful acts of war) from conflict-ending strategies and negotiations, and barriers to advancing reconciliation and transition from fragile and conflict-ridden States that have been mired in cyclical violence. Many conflict-ending and reconciliation priorities are driven by human rights imperatives, underpinned by human rights enforcement and values (see [S/2004/616](#)). Third, the consequences for the provision of impartial humanitarian activities in armed conflict and fragile settings resulting from the application of broadly based national and international regulation on terrorism have, it should be acknowledged, been extremely severe. Impartial humanitarian action, in particular the provision of medical supplies, shelter and food, is the sine qua non in many parts of the world for the exercise of essential social and economic rights, including the rights to food, safe drinking water and adequate access to health care. Designating certain non-State armed groups in non-international armed conflicts as terrorists and linking the provision of humanitarian activities – protection and assistance – as a form of support for terrorism or to persons or entities designated as terrorists result in the lowering of fundamental human rights and humanitarian protections for the weakest and most vulnerable.⁴⁶ The state of the applicable law as developed by the Security Council is inadequate, and concerted State attention and remediation are required to address the deficits outlined below.⁴⁷ Fourth, in parallel, listing and sanctions requirements for known or suspected terrorists through watch-listing practices at the national, regional and global levels have evidenced serious human rights deficiencies and are inconsistent with the minimal due process guarantees found in international law.⁴⁸ Finally, the Special Rapporteur recognizes that there may be sovereignty concerns in the shift from international humanitarian law to terrorism regulation. The transnational criminalization of terrorism in conflicts may establish an expansive jurisdiction that breaks the critical nexus between the State’s territorial sovereign rights in relation to criminal and constitutional norms.⁴⁹

⁴⁴ The Special Rapporteur notes that, in accordance with Security Council resolution [1373 \(2001\)](#), the duty to criminalize terrorist acts does not require States to criminalize acts that are not prohibited by international humanitarian law, and that Council resolution [1566 \(2004\)](#) and the updated Technical Guide to the Implementation of Security Council Resolution [1373 \(2001\)](#) and Other Relevant Resolutions ([S/2019/998](#), annex) tie definitions to the sectoral conventions, many of which precisely exclude armed forces in armed conflict.

⁴⁵ Tristan Ferraro, “Interaction and overlap between counter-terrorism legislation and international humanitarian law”, in ICRC, *Proceedings of the Bruges Colloquium* (2016).

⁴⁶ Security Council resolution [1373 \(2001\)](#), para. 1 (d); see also submissions from humanitarian organizations.

⁴⁷ Emma O’Leary, “Principles under pressure”, 2018. See also Security Council resolutions [2462 \(2019\)](#), para. 24, and [2482 \(2019\)](#), para. 16.

⁴⁸ Ombudsman’s report for 2020; [S/2020/493](#), in which the lack of documentation on humanitarian consequences is noted; Gavin Sullivan, *The Law of the List* (Cambridge University Press, 2020); and United States of America, Supreme Court, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), case Nos. 08-1498 and 09-89, Decision, 21 June 2010.

⁴⁹ A number of general terrorism offences found in Security Council resolutions lack international legal definition and, thus, precision. The Special Rapporteur points out the particular challenges that this poses in the context of extradition or lawful transfer proceedings. Moreover, it is not a right of States to criminalize insurgency in the territory of other States, and they are specifically not obliged to do so under international humanitarian law.

D. Institutional dimensions of the United Nations counter-terrorism architecture

27. The activities of an increasing number of United Nations organs, entities and mechanisms touch on counter-terrorism, including in situations of armed conflict; therefore, such bodies engage with the interface between international human rights law and humanitarian law in that context. They include, to varying degrees, members and observers of the United Nations Global Counter-Terrorism Coordination Compact, including under the umbrella of its working groups. At the same time, other entities, such as United Nations human rights mechanisms, certain investigative mechanisms, commissions of inquiry and fact-finding missions, are also pertinent actors in this space.

28. A notable role in this context is played by the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism and its Executive Directorate.⁵⁰ As the entity tasked with monitoring and facilitating the implementation by Member States of a series of Security Council resolutions, the Executive Directorate is called upon to assess national counter-terrorism laws, policies and practices that implement measures mandated by the Council, including their compliance with applicable international human rights, international humanitarian and refugee law (see S/2019/998). Therefore, the Counter-Terrorism Committee and its Executive Directorate exert a significant direct influence on ways in which Member States interpret and implement relevant obligations under international law, including their approach to addressing possible tension or conflict between international human rights and humanitarian law norms, on the one hand, and the counter-terrorism framework, on the other.⁵¹ These assessments and the resulting reports and recommendations are, in principle, confidential,⁵² leading to a lack of transparency that contributes to reduced internal consistency within the United Nations system in relation to approaching the interaction between counter-terrorism regulation and other relevant international law norms and standards. The Special Rapporteur is profoundly concerned that such a lack of transparency occludes the compatibility of advice given by the Executive Directorate with the assessment of human rights deficits in counter-terrorism practice by authoritative entities and processes (such as the universal periodic review, determinations of the United Nations treaty bodies and country assessments by the Special Rapporteur) and that this will be further compounded in the area of international humanitarian law, with augmented Security Council direction given to the Executive Directorate (see Council resolution 2462 (2019)). The Special Rapporteur recognizes the profoundly political context in which counter-terrorism entities operate and fears that these dynamics may be exacerbated in the context of international humanitarian law assessment, not least in engagement with armed conflict status from which norm obligation determinations follow. This shortcoming is of particular concern given the political weight of recommendations issued by the Counter-Terrorism Committee and its Executive

⁵⁰ See Security Council resolution 2395 (2017); S/2019/998; and Dustin A. Lewis, Naz K. Modirzadeh and Jessica S. Burniske, “The Counter-Terrorism Committee Executive Directorate and international humanitarian law: preliminary considerations for States”, legal briefing, March 2020, addressing the role of the Executive Directorate as a “special political mission” operating under the policy guidance of the Counter-Terrorism Committee, specifically affirming the constraints of the Charter (in particular Article 103) on such bodies.

⁵¹ The Counter-Terrorism Committee Executive Directorate also spearheaded thematic initiatives that touch upon, among other things, obligations under international humanitarian law, such as the guiding principles on foreign terrorist fighters (Madrid Guiding Principles) (S/2015/939, annex II) and the addendum thereto (S/2018/1177, annex).

⁵² Assessments, recommendations and country-specific updates on the implementation of relevant Security Council resolutions have not been made public since 2006.

Directorate and the comparatively high rate of compliance with counter-terrorism-related soft and informal norms and relevant guidance by Member States, compared with the lacunae in human rights and humanitarian law compliance identified in the present report and elsewhere (see [A/74/335](#), para. 22).

29. Assessing the scope and content of State obligations under international human rights law and international humanitarian law in the context of counter-terrorism requires entities of the United Nations counter-terrorism architecture to grapple with complex questions, at times without adequate in-house subject-matter expertise or sustained and integrated engagement with external experts. The Special Rapporteur emphasizes the importance and challenges for such entities that address, within the framework of their activities, the compatibility of counter-terrorism efforts with international human rights and humanitarian law. In particular, given the challenges documented in the present report in ensuring the appropriate application of international humanitarian law, there are meaningful concerns about the political pressure that such entities will face if they engage in international humanitarian law assessment, to the detriment of the enforcement of both international humanitarian law and international human rights law. Moreover, the Special Rapporteur is cognizant of the potential that minimal and/or non-transparent in-house assessment may function to dislodge the pre-eminent interpretative role of treaty bodies (with regard to human rights) and ICRC (with regard to international humanitarian law). Expert and impartial human rights and humanitarian law practice is also imperative to avoid the increased fragmentation and diminution of norms in this space through the conflicting interpretation of norms that regulate the prevention and countering of terrorism. United Nations entities, in the context of developing guidance, technical assistance, capacity-building and other programmes, initiatives and activities aimed at supporting Member States, should strive to provide nuanced and accurate assistance and advice depending on their mandates and primary thematic expertise rather than compartmentalized and fragmented guidance that fails to consider the totality of State obligations in relation to their counter-terrorism efforts. These entities should ensure that such advice is consistent with authoritative interpretations and implementation of international humanitarian law and international human rights law by United Nations judicial and quasi-judicial mechanisms, including human rights treaty monitoring bodies, as well as the pre-eminent role of ICRC in the field of humanitarian law. Such an approach also pre-empts Member States' receiving conflicting advice from different United Nations entities, depending on the mandate and primary thematic expertise of the body in question. It also calls for constructive and regular consultation and cooperation among United Nations entities, with the aim of facilitating a veritable "One United Nations" approach that builds upon the thematic expertise in the area of human rights law and international humanitarian law of relevant entities and mechanisms and therefore meaningfully furthers respect for international norms and standards.

E. Protecting the integrity of principled humanitarian action: humanitarian exemptions

30. While acknowledging the importance of criminalizing the financing of terrorism and that of terrorism sanctions regimes, the Special Rapporteur has already addressed the very serious impact of the complex web of interwoven counter-terrorism measures, legislation, regulations, donor requirements and terrorism sanctions regimes aimed at limiting, and sometimes criminalizing, various forms of broadly defined support and assistance to terrorist groups (see [A/74/371](#), paras. 31–44, and [A/HRC/40/52](#)). She is also aware that sanctions regimes have in various instances led to the impediment or delay of humanitarian operations, many of which relate to the

core mandate of humanitarian actors, including that of ICRC.⁵³ The proliferation, coexistence and overlap of these broad and vague measures, which can be opaque and lacking in clear implementation guidance, not only restrict access to needy populations in areas controlled by non-State armed groups but also have an impact on humane, neutral, independent and impartial humanitarian action in various ways.⁵⁴ Regrettably, they can result in the arrest and prosecution of humanitarian, human rights and other civil society actors. Indeed, such measures ultimately impede the ability of impartial humanitarian organizations, including ICRC, to carry out life-saving humanitarian tasks assigned to them by States parties to the Geneva Conventions of 1949 and their Additional Protocols,⁵⁵ including the provision of food and medical assistance.⁵⁶ Furthermore, while the primary focus in this context is humanitarian action, the Special Rapporteur notes that the measures also limit critical work in the field of supporting respect for international norms, such as human rights representation and advocacy, training, conflict resolution, fact-finding and evidence gathering for the purposes of prosecution. These elements play an important role in peacebuilding, delivering justice to victims and reconciliation, and are therefore as much a part of an effective strategy for counter-terrorism and preventing violent extremism as bringing life-saving assistance to populations stranded under the aegis of violent non-State armed groups.

31. The Security Council holds a particular responsibility, given that a number of the counter-terrorism measures that it has adopted play a central role in impeding humanitarian action, not least in the areas of sanctions (both sanctions administered by the United Nations and those resulting from Council resolution [1373 \(2001\)](#)), financing and support for terrorism or terrorist actors and travel. Worryingly, although the Security Council Committee pursuant to resolutions [1267 \(1999\)](#) and [1989 \(2011\)](#) concerning Al-Qaida and associated individuals and entities has never listed an individual solely on the basis of the provision of medical or humanitarian assistance, it has nonetheless referred to medical activities as part of the basis for listing two individuals and two entities, implying that medical care and medical supplies are considered forms of impermissible support for designated terrorist groups.⁵⁷

32. The Special Rapporteur is encouraged that the Secretary-General has called upon States to not impede efforts by humanitarian organizations to engage with armed groups in order to seek improved protection for civilians – even those groups that are proscribed in some national legislation (see [S/2009/277](#), para. 45). The Secretary-General has also called for measures that guarantee the ability of medical personnel to treat patients in all circumstances, without leading to any form of sanctions being adopted.⁵⁸ These are essential measures to protect both the human rights of individuals and their protective entitlements under international humanitarian law. The Special Rapporteur is also encouraged that, heeding these calls, the Security Council, following the General Assembly (see Assembly resolutions [70/291](#), para. 22, and [72/284](#), para. 79), has recently urged States, when designing and applying

⁵³ Such operations includes visits and material assistance for detainees (including family visits), first aid training, war surgery seminars, dissemination of information on international humanitarian law to weapons-bearers, delivery of aid to meet the basic needs of the civilian population in areas that are hard to reach and medical assistance for wounded and sick fighters.

⁵⁴ See United States, Supreme Court, *Holder v. Humanitarian Law Project*.

⁵⁵ These include rules governing humanitarian operations, including the entitlement of impartial humanitarian actors to offer their services.

⁵⁶ Alice Debarre, “Safeguarding medical care and humanitarian action in the United Nations counter-terrorism framework”, International Peace Institute, September 2018; and the Madrid Guiding Principles ([S/2015/939](#), annex II, sect. III.C).

⁵⁷ Debarre, “Safeguarding medical care and humanitarian action”.

⁵⁸ See General Assembly resolution [72/284](#), para. 74; [S/2016/722](#), annex, para. 10 (recommendation 3.1); and [S/2018/462](#), para. 22.

measures to counter terrorism, to take into account the potential effect of such measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law (see Council resolutions [2462 \(2019\)](#), para. 23, and [2482 \(2019\)](#)). This is a welcome and positive departure.⁵⁹

33. However, these statements of principle are not sufficient to actively protect the integrity of humanitarian action and actors working in areas where terrorist groups are active. Indeed, humanitarian law already protects engagement for humanitarian purposes, and the importance of humanitarian access is routinely included in Security Council resolutions (see, for example, resolutions [2139 \(2014\)](#), para. 7, and [2175 \(2014\)](#), para. 3). Given the effect – real or chilling – that these measures have already had on the delivery of principled humanitarian assistance in challenging environments to populations in Afghanistan, Iraq, Mali, Nigeria, Somalia, the Syrian Arab Republic, Yemen and Gaza, it is the clear position of the Special Rapporteur that the current matrices do not permit humanitarian actors to carry out their mandates in a way that complies with international humanitarian law, thus compromising the fundamental rights and dignity of vulnerable people.⁶⁰ States and international organizations must take specific action to ensure that their counter-terrorism frameworks are effectively respectful of international humanitarian law, thereby advancing the fundamental obligation of States to protect and promote the rights of individuals.⁶¹

34. In order to ensure the integrity of humanitarian action, States and international organizations must regulate in a way that effectively gives precedence to the rules of international humanitarian law when the latter govern. Correspondingly, States and international organizations are encouraged to authorize and not prohibit the assistance or protection activities carried out by impartial humanitarian organizations in accordance with international humanitarian law, even if they benefit individuals designated as terrorists. The Special Rapporteur has already addressed the need for States and international organizations, including the Security Council, to adopt humanitarian exemption clauses⁶² that unambiguously exempt humanitarian actions from their counter-terrorism measures, granting immunity from counter-terrorism and sanctions regimes to all individuals and organizations engaged in principled humanitarian action (see [A/HRC/40/52](#), paras. 21–22).

35. The Special Rapporteur acknowledges that such exemptions already exist in certain national jurisdictions.⁶³ They can take various forms and be varyingly restrictive. For example, the concept of what is considered “humanitarian” can also be unhelpfully compartmented, with distinctions between, for example, the delivery of medicine and the provision of medical services.⁶⁴ By creating silos around humanitarian activity, or rendering their practical application seemingly random, such exemptions fail to grasp the complexity of humanitarian action and provide insufficient legal certainty to humanitarian actors, a prerequisite for the delivery of principled humanitarian action and a central requirement of human rights law (see International Covenant on Civil and Political Rights, art. 15). The Security Council

⁵⁹ See, for example, the submissions of Sweden and Switzerland.

⁶⁰ In numerous submissions to the Special Rapporteur on this issue, confidentiality was requested on the basis of fear of retaliation by States against humanitarian organizations working in conflict-affected areas.

⁶¹ United Nations University, “Briefing on United Nations sanctions: nine points on designing United Nations sanctions to better protect humanitarian activities”, July 2020.

⁶² See the exemptions in Security Council resolutions [1452 \(2002\)](#), para. 1 (a), [2253 \(2015\)](#) and [2368 \(2017\)](#). See also [A/64/258](#), [A/67/396](#), [A/73/361](#) and [A/HRC/34/61](#).

⁶³ Notably in Australia and the United States (see [A/70/371](#), para. 34, and [A/73/314](#), para. 51).

⁶⁴ United States, Court of Appeals, Second Circuit, *United States v. Farhane*, case No. 634 F.3d 127, Decision, 4 February 2011.

should draw on its experience with other humanitarian exemptions to sanctions regimes (such as resolution 2397 (2017) on the Democratic People’s Republic of Korea), in particular its – albeit limited – humanitarian exemption incorporated into sanctions measures pursuant to resolution 751 (1992) concerning Somalia, which also includes terrorist groups (see resolutions 1916 (2010) and 2444 (2018), para. 48, containing exemptions in the context of famine). In contrast with humanitarian exemptions, derogation systems, temporary authorizations or licences not only raise obstacles but are also often unworkable from an operational perspective. In addition, derogation, authorization or licence systems are not compatible with international humanitarian law, adding a layer of consent to humanitarian action not foreseen under that body of law, which only requires impartial humanitarian organizations to obtain the consent of the belligerents concerned, not that of third States or international organizations, to conduct their activities. Third States and international organizations are only under the obligation to allow and facilitate humanitarian action, a function that derogations do not fulfil. The Special Rapporteur underscores the essential interconnectedness between the provision of humanitarian assistance and the protection of individual human rights (health, food, water, education and security)⁶⁵ and stresses that to undermine the work of humanitarian actors using counter-terrorism discourse and practice is to undermine the most essential rights of the most vulnerable of people on the planet.

F. Equality and non-discrimination

36. Equality and non-discrimination are hardwired into the international human rights framework. They find expression in the Charter, the Universal Declaration of Human Rights, the core human rights covenants adopted under the auspices of the United Nations and regional human rights treaties. They are customary law norms and the bedrock of human dignity from which the essential character of human rights flows. They constitute indispensable legal norms in addressing States’ human rights obligations while countering terrorism. They affirm that States must treat persons equally and without distinction in any measure or practice designed to regulate the prevention and countering of terrorism, ensuring, for example, that victims of terrorism and victims of counter-terrorism are treated equally under the law and entitled to the same process, remedies and status. While international humanitarian law differentiates between categories of actors in armed conflict, it maintains a foundational commitment in its sphere of application to equality and non-discrimination that has a horizontal legal application among parties to a conflict.⁶⁶ Specifically, a key aspect of equality under international humanitarian law is the substantial equality of the obligations of parties to an armed conflict, both State and non-State parties, albeit without conferring legitimacy on non-State groups. Equality is also reflected in the non-discrimination of safeguards vis-à-vis belligerents. The centrality of equality and non-discrimination rules to each legal regime is exceptionally important with regard to the uninterrupted protection of rights regardless of the circumstances that apply. These rules maintain a continuum of rights-bearing responsibilities by States, whether in times of armed conflict or peace. The protection of equality in armed conflict (international or non-international) ensures and creates a springboard for the protection of rights in peacetime and often creates the enabling conditions to bring about a transition from conflict to non-conflict and reconciliation. Ensuring the practical application of equality and non-discrimination in contexts of counter-

⁶⁵ The Special Rapporteur expresses her concern in that regard in relation to paragraph 3 of Security Council resolution 2532 (2020), in which the extension of a “humanitarian pause” to “military operations against Islamic State in Iraq and the Levant” is expressly prohibited.

⁶⁶ This is captured in ICRC, Customary International Humanitarian Law, rule 88 on non-discrimination.

terrorism (such as criminal law sanctions, administrative measures and detention processes) remains contested. The Special Rapporteur has observed the attraction for States of placing counter-terrorism responses in a *sui generis* category, entirely divorced from these customary and treaty law obligations. The attraction appears particularly pronounced in situations of non-international armed conflict, situations of humanitarian crisis and in States where long-standing grievances concerning minority status and rights are being defined wholesale as “terrorism”. Ensuring the enforcement of international humanitarian law is one of the most effective means of addressing the broader protection of human rights in such contexts.

G. Foreign terrorist fighters and their families

37. The Special Rapporteur has consistently stated that the urgent return and repatriation of foreign fighters and their families from conflict zones is the only international law-compliant response to the complex and precarious human rights, humanitarian and security situation faced by the women, men and children who are detained in overcrowded camps, prisons or elsewhere in the north-eastern part of the Syrian Arab Republic and in Iraq.⁶⁷ Their return is a comprehensive response that amounts to the positive implementation of Security Council resolutions 2178 (2014) and 2396 (2017) and is considerate of a State’s long-term security and justice interests.⁶⁸ The Special Rapporteur finds that conditions in the detention camps amount to torture and inhuman and degrading treatment under international law.⁶⁹ She affirms that persons held in the camps are subject to numerous intersecting and compounded human rights violations, such as violations relating to arbitrary detention, fair trial, discrimination, health and education. She finds several violations of the rights of children as set out in the Convention on the Rights of the Child. She accepts that parallel violations of international humanitarian law, at a minimum the prohibition under common article 3 of the Geneva Conventions on torture, humiliating and degrading treatment, violence to life and person, judicial guarantees and care of the sick and wounded and the prohibition of adverse distinction founded on protected criteria, are also implicated.

38. The acceptance by States of a legal no-man’s-land in which human rights obligations are not formally applicable to the non-State actor holding their nationals (such as the Syrian Democratic Forces) and a refusal to accept responsibility for their nationals, including children, are not only a humanitarian tragedy but an abrogation of the most fundamental legal responsibilities. The Special Rapporteur takes the view that a number of States may exercise *de facto*⁷⁰ or constructive jurisdiction over the conditions of their nationals held in camps specifically because they have the practical ability to bring the detention and attendant violations to an end through repatriation, as evidenced by the successful repatriation efforts of Ireland, Kazakhstan and the Russian Federation, as well as Kosovo.⁷¹ She affirms a positive obligation for States

⁶⁷ See www.ohchr.org/EN/Issues/Terrorism/Pages/Statements.aspx.

⁶⁸ Office of the United Nations High Commissioner for Human Rights, “Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic: legal analysis”, 2020.

⁶⁹ This view is shared by the Special Immigration Appeals Commission and not contested by the Court of Appeal of England and Wales in its decision regarding Shamima Begum.

⁷⁰ See United Kingdom, Supreme Court, *Rahmatullah. Secretary of State for Defence*, case No. [2013] 1 AC 614, 656 [123].

⁷¹ References to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

to take all reasonable means to end erga omnes violations of human rights and humanitarian law, in particular those directed at children.⁷²

39. The Special Rapporteur highlights her concerns about the sui generis regulation of foreign terrorist fighters and stresses that the totality of international law, and not cherry-picked aspects of it, apply to the treatment of foreign terrorist fighters and their families. The deployment of “super legislative” Security Council resolutions, which have been interpreted by some States as facilitating the circumvention of pre-existing human rights and humanitarian law obligations, is regrettable and merits pause. Counter-terrorism regulation is increasingly emerging as a hyperexceptional legal regime, with devastating consequences for individuals.

40. The Special Rapporteur stresses the self-evident importance of and need for applying international humanitarian law to contexts of armed conflict. She decries the rhetorical and descriptive use of armed conflict language by States and the subsequent denial of the applicable legal rules that accompany that classification. She notes that the term “foreign terrorist fighter” and the nomenclature that has emerged with it attached to family members of foreign fighters, the majority of whom are women and children (such as “affiliated” or “associated”), has no protective basis, thereby leaving individuals caught up in the maelstrom of armed conflict profoundly vulnerable. One implication of ways in which Security Council resolutions on counter-terrorism and associated soft law are implemented is that all individuals perceived as being affiliated with Islamic State in Iraq and the Levant are considered “terrorists” and are beyond the protection of the law.⁷³ This view is inconsistent with the elemental basis of both human rights and humanitarian law.⁷⁴ The Special Rapporteur views the application of international humanitarian law as not only legally sound but particularly essential to safeguard the rights of persons found in north-eastern parts of the Syrian Arab Republic and in Iraq. Precisely because these individuals find themselves in the power of a party to the conflict, they are not excluded from protection under international humanitarian law. No existent rule of human rights and humanitarian law (whether treaty or customary law) excludes their protection; the opposite is true, given that both bodies of law demand it. Such protections include the provisions of common article 3 and customary international law applicable in armed conflict, specifically the articulation of the grounds and procedures for detention of individuals that is not arbitrary, the full enforcement of essential judicial guarantees if individuals are charged with criminal or terrorism offences, no transfer to the power of another party to the conflict or State if they are to face violations of fundamental human rights, a prohibition of torture, which means that their conditions of confinement must not per se constitute torture or inhuman and degrading treatment, and a prohibition of adverse discriminatory treatment. The Special Rapporteur emphasizes that adverse distinction includes the phrase “other similar criteria”, which involves discrimination based on mere association with, proximity to, sexual relationship with and birth by a foreign fighter.

41. The Special Rapporteur is appalled by the treatment of children in camps such as the Hawl and Rawj camps. State reluctance to apply the law governing the treatment of children associated with armed groups (such as child soldiers) to children in “terrorism” contexts points to indefensible double standards and doublespeak in the application of international law. The Special Rapporteur confirms that the Optional Protocol to the Convention on the Rights of the Child on the involvement of

⁷² General comment, common article 1, on the obligation of all States parties to “respect and ensure respect”.

⁷³ Geneva Academy, *Foreign Fighters under International Law*, Academic Briefing, No. 7 (Geneva, 2014).

⁷⁴ ICRC, “Humanitarian concerns in the aftermath of the military operations against the Islamic State group in Syria and Iraq”, position paper, annex 2.

children in armed conflict requires special protection for children, including unaccompanied, orphaned or separated children. She affirms the complementary legal protections for children under both international human rights law and international humanitarian law and the application of customary international law applicable in armed conflict to children detained in relation to the conflict.⁷⁵ She finds it deeply troubling that States that profess a commitment to human rights and humanitarian law simply fail to live up to those standards with regard to children in the camps. International humanitarian law does not wither or fall away when designations of terrorism are placed on individuals, including women and children. The necessity of upholding those norms has never been greater, and the obligations on States never clearer.

IV. Recommendations

A. Recommendations for the United Nations

42. All United Nations entities engaged in counter-terrorism activities must ensure the full application of international law, including international human rights law, international humanitarian law and refugee law, and avoid undermining any of these three bodies of interdependent norms directly or indirectly.

43. United Nations entities should work towards furthering the systemic integration of international human rights and humanitarian law in counter-terrorism efforts by elevating, supporting and integrating the work, interpretation and findings of authoritative human rights and humanitarian law bodies or entities.

44. United Nations entities mandated or engaged in counter-terrorism activities, including in particular the Office of Counter-Terrorism and the Counter-Terrorism Committee Executive Directorate, should establish and maintain clear, consistent and structured methods and practices of engagement with civil society, including humanitarian actors and entities. This includes taking on board the views of civil society concerning the negative impact of counter-terrorism measures on human rights and humanitarian action.

45. The Security Council should:

(a) Recognize the necessity of upholding human rights and humanitarian law, encourage this through its resolutions and discourage misapplication of counter-terrorism norms to the legitimate scope of human rights and the application of international humanitarian law;

(b) Ensure that any future anti-terrorism resolutions under Chapter VII of the Charter are drafted so as to exclude the activities of neutral, independent and impartial humanitarian organizations from their scope. The Council should consider mitigating the unexpected negative impact of existing resolutions on impartial humanitarian activities and include adequate humanitarian safeguards in future resolutions regarding terrorism;

(c) Find ways to engage consistently with impartial humanitarian organizations and independent civil society organizations, as well as human rights and humanitarian law experts, to remain apprised of the negative impact of counter-terrorism regulation on the protection of human rights and international humanitarian law.

⁷⁵ Additional Protocol I, art. 77 (3), and Additional Protocol II, art. 4 (3) (d).

B. Recommendations for States

46. Member States are urged to repatriate their nationals, in particular women and children, from detention camps in the north-east of the Syrian Arab Republic, noting that their continued inaction constitutes a breach of their obligations under international human rights law and international humanitarian law.

47. Member States are urged to prosecute their nationals or persons within their effective control for serious violations of human rights and humanitarian law, including war crimes, genocide and crimes against humanity, in trials that meet the requisite standards of fair trial guaranteed under international human rights law.

48. Member States should adopt humanitarian exemption clauses under the same conditions as those referred to in paragraph 45 (b).

49. Member States are urged to meet their fundamental human rights and humanitarian law obligation to protect children caught up in situations of armed conflict and terrorism, including repatriation, reintegration and family unity, and preserve the best interests of the child in all their actions.
