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Reducing the Negative Effects of Counterterrorism Frameworks and Other Restrictive Measures on Humanitarian Action and Enforcing the Obligations of States in Relation to the COVID-19 Vaccine

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**REDUCING THE NEGATIVE EFFECTS OF
COUNTERTERRORISM FRAMEWORKS AND
OTHER RESTRICTIVE MEASURES ON
HUMANITARIAN ACTION AND ENFORCING
THE OBLIGATIONS OF STATES IN RELATION
TO THE COVID-19 VACCINE**

CLÁUDIO CERQUEIRA BASTOS NETTO*

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I. INTRODUCTION

Countering terrorism has been a priority agenda point for the international community, especially after the September 11th attacks.¹ As the International Committee of the Red Cross (ICRC) points out, “States have had to confront a threat emanating from individuals and non-State armed groups [(NSAGs)] that resort to acts of terrorism. In response, States and international organizations have developed increasingly robust counterterrorism measures.”²

States are entitled to fight terrorism, given that it can cause harm to civilians.³ In fact, terrorist acts can amount to international crimes and/or violations of International Humanitarian Law (IHL) and International Human Rights Law (IHRL),⁴ and their perpetrators must be brought to justice.⁵ At the same time, States have to make sure that any counterterrorism (CT) measure complies with their IHL and IHRL obligations, as they do not cease to apply in the face of the threat posed by terrorism.⁶ Due to the seriousness of this issue, international organizations and civil society organizations have

1. See Off. of the U.N. High Comm’r for Hum. Rts., *Fact Sheet No. 32: Human Rights, Terrorism and Counter-Terrorism*, 19 (2008), <https://ohchr.org/Documents/Publications/Factsheet32EN.pdf> [hereinafter *Fact Sheet No. 32*] (noting the swift action by the UNSC and regional organizations following the terrorist attacks on Sept. 11, 2001 to strengthen the legal framework for international cooperation and common approaches to the threat of terrorism).

2. INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS: RECOMMITTING TO PROTECTION IN ARMED CONFLICT ON THE 70TH ANNIVERSARY OF THE GENEVA CONVENTIONS, 58 (2019) [hereinafter INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT].

3. See *Fact Sheet No. 32*, *supra* note 1, at 1 (noting that security of the individual is a basic human right and that States are obligated to protect the human rights of their nationals).

4. See *id.* at 12 (explaining that acts of terrorism are specifically prohibited by IHL and IHRL).

5. *Id.* Additionally, States have an obligation to prosecute individuals who have committed grave breaches of the Geneva Conventions, Additional Protocol I, or other serious violations of IHL. See *Grave Breaches*, INT’L COMM. OF THE RED CROSS, <https://casebook.icrc.org/glossary/grave-breaches> (last visited Oct. 19, 2021) (stating that particularly serious violations must be prosecuted on the basis of universal jurisdiction).

6. See INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT, *supra* note 2, at 58 (raising the misperception that IHL does not apply to persons designated as terrorists).

written reports on the compatibility of anti-terrorism measures with IHL and human rights protections.⁷

This article analyzes the impact of CT measures on humanitarian activities, such as undue delays and restrictions to the provision of humanitarian services and the risks of liability for humanitarian organizations and individuals performing activities protected by IHL. Although the main focus of this article is the negative effects of CT measures on the activities of humanitarian actors, it will also mention IHRL obligations of States. The definitions of terrorism or terrorist acts will not be discussed—rather, the focus will be on the effects of the measures employed to counter terrorism. Moreover, this article will propose solutions to improve compliance with IHL and to safeguard humanitarian activities in the midst of the fight against terrorism.⁸

This article will also analyze how public health measures implemented by States to stop the spread of the COVID-19 pandemic may have further reduced the ability of humanitarian organizations to provide protection and assistance services as protected by IHL, and added even more obstacles to an already challenging context.⁹ Also, it will explain how IHL provisions apply during a pandemic and how they can be vital to save lives and provide vital assistance to populations affected by conflict.¹⁰ Relevant IHL obligations include specific protections to medical units and medical personnel, as well as protections to objects indispensable to the survival of the civilian population, such as water supplies. Lastly, this article will analyze

7. See, e.g., Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/HRC/37/52 (Mar. 1, 2018) [hereinafter *March 2018 Report on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*] (recognizing that counter-terrorism is essential to human rights).

8. See *infra* Section II.B.

9. See Katariina Mustasilta, *From Bad to Worse? The Impact(s) of COVID-19 on Conflict Dynamics*, EUROPEAN UNION INST. FOR SEC. STUD. (June 11, 2020), <https://www.iss.europa.eu/content/bad-worse-impacts-covid-19-conflict-dynamics> (examining how the pandemic further limited the ability of humanitarian organizations to provide assistance in territories experiencing conflict).

10. See *id.* (stating that “the pandemic itself risks exacerbating inequalities and further burdening already vulnerable groups within conflict-affected societies.”).

the IHL and IHRL obligations which States must respect while providing vaccinations to their populations.¹¹

II. THE IMPACT OF CT MEASURES IN THE COMPLIANCE WITH IHL

A. NEGATIVE EFFECTS OF RESTRICTIVE MEASURES

The ICRC has found that some States may claim that “the *exceptional* threat posed by non-State armed groups designated as ‘terrorist’ requires an *exceptional* response.”¹² This reasoning can be used to adopt interpretations that jeopardize compliance with IHL obligations, including:

[B]road interpretations of who may be lawfully targeted, under which persons involved in financing organized armed groups designated as “terrorist”, for instance, are targeted; a laxing in interpreting the principle of proportionality, permitting excessive incidental loss of civilian life, injury to civilians, and/or damage to civilian objects; and a selective approach to the rules governing deprivation of liberty of persons designated as “terrorists”, justifying, for instance, prolonged solitary confinement, deprivation of family contact, or the impossibility of challenging the lawfulness of the detention.¹³

In addition, CT measures may create obstacles to the work of humanitarian organizations and affect their ability to provide life-saving assistance and protect civilians affected by conflict.¹⁴ As the ICRC summarizes, CT measures may affect compliance with specific IHL rules:

[A] number of counterterrorism measures criminalize one or more of the following acts: engagement with non-State armed groups designated as

11. See Alex Breitegger, *COVID-19 Vaccines and IHL: Ensuring Equal Access in Conflict-Affected Countries*, HUMANITARIAN L. AND POL'Y (Nov. 5, 2020), <https://blogs.icrc.org/law-and-policy/2020/11/05/covid-19-vaccines/> (explaining various IHL and IHRL obligations that relate to the provision of vaccines).

12. INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT, *supra* note 2, at 58.

13. *Id.* at 59.

14. See *id.* (noting that various armed conflicts in the past decade have shown how counterterrorism measures adversely affect the ability of humanitarian organizations to carry out their activities).

“terrorist”; presence in areas where these groups are active; or delivery of medical services to wounded or sick members of such groups. *Such prohibitions are incompatible with three areas of IHL: the rules governing humanitarian activities, including the entitlement of impartial humanitarian organizations to offer their services and the obligation to allow and facilitate the relief activities undertaken by such organizations; the rules protecting the wounded and the sick as well as those providing medical assistance, notably the prohibition against punishing a person for performing medical duties in line with medical ethics; and the rules protecting humanitarian personnel.*¹⁵ (emphasis added)

CT measures may represent a threat to both IHL and IHRL, considering that States employ CT measures not only in the context of armed conflicts, but also during peace times.¹⁶ CT measures may affect IHRL obligations in situations that are not classified as an armed conflict, in which IHL is not applicable.¹⁷ In order to comply with their legal obligations, States should not raise the need to counter terrorism as a justification to the use of force and/or authoritarian measures which may cause violations to human rights.¹⁸ Human rights that may be affected by CT measures include, inter alia, the right to life, the right to personal liberty, the right to due process and judicial guarantees, right to nationality,¹⁹ and the prohibition on torture and cruel, inhuman and degrading treatment.²⁰ CT efforts have included the adoption of a range of measures, both at

15. *Id.* at 60.

16. *Id.*

17. *See Fact Sheet No. 32, supra* note 1, at 12 (noting that IHL applies only in situations of armed conflict).

18. *See id.* at 9 (stating that States’ measures to combat terrorism must comply with international laws).

19. One example is the deprivation of nationality of persons associated with armed groups or armed forces, including persons who fought on behalf of armed groups or the family members of those who fought. This has happened in relation to persons who have traveled to Syria and Iraq to join ISIS and who have since been prevented from returning to their home countries. *See* Rikar Hussein & Ghita Intan, *Hundreds of Indonesian Former IS Members, Families Could Become Stateless*, VOA NEWS, (Feb. 29, 2020), <https://www.voanews.com/extremism-watch/hundreds-indonesian-former-members-families-could-become-stateless> (reporting an instance in Indonesia where counter-terrorism measures affected the right to nationality).

20. *See Fact Sheet No. 32, supra* note 1, at 4 (listing human rights that may be affected by counter-terrorism measures).

the domestic level (i.e., implementation of national legislation)²¹ and the international level.²² In this regard, the U.N. Security Council (hereinafter SC or the Council) plays a particularly important role as it has adopted sanctions regimes, CT resolutions and created part of the U.N. CT framework, like the Counter-Terrorism Committee (CTC) and the Counter-Terrorism Committee Executive Directorate (CTED).²³ Even more importantly, the SC has adopted CT-related resolutions under Chapter VII of the U.N. Charter—thus making them binding on all 193 U.N. member States²⁴—such as Resolution 1373 (2001) and Resolution 2462 (2019).²⁵

Said resolutions have included operative paragraphs (OPs) mandating States to adopt measures aimed at preventing and suppressing terrorism, such as imposing regulations on the financing of terrorism²⁶ and provision of material support to terrorism or terrorist actors,²⁷ as well as imposing sanctions.²⁸ However, they did

21. *See id.* at 20 (stating that individual States have implemented legislation relating to counter-terrorism).

22. *See id.* (stating that the international community has adopted measures have implemented legislation relating to counter-terrorism). *See also* BEN HAYES, *THE IMPACT OF INTERNATIONAL COUNTERTERRORISM ON CIVIL SOCIETY ORGANISATIONS: UNDERSTANDING THE ROLE OF THE FINANCIAL ACTION TASK FORCE* (Maïke Lukow & Christine Meissler eds., 2017); SARAH MARGON, *UNINTENDED ROADBLOCKS: HOW U.S. TERRORISM RESTRICTIONS MAKE IT HARDER TO SAVE LIVES* (Ctr. for Am. Progress pub., 2011).

23. S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1535, ¶ 5 (Mar. 26, 2004). *See also* UN Security Council, Letter Dated 21 July 2020 from the Chair of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council, 21 July 2020, S/2020/731 (explaining guidelines for Member State visits performed by the Counter-Terrorism Committee); G.A. Res. 71/291 (June 19, 2017) (establishing the UN Office of Counterterrorism (OCT), an organ that has the objective of assisting member States in implementing the UN Global Counter-Terrorism Strategy).

24. U.N. Charter art. 24, ¶ 1.

25. OHCHR, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, A/HRC/40/52, 2019. *See also* S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 2462 (Mar. 28, 2019).

26. S.C. Res. 1373, ¶ 1 (Sept. 28, 2001); S.C. Res. 2462, ¶¶ 1–8 (Mar. 28, 2019).

27. S.C. Res. 1373, ¶ 2 (Sept. 28, 2001); S.C. Res. 2462, ¶ 1 (Mar. 28, 2019).

28. S.C. Res. 1368, ¶ 1 (Sept. 12, 2001); S.C. Res. 1390, (Jan. 28, 2002); S.C. Res. 1373, ¶ 1 (Sept. 28, 2001); *See generally Security Council Resolutions*, U.N.,

not include clear and detailed definitions of the acts that amount to material support to terrorists, and this vague language creates problems to humanitarian organizations and individuals working for them who want to make sure they are not subject to liability for such offenses while carrying out impartial, humanitarian activities.²⁹ For example, in SC Resolution 2462 (2019), the Council decided that U.N. member States shall criminalize the:

[W]illful provision or collection of funds, financial assets or economic resources or financial or other related services . . . for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act.³⁰

Although States have a legitimate concern with combatting terrorism, including its financing, they have to make sure that CT provisions respect IHL and IHRL, and that such measures do not have unintended effects on humanitarian action and human rights.³¹

Prohibitions on the financing of terrorism could have negative repercussions for the provision of impartial, humanitarian services.³² As Nathalie Weizmann points out, “[h]umanitarian activities may, at times, entail incidental payments, such as tolls, taxes, permit and other fees, to armed groups who have control over the territory where the activities are carried out or pass through.”³³ Payment of tolls,

<https://www.un.org/sc/ctc/resources/security-council/resolutions/> (last visited Jan. 7, 2022) (listing SC resolutions related to CT).

29. S.C. Res. 2462, ¶ 5 (Mar. 28, 2019).

30. *Id.*

31. INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT, *supra* note 2, at 58.

32. See BEN HAYES, THE IMPACT OF INTERNATIONAL COUNTERTERRORISM ON CIVIL SOCIETY ORGANISATIONS: UNDERSTANDING THE ROLE OF THE FINANCIAL ACTION TASK FORCE 5 (Maïke Lukow & Christine Meissler eds., 2017) (arguing that prohibitions on terrorist financing have limited the capabilities and independence of civil society organizations).

33. Nathalie Weizmann, *Painting Within the Lines: The UN’s Newest Resolution Criminalizing Financing for Terrorists-Without Imperiling Humanitarian Activities*, JUST SEC. (Mar. 29, 2019), <https://www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperiling-humanitarian->

taxes, or other fees to NSAGs may threaten humanitarian workers with criminal liability for financing terrorism—i.e., they may incur violations of asset freezes and/or of measures that criminalize the provision of material support to terrorism and financing of terrorism.³⁴ Also, the facilitation of peace negotiations and mediation talks could raise concerns with criminal liability, given that an organization (such as the ICRC) may facilitate the travel of individuals designated as terrorists (e.g., by the payment of travel expenses) to a neutral location where they can engage in peace negotiations.³⁵ CT frameworks may expose humanitarian organizations and individuals performing these activities to liability, even though those humanitarian activities are protected by IHL.³⁶

Measures that criminalize engagement with NSAGs may also create obstacles to humanitarian assistance.³⁷ Humanitarian organizations engage directly with NSAGs listed as terrorists and carry out their activities in areas controlled by NSAGs to offer their neutral, humanitarian services, such as the provision of humanitarian aid—including food, medicine and medical services.³⁸ As Nathalie Weizmann explains, humanitarian services are to be provided to all

activities/.

34. *See id.* (noting that humanitarian activities may sometimes entail incidental payments to armed groups who have control over the territory where the activities are carried out). *See also* Inter-Agency Standing Comm., Desk Review of Relevant Literature on the Impact of Counter-Terrorism Legislation and Measures on Principled Humanitarian Assistance 1–2 (2020) (unpublished manuscript) (on file with author), https://interagencystandingcommittee.org/system/files/2020-02/IASC_RG3_COTER_Recommendations%20from%20desk%20review_for%20publication.pdf (highlighting problems associated with counter-terrorism legislation that incidentally subjects humanitarian actors to criminal liability).

35. *See* Weizmann, *supra* note 33 (noting that using funds to facilitate the travel of individuals designated as terrorists is prohibited under international law, even in the absence of a link to a specific terrorist act).

36. *See id.* (raising the challenge that humanitarian organizations face of being exposed to criminal liability under counter-terrorism frameworks, despite their humanitarian activities being protected under IHL).

37. *See id.* (analyzing the negative effects that may result from humanitarian organizations avoiding engagement with certain armed groups in order to limit exposure to criminal liability).

38. *See id.* (explaining that humanitarian organizations offer their impartial services with a view of safeguarding the life and dignity of persons affected by the conflict).

persons affected by conflict without adverse distinction³⁹ and accordingly with the principles of neutrality and impartiality:

In situations of armed conflict, it is common for impartial humanitarian activities to be carried out for the benefit of persons who are not or no longer fighting and are members of, or in areas under the control of, non-state armed groups that governments, regional organizations or the UN have designated as terrorist (such as Hamas or Al-Shabaab). IHL explicitly recognizes that impartial humanitarian organizations may offer their services to parties to armed conflict, whether States or non-State armed groups (regardless of their designation as terrorist), with a view to safeguarding the life and dignity of persons affected by the conflict. Such humanitarian services can include assistance activities to provide food and medicine, repair systems for water supply and treatment, build medical facilities, and clear mines and unexploded ordnance. Humanitarian protection activities, such as visits to persons deprived of their liberty, aim to ensure that parties to conflict respect their obligations under IHL.⁴⁰

Although said activities are protected by IHL, they may be characterized as a violation to sanctions regimes passed by the SC under Chapter VII of the U.N. Charter that specifically target NSAGs deemed to be terrorist organizations.⁴¹ As Alice Debarre points out, “[s]anctions regimes are a key instrument in the UN Security Council’s counterterrorism arsenal that can impact impartial humanitarian action.”⁴² In its Resolution 2368 (2017) and its predecessor resolutions dating back to Resolution 1267 (1999), the SC has imposed targeted sanctions on individuals, groups, undertakings, and entities linked to ISIL (Da’esh) and Al-Qaida.⁴³ Such sanctions include asset freezes, travel bans, and arms embargos.⁴⁴ The Council also created a Sanctions Committee

39. *Rule 88. Non-Discrimination*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule88 (last visited Sept. 14, 2021).

40. Weizmann, *supra* note 33.

41. See ALICE DEBARRE, MAKING SANCTIONS SMARTER: SAFEGUARDING HUMANITARIAN ACTION 13 (Albert Trithart ed., 2019), https://www.ipinst.org/wp-content/uploads/2019/12/1912_Making-Sanctions-Smarter.pdf [hereinafter MAKING SANCTIONS SMARTER] (presenting an example of activities that are protected under IHL but which also violate U.N. sanctions).

42. *Id.*

43. S.C. Res. 1267, ¶ 4 (Oct. 15, 1999).

44. *Id.*

entitled, inter alia, to oversee the implementation of the sanctions measures and designate individuals and entities who meet the listing criteria.⁴⁵

These sanctions regimes could affect IHL provisions such as protections to the wounded and sick and of humanitarian personnel.⁴⁶ Although no individual or entity has been targeted by SC sanctions measures solely on the basis of provision of medical care and/or medical supplies, the ISIL (Da'esh) & Al-Qaida Sanctions Committee has referenced medical activities as part of the basis for listing two individuals and two entities.⁴⁷ The enforcement of these prohibitions in the context of an armed conflict would be contrary to IHL provisions that stipulate that the wounded, sick, and shipwrecked must receive the medical care and attention required by their condition.⁴⁸ Furthermore, it would be contrary to provisions on

45. See generally *Sanctions*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/sanctions/information> (last visited Sept. 14, 2021) (providing a general overview on sanctions and which ones are active).

46. See MAKING SANCTIONS SMARTER, *supra* note 41, at 2 (raising concerns that sanctions regimes could inhibit the protection of the wounded and sick as well as humanitarian personnel); See generally DUSTIN A. LEWIS ET AL., *MEDICAL CARE IN ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AND STATE RESPONSES TO TERRORISM* (Harvard L. Sch. Program on Int'l L. and Armed Conflict pub., 2015), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:22508590> (explaining, inter alia, the rising criminalization of medical care in relation to counter-terrorism security measures).

47. See *Narrative Summaries of Reasons for Listing*, U.N. SEC. COUNCIL, www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list/summaries (last visited Jan. 7, 2022) (listing numerous entities and individuals, including: Zafar Iqbal, who was listed in 2012 for, among other reasons, being “president of the [Lashkar-e-Tayyiba/Jamaat-ud-Dawa] medical wing”; Redendo Cain Dellosa, listed in 2009 for, among other reasons, having “provided medical supplies to [Abu Sayyaf Group] members”; Al Akthar Trust International, listed in 2009, for, among other reasons, “secretly treating wounded members of Al-Qaida . . . at the medical centers it was operating in Afghanistan and Pakistan”; and the Global Relief Foundation, listed in 2010, for, among other reasons, having a “medical-relief coordinator” travel to Afghanistan and undertaking “dealings with Taliban officials until the collapse of the Taliban regime.”); See also U.N. DEP'T OF POL. AND PEACEBUILDING AFFS., *SUBSIDIARY ORGANS OF THE UNITED NATIONS SECURITY COUNCIL 8–9* (2021), <https://www.un.org/securitycouncil/sanctions/information> (detailing designation criteria for the ISIL (Da'esh) and Al-Qaida Sanctions Regime).

48. MAKING SANCTIONS SMARTER, *supra* note 41, at 19; See also Convention (I) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked

the respect and protection of medical personnel and the prohibition of punishment of any person for performing medical duties compatible with medical ethics.⁴⁹

Sanctions regimes aim to reduce forms of support for terrorism, but they also unintendedly affect the ability of impartial humanitarian organizations, such as the ICRC, to offer their protection and assistance services during armed conflicts as inscribed in IHL.⁵⁰ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, notes that “sanctions regimes have in various instances led to the impediment or delay of humanitarian operations.”⁵¹ The core humanitarian operations affected by

Members of Armed Forces at Sea arts. 3, 12, 15, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (hereinafter First Geneva Convention); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 3, 12, 18(1), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (hereinafter Second Geneva Convention); Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 3 & 16, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereinafter Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 10, June 8, 1977, 1125 U.N.T.S. 3 (hereinafter Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) arts. 7 & 8, June 8, 1977, 1125 U.N.T.S. 609 (hereinafter Additional Protocol II); *Rule 110. Treatment and Care of the Wounded, Sick and Shipwrecked*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule110#:~:text=Interpretation-,Rule%20110.,grounds%20other%20than%20medical%20ones. (last visited Nov. 5, 2021).

49. See MAKING SANCTIONS SMARTER, *supra* note 41, at 17 (arguing that the enforcement of sanctions measures may conflict with the obligation to protect medical personnel); see also Additional Protocol I, *supra* note 48, art. 16; Additional Protocol II, *supra* note 48, art. 10; *Rule 25. Medical Personnel*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule25 (last visited Jan. 7, 2022); *Rule 26. Medical Activities*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule26 (last visited Jan. 7, 2022).

50. See INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT, *supra* note 2, at 59 (arguing that sanctions regimes may indirectly inhibit the ability of impartial humanitarian organizations to offer aid).

51. Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report on Promotion and Protection of Human Rights and Fundamental Freedoms*

sanctions include:

[V]isits 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.⁵²

Besides U.N.-based initiatives, national sanctions regimes can also affect the ability of impartial, humanitarian organizations to engage with NSAGs and offer humanitarian services in areas controlled by them.⁵³ On January 10, 2021, the United States listed Ansar Allah (also known as “the Houthis”) as a foreign terrorist organization,⁵⁴ and imposed an asset freeze and other coercive measures against this NSAG.⁵⁵ A group of NGOs has stated that these measures would affect their ability to engage with NSAGs that act as de facto authorities in Yemen, and they would “have catastrophic impacts on the world’s largest humanitarian crisis and response, while also

While Countering Terrorism, U.N. Doc. A/75/337 15 (Sept. 3, 2020) [hereinafter *September 2020 Report on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*].

52. *Id.* at 16.

53. See INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT, *supra* note 2, at 59 (explaining that in addition to international sanctions regimes, national sanctions regimes may inhibit the ability of impartial humanitarian organizations to offer aid); See also KAY GUINANE ET AL., COLLATERAL DAMAGE: HOW THE WAR ON TERROR HURTS CHARITIES, FOUNDATIONS, AND THE PEOPLE THEY SERVE (Briann Gumm ed., 2008), http://www.charityandsecurity.org/studies/Collateral_Damage; THE WORLD BANK, STAKEHOLDER DIALOGUE ON DE-RISKING: FINDINGS AND RECOMMENDATIONS (2016), <https://documents1.worldbank.org/curated/en/397411476868450473/pdf/109337-WP-StakeholderDialogueonDerisking-PUBLIC-ABSTRACT-SENT.pdf>.

54. See Immigration and Nationality Act, 8 U.S.C. 1189 § 219 (2021) (authorizing the U.S. Secretary of State to designate an organization as a terrorist organization); Executive Order 13224, 3 C.F.R. § 13.224 (2001) (establishing sanctions against foreign persons listed in the EO and against others who are deemed to have committed or who “pose a significant risk of committing” terrorist acts against the United States).

55. The decision was later reversed by U.S. President Joe Biden. See John Hudson & Missy Ryan, *Biden Administration to Remove Yemen’s Houthi Rebels from Terrorism List in Reversal of Trump-Era Policy*, WASH. POST (Feb. 6, 2021), https://www.washingtonpost.com/national-security/biden-yemen-rebels-terrorist-list/2021/02/05/e65e55c8-5b40-11eb-aaad-93988621dd28_story.html.

hampering U.N.-led efforts to secure a ceasefire and start to peace talks.”⁵⁶ At a SC meeting, the U.N. Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator warned that such listing would cause a large-scale famine,⁵⁷ which would not be prevented even with the provision of licenses and exemptions to humanitarian organizations.⁵⁸

These licenses are authorizations provided by the sanctioning entity to persons or organizations who wish to carry out transactions or activities that would be prohibited by sanctions regimes or restrictive measures.⁵⁹ Licenses can be too cumbersome and resource-consuming for humanitarian organizations,⁶⁰ and they can impose risks for private actors who want to shield themselves from liability or from being targeted by an asset freeze in the case of diversion of resources to any listed person or organization.⁶¹ On that

56. Letter from Civil Society to U.S. Congress (Dec. 3, 2020) (on file with author), https://webassets.oxfamamerica.org/media/documents/Civil_Society_Letter_to_Congress_on_Yemen_.pdf.

57. See Press Release, Security Council, United States’ Designation of Houthi Militia as Foreign Terrorist Organization Risks Expediting Large-Scale Famine in Yemen, Speakers Warn Security Council, U.N. Press Release SC/14410 (Jan. 14, 2021) [hereinafter Designation of Houthi Militia] (reporting that the U.N. Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator warned the UNSC that the United States’ imposition of sanctions measures on the Houthis could exacerbate the risk of famine in Yemen).

58. See *id.* (reporting that the U.N. Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator warned the Security Council that the United States’ imposition of sanctions measures on the Houthis could exacerbate the risk of famine in Yemen even if humanitarian organizations were granted licenses and exemptions from the measures).

59. See *OFAC License Application Page*, U.S. DEPT. OF TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/ofac-license-application-page> (last visited Oct. 19, 2021) (defining “license” as “an authorization from [the U.S. Office of Foreign Assets Control] to engage in a transaction that otherwise would be prohibited.”).

60. See ALICE DEBARRE, SAFEGUARDING HUMANITARIAN ACTION IN SANCTIONS REGIMES 3, 10 (2019), https://www.ipinst.org/wp-content/uploads/2019/06/1906_Sanctions-and-Humanitarian-Action.pdf [hereinafter SAFEGUARDING HUMANITARIAN ACTION IN SANCTIONS REGIMES] (raising practical challenges that humanitarian organizations face in applying for licenses and exemptions).

61. See KATE MACKINTOSH & PATRICK DUPLAT, STUDY OF THE IMPACT OF COUNTER-TERRORISM MEASURES ON PRINCIPLED HUMANITARIAN ACTION 46 (Tim

issue, Debarre mentions that humanitarian organizations may impose excessive self-regulation to avoid legal repercussions, and uses the example of Somalia, where “[e]ven organizations covered by [a humanitarian] exemption reportedly have concerns about using it due to the reputational risks of even an isolated incident of aid being diverted to al-Shabab.”⁶²

Considering all of these risks of liability, CT measures may discourage humanitarian organizations from engaging with NSAGs to avoid exposure to liability, generating a “chilling effect.”⁶³ As a result, humanitarian organizations face difficulties working in areas controlled by NSAGs listed as terrorists, where they may have a lesser presence in comparison to areas controlled by governmental authorities, due to the hurdles imposed by CT measures.⁶⁴ As a Harvard study found, humanitarian actors “may prematurely end or cease to undertake needs-based assistance activities due to actual or perceived counterterrorism regulations.”⁶⁵ Working in areas controlled by NSAGs designated as terrorists represents a risk of being “in breach of counterterror legislation as it is impossible to function in these areas without engaging the [de facto] authorities and thus directly or indirectly benefiting them.”⁶⁶

Some humanitarian organizations have described challenges in having access to areas controlled by NSAGs and receiving less funding for these areas, as the chilling effect also impacts humanitarian organizations’ access to donations and financial

Morris ed., 2013) (discussing licenses as a viable option for humanitarian organizations); MARK BRADBURY, STATE-BUILDING, COUNTERTERRORISM, AND LICENSING HUMANITARIANISM IN SOMALIA 12 (2010) (describing unique licensing issues in Somalia).

62. MAKING SANCTIONS SMARTER, *supra* note 41, at 16.

63. Weizmann, *supra* note 33.

64. See JESSICA S. BURNISKE & NAZ K. MODIRZADEH, PILOT EMPIRICAL SURVEY STUDY ON THE IMPACT OF COUNTERTERRORISM MEASURES ON HUMANITARIAN ACTION 6 (2017), <https://blogs.harvard.edu/pilac/files/2017/03/Pilot-Empirical-Survey-Study-2017.pdf> (exploring the “chilling effect” of counterterrorism laws).

65. NAZ K. MODIRZADEH, COMMENT ON THE PILOT EMPIRICAL SURVEY STUDY ON THE IMPACT OF COUNTERTERRORISM MEASURES ON HUMANITARIAN ACTION 74 (2017), <http://blogs.harvard.edu/pilac/files/2017/03/Comment-on-the-Pilot-Empirical-Survey-Study-2017.pdf>.

66. BURNISKE & MODIRZADEH, *supra* note 64, at 65.

services.⁶⁷ Consequently, areas controlled by NSAGs may receive less aid, ultimately negatively affecting the persons who live in these areas.⁶⁸ As the ICRC recently stated to the Security Council, CT measures “can criminalize and restrict impartial humanitarian action, while counter-terrorism clauses in grant contracts, banking de-risking measures, and sanctions regimes collectively also lead to a ‘chilling effect,’ which disincentivizes or prevents frontline responders from reaching populations in need.”⁶⁹ Taking into account all these effects, CT measures may be incompatible with the letter and spirit of IHL,⁷⁰ which in Common Article 3 specifically allows humanitarian organizations (such as the ICRC) to offer their services to the parties of a NIAC and to carry out humanitarian activities to the benefit of those affected by the conflict.⁷¹

B. HOW TO IMPROVE IHL AND IHRL COMPLIANCE

Considering this challenging scenario, humanitarian safeguards must be implemented to allow the provision of IHL-protected humanitarian services to those who need it. This can be done in different ways, both domestically and internationally.

One way is to include IHL and IHRL language in Security Council resolutions. SC resolutions on CT did not initially include an operative provision mentioning that States should comply with IHL

67. See *id.* at 7 (musing about the lack of clarity surrounding the impact of counterterrorism law).

68. See *id.* at 67 (discussing the impact of funding in certain geographic areas; specifically, one humanitarian organization states that “[a]reas controlled by listed groups receive less funding despite humanitarian needs, certain civil servants, perceived as recruited by the ruling listed group(s) are not necessarily eligible for assistance due to their employment status rather than based on their actual humanitarian needs.”).

69. *Statement to United Nations Security Council Debate: Threats to International Peace and Security Caused by Terrorist Acts: International Cooperation in Combating Terrorism 20 Years After the Adoption of Resolution 1373 (2001)*, INT’L COMM. OF THE RED CROSS (Jan. 12, 2021), <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations> [hereinafter *Statement to United Nations Security Council Debate*].

70. See *id.* (commenting further on the “chilling effect” of counterterrorism law).

71. INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT, *supra* note 2, at 52.

and IHRL while applying its provisions;⁷² it was only in 2005 when Resolution 1624 expressly did so.⁷³ Recently, the SC has implemented humanitarian safeguards in resolutions 2462 and 2482, both of 2019, in which it urged States to “take into account” the “potential effect” of CT measures on impartial humanitarian action.⁷⁴ It also decided that States shall establish the terrorism-related offenses in their domestic framework “in a manner consistent with their obligations under international law, including international humanitarian law[.]”⁷⁵ and demanded that States ensure that CT measures comply with international law, including IHL obligations.⁷⁶ Said provisions reaffirm that IHL remains applicable in the context of the fight against terrorism, and acknowledge that CT measures could inadvertently interfere with impartial humanitarian action.⁷⁷

Another possible action is adding either “humanitarian

72. See S.C. Res. 1535, ¶ 4 (Mar. 26, 2004) (“[r]eminding 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[.]”).

73. See S.C. Res. 1624, ¶ 4 (Sept. 14, 2005) (stating that “States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law[.]”). See also S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1390 (Jan. 16, 2002).

74. S.C. Res. 2462, ¶ 24 (Mar. 28, 2019) (“*Urges* States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law[.]”).

75. *Id.* ¶ 5.

76. *Id.* ¶¶ 5–6 (“*Decides* that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense the willful provision or collection of funds [. . . and] *Demands* that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law[.]”).

77. *Id.*

exceptions” or “humanitarian exemptions” to sanctions regimes or other CT frameworks.⁷⁸ Debarre notes that the use of these terms is inconsistent, but makes the following distinction: “an exemption refers to a provision allowing humanitarian actors to apply for permission to conduct their activities. An exception is a provision that carves out legal space for humanitarian actors, activities, or goods within sanctions measures without any prior approval needed.”⁷⁹ Debarre further explains that:

Humanitarian actors have indicated the need for exceptions, rather than case-by-case exemptions, for humanitarian activities. These exceptions can come in different forms. Ideally, an exception would be broad, applying across all sanctions regimes to all humanitarian actors for all humanitarian activities. At the UN, this could take the form of a stand-alone resolution that would apply to all UN sanctions regimes. Such a crosscutting resolution would provide much-needed clarity and certainty for the humanitarian sector.⁸⁰

Debarre also iterates that exemptions may not be a politically viable solution due to the positions among the SC member States.⁸¹ Despite political disagreements, the SC should act to find consensus on humanitarian affairs,⁸² given that it has a duty to carry out its functions in accordance with the purposes and principles of the United Nations,⁸³ which include achieving international co-operation in solving international problems of a humanitarian character as well as promoting respect for human rights.⁸⁴

78. MAKING SANCTIONS SMARTER, *supra* note 41, at 29.

79. *Id.* at 5.

80. *Id.* at 19–20.

81. *See id.* (noting that some member states want to maintain control over the sanctions they impose).

82. *See* Meetings Coverage, Security Council, Amid Spiking Humanitarian Needs, Security Council Must Use All Available Tools to Reverse ‘Relentless Wave of Attacks’ on Aid Workers, Experts Stress, U.N. Meetings Coverage SC/14582 (July 16, 2021) (“States must also renew consensus around key tenets of international humanitarian law and ensure they are respected and implemented.”).

83. *See* U.N. Charter art. 24, ¶¶ 1–3.

84. *Id.* arts. 1, 55. *See also* Hans-Peter Gasser, *The United Nations and International Humanitarian Law: The International Committee of the Red Cross and the United Nations’ Involvement in the Implementation of International Humanitarian Law*, INT’L COMM. OF THE RED CROSS (Oct. 19, 1995), <https://www.icrc.org/en/doc/resources/documents/misc/57jmuk.htm> (outlining

The General Assembly (GA) can also work to safeguard humanitarian action.⁸⁵ It can strengthen humanitarian safeguards and include IHL language in its biannual review of the U.N. Global Counter-Terrorism Strategy (GCTS), which was first adopted in the form of a resolution and an annexed plan of action in 2006.⁸⁶ Member States should also look to add IHL language in other GA resolutions, such as the biannually reviewed Sixth Committee resolution on measures to eliminate international terrorism.⁸⁷ The GA could implement humanitarian safeguards in its resolutions similar to those of UNSC Res. 2462.⁸⁸ Including such provisions in GA resolutions would represent an important political commitment to protecting humanitarian action, which could then influence States' conduct internationally as well as domestically.⁸⁹

At the national level, some States have included safeguards for humanitarian action in their domestic CT legislation. As Weizmann explains, more can be done to improve humanitarian safeguards at the domestic level:

In implementing [resolution 2462] and other counterterrorism measures [to national frameworks and/or legislation], States must ensure that they do not impede humanitarian activities as envisioned by IHL. This will require ensuring that counterterrorism measures, which are becoming increasingly detailed and prescriptive, are accompanied by equally strong safeguards for impartial humanitarian activities. It will also require a concerted and enduring effort to increase States' understanding of the

timeline of UN priorities, including humanitarian).

85. MAKING SANCTIONS SMARTER, *supra* note 41, at 2 (comparing the capacity of the UNGA and the UNSC).

86. See G.A. Res. 60/88, annex (Jan. 11, 2006); see also G.A. Res. 75/291 (June 30, 2021) (reviewing the GCTS).

87. See e.g., Gen. Assembly, Rep. of the Sixth Comm. on its Seventy-Fourth Session, U.N. Doc. A/74/432 (2019).

88. See S.C. Res. 2462 (Mar. 28, 2019).

89. See NICOLE RUDER ET AL., THE GA HANDBOOK: A PRACTICAL GUIDE TO THE UNITED NATIONS GENERAL ASSEMBLY 52 (Johann Aeschlimann & Mary Regan eds., 2017), https://www.eda.admin.ch/dam/mission-new-york/en/documents/UN_GA_Final.pdf [hereinafter *The GA Handbook*] (“GA resolutions reflect the degree of intergovernmental agreement, the evolution of political ideas and the state of global cooperation on a given topic.”).

tension between counterterrorism measures and humanitarian activities.⁹⁰

For instance, Australia has introduced a safeguard in its domestic CT legislation in relation to a prohibition to traveling and remaining at “declared areas”—areas that are believed to be controlled by groups listed as terrorists according to the Australian Government⁹¹—effectively prohibiting Australian nationals from entering areas controlled by non-State armed groups.⁹² To safeguard humanitarian action, Australian law affirms that persons providing “aid of a humanitarian nature” should not be found liable for such offenses.⁹³ Other countries, such as the United Kingdom,⁹⁴ have implemented similar CT offenses into their domestic law, and have included similar humanitarian exemptions with respect to these laws.⁹⁵ Other examples are the relevant CT laws of Chad⁹⁶ and Ethiopia,⁹⁷ which have included broad humanitarian clauses

90. Weizmann, *supra* note 33.

91. See *Protocol for Declaring an Area*, AUSTRALIAN NAT’L SEC., <https://www.nationalsecurity.gov.au/what-australia-is-doing/places-you-cant-go/protocol-for-declaring-an-area> (last visited Dec. 22, 2021) (describing the Australian Government’s criteria for categorizing declared areas).

92. See *id.*

93. There are no exemptions in respect to certain terrorism-related offences concerning the provision of training and funds. *Criminal Code Act 1995*, (Cth) div 102.5–102.6 (Austl.). See also Dustin A. Lewis, *Humanitarian Exemptions from Counter-terrorism Measures: A Brief Introduction*, 47 PROC. BRUGES COLLOQUIUM 141, 145 (2017) (“In claiming extraterritorial jurisdiction over certain anti-terrorism offences, both Australia and the US prescribe legislative jurisdiction over conduct in foreign territories where principled humanitarian action might occur in relation to situations of armed conflict involving designated terrorists.”).

94. See Jessica Abrahams, *Humanitarians Win Exemptions from Parts of UK Counterterrorism Bill*, DEXEX (Jan. 23, 2019), <https://www.devex.com/news/humanitarians-win-exemption-from-parts-of-uk-counterterrorism-bill-94179> (summarizing developments in British law).

95. See *id.*

96. See *Répression des Actes de Terrorisme en République du Tchad* [Civil Code] art. 1.4 (Chad).

97. See Proclamation No. 1176/2020 (A Proclamation to Provide for the Prevention and Suppression of Terrorism Crimes), *Federal Negarit Gazette*, No. 20, 25 Mar. 2020, art. 9, ¶ 5 (Eth.) (“Notwithstanding to Sub Article 1 to 4 of this Article a humanitarian aid given by Organizations engaged in humanitarian activities or a support made by a person who has legal duty to support other is not punishable for the support made only to undertake function and duty.”).

encompassing all impartial humanitarian activities performed by neutral, impartial organizations in their domestic CT laws. The same applies for Switzerland, which included an exception to humanitarian organizations providing services “according to Common Article 3 to the 1949 Geneva Conventions.”⁹⁸ Other States should follow suit and implement humanitarian clauses which unequivocally include all impartial, humanitarian actors, as a means of ensuring that humanitarian organizations can offer their services without fear of liability, in accordance with IHL.

To comply with Common Article 3, safeguards shall encompass all humanitarian actors providing impartial humanitarian services.⁹⁹ The Philippines has included in its CT law a humanitarian clause that limits exemptions to U.N. and/or Red Cross workers.¹⁰⁰ The Netherlands has a similar draft proposal awaiting a vote in its parliament.¹⁰¹ Instead of implementing exemptions that apply only to

98. Consiglio Federale (Federal Council), Sept. 14, 2018, Loi 18.071. art. 260 (Switz.).

99. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD para. 788–99 (2016) [hereinafter COMMENTARY ON GENEVA I].

100. See Act to Prevent, Prohibit, and Penalize Terrorism, Rep. Act. No. 11479, § 13 (July 3, 2020) (Phil.) (“Humanitarian Exemption – Humanitarian activities undertaken by the International Committee of the Red Cross (ICRC), the Philippine Red Cross, and other state-recognized impartial humanitarian partners or organizations in conformity with the International Humanitarian Law (IHL), do not fall within the scope of Section 12 of this Act.”). *But see* Julie McCarthy, *Why Rights Groups Worry About the Philippines' New Anti-Terrorism Law*, NAT'L PUB. RADIO (July 21, 2020, 2:48 PM), <https://www.ctpublic.org/2020-07-21/why-rights-groups-worry-about-the-philippines-new-anti-terrorism-law> (highlighting human rights concerns regarding the Philippine counterterrorism legislation and its potential for abuse).

101. Stb. 2019 35125 (10 Sept. 2019) (Neth.); *See also* Michiele Hofman, *I'm a Humanitarian. Don't Prosecute Me for Doing My Job*, THE NEW HUMANITARIAN (Nov. 12, 2019), <https://www.thenewhumanitarian.org/opinion/2019/11/12/humanitarian-aid-Dutch-counter-terror-law> (“The law proposes to criminalise citizens’ travel – without Dutch government permission – to areas it designates as controlled by ‘terrorist’ organisations. The criteria upon which such permission will be granted are not clear. [. . .] The Dutch law provides an exemption for EU, UN, and International Committee of the Red Cross staff, but amendments to include all humanitarians were rejected. The key argument seems to be that it is difficult to define a humanitarian worker.”).

international organizations, these provisions must include safeguards to all impartial humanitarian organizations,¹⁰² considering that Common Article 3 “grants impartial humanitarian bodies the right to offer their services to the Parties to a [NIAC].”¹⁰³

During the fight against terrorism, safeguarding humanitarian action and strengthening human rights is in the interest of States.¹⁰⁴ Addressing humanitarian and human rights concerns should not be interpreted as an obstacle to countering terrorism, but as a necessary factor of preventing and countering violent extremism.¹⁰⁵ The U.N. General Assembly itself has pledged to address conditions conducive to the spread of terrorism, including the “lack of the rule of law and violations of human rights.”¹⁰⁶ The GA also recognized that “ethnic, national and religious discrimination, political exclusion, [and] socio-economic marginalization” may be conditions conducive to the spread of terrorism.¹⁰⁷

Human rights abuses may be a factor to marginalizing communities and increasing their vulnerability to engage in violent extremism.¹⁰⁸ For example, a 2017 UNDP report affirmed that 71 per cent of the individuals interviewed pointed to “government action,” such as the “killing of a family member or friend” or the “arrest of a family member or friend” as a factor that encouraged them to take steps to join a violent extremist group.¹⁰⁹ Humanitarian safeguards

102. See *Statement to United Nations Security Council Debate*, *supra* note 69.

103. COMMENTARY ON GENEVA I, *supra* note 99, paras. 779–84.

104. See Fionnuala Ní Aoláin, *How Can States Counter Terrorism While Protecting Human Rights?*, 45 OHIO N.U.L. REV. 1, 2 (2019) [hereinafter *How Can States Counter Terrorism While Protecting Human Rights?*] (outlining the relationship between human rights and security).

105. For example, UNDP’s conceptual framework includes human rights violations as one of the drivers that lead to radical behavior and result in violent extremist action. See THE GLOBAL MEETING ON PREVENTING VIOLENT EXTREMISM THROUGH PROMOTING INCLUSIVE DEVELOPMENT, TOLERANCE AND RESPECT FOR DIVERSITY, U.N. DEV. PROGRAM 10 (2016) [hereinafter THE GLOBAL MEETING ON PREVENTING VIOLENT EXTREMISM] (illustrating the political roots of violent extremism).

106. G.A. Res. 60/288, annex (Sept. 20, 2006).

107. *Id.*

108. See CHUCK THIESSEN, PREVENTING VIOLENT EXTREMISM WHILE PROMOTING HUMAN RIGHTS: TOWARD A CLARIFIED UN APPROACH 3 (2019) (exploring the link between human rights grievances and terrorism).

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must be implemented as soon as possible, including during peace times, given that it may be too late to do so after a conflict emerges¹¹⁰—or after a new emergency arises, such as the COVID-19 pandemic.¹¹¹

III. UNEXPECTED CRISIS: COVID-19 CREATES NEW CHALLENGES AND IMPOSES FURTHER RESTRICTIONS TO HUMANITARIAN ACTORS

New challenges have been imposed on the entire world due to the public health emergency caused by the Sars-CoV-2 virus, which causes the infectious disease known as COVID-19.¹¹² In March 2020, the World Health Organization declared that COVID-19 had reached the status of a pandemic.¹¹³ Conflict-affected regions, where the conditions of vulnerability were already severe before the pandemic, are specially impacted by this public health emergency.¹¹⁴ U.N. Secretary-General Antonio Guterres called for a global ceasefire based on a fundamental recognition: “There should be only one fight in our world today, our shared battle against COVID-19.”¹¹⁵

To combat the pandemic, States have implemented restrictive

TIPPING POINT FOR RECRUITMENT 5 (U.N. Dev. Program pub., 2017), <http://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf>.

110. See U.N. Secretary General, *Plan of Action to Prevent Violent Extremism*, U.N. Doc. A/70/674 (Dec. 24, 2015).

111. See UNITED NATIONS COMPREHENSIVE RESPONSE TO COVID-19: SAVING LIVES, PROTECTING SOCIETIES, RECOVERING BETTER 5 (2020) (announcing recent linkages between pandemic and non-health impacts).

112. See Stewart M. Patrick, *Another Victim of Covid-19: Sustainable Development*, WORLD POL. REV. (May 4, 2020), <https://www.worldpoliticsreview.com/articles/28732/another-victim-of-covid-19-sustainable-development> (listing unforeseen impact areas of COVID-19).

113. WHO Director-General's Opening Remarks at the Media Briefing on Covid-19, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

114. See Mustasilta, *supra* note 9 (comparing pandemic effects on conflict affected and peaceful countries).

115. Press Release, Secretary General, Secretary-General Reiterates Appeal for Global Ceasefire, Warns ‘Worst is Yet to Come’ as COVID-19 Threatens Conflict Zones, U.N. Press Release SG/SM/20032 (Apr. 3, 2020) [hereinafter Appeal for Global Ceasefire].

measures to stop the spread of the virus,¹¹⁶ and they may have unintended effects on humanitarian assistance.¹¹⁷ In some cases, public health measures may negatively affect the ability of humanitarian organizations to provide their services,¹¹⁸ which was already impacted by other restrictive measures such as CT and sanctions frameworks.¹¹⁹ The ICRC affirms that:

Counter-terrorism measures compounded with Covid-19 restrictions have made access for impartial humanitarian organizations more difficult in the past year. We estimate that over 60 million people live in areas where non-state actors exercise control. With counter-terrorism measures and Covid-19 restrictions, these populations and others affected by armed conflict and violence are harder to reach. Impartial humanitarian actors such as the ICRC are hindered in their ability to visit persons being detained by “the other side”, recover dead bodies, train armed groups on IHL, restore damaged water supplies and other services for the civilian population, and facilitate mutual detainee releases and swaps.¹²⁰

Given this complex scenario, States must ensure that their CT and public health measures comply with IHL,¹²¹ given that IHL provisions can be crucial to fighting the pandemic and saving lives.¹²² IHL rules on humanitarian access must be observed by all parties to

116. See Nils Haug et al., *Ranking the Effectiveness of Worldwide COVID-19 Government Interventions*, 4 NAT'L. HUM. BEHAV. 1303, 1303–12 (2020) (describing rollout of non-pharmaceutical interventions).

117. See *Our Response to the Coronavirus Covid-19 Pandemic*, MÉDECINS SANS FRONTIÈRES (Aug. 16, 2021), <https://www.msf.org/covid-19-depth> (announcing MSF policy).

118. See Rebecca Brubaker et al., *COVID-19 and Humanitarian Access: How the Pandemic Should Provoke Systemic Change in the Global Humanitarian System*, U.N. UNIV. (Apr. 8, 2021), http://collections.unu.edu/eserv/UNU:8033/UNU_COVIDandHumanitarianAccess_FINAL.pdf (outlining humanitarian aid hurdles).

119. See *Statement to United Nations Security Council Debate*, *supra* note 69 (responding to debate with policy observations related to humanitarian impacts in conflict zones).

120. *Id.*

121. See S.C. Res. 2462, ¶ 5 (Mar. 28, 2019).

122. See INT'L COMM. OF THE RED CROSS, COVID-19 AND INTERNATIONAL HUMANITARIAN LAW 1, https://www.icrc.org/en/download/file/118038/covid-19_and_ihl.pdf [hereinafter COVID-19 AND INTERNATIONAL HUMANITARIAN LAW] (stating that “adequately staffed and well-equipped medical facilities are necessary for the provision of medical care on a large scale”).

the conflict and must not be negatively impacted by public health measures.¹²³ As the ICRC points out, “IHL rules on humanitarian access are not displaced by health regulations and other measures taken by belligerents and third States to combat the spread of COVID-19.”¹²⁴ Although consent from authorities is necessary to carry out humanitarian operations, such consent “is not discretionary and arguments based on the necessity to counter the spread of COVID-19 are not valid grounds under IHL to deny consent to humanitarian activities undertaken by impartial humanitarian organizations”¹²⁵ such as the ICRC, and any measures imposed by authorities to the delivery of aid “cannot, in practice, end up amounting to a refusal of consent, unduly delay humanitarian operations, or make their implementation impossible.”¹²⁶

The ICRC describes the IHL framework in 4 steps:

- 1) Each party to an armed conflict bears the primary obligation to meet the basic needs (including in terms of health) of the population under its control;
- 2) impartial humanitarian organizations have the right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population are not fulfilled;
- 3) impartial humanitarian activities undertaken in situations of armed conflict are generally subject to the consent of the parties to the conflict concerned;
- and 4) once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict, as well as all States that are not a party thereto, must allow and facilitate the rapid and unimpeded passage of the relief schemes, subject to their right of control.¹²⁷

Amid COVID-19 lockdowns, compliance with said rules on humanitarian access was sometimes overlooked.¹²⁸ Measures aimed at containing the pandemic added a new set of restrictions, in

123. See INT'L COMM. RED CROSS, IHL RULES ON HUMANITARIAN ACCESS AND COVID-19 1 (2020), <https://reliefweb.int/report/world/ihl-rules-humanitarian-access-and-covid-19> (noting that State measures to tackle COVID-19 must be consistent with IHL but not displace it).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2.

128. *Our Response to the Coronavirus COVID-19 Pandemic*, MÉDECINS SANS FRONTIÈRES (Sept. 26, 2021), <https://www.msf.org/covid-19-depth>.

addition to previous measures like CT and sanctions regimes.¹²⁹ Public health measures can block humanitarian access protected by IHL,¹³⁰ as well as create serious logistical challenges.¹³¹ For instance, *Médecins Sans Frontières* (MSF) has reported that its activities have been impacted by “community lockdowns, reduced production of active pharmaceutical ingredients, and reduction in export movements,” as well as its ability to move staff between countries due to COVID-19 travel restrictions.¹³² The Norwegian Refugee Council remarked that:

In addition to [public health] national restrictions which impact humanitarian access, sanctions are negatively affecting aid agencies’ ability to respond to Covid-19. [. . .] While humanitarian exemptions are already in place for some sanctioned regimes, in practice, these existing procedures are slow and bureaucratic, and many organisations, including banks, feel unable to offer services that allow aid agencies to continue to operate in affected countries. Efforts to curb the spread of Covid-19 in some countries are crippled as a result. Governments must ensure sanctions do not impede the delivery of humanitarian aid including medical equipment and supplies to countries trying to contain or prevent the spread of coronavirus.¹³³

COVID-19 further limited the ability of humanitarian organizations to provide their services, which was already being reduced due to the aforementioned negative effects of CT

129. See Oona Hathaway, *COVID-19 and International Law Series: International Humanitarian Law – Humanitarian Access*, JUST SEC. (Nov. 12, 2020), <https://www.justsecurity.org/73336/covid-19-and-international-law-series-international-humanitarian-law-humanitarian-access> (citing Syria and Afghanistan as examples of States that violated their obligation to permit humanitarian access).

130. See *Our Response to the Coronavirus Covid-19 Pandemic*, *supra* note 128 (highlighting the risk of supply shortages for other diseases due to community lockdowns, reduced pharmaceutical production, and reduction in export movements).

131. See *id.* (noting that travel restrictions limit the ability of aid staff to move between countries).

132. *Id.*

133. See *The Humanitarian Impact of Covid-19 on Displaced Communities*, NORWEGIAN REFUGEE COUNCIL (Apr. 30, 2020), <https://www.nrc.no/globalassets/pdf/reports/the-humanitarian-impact-of-covid-19-on-displaced-communities/nrc-humanitarian-impact-of-covid-19-on-displaced-people.pdf> (highlighting that sanctions are negatively affecting aid agencies’ ability to respond to COVID-19).

measures.¹³⁴ Authorities should take steps to safeguard humanitarian action and comply with their IHL obligations, such as considering humanitarian personnel as essential workers who are not subject to movement restrictions such as curfews, lockdowns and travel bans; and ensuring “that humanitarian flights and convoys are permitted to continue operations safely.”¹³⁵

IHL also provides crucial protections to medical units and personnel.¹³⁶ As the ICRC points out:

Under IHL, medical personnel, units and transports exclusively assigned to medical purposes must be respected and protected in all circumstances. In occupied territories, the occupying power must also ensure and maintain medical and hospital establishments and services, public health and hygiene. In addition, IHL provides for the possibility of setting up hospital zones that may be dedicated to addressing the current crisis.¹³⁷

Moreover, IHL “expressly prohibits attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population, including drinking water installations and supplies”¹³⁸—a vital provision given that access to water is essential

134. *Id.*

135. *Id.*

136. See discussion *infra* Section IV.

137. COVID-19 AND INTERNATIONAL HUMANITARIAN LAW, *supra* note 122, at 1; see also First Geneva Convention, *supra* note 48, arts. 3, 19, 23, 24, 25, 26, 35; Second Geneva Convention, *supra* note 48, arts. 3 & 36; Fourth Geneva Convention, *supra* note 48, arts. 3, 14(1), 15, 18, 20, 21, 56; Additional Protocol I, *supra* note 48, arts. 12, 15, 16, 21; Additional Protocol II, *supra* note 48, arts. 10 & 11; *Rule 25. Medical Personnel*, *supra* note 49; *Rule 26. Medical Activities*, *supra* note 49; *Rule 28. Medical Units*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule28 (last visited Oct. 20, 2021); *Rule 29. Medical Transports*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule29 (last visited Oct. 20, 2021); *Rule 35. Hospital and Safety Zones and Neutralized Zones*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule35.

138. COVID-19 AND INTERNATIONAL HUMANITARIAN LAW, *supra* note 122, at 1; see also Additional Protocol I, *supra* note 48, arts. 54(2) & 57(1); Additional Protocol II, *supra* note 48, arts. 13(1) & 14; *Rule 15. Principle of Precautions in Attack*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule15 (last visited Jan. 7, 2022); *Rule 54. Attacks Against Objects Indispensable to the Survival of the Civilian Population*, IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule54 (last visited Jan. 7, 2022).

to maintaining simple hygiene measures and thus preventing the spread of the virus.¹³⁹ Other relevant IHL provisions include special protections to persons specifically at risk of contracting COVID-19, such as elderly persons, detainees, migrants, refugees, and children.¹⁴⁰ For example, Article 29 of the Third Geneva Convention establishes that:

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them. Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.¹⁴¹

These provisions can help in stopping the spread of COVID-19 by ensuring the cleanliness of detention places and providing POWs with water and soap for hand-washing.¹⁴²

The pandemic has also brought a new angle to a highly politicized debate: the application of unilateral coercive measures (UCMs).¹⁴³ UCMs are understood as national and regional sanctions regimes other than those enacted by the SC acting under Chapter VII of the U.N. Charter.¹⁴⁴ In 2014, the U.N. Human Rights Council (HRC)

139. See COVID-19 AND INTERNATIONAL HUMANITARIAN LAW, *supra* note 122, at 1.

140. See *id.* at 2.

141. Geneva Convention Relative to the Treatment of Prisoners of War art.29, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

142. See COVID-19: Authorities Must Protect Health of Detainees, Staff and Ultimately Surrounding Communities, INT'L COMM. OF THE RED CROSS (Apr. 7, 2020), <https://www.icrc.org/en/document/covid-19-places-detention-must-protect-health-detainees-staff-and-ultimately-surrounding>.

143. Robert Kang, *CIC Explainer: UN Debates on Sanctions During COVID-19 Era*, N.Y.U. CTR. ON INT'L COOP. (Mar. 8, 2021), <https://cic.nyu.edu/blog/cic-explainer-un-debates-sanctions-during-covid-19-era>.

144. See U.N. Off. of the High Comm'r for Hum. Rts., *Mandate of the Special Rapporteur*, A/70/345 (last visited Oct. 20, 2021), <https://www.ohchr.org/EN/Issues/UCM/Pages/Mandate.aspx> (stating the HRC defined UCMs "as measures including, but not limited to, economic and political ones, imposed by States or groups of States to coerce another State in order to

passed a resolution affirming that “unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter and the norms and principles governing peaceful relations among States, and highlights that on long-term, these measures may result in social problems and raise humanitarian concerns in the States targeted.”¹⁴⁵ The HRC also created the mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights (SR-UCMs).¹⁴⁶ The GA¹⁴⁷ and the SC¹⁴⁸ also have discussed the issue of UCMs.

The mandate of the SR-UCMs makes a distinction between “the clearly legal multilateral sanctions taken by the UN Security Council” and sanctions measures adopted by States.¹⁴⁹ In that regard, distinctions can also be made in relation to the aim of each regime.¹⁵⁰ CT measures, such as the ones on UNSC Res. 1373¹⁵¹ and 2462,¹⁵² have the goal of combatting terrorism.¹⁵³ UCMs may have the goal of

obtain from it the subordination of the exercise of its sovereign rights with a view to securing some specific change in its policy.”)

145. Human Rights Council Res. 27/21, U.N. Doc. A/HRC/RES/27/21, at 1–2 (Oct. 3, 2014).

146. *See id.* at 23.

147. *See generally* G.A. Res. 44/215 (Dec. 22, 1989); G.A. Res. 52/120 (Feb. 23, 1998).

148. *See Arria-Formula Meeting on Unilateral Coercive Measures*, SEC. COUNCIL REP. (Nov. 24, 2020), <https://www.securitycouncilreport.org/whatsinblue/2020/11/arria-formula-meeting-on-unilateral-coercive-measures.php?print=true> (discussing the impacts of State-imposed Unilateral Coercive Measures as they relate to the Covid-19 pandemic and the international community).

149. U.N. Off. of the High Comm’r for Hum. Rts., *One Third of Humanity Lives in Countries Subjected to Unilateral Coercive Measures*, UN Rights Expert Says, (Oct. 26, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16652&LangID=E>.

150. *See* Nadeshda Jayakody, *Refining United Nations Security Council Targeted Sanctions*, 29 SEC. AND HUM. RTS. 91 (2018) (explaining the various objectives which U.N. sanctions regimes seek to address).

151. S.C. Res. 1373 (Sept. 28, 2001).

152. S.C. Res. 2462 (Mar. 28, 2019).

153. *See Security Council Resolutions*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/ctc/content/security-council-resolutions> (last visited Sept. 26, 2021).

improving the human rights situation in a given country,¹⁵⁴ as it is the case for some U.S.-mandated sanctions.¹⁵⁵

Some humanitarian concerns are described in the latest report of the current SR-UCMs, Ms. Alena Douhan.¹⁵⁶ She describes how UCMs can affect the sanctioned States' efforts to curb the pandemic and stop the spread of Sars-CoV-2.¹⁵⁷ She argues that:

[E]ven in situations when humanitarian exemptions are applicable, natural and legal entities like banks, ships etc. are reluctant to be involved in transactions for fear of responsibility that results in overcompliance with already massive sanctions regimes. It has been reported, in particular, that in March 2020 a Chinese businessman announced the donation to Cuba of 100,000 masks, 10,000 kits for the rapid detection of the virus responsible for COVID-19, ventilators, gloves and medical protective suits. The shipment could not reach its final destination, however, as the hired carrier, a United States company, declined at the last minute to deliver the goods, citing United States regulations.¹⁵⁸

Many times, debates on UCMs have focused not on the aforementioned negative impacts of restrictive measures on humanitarian action and IHL compliance, but on political rhetoric.¹⁵⁹ For instance, in remarks at a virtual seminar, a Chinese ambassador made harsh critiques of US-sanctions, affirming that “[UCMs have] served as a basic tool by the US in its foreign policy since World War II, and has given rise to huge humanitarian disasters in many

154. See Aryeh Neier, *Do Economic Sanctions in Response to Gross Human Rights Abuses Do Any Good?*, JUST SEC. (Apr. 29, 2021), <https://www.justsecurity.org/75908/do-economic-sanctions-in-response-to-gross-human-rights-abuses-do-any-good/> (arguing that sanctions in response to human rights abuses as opposed to national security reasons are generally more successful).

155. See e.g., Glob. Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, 130 Stat. 2533–38 (2016); Exec. Order No. 13818, 82 Fed. Reg. 60,893 (Dec. 26, 2017).

156. See Alena Douhan (Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights), *Negative Impact of Unilateral Coercive Measures: Priorities and Road Map*, ¶ 26, U.N. Doc. A/HRC/45/7 (Jul. 21, 2020).

157. See *id.* ¶ 45.

158. *Id.* ¶ 36.

159. See Kang, *supra* note 143 (noting that some have observed the counterproductive effect of sanctions on the desired political shifts).

countries, [and the] US has chosen to turn ‘a blind eye’, in a selective manner, to these grave consequences, though it has to chant the slogan of ‘protecting human rights’ on other occasions.”¹⁶⁰ Another example is a joint declaration by Cuba, Iran, and Venezuela, which has condemned UCMs and affirmed that “US sanctions should be seen as weapons of war and means of aggression and considered as crimes against humanity,” as well as a tool of regime-change.¹⁶¹

The humanitarian impact of resolutions and restrictive measures—be it SC resolutions, SC sanctions regimes, other sanctions regimes (including UCMs), or measures to fight COVID-19—is a legitimate concern¹⁶² and one which has been well documented by humanitarian organizations and other actors.¹⁶³ The politically charged debate on UCMs can be counterproductive—to CT and non-CT measures alike—as it can be hard for humanitarian organizations to maintain their impartiality if they engage in politicized discussions such as the previously mentioned debates on UCMs.¹⁶⁴ For example, according to the Fundamental Principles of the International Red Cross and Red

160. Wang Qun, Ambassador, Permanent Mission of the People’s Republic of China to the U.N. and Other Int’l Orgs. in Vienna, *Remarks at the Virtual Seminar on Unilateral Coercive Measures and Their Impacts in the Context of COVID-19 Pandemic* (Dec. 2, 2020).

161. *Cuba, Iran, Venezuela Strongly Reject Unilateral Coercive Measures*, REPRESENTACIONES DIPLOMÁTICAS DE CUBA EN EL EXTERIOR (June 27, 2019), <http://misiones.minrex.gob.cu/en/articulo/cuba-iran-venezuela-strongly-reject-unilateral-coercive-measures>.

162. See NORWEGIAN REFUGEE COUNCIL, *supra* note 143, at 8 (“As states continue to adopt measures aimed at combating terrorist activity, humanitarian organisations remain concerned about the impact these measures have on their ability to deliver aid to populations in areas under the control of designated terrorist groups (DTGs).”).

163. See SAFEGUARDING HUMANITARIAN ACTION IN SANCTIONS REGIMES, *supra* note 65, at 1, 3 (citing Syria and the DPRK as examples of documented challenges); See also NORWEGIAN REFUGEE COUNCIL, *supra* note 133; *Counter-Terrorism Measures must not Restrict Impartial Humanitarian Organizations from Delivering Aid*, INT’L COMM. OF THE RED CROSS (Jan. 12, 2021), <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations>.

164. Cf. Stephanie Fillion, *Does the UN Security Council Have an Arria-Formula Problem*, PASSBLUE (July 6, 2021), <https://www.passblue.com/2021/07/06/does-the-un-security-council-have-an-arria-formula-problem/> (documenting the politicization of informal meetings of the U.N. SC).

Crescent Movement (which bind the ICRC and other components of the Movement), the Movement “may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.”¹⁶⁵ All States should refrain from ramping up their political rhetoric, and concentrate on finding consensus in humanitarian issues and upholding their IHL and IHRL obligations.¹⁶⁶

Lastly, it is important to recall that States must also comply with their IHRL obligations while taking steps to fight the pandemic in relation to all persons under their jurisdiction.¹⁶⁷ Declarations of state of emergency must conform to IHRL standards.¹⁶⁸ Measures such as border closings¹⁶⁹ may prevent persons from exercising their right to

165. Int’l Comm. of the Red Cross, *The Fundamental Principles of the International Red Cross and Red Crescent Movement* (Oct. 31, 1986), <https://www.icrc.org/en/doc/resources/documents/red-cross-crescent-movement/fundamental-principles-movement-1986-10-31.htm>.

166. In relation to UCMs, policy-focused think tanks have proposed changes to the domestic architectures of sanctions regimes which could be a first step to improving the system. See RICHARD HANANIA, *INEFFECTIVE, IMMORAL, POLITICALLY CONVENIENT: AMERICA’S OVERRELIANCE ON ECONOMIC SANCTIONS AND WHAT TO DO ABOUT IT* 11 (CATO Inst. pub., 2020), <https://www.cato.org/sites/cato.org/files/2020-02/pa-884-updated.pdf> (“first, if using sanctions, the United States should limit them to individuals or symbolic targets rather than restrict entire categories of trade; second, the United States should be laxer in its enforcement of current and future sanctions regimes; and third, the law should be changed to make it more difficult for the executive branch to unilaterally impose sanctions in perpetuity.”).

167. See Jakub Jaraczewski, *Emergency Measures, Human Rights and the Rule of Law in the Face of COVID-19*, GLOB. CAMPUS OF HUM. RTS. (Aug. 4, 2021), <https://gchumanrights.org/preparedness/article-on/emergency-measures-human-rights-and-the-rule-of-law-in-face-of-covid-19.html> (arguing the restrictions imposed by States in response to the Covid-19 pandemic should keep international human rights standards in mind).

168. See International Covenant on Civil and Political Rights [ICCPR] art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 (detailing derogations of rights during public emergencies); *March 2018 Report on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, *supra* note 7 (examining the use and abuse of emergency powers during crises and providing recommendations for State compliance with IHRL during declarations of public emergencies).

169. See OCHR, IOM, UNHCR and WHO Joint Press Release: *The Rights and Health of Refugees, Migrants and Stateless Must Be Protected in COVID-19 Response*, WORLD HEALTH ORG. (Mar. 31, 2020), <https://www.who.int/news/item/31-03-2020-ohchr-iom-unhcr-and-who-joint-press->

seek asylum according to international refugee law.¹⁷⁰ In a press release, the U.N. High Commissioner for Refugees, the International Organization for Migration, the Office of the United Nations High Commissioner for Human Rights, and the World Health Organization reminded States that: “While countries are closing their borders and limiting cross-border movements, there are ways to manage border restrictions in a manner which respects international human rights and refugee protection standards, including the principle of non-refoulement, through quarantine and health checks.”¹⁷¹

IV. INTERNATIONAL LAW AND VACCINES

The development of vaccines effective against the COVID-19 virus has prompted a race to the vaccine.¹⁷² All over the world, governments are working to acquire vaccines¹⁷³ and administer them to their populations.¹⁷⁴ While drawing up plans on the distribution and administration of COVID-19 vaccines, IHL and IHRL obligations must be respected.¹⁷⁵

release-the-rights-and-health-of-refugees-migrants-and-stateless-must-be-protected-in-covid-19-response [hereinafter Joint Press Release].

170. *See id.* (explaining alternative methods for allowing refugees to seek asylum in light of the pandemic).

171. *Id.*

172. Eliza Mackintosh et al., *Inside the Multibillion Dollar Race for a Covid-19 Vaccine*, CNN (Aug. 14, 2020), <https://edition.cnn.com/interactive/2020/08/health/coronavirus-vaccine-race-intl/> (documenting the international scientific effort to develop a Covid-19 vaccination as of August 2020).

173. *See id.* (documenting the various innovations different countries are trying in efforts to create a vaccine).

174. *See* Alix Culbertson, *Coronavirus: Race to Buy COVID-19 Vaccines as Governments Sign Huge Deals*, SKY NEWS (June 16, 2020), <https://news.sky.com/story/coronavirus-race-to-buy-covid-19-vaccines-as-governments-sign-huge-deals-12007363>

(discussing the race to develop a vaccine as of June 2020, particularly between the European Union and the United States).

175. *See* Alexander Breitegger, *COVID-19 Vaccines and IHL: Ensuring Equal Access in Conflict-Affected Countries*, HUMANITARIAN L. AND POL'Y (Nov. 5, 2020), <https://blogs.icrc.org/law-and-policy/2020/11/05/covid-19-vaccines/> (arguing that international humanitarian law should not be overlooked in distributing the Covid-19 vaccination worldwide).

IHL provides specific protections to medical units and to medical personnel exclusively assigned to medical purposes, including providing vaccinations.¹⁷⁶ As Alexander Breitegger points out, “[a]part from the search for, collection, transportation, diagnosis and treatment of wounded and sick people, IHL recognizes ‘prevention of disease’ as a medical purpose,”¹⁷⁷ which includes vaccinations.¹⁷⁸ Medical personnel are defined as persons assigned, by a party to the conflict, exclusively to medical purposes.¹⁷⁹ During armed conflicts, “[m]ilitary and civilian medical personnel may not be attacked and must be allowed to perform their mission, even in the midst of the fighting.”¹⁸⁰ Breitegger adds that:

Under international humanitarian law, healthcare personnel, facilities and transports involved in the transport, distribution or administering of vaccines enjoy specific protection when they are exclusively assigned by a competent authority of a party to a conflict to one or more medical purposes. Specific protection means that: 1) they must be respected and protected at all times (unless they commit, or are used to commit acts harmful to the enemy, outside their humanitarian functions); 2) they are entitled to use the emblem of the red cross, red crescent or red crystal; and 3) a loss of specific protection only becomes effective once a warning has not been complied with.¹⁸¹

One important requirement to the application of this special regime of protection is that medical personnel are assigned to their

176. See First Geneva Convention, *supra* note 48, art. 19; Fourth Geneva Convention, *supra* note 48, arts. 3 & 18; Additional Protocol I, *supra* note 48, art. 12; *Rule 28. Medical Units*, *supra* note 137.

177. Breitegger, *supra* note 175.

178. See *id.* (discussing how vaccines are considered prevention under IHL). See also INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 129 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; *First Geneva Convention*, *supra* note 48, art. 24; *Additional Protocol I*, *supra* note 48, art. 8(e); *Rule 25. Medical Personnel*, *supra* note 49; *Rule 28. Medical Units*, *supra* note 137; *Rule 29. Medical Transports*, *supra* note 137.

179. *Additional Protocol I*, *supra* note 48, art. 8(c).

180. SASSÒLI, *supra* note 8, at 234 (explaining the special protections afforded to medical personnel).

181. Breitegger, *supra* note 175.

task by a party to the conflict.¹⁸² As Marco Sassòli explains, “medical personnel employed in the public health service may be considered as being automatically ‘assigned’ because the public health service is part of the public administration of the party to the conflict.”¹⁸³ For the case of private healthcare personnel, it is necessary that the party to the conflict assigns this personnel to their medical functions through a formal act of State so they can be entitled to these special IHL protections for medical personnel.¹⁸⁴ This requirement implies an element of State control over which personnel are entitled to said protections.¹⁸⁵ Another important requirement is that personnel be exclusively assigned to medical duties—thus, soldiers engaged in active combat shall not be considered medical personnel even if they have medical training.¹⁸⁶

As Sassòli points out, there is no specific requirement for the act of State assignation to medical duties, and the act itself may take different forms.¹⁸⁷ Taking this into account, a State-mandated vaccination plan can be considered an act of State that complies with this requirement if it assigns personnel exclusively to the administration of vaccines, which is one of the medical purposes recognized by IHL, in the context of the COVID-19 pandemic.¹⁸⁸

182. See SASSÒLI, *supra* note 8, at 236 (explaining the applicability of this protection for medical personnel).

183. See *id.* (arguing because they work for the public health system, public health care employees are inherently assigned prior to conflict).

184. See *id.* (explaining the steps required for private medical personnel to be assigned to various roles).

185. See MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* 105–06 (2nd ed. 2013) (arguing that the definition of “medical personnel” is not so liberal as to rule out the possibility of State control).

186. See *id.* (explaining that soldiers with medical training cannot be considered medical personnel when actively engaged in a combat function).

187. See SASSÒLI, *supra* note 8, at 235–36 (arguing that public health professionals are inherently assigned because the public health system and the party in conflict are the same).

188. See *id.* at 236 (“It must be stressed that medical personnel categories benefit from the regime foreseen by IHL not simply if they have medical training and duties, but only if they were designated, that is, if they were assigned to their task by a party to the conflict.”); Breitegger, *supra* note 186 (explaining the obligation on States to prevent epidemics and major communicable disease

Thus, the special regime of protection to medical personnel under IHL would be applicable to the staff of NGOs and private healthcare services if they are exclusively assigned to administer vaccines by the State party to the conflict as part of their vaccination campaign.¹⁸⁹ In the case of ordinary healthcare staff who have not been assigned to perform their duties by a party to the conflict, they retain civilian status under IHL¹⁹⁰ and they “may not be attacked and must be respected as such when in the power of a party to the conflict.”¹⁹¹

IHL also establishes a duty to respect and protect medical facilities.¹⁹² As Breitegger notes, the definition of medical units under Article 8(e) of Additional Protocol I (API) to the Geneva Conventions encompasses “preventive centres and institutes.”¹⁹³ API provides protections to medical units in Articles 12, 13, and 14.¹⁹⁴ Most notably, Article 12 establishes that “[m]edical units shall be respected and protected at all times and shall not be the object of attack.”¹⁹⁵ Such protections are extended to facilities engaged in the research, trial, and production of vaccines, as they may qualify as medical units.¹⁹⁶ As Breitegger notes, “aircraft, ships or vehicles exclusively assigned to the transportation of medical personnel, including those engaged in disease prevention, and/or medical supplies serving a preventive medical purpose like vaccines, are to be regarded as medical transports,”¹⁹⁷ which shall be protected in the

through measures which may include vaccinations).

189. See *Rule 25. Medical Personnel*, *supra* note 49 (“Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances.”).

190. See SASSÒLI, *supra* note 8, at 236.

191. See *id.* (arguing that medical personnel are still civilians regardless of assignment and therefore are protected from attack).

192. See *First Geneva Convention*, *supra* note 48, art. 19; *Fourth Geneva Convention*, *supra* note 48, art. 18; *Additional Protocol I*, *supra* note 48, art. 8(e).

193. For example, “primary healthcare centres serving disease prevention, and in particular ‘vaccination centres’ engaged in prevention or containment of epidemics.” See Breitegger, *supra* note 175; see also *Additional Protocol I*, *supra* note 48, art. 8(e).

194. See *Additional Protocol I*, *supra* note 48, arts. 12–14.

195. See *id.* art. 12.

196. See Breitegger, *supra* note 175 (discussing the classification of vaccine research facilities as medical units); See also *Additional Protocol I*, *supra* note 48, art. 8(e).

197. Breitegger, *supra* note 175.

same way as medical units under Article 21 of API.¹⁹⁸ These IHL obligations do not impede parties from inspecting materials—e.g., at military checkpoints—as long as disruptions or delays of medical activities are minimized and activities are not unduly impeded or delayed.¹⁹⁹

IHL also prohibits parties to the conflict from punishing persons for performing medical duties in line with medical ethics.²⁰⁰ Compelling one to perform acts contrary to medical ethics is also prohibited.²⁰¹ As Breitegger explains, these rules apply to medical activities that include vaccinations:

Regardless of whether they qualify for specific protection as medical personnel, no healthcare personnel may be compelled to act contrary to medical ethics or be threatened, harassed or punished for performing medical activities compatible with medical ethics, including those related to vaccinations. Medical ethics include the equitable use of resources to the best available healthcare services; providing healthcare without discrimination and whenever possible, with the explicit consent of the person concerned; or respecting medical confidentiality, unless there is a real and imminent threat of harm to the person concerned or others. *Healthcare professionals could not, for instance, be compelled to refrain from vaccinating certain members of affected populations based on the fact that they are associated with an adversary party to a conflict or punished for doing so.*²⁰² (emphasis added)

IHL rules on situations of occupation are also relevant, given that they establish norms related to standards of public health in the occupied territory.²⁰³ As mentioned above, belligerents have the

198. *Additional Protocol I*, *supra* note 48, art. 21.

199. Breitegger, *supra* note 175 (explaining how inspections are permissible unless they cause unreasonable delay or disruption).

200. *See Additional Protocol I*, *supra* note 48, art. 16; *Additional Protocol II*, *supra* note 48, art. 10; *Rule 26. Medical Activities*, *supra* note 49 (documenting the medical ethics standard and rules of engagement regarding performance of medical duties).

201. *Rule 26. Medical Activities*, *supra* note 49 (stating that punitive measures against medical personnel performing medical duties are prohibited).

202. Breitegger, *supra* note 175; *see also* First Geneva Convention, *supra* note 48, art. 18(3); *Additional Protocol I*, *supra* note 48, art. 16; *Additional Protocol II*, *supra* note 48, art. 10; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 178, at 1426; *Rule 26. Medical Activities*, *supra* note 49.

203. *See Fourth Geneva Convention*, *supra* note 48, arts. 55–56.

primary responsibility of meeting the basic needs of the population under their control during armed conflicts.²⁰⁴ In situations of occupation, the Occupying Power bears responsibilities in relation to the public health of the population it occupies, as established by Article 56 of the Fourth Geneva Convention of 1949 (GCIV):

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.²⁰⁵

The 1958 ICRC Commentaries to GCIV affirm that co-operation of national and local authorities is necessary,²⁰⁶ thus the Occupying Power is not solely responsible to coordinate a response to epidemics.²⁰⁷ At the same time, the Occupying Power must “ensure that hospital and medical services can work properly and continue to do so” when medical services are disorganized due to the effects of the conflict.²⁰⁸ In addition, according to the 1958 ICRC Commentaries, Article 55 of GCIV “requires the Occupying Power to import the necessary medical supplies, such as medicaments, vaccines and sera, when the resources of the occupied territory are inadequate.”²⁰⁹

204. See IHL RULES ON HUMANITARIAN ACCESS AND COVID-19, *supra* note 123, at 1 (describing belligerents’ responsibility to provide a civilian population’s basic needs when under their control).

205. *Fourth Geneva Convention*, *supra* note 48, arts. 55–56.

206. See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE FOURTH GENEVA CONVENTION: CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 312 (1958) [hereinafter COMMENTARY ON GENEVA IV].

207. See *id.* 312–13 (asserting that the power to control epidemics lies beyond the party in control).

208. *Id.* at 313.

209. *Id.* at 314. See also *Fourth Geneva Convention*, *supra* note 48, art. 55 (“To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”).

These IHL obligations, clearly established in GCIV, must be respected by all States which currently occupy other territories in the context of an international armed conflict.²¹⁰ These dispositions would apply notably in the Palestinian territories occupied by Israel.²¹¹ While the Palestinian Authority bears the primary responsibility for health care in territories under its authority per GCIV and the Oslo Accords,²¹² Israel has a legal obligation under IHL to provide vaccines to Palestinians.²¹³

IHRL obligations will also bind States to provide vaccines to persons under their jurisdiction.²¹⁴ Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) affirms that States have an obligation to take steps to achieve the full realization of the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health[.]” including those necessary for the “prevention, treatment and control of epidemic, endemic, occupational and other diseases[.]”²¹⁵ The Convention on the Rights of the Child (CRC) establishes obligations to ensure the provision of healthcare to children, as well as to combat disease.²¹⁶ These obligations are binding upon all States parties,

210. See *Fourth Geneva Convention*, *supra* note 48, art. 55.

211. See *id.* (requiring occupying powers to provide the required medical supplies for the civilian population under occupation if resources of the occupied territory are inadequate); See also *Israel/OPT: UN Experts Call on Israel to Ensure Equal Access to COVID-19 Vaccines for Palestinians*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Jan. 14, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26655> [hereinafter *UN Experts Call on Israel*] (calling on Israeli leaders to provide equitable access to the Covid-19 vaccine to Palestinians under Israeli control and explaining the obligation under GCIV for Israel, as an occupying power, to provide for the health needs of Palestinians).

212. *UN Experts Call on Israel*, *supra* note 211 (explaining how Israel, as the occupying power, bears responsibility for health services in the Occupied Palestinian Territories).

213. *Id.* (asserting that until Israel ends its occupation, Israel has an international legal obligation to Palestinians under Israeli occupation).

214. Committee on Economic, Social and Cultural Rights, 22nd Sess., CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR General Comment No. 14].

215. International Covenant on Economic, Social and Cultural Rights art. 12(c), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

216. Convention on the Rights of the Child art. 24(1), Nov. 20, 1989, 1577

which shall take positive steps to provide vaccines in order to fulfill their obligations.²¹⁷

As recognized by the International Court of Justice (ICJ), both the ICESCR and the CRC are applicable to the Palestinian territories occupied by Israel.²¹⁸ Thus, Israel has IHL and IHRL obligations to provide vaccines to Palestinians in occupied territories.²¹⁹ As Eyal Benvenisti argues, Israeli law also obligates Israel to ensure that Palestinians are vaccinated, based on decisions of the Israeli Supreme Court and opinions of the Knesset.²²⁰ Despite both

U.N.T.S. 3 (“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”); *id.* art. 24(2)(c) (“States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: [. . .] To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution[.]”).

217. See e.g., *id.* art. 24 (placing a positive obligation on States parties to take “appropriate measures” to ensure the “full implementation” of the right to health for children).

218. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 112–13 (July 9) (“[The ICJ] would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which ‘States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .’. That Convention is therefore applicable within the Occupied Palestinian Territory.”).

219. See *UN Experts Call on Israel*, *supra* note 211 (describing the application of IHL and IHRL obligations to Israel regarding the provision of Covid-19 vaccines to Palestinians in occupied territory).

220. See Eyal Benvenisti, *Israel is Legally Obligated to Ensure the Population in the West Bank and Gaza Strip Are Vaccinated*, JUST SEC. (Jan. 7, 2021), <https://www.justsecurity.org/74091/israel-is-legally-obligated-to-ensure-the-population-in-the-west-bank-and-gaza-strip-are-vaccinated/> (arguing that Israeli law, including decisions made by the Israeli Supreme Court, requires Israel to provide vaccines to Palestinians).

international and domestic law clearly stating such obligations,²²¹ the Israeli Health Minister has affirmed that ensuring that Palestinians are vaccinated is in Israel's interests, but is not its legal obligation.²²²

States also have an obligation to administer vaccines without discrimination²²³ and they must not adopt policies that have discriminatory effects.²²⁴ As Breitegger argues, both IHL and IHRL mandate that the aforementioned obligations are:

[I]mplemented without adverse distinction, i.e. distinction on any grounds other than health-related considerations. Health-related considerations may actually require prioritized or even differentiated treatment so as to ensure *de facto* equal treatment. This means prioritizing vaccinations for people who may be particularly at risk, such as older people, people with co-morbidities, or health workers themselves. It also requires States to take specific positive measures for people who have particular difficulties accessing vaccination programmes, including children, older people, or

221. See *UN Experts Call on Israel*, *supra* note 211 (describing the IHL and domestic obligations of Israel to the Palestinian population).

222. Chantal Da Silva, *Israeli Health Minister Says Not Country's Job to Give Vaccine to Palestinians in Occupied Territory*, INDEP. (Jan. 24, 2021), <https://www.independent.co.uk/news/world/middle-east/coronavirus-vaccine-israel-palestinians-b1791884.html>.

223. See *Statement by UN Human Rights Experts Universal Access to Vaccines is Essential for Prevention and Containment of COVID-19 Around the World*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Nov. 9, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E> [hereinafter *Universal Access to Vaccines is Essential*] (noting that States are obligated to provide vaccines to their population without discrimination).

224. See *id.* (calling for unity and equity in production and distribution of vaccines and efforts against COVID-19); see also ICESCR, *supra* note 215, art. 2.2 (requiring States to provide for the guarantees of the ICESCR without discrimination); Convention on the Rights of the Child, *supra* note 216, art. 2(1) (requiring States to provide for the rights listed in the Convention without discrimination); WORLD HEALTH ORG., WHO SAGE VALUE FRAMEWORK FOR VACCINE ALLOCATION AND PRIORITIZATION OF COVID-19 VACCINATION 2 (2020) (establishing a set of six principles for vaccine distribution based on equity and respect); *Statement by UN Human Rights Experts Universal Access to Vaccines is Essential for Prevention and Containment of COVID-19 Around the World*, U.N. OFF. OF THE HIGH COMM'R ON HUM. RTS. (Nov. 9, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E> (stressing the importance of making the vaccine "fully available, accessible and affordable" to everybody).

people with disabilities.²²⁵

Compliance with said obligations may be at risk in some States.²²⁶ In Colombia, authorities have expressed a desire to implement discriminatory policies that would outright deny access to the COVID-19 vaccine to undocumented migrants.²²⁷ Another example is that U.S. policies may require local authorities to collect and report the personal details of persons who receive vaccinations,²²⁸ which can serve as a way of intimidating undocumented migrants who fear arrest and deportation.²²⁹ Even if the discriminatory effect is not intended, this policy would violate IHRL obligations, given that it ultimately implements measures that produce discriminatory effects²³⁰ and that affect the fulfillment of the right to health as established by the ICESCR and the CRC.²³¹ This obligation also exists at the regional level, as the Inter-American Court of Human Rights has ruled that “the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights. . . .”²³²

225. See Breitegger, *supra* note 175 (describing factors to consider in ensuring the equitable distribution of vaccines).

226. See Jorge Valencia, *Colombia’s President Will Refuse Coronavirus Vaccine for Undocumented Venezuelans*, WORLD (Dec. 29, 2020), <https://www.pri.org/file/2020-12-29/colombia-s-president-will-refuse-coronavirus-vaccine-undocumented-venezuelans> (describing the Colombian President’s refusal to provide vaccines to marginalized groups).

227. *Id.* (estimating that 1 million Venezuelans are living in Colombia).

228. See Gabrielle Debinski, *Vaccine Politics and Human Rights*, GZERO (Jan. 13, 2021) <https://www.gzeromedia.com/vaccine-politics-and-human-rights> (explaining that the United States previously implemented a policy requiring local authorities to collect and report on the vaccine status of private citizens).

229. *Id.* (discussing vaccine fears and the consequential impact on vaccine participation).

230. See ICESCR, *supra* note 215, arts. 2.2 & 3; see also CESCR General Comment No. 14, *supra* note 214, ¶ 18 (“By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care . . . which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.”).

231. See Convention on the Rights of the Child, *supra* note 216, art. 24; ICESCR, *supra* note 215, art. 12.

232. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, at 113, “Decides,” ¶ 8 (Sept. 17, 2003).

IHL has another relevant obligation in the context of the pandemic, vis-à-vis prisoners of war (POWs).²³³ Article 29 of the Third Geneva Convention establishes that “[t]he Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics.”²³⁴ Thus, the Detaining Power has a legal obligation to provide vaccines to POWs and to prevent the spread of COVID-19 in detention facilities.²³⁵ In visits to POW camps, the ICRC “regularly impressed upon the Detaining Power the necessity of . . . [e]arly detection of communicable diseases and administration of vaccinations, where necessary.”²³⁶

V. CONCLUSION

States are not exempt from abiding by their IHL and IHRL obligations during emergencies or unexpected crises.²³⁷ Combatting terrorism is not a justification to violate IHL or IHRL, and measures intended to curb the COVID-19 pandemic also have to comply with international law.

This essay analyzed the compatibility of CT measures—including UNSC resolutions, sanctions regimes, national legislation and UCMs—with IHL and IHRL obligations, taking into account their

233. See *Third Geneva Convention*, *supra* note 48, art. 29.

234. *Id.*; see also Breitegger, *supra* note 175.

235. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 206–07 (Jean S. Pictet, ed. 1958) (describing the ICRC's warning to those managing POW camps of the necessity that communicable diseases be detected early and vaccines be distributed).

236. *Id.*

237. See INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW ANSWERS TO YOUR QUESTIONS 36–37 (2014), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0703.pdf> (affirming that IHL applies exclusively to situations of armed conflicts and that it does not allow States to derogate from its obligations and explaining that derogations from IHRL obligations are only possible under limited, specific circumstances and according to the criteria set out in some human rights treaties. Such derogations must “be necessary and proportional to the crisis, must not be introduced on a discriminatory basis and must not contravene other rules of international law – including provisions of IHL.”); See also COVID-19 AND INTERNATIONAL HUMANITARIAN LAW, *supra* note 122 (describing IHL obligations that are particularly relevant in the context of a pandemic).

effects on the provision of IHL-protected humanitarian services as well as the enjoyment of human rights. Sanctions and CT measures may criminalize or forbid interactions with NSAGs, thus raising concerns of liability for humanitarian organizations that provide assistance to affected populations in areas controlled by NSAGs.²³⁸

Moreover, the criminalization of terrorist financing may affect the ability of humanitarian organizations to conduct financial transactions such as payments of tolls, taxes, etc.²³⁹ Humanitarian exemptions are desperately needed to avoid the disruption of humanitarian activities, and licensing regimes should be avoided.²⁴⁰ States must rethink their CT efforts, as they may cause a “chilling effect” that discourages or precludes humanitarian organizations from carrying out their activities in areas controlled by NSAGs. In addition to CT frameworks, public health measures can impose additional challenges to the delivery of humanitarian aid.²⁴¹ States and international organizations must make sure that their laws and policies respect their IHL and IHRL obligations, and that they do not hinder the delivery of humanitarian aid and other humanitarian activities as well as the enjoyment of human rights.

In the midst of a global effort to provide vaccines, States must comply with their international obligations. IHL obligations remain applicable during the pandemic, and parties to the conflict must respect rules on the protection of civilians in occupied territory, the protection of medical personnel and medical objects, and obligations regarding POWs.²⁴² Moreover, IHRL mandates that States must abide by the principle of non-discrimination while providing

238. See Naz K. Modirzadeh, *Humanitarian Engagement Under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape*, 93 INT’L REV. RED CROSS 1, 2 (2011) (describing concerns of liability for humanitarian organizations that provide assistance to affected populations).

239. *Id.* at 14 (discussing the obstacles to humanitarian organizations created by measures that counter terrorism financing).

240. *Id.* at 8 (discussing the need for humanitarian exemptions).

241. See discussion *supra* Section II.

242. See Cordula Droege, *COVID-19 Response in Conflict Zones Hinges on Respect for International Humanitarian Law*, HUMANITARIAN L. & POL’Y (Apr. 16, 2020), <https://blogs.icrc.org/law-and-policy/2020/04/16/covid-19-response-respect-international-humanitarian-law/> (discussing the extent to which IHL obligations remain applicable during the pandemic).

vaccinations and must take steps to ensure the right to health.²⁴³

The ICRC points out that “[s]ome States are dehumanizing adversaries and employing rhetoric to indicate that actors designated as ‘terrorist’ are undeserving of the protection of international law, including IHL[.]”²⁴⁴ This divisive rhetoric serves as the basis to CT measures that threaten compliance with essential IHL obligations such as the provision of medical assistance to the wounded and sick, which can be traced as far back as the efforts spearheaded by Henry Dunant on the aftermath of the Battle of Solferino.²⁴⁵ The pushback on the legal foundations of IHL is worrisome. States must change the way they view CT efforts and implement safeguards to ensure that impartial humanitarian organizations have rapid and unimpeded access to affected populations without fear of criminalization and liability.

243. See ICESCR, *supra* note 215, arts. 2.2 & 3; see also Breitegger, *supra* note 175 (asserting that preventive measures, including vaccines, are part of the right to health).

244. INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS: RECOMMITTING TO PROTECTION IN ARMED CONFLICT ON THE 70TH ANNIVERSARY OF THE GENEVA CONVENTIONS 58 (2019).

245. See HENRI DUNANT, A MEMORY OF SOLFERINO 69 (Am. Nat'l Red Cross pub., 1959).