**ICRC Submission**

**Call for Input - UN Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism (CT) - Thematic Report to the 75th session of the UN General Assembly**

The ICRC thanks the Special Rapporteur for having invited stakeholders, including humanitarian organizations, to provide input for her thematic report to the seventy-fifth session of the General Assembly.

The ICRC commends the Special Rapporteur for her work on this important issue. Recent years have illustrated the importance of the subject and the necessity to further analyze the interplay between International Humanitarian Law (IHL), human rights law (IHRL) and the legal framework governing CT. In this regard, the ICRC has no doubt that the Special Rapporteur’s forthcoming report will constitute an important contribution to and clarification of the issue.

As per the Special Rapporteur’s invitation, the ICRC would like to share the following general observations. These observations are mainly based on IHL in light of the ICRC’s role regarding this corpus juris, but are without prejudice to the applicability and important role played by other applicable bodies of laws, notably IHRL.

The ICRC observations below are not meant to be exhaustive but focus on 3 specific points: IHL contribution to the CT debate, the protection afforded by IHL to persons designated as terrorist or associated with terrorism, and the necessity to protect principled humanitarian activities when taking CT measures.

1. The contribution of IHL to the CT debate:

Recent years have again seen the rise of non-State armed groups resorting to acts of terrorism. This situation has led States and international organizations to react by tightening existing counter-terrorism measures and introducing new ones.

Fighting terrorism may take various forms, including armed conflict. In this regard, it is the ICRC’s view that violence that is labelled as “terrorist” - whether politically or by legal norms outside IHL – may well cross the threshold of an armed conflict. Determining whether this kind of armed violence will constitute an armed conflict is to be made exclusively on the basis of the classic criteria of an armed conflict derived from IHL norms, irrespective of the designation given to those involved therein.

However, some States still deny that non-State armed groups designated as “terrorist” could be a party to a non-international armed conflict within IHL’s meaning, therefore challenging IHL applicability to counter-terrorism operations. Nonetheless, this trend is progressively reversing, and more and more stakeholders accept that IHL is relevant for their counter-terrorism activities when the condition of this body of law’s applicability are met.

The ICRC recalls that IHL plays an important role and must also be factored in the long-standing discussions around the definition of terrorism under international law. IHL is not only - under certain circumstances - applicable to CT contexts but it constitutes also a very relevant body of law, and sometimes the primary body of law, that deals efficiently with acts of terrorism committed in situation of armed conflict.

Although IHL does not provide a definition of terrorism, it prohibits in situations of armed conflict most acts that are criminalized as “terrorist” acts in domestic legislation and international conventions specifically addressing terrorism. For instance, in armed conflict, IHL prohibits direct and deliberate attacks against civilians, based on the principle of distinction, which is a cornerstone of this body of law. It also prohibits indiscriminate attacks and hostage taking to name but a few examples.

Even if IHL does not define terrorism, it is nonetheless not silent on this issue. It expressly prohibits "measures of terrorism" (Article 33 of the Geneva Convention IV) and "acts of terrorism" (Article 4 of Additional Protocol II) against persons not or no longer taking part in hostilities, irrespective of who - among parties to the armed conflict - commits such acts. The main objective of these provisions is to ensure that a party to an armed conflict is prohibited from terrorizing civilians under its control.

IHL rules governing the conduct of hostilities also expressly cover certain acts of terrorism. Both Additional Protocols I and II prohibit acts aimed at spreading terror among the civilian population. The relevant Articles - 51.2 of Additional Protocol I and 13.2 of Additional Protocol II - are a key element of IHL rules governing the conduct of hostilities.

IHL therefore provides a strong legal framework with explicit prohibitions applicable also to non-state armed groups designated as terrorists whose violations - which may constitute war crimes - entail individual criminal responsibility both at domestic and international level. But States may also choose to additionally designate such acts as “terrorist” under international or domestic law.

In this regard, the ICRC posits that while establishing CT offences, States should not consider as terrorist offences acts that are governed and not prohibited by IHL such as attacks against military objectives in armed conflict, for instance. Interaction between IHL and CT criminal laws should be regulated notably by means of an IHL savings clause such as the one recently introduced by Chad in its new CT law.

1. IHL protections afforded to persons designated as terrorist or associated with terrorism:

The ICRC has frequently expressed an urgent need to affirm that international law must govern the treatment of ‘foreign fighters’ and their families. The ICRC is concerned by a persistent legislative trend that treats these individuals as exceptional cases to whom pre-existing international law – IHL and IHRL as applicable – does not apply.[[1]](#footnote-1) Such ‘exceptionalism’ creates some of the most haunting situations witnessed by the ICRC: the camps and places of detention in North-East Syria where persons associated or suspected of association with the Islamic State group remain located are emblematic in this regard.

Al Hol camp is home to more than 40,000 children stranded in legal limbo. There is no access to education, and access to food, clean water and health care is limited. The children of Al Hol are among more than 100,000 people who remain in camps in northern Syria; thousands more, mostly men but also women and children, some as young as 12, are held in places of detention. Most are from Syria and Iraq, but a significant percentage are from elsewhere – more than 60 countries on several continents. All of them are trapped in an unsustainable status quo that requires urgent international action.

These individuals – irrespective of nationality, personal situation, past actions and indeed even their age – are portrayed as an exceptional security threat requiring an exceptional response. Branding all individuals perceived to be affiliated with the Islamic State group as ‘terrorists’ has placed them beyond the protection of the law. With this humanitarian impact in mind, the ICRC submits the following three observations regarding the legal implications of the overlap between the Security Council Resolutions governing FTF and obligations under IHL and IHRL.

1. *General observation*

UN Security Council Resolution (UNSCR) 2178 defines the notion of ‘FTF’ broadly. By contrast, ‘foreign fighter’ is not a legal term within IHL nor does it trigger specific treatment. There is no specific regime – and there are no rules – under IHL dealing explicitly with foreign fighters and their families. IHL deals with these individuals as it does with any other person involved in or affected by armed conflict.

Accordingly, when ‘foreign fighters’ and their families are in the power of a belligerent in an armed conflict, notably when deprived of their liberty, they must benefit from the same protection provided by IHL rules as any other person in such a situation. In NIACs, common Article 3 and customary IHL – as well as Additional Protocol II as applicable – govern their treatment. These rules require, *inter alia*, that grounds and procedures are provided by the detaining party when they are interned for imperative reasons of security, that judicial guarantees are respected where individuals face criminal charges, and that no one is transferred to an authority if there are substantial reasons to believe that the person would be in danger of being subjected to certain fundamental rights violations if transferred.

In addition, persons designated as terrorist (including as ‘FTF’) or associated with them benefit in an armed conflict from the overarching principles of humanity and humane treatment within IHL, which encompass a broad prohibition of discrimination and make equal treatment an essential component of IHL’s protection. Adverse distinction in the application of IHL based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited in both IAC and NIAC by multiple IHL treaty provisions as well as customary IHL. CT norms regulating the treatment of persons under an opposing belligerent’s control in armed conflict must not violate this prohibition of adverse distinction; this is particularly significant for persons designated as terrorist, who may be at risk of adverse treatment on the basis of their ‘religion or belief, political or other opinion.’

1. *Protections specific to children*

Operative paragraph 4 of UNSC Resolution 2178 (2014) expressly acknowledges that children may be recruited as ‘FTF’. The ICRC has observed that States are reticent to apply the law and standards governing the treatment of children associated with armed groups (commonly referred to as “child soldiers”) to children in ‘terrorist’ context who have been or who are suspected to have been trained and/or used in hostilities. This has resulted in parallel standards in the Security Council, whereby the Security Council addresses child FTF in CT resolutions, and promotes a different set of standards in the Security Council children and armed conflict agenda.

It therefore merits emphatic emphasis that children termed “foreign fighters” remain entitled to the legal protections they have by virtue of their identity as a child, under both IHRL and IHL. Pursuant to customary IHL, children are entitled to special respect and protection – including if they are detained for reasons related to an armed conflict. Additional Protocol I, Article 77(3) and Additional Protocol II, Article 4(3)(d) specifically provide that children who have been unlawfully recruited remain entitled to the special protection afforded to children. Notably, States party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (the vast majority of States) are obliged, when necessary, to accord to unlawfully recruited children all appropriate assistance for their physical and psychological recovery and their social reintegration; and to cooperate for the rehabilitation and social reintegration of such children, including through technical and financial assistance.

When implementing CT-related Security Council resolutions, the ICRC recommends that States are concurrently reminded that Security Council Resolution 2427 (2018), and in particular paragraphs 19-21 thereof, also address children associated with armed groups in counter-terrorism contexts and accordingly must be implemented alongside the CT framework. This UNSC Resolution reflects IHL and IHRL standards regarding the special protection and reintegration to which children associated with armed groups, including those designated as terrorist, remain entitled.

1. *The treatment of women*

UNSC Resolution 2396 (2017) acknowledges that there is a need to distinguish between those involved in terrorism and their accompanying family members, and recognises that women in this context may also be victims of acts of terrorism. The ICRC has elsewhere observed that caution must be exercised to avoid oversimplification of women in this context. Where it applies, IHL contains clear rules that add specificity to the need to acknowledge that there is a diversity of individual cases among women, and this requires assessments of their participation in the conflict on a case-by-case basis.

Under IHL, outside criminal proceedings, women (and men) must only be detained for imperative reasons of security. Regardless of their potential culpability under domestic or international law, women have a distinct set of needs and face specific physical and psychological risks, and are entitled to corresponding humane treatment. Their distinct needs include basic female hygiene items, and medical care for pregnant women, nursing mothers, and those who have experienced sexual violence. Better consideration of these IHL obligations could advance precision and clarity in the treatment of women who are designated as ‘terrorist’ or ‘FTF’ or who are identified as family members.

1. Protection of principled humanitarian action in the context of CT measures:

The ICRC has observed in recent years the development of ever broader and stricter CT measures at international, regional and domestic levels.

There is no doubt that it is legitimate and necessary for states and international organizations to take action to ensure security. The ICRC condemns acts of terrorism irrespective of their perpetrators, whether committed within or outside armed conflict.

However, the ICRC is experiencing the negative effects of CT measures most strongly in three areas. First, domestic measures such as CT penal laws prohibiting acts of support to organizations designated as “terrorists” may criminalize humanitarian activities and actors. Second, sanctions regimes have in various instances led to the impediment or delay of humanitarian operations, many of which relate to the core mandate of the ICRC: visits and material assistance to detainees (including family visits), first aid training, war surgery seminars, IHL dissemination to weapons bearers, delivery of aid to meet the basic needs of the civilian population in areas ‘hard-to-reach’, and medical assistance to wounded and sick fighters. Third, donor requirements aimed at addressing compliance with CT measures and the risk of aid diversion (including support to entities and individuals listed as “terrorists”) have limited access to funding and the transfer of funds for humanitarian organizations.

On this basis, the ICRC has on various occasions reminded States and international organizations that principled humanitarian action should not be impeded by CT measures and that IHL rules must be factored in while taking initiatives aimed at combating terrorism.

The ICRC has identified three areas of IHL in which CT measures have a direct impact on IHL rules and ultimately on the ability of impartial humanitarian organizations such as the ICRC to deliver the humanitarian tasks assigned to them by the States parties to the Geneva Conventions of 1949 and their additional Protocols:

* the rules governing humanitarian operations, including the entitlement of impartial humanitarian action to offer their services, which require belligerents and third States to allow and facilitate humanitarian activities.
* the rules protecting the wounded and the sick as well as those providing medical assistance reflecting a foundational principle of IHL
* the rules requiring respect and protection of humanitarian personnel undertaking impartial humanitarian activities.

In this regard, the ICRC welcomes the recent developments at the UN Security Council with resolutions 2462 and 2482 of 2019 but also the November 2019 EU Council conclusions on IHL and humanitarian assistance, all of which require States to comply with IHL when devising and implementing CT measures, including sanctions regimes targeting entities and persons designated a terrorist.

States and international organizations are now expected to take concrete action to ensure that their CT measures are effectively respectful of IHL. In this context, it is the ICRC view that expressions used in these resolutions and conclusions such as “compliance with IHL”, “in conformity with IHL” or “in a manner consistent with IHL” should be interpreted - in case of overlaps or clashes with CT frameworks - in a way that effectively gives precedence to IHL rules when the latter govern and authorize/do not prohibit the issue at hand, for instance the assistance or protection activities carried out by impartial humanitarian organization in accordance with IHL, even if they benefit to individuals designated as terrorist.

Concrete implementation of States’ obligations to ensure that CT measures are compliant with IHL should take the form of “well-framed” humanitarian exemptions introduced notably in CT criminal laws and sanctions regimes with the view to excluding from their scope exclusively humanitarian activities (including assistance and protection alike) undertaken by impartial humanitarian organizations in a manner consistent with IHL, and only them. Recent developments in the Philippines, Ethiopia or Chad for instance show that humanitarian exemptions can be included in CT legislation without hampering the capacity of the States concerned to fight terrorism.

In relation to sanctions regimes, the ICRC takes note that those in charge of establishing and enforcing them often opt for a derogation system instead of humanitarian exemption. If the ICRC welcomes efforts to protect humanitarian space, it nonetheless underlines that derogations, temporary authorizations or licenses still raise obstacles and are not workable from an operational perspective. In addition, derogation/authorizations/licenses systems are not compatible with IHL as they add an additional layer of consent to humanitarian action not foreseen under this body of law. Under IHL, impartial humanitarian organizations only need the consent of belligerents concerned - not that of third States/international organizations - to deliver their activities. On the contrary, once the consent of the belligerents concerned is obtained, third States and international organizations are under the obligation to allow and facilitate humanitarian action, a function that derogations do not fulfill in the ICRC’s view.

Eventually, what is at stake is our ability to cross frontlines to deliver humanitarian activities for communities living in areas controlled by armed groups and individuals designated as terrorists. Without taking into account IHL and principled humanitarian action, CT measures can negatively impact our ability to implement our humanitarian mandate. As a consequence, people suffer at the very moment when IHL should protect them.

The ICRC stands ready to further discuss the issue with the Special Rapporteur and will remain at her disposal for any question or any additional information.

1. In this respect please see *Annex 1: ICRC, IHL and the Challenges of Contemporary Conflicts, ICRC, Geneva, 2019, Chapter on Foreign Fighters and their Families*, and *Annex 2: ICRC Position Paper: Humanitarian concerns in the aftermath of the military operations against the Islamic State group in Syria and Iraq*. [↑](#footnote-ref-1)