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

## **Saving lives is not a crime**

### **Note by the Secretary-General\*\***

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnes Callamard, submitted in accordance with Assembly resolution 71/198.

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\* A/73/50.

\*\* The present report was submitted after the deadline in order to be able to reflect the most recent developments

## **Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions**

### *Summary*

The present report outlines the main activities undertaken by the Special Rapporteur over the past year, including 183 communications to States and non-State actors, 78 press statements, and the presentation of her second report to the Human Rights Council on the Human Rights Obligations of Armed non-State Actors with respect to the Right to Life.

Entitled “Saving lives is not a crime,” the present report focuses on the criminalization, and targeting of humanitarian services and actors, arising from counter-terrorism, migration deterrence, and the outlawing or stigmatization of sexual and reproductive rights. The Special Rapporteur argues that by obstructing the provision of life saving services, and criminalizing acts of solidarity, States are violating normative pillars of international human rights and humanitarian law. What follows are arbitrary deprivations of life under the convenient banners of fighting terrorism, combatting smuggling, or guarding social mores.

The report identifies some positive, yet ad hoc, developments at the United Nations, and good practices by Member States which ought to be expanded and emulated. The Special Rapporteur recommends in particular a United Nations Security Council resolution exempting humanitarian actions from all counter-terrorism measures; the exemption of humanitarian and solidarity acts from domestic smuggling legislation; a narrowing of the international funding gap for comprehensive sexual and reproductive health services. She calls on States to end all forms of criminalisation, harassment and stigmatization of individuals and organizations providing life-saving services.

## I. Introduction

1. The present report is submitted by the Special Rapporteur on extrajudicial, arbitrary or summary executions pursuant to General Assembly resolution 71/198 and Human Rights Council resolution 35/15. It summarizes the activities undertaken by the Special Rapporteur during the past year and includes her thematic report, focusing on the criminalization and targeting of life-saving and protection services to people in need.

## II. Activities of the Special Rapporteur

### A. Country visits

2. At the invitation of the respective Governments, the Special Rapporteur carried out official visits to the Republic of Iraq from 14 to 23 November 2017 (A/HRC/38/44/Add.1), and El Salvador from 25 January to 5 February 2018 (A/HRC/38/44/Add.2).

3. The Special Rapporteur sent requests for official visits to the Governments of Afghanistan, Bangladesh, Brazil, the Democratic Republic of the Congo, Libya, the United States of America, the Syrian Arab Republic and Venezuela (Bolivarian Republic of), and reminders to Pakistan, Nigeria, Kenya and the Republic of Yemen.

4. She thanks the Governments of Nigeria and Mozambique for responding positively to her country visit requests and encourages the Governments of the other above-mentioned States to extend an invitation for a visit in the near future.

### B. Communications and press releases

5. Between 1 February 2017 and 31 July 2018, the Special Rapporteur issued, alone or jointly with other special procedures, a total of 183 communications to States and non-State actors and 78 press statements. Detailed information can be found in the observations on communications report (A/HRC/38/44/Add.3) and the Special Procedures public Communications database<sup>1</sup>.

### C. Meetings and other activities

6. The Special Rapporteur presented her second report to the Human Rights Council in March 2018 on the Human Rights Obligations of Armed non-State Actors with respect to the Right to Life (A/HRC/38/44).

7. From July 2017 to July 2018, the Special Rapporteur chaired, organized and/or participated in 22 international meetings, conferences and other events, a number of which are highlighted below. A full overview is contained in the observations on communications report (A/HRC/38/44/Add.3):

- Expert Workshop on Witchcraft and Human Rights organized by the Independent Expert on the enjoyment of human rights by persons with albinism (September 2017, Geneva);
- Global Compact on Migration, preparatory meeting (December 2017, Puerto Vallarta, Mexico);
- Briefing for United Nations Security Council Member States on Iraq organized by the Kingdom of the Netherlands (February 2018, New York);
- Expert meeting on the draft treaty on crimes against humanity (March 2018, New York);

<sup>1</sup> <https://spcommreports.ohchr.org/>.

- Expert panel on the accountability for killings of women and LGBTI persons during conflict, held in the margins of the Commission on the Status of Women (March 2018, New York);
- Twenty-Fifth Anniversary Celebration of the World Conference on Human Rights, Austrian Federal Ministry for Foreign Affairs (May 2018, Vienna);
- Launch of the Inquiry Report of the All- Party Parliamentary Group, The UK's Use of Armed Drones: Working with Partners, (July 2018, London).

### III. Saving lives is not a crime

*“We, the undersigned, Jewish children hidden during the Second World War to escape deportation, solemnly declare: if we are alive, it is because solidarity offenders disobeyed, hid us, fed us, despite the laws of Vichy and the occupant. They opened their doors, falsified our identity, they kept silent ignoring the injunctions of the police and the administration, they took side roads against the persecution...*

*Their solidarity is now publicly recognized. We are grateful to them, as we are to the courage of our parents who have made the hard choice to separate from us and turn their children into "unaccompanied minors".*

*But this duty of solidarity also applies today and we call for the end of [these] intimidating processes. We proclaim the legitimacy of citizens' right of scrutiny over the practices of administration, justice or the police. We stand in solidarity with those who show solidarity with people in precarious situations without worrying about whether or not they are in a legal situation regarding their stay. We pass the torch of solidarity to whistleblowers, citizens critical of xenophobic policies, solidarity with everyday life<sup>2</sup>.”*

8. ‘Humanitarian’ action in the form of life-saving measures by private individuals, can be traced back over hundreds of years and across the globe.<sup>3</sup> Diverse faiths, beliefs and morality shaped what emerges today as the modern humanitarian regime. Concepts of charity, solidarity and protection of “the stranger” figure prominently in the historical shaping of societies around the world. The anti-slavery movements, for example, consolidated a conviction in the legitimacy of personal action in violation of domestic laws, generated by the suffering of slaves, and grounded in the ethics of universal humanity. As John Brown told the 1859 US Anti-Slavery Convention in New England “talk [...] will never set the slave free.” To end this abomination, abolitionists needed “action-action”. Time and again, individuals, alone or with others, have felt compelled to act: to save lives or protect the right to live with dignity, in the name of solidarity with the common humanity of all human beings.

9. In our modern world, millions are on the move globally, with thousands dying each year as they seek to escape war, persecution, climate degradation, and poverty. Responding in the name of deterrence, governments are exacerbating, not reducing, the dangers faced. Appalled by human suffering, people around the world are stepping up to offer rescue and support, including food, water, medical services, lodging and transportation. The result is that civic humanitarian services are reaching levels not seen since the aftermath of World War II.<sup>4</sup> Governments have reacted by harassing even prosecuting “spontaneous” or organized humanitarian acts.

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<sup>2</sup> <http://www.ujfp.org/spip.php?article5421> Unofficial translation.

<sup>3</sup> This report defines humanitarian actions/services as acts intended to protect life, including life with dignity. This definition includes acts provided by organisations and individuals alone, and covers both assistance and protection. It is based on the International Court of Justice definition as acts which “prevent and alleviate human suffering wherever it may be found” and “protect life and health and to ensure respect for the human being.” It is also derived from the jurisprudence on dignified life. See ICJ, Military and Paramilitary Activities in and against Nicaragua case, Merits, Judgment, 1986, para. 242.

<sup>4</sup> Liz Fekete, “Introduction,” *Humanitarianism: the Unacceptable Face of Solidarity*, Institute of Race Relations (2017), 1.

10. At the direction of the Security Council, governments have instituted counter-terrorism legislative frameworks that, given their stringency, potentially criminalize even life-saving medical aid or food relief, and in any case impose chilling effect on the provision of humanitarian aid for people desperately needing help.

11. Various States have also adopted laws or measures preventing or hindering organizations from providing life-saving services to girls, women and LGBTI persons, thus contributing to increased rates of otherwise preventable morbidity and mortality.

12. This report asserts that saving lives should never be a crime. It argues that the failure to exempt humanitarian services from the overreach of punishing policies, active obstruction of the provision of life saving services, and/or criminalization of acts of solidarity and compassion constitute violations of the State's obligation under the right to life. Any deaths that may be attributable to such measures amount to arbitrary deprivations of life which engages the responsibility of the State.

## A. The prohibition of arbitrary deprivation of life

13. The right not to be arbitrarily deprived of life is a foundational and universally recognized right, applicable at all times and in all circumstances, including during armed conflict or other public emergency. The right to life is protected by international and regional treaties, customary international law and domestic legal systems (A/72/335, para. 14).

14. Article 6(1) of the International Covenant on Civil and Political Rights provides that "[e]very human being has the inherent right to life" and that "no one shall be arbitrarily deprived of his life." Article 26 entitles everyone to protection of this right "without any discrimination". Arbitrariness may be inferred from laws and practices, which violate the principle of non-discrimination, and which may be unnecessary and disproportionate.<sup>5</sup> Legal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination. Any deprivation of life based on discrimination in law or practice is ipso facto arbitrary in nature. "[D]eliberate intent' on the part of the State is not required for a killing or a deprivation of life to be deemed 'arbitrary'."<sup>6</sup>

15. States must prevent the "arbitrary" deprivation of life, including through an appropriate framework of laws, institutions and procedures. States must respect the right to life by ensuring that their organs and agents do not deprive any person of life arbitrarily. They must also protect and fulfil the right to life by exercising due diligence to prevent deprivations of life by private actors.

16. The deprivation of life by the State cannot be justified on any other basis than that it is required to save life. Limitations on the right to life cannot be justified on grounds of national security, protecting property, asserting the authority of the State or imposing moral or religious values (A/71/372).

17. The State has a positive and substantive duty to take preventative action where there are foreseeable threats to life originating from either State authorities or private actors within its jurisdiction. This obligation also arises in the event of life-threatening situations, such as natural hazards, which State authorities knew or ought to have known about, and it applies even if the population at risk acted unlawfully.<sup>7</sup> The obligation of States to respect and ensure the right to life extends to all threats that can cause death, even if such threats have not yet resulted in death.<sup>8</sup>

<sup>5</sup> A/HRC/35/23, para. 33.

<sup>6</sup> A/HRC/35/23, para. 34.

<sup>7</sup> ECtHR, *Keenan v. The United Kingdom*, 2001; *Osman v. The United Kingdom*, 1998; *Budayeva and others v. Russia*, 2008; *Öneryildiz v. Turkey*, 2004.

<sup>8</sup> *Chongwe v. Zambia*, 25 Nov. 2000, para. 5.2.; ECtHR, *Ilhan v Turkey*, 2000, para. 75-76; I/ACHR, *Rochela Massacre v Colombia*, 2007, para. 127.

### **Right to life: right to food, shelter, water and sanitation, and health**

18. The right to life is inextricably linked to the rights guaranteed by the International Covenant on Economic, Social and Cultural Rights, such as the right to physical and mental health, the right to food, or the right to water. The *Vienna Declaration of Human Rights* in 1993 reaffirmed the indivisibility of all human rights, recommending the development of an optional complaints procedure for the ICESCR, established in 2008.<sup>9</sup>

19. The Human Rights Committee recognized that the right to life should not be interpreted narrowly, noting that it places not only negative obligations on States (“don’t kill”) but also positive obligations (“protect life”) to ensure access to the basic conditions necessary to sustain life.<sup>10</sup> It has affirmed that measures which restrict “access to all basic and life-saving services such as food, health, electricity, water and sanitation” are contrary to article 6.<sup>11</sup> It has expressed concern that article 6 may be violated by a “lack of measures to deal with food and nutrition situation and lack of measures to address, in cooperation with the international community, causes and consequences of drought and other natural disasters.”<sup>12</sup> For instance, denying access to water, through disconnections or otherwise, and the destruction of sanitation infrastructure can rise to a violation of the right to life.<sup>13</sup>

20. State failure to provide access to health care, including through restrictions on health-care providers,<sup>14</sup> may violate the right to life.<sup>15</sup> State respect of the right to health means that they must refrain from discrimination in access to healthcare services and refrain from compelling health practitioners to deny certain individuals healthcare. This obligation includes eschewing formulating policies or practices that directly or indirectly impede access to healthcare for “unpopular” groups, such as migrants, or those suspected or involved with government opposition, terrorism, protest movements as well as ordinary citizens, such as women exercising their reproductive rights.<sup>16</sup> Respecting the right to health requires States to refrain from “limiting access to health services as a punitive measure,”<sup>17</sup> from formulating laws and policies which criminalize healthcare by health professionals or interfere with their duty to provide services in an impartial manner.<sup>18</sup> Failure to respect the right to health cannot be excused on resource, security, or other grounds.<sup>19</sup>

### **Humanitarian action**

21. A necessary corollary of the above is that, with regard to humanitarian services, a State has two set of obligations: a positive obligation to agree to, and facilitate, such services and a negative obligation not to impede the offer and provision of humanitarian services to individuals and populations in need.

22. International humanitarian law clearly imposes an obligation to respect and protect humanitarian actors.<sup>20</sup> Parties to an armed conflict must protect civilian humanitarian actors, not just from attack, but also from harassment, intimidation, arbitrary detention and any other activities that might impede their work. This set of protections is of a corollary nature: the primary obligation is on the party to the conflict to provide for the population, yet when that party fails to discharge its obligation, individuals, as well as impartial humanitarian bodies, may offer and provide their services. These protections undergird the prohibition under customary international humanitarian law of starvation of civilians as a method of

<sup>9</sup> A/CONF.157/23, para 75.

<sup>10</sup> HRI/GEN/1/Rev.1 at 6.

<sup>11</sup> CCPR/C/ISR/CO/4 (2014).

<sup>12</sup> CCPR/CO/72/PRK (2001).

<sup>13</sup> CCPR/C/ISR/CO/3 (2010); CCPR/C/ISR/CO/4 (2014).

<sup>14</sup> *The Criminalization of Health Care*, Essex University, 2018

<https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf>.

<sup>15</sup> IACtHR, *Sawhoyamaya Indigenous Community v. Paraguay*, 2006.

<sup>16</sup> E/CN.4/2003/58 para 97

<sup>17</sup> E/C.12/2000/4, para 34.

<sup>18</sup> A/68/297 para 70(c).

<sup>19</sup> E/C.12/1999/5 para 19; ICESCR/E/C.4 paras 16, 34; A/HRC/S-17/2/Add.1, para 81.

<sup>20</sup> [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule31#Fn\\_84AA347B\\_00001](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule31#Fn_84AA347B_00001).

warfare/combat and on attacking or destroying objects that are indispensable to their survival. Protecting humanitarian actors is an "indispensable condition" for the delivery of essential care.<sup>21</sup>

23. Under this framework, when the civilian population is not adequately supplied, no party to an armed conflict may *arbitrarily* withhold consent to offers of legitimate humanitarian services from an impartial humanitarian body. Refusing relief action or consignments is thus not a matter of discretion.<sup>22</sup> Since 1864, humanitarian law has also established that the civilian population itself and local organizations may provide humanitarian services on their own initiative.

*"if the survival of the civilian population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place (...) The authorities responsible for safeguarding the population in the whole of the territory of the state cannot refuse such relief without good grounds. Such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat as the population would be left deliberately to die of hunger without any measures being taken."<sup>23</sup>*

24. The obligation to allow and not impede humanitarian action has increasingly been recognized by soft law instruments in emergency situations. An example is emerging international law on disaster assistance.<sup>24</sup> Principle 25 on the Guiding Principles on Internal Displacement insists that "all authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced." It also demands that consent "shall not be arbitrarily withheld," particularly when authorities concerned are "unable or unwilling to provide the required humanitarian assistance." The Red Cross Movement has called for the recognition of a distinct right to receive humanitarian assistance, as "a fundamental humanitarian principle which should be enjoyed by all citizens of all countries<sup>25</sup>." These instruments tend to focus on State obligations vis-à-vis *international* humanitarian actions, which raise a range of issues related to national sovereignty, many of which are not present in the case of domestic humanitarian actors.

25. Under international human rights law, the absolute right to life entails a negative obligation on the State not to engage in acts – such as the prohibition, criminalization or impediment of humanitarian actions – that would jeopardise the enjoyment of this right. States might justify such acts in response to perceived 'threats' to national security or social norms. The Special Rapporteur equates them to a qualified use of force, thus requiring that they be both necessary and proportional. It is impossible to imagine how acts whose likely result is the potential death of civilian populations could ever meet these criteria (i.e. could be justified by the need to protect life).

26. Acts prohibiting or otherwise impeding humanitarian services violate State's obligation to respect the right to life. Any death that may be linked to such prohibition would constitute an arbitrary deprivation of life.

27. Such prohibition or impediment also violates State's positive obligations. The Committee on Economic, Social and Cultural Rights has stated that the realization of such rights "to the maximum of a State's available resources" refer to "*both the resources existing*

<sup>21</sup> Ibid.

<sup>22</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977, Geneva, 1987, p.819-820; Jelena Pejic, "The right to food in situations of armed conflict: The legal framework," IRRIC December 2001 Vol. 83 No 844; ICC Statute.

<sup>23</sup> Sandoz, Supra note 22, p. 1479.

<sup>24</sup> A/RES/46/182, para. 6 (States "whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care"); *see also* Draft Articles on the Protection of Persons in the Event of Disasters, Arts. 6, 10, 11 (State has obligation to "ensure the protection of persons" and duty to seek assistance when it cannot meet those needs).

<sup>25</sup> <http://www.ifrc.org/Global/Publications/disasters/code-of-conduct/code-english.pdf>.

within a State and those available from the international community through international cooperation and assistance. domestic and international assistance<sup>26</sup>.” (E/1991/23, para. 13). With respect to the right to food, the Committee articulated an obligation to seek and obtain “international support to ensure the availability and accessibility of the necessary food” (E/C.12/1999/5, para. 17). It also lists direct violations of the right to life, including:

“denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is proactive; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.” (Ibid, para. 19).

28. When the State is not providing food, water, shelter or rescue mechanisms sufficient to protect life and dignity, then humanitarian actors are indispensable in delivering those services. As the judgment below highlights, the State has a positive obligation to seek and facilitate humanitarian action (through an act of delegation) and a negative obligation not to prevent it.

“Whereas, in the case of a fundamental freedom, the State, if it does not have the means to satisfy the request for accommodation of a homeless person, must delegate this duty of emergency shelter to any other legal or physical person who can accommodate homeless people; Whereas it is therefore paradoxical that the State continues today to prosecute [Father Riffard] for having done what [the State] should have done itself.”<sup>27</sup>

29. Finally, both within and outside the context of armed conflict, laws and policies that seek to prevent life-saving and life-sustaining services to populations because of their ethnicity, religion, or immigration status constitute a violation of Article 6 of the ICCPR. The State may not fail to discharge its obligation to respect and protect the right to life, and then exacerbate and compound that failure by precluding others from undertaking activities aimed at providing that core obligation, particularly if the State’s actions or inactions are driven by discriminatory motives or result in discrimination.

#### IV. The implications of measures combating terrorism

30. In a series of resolutions, the Security Council has obligated Member States to take various measures against terrorism. In general terms, these resolutions require the suppression, including through criminal prosecution, of those providing “funds” or “services” to designated terrorists or in other ways “supporting terrorist acts.”<sup>28</sup> The Security Council has added individuals and organizations to sanctions lists in part based on their providing medical services and supplies.<sup>29</sup> It has not, however, defined what constitutes an act of terrorism.<sup>30</sup>

31. The resulting creation of a sizable body of new norms, amounting to the establishment of a counter-terrorism regime (A/71/384, paras 23-23) has led to a corresponding expansion in donor demands on humanitarian actors.

“[C]ounterterrorism-based regulations and requirements are increasing and are spreading not only geographically but also in terms of the range of government

<sup>26</sup> E/1991/23, para. 13.

<sup>27</sup> Tribunal correctionnel de Saint-Étienne, 11 June 2014.

<sup>28</sup> S.C. Res. 1373, 1456, 1566, 1624, 2178, 2341, 2354, 2368, 2370, 2395 and 2396.

<sup>29</sup> Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, “Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism” Harvard, 2015, 110-11.

<sup>30</sup> A/HRC/16/51.



*and agency donors adopting more restrictive counterterrorism approaches. What may have once been seen as a tension arising primarily from one or two major donors may now constitute a range of counterterrorism-based policies and regulations that must be negotiated with virtually all government donors, donor funds, and intergovernmental donors.*<sup>31</sup>

32. The bulk of these regimes are premised on an overly broad notion of acts supporting terrorism and do not take sufficient cognizance of protected activities, including life-saving ones. Security Council resolutions proclaim, often in preambles, that Member States must ensure that counter-terrorism measures comply with their international law obligations, in particular international human rights, refugee and humanitarian law.<sup>32</sup> As highlighted below, such demand has not been consistently implemented. The lack of a globally agreed definition on terrorism has meant that States have adopted unacceptably wide and nefarious definitions in domestic law. The knock-in effects are that a wide range of humanitarian acts are tagged as supportive of terrorism. What follows is the abrogation of the right to life under the convenient banner of terrorism.

### **International principles of humanity for the enemy**

33. One of the most fundamental norms of international humanitarian law is the need to protect impartial medical care to all wounded and sick, including members of adversary parties and the population under its control.<sup>33</sup> This is a norm under direct attack by counter-terrorism measures. For instance, States are convicting individual doctors who provide impartial medical treatment to designated terrorist groups.<sup>34</sup> Customary international law provides that "medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances."<sup>35</sup> Medical personnel is understood in a broad sense to include any person engaged in medical activities.<sup>36</sup> It covers those working for the armed party, as well as medical personnel made available to that party by a humanitarian organization.<sup>37</sup> Importantly, since 1864, international humanitarian law has also established legal protections for unassigned medical caregivers (those *not* authorized and controlled by a party to the conflict), such as indigenous doctors and nurses.

34. Pursuant to international humanitarian law, under no circumstances shall *any person* be punished for having provided medical services compatible with medical ethics, regardless of the person benefiting therefrom.<sup>38</sup> This protection arises against the broader normative backdrop, in which the wounded and sick, as defined in international humanitarian law, must receive all feasible medical care required by their condition; and that care must be provided as soon as practicable and be guided by medical need without adverse discrimination on any (i.e., non-medical) ground. Where a party to the conflict is not providing such care, an impartial humanitarian body or private individual caregivers may themselves provide such care. This system of protections has been conceived as bestowing a right, even a duty for medical personnel, to administer care to one's worst enemy, in the middle of the most cruel battle, if they are wounded.<sup>39</sup> The ICRC *common ethical principles of healthcare in conflict and other emergencies* insist that health-care personnel shall provide the necessary care with humanity, while respecting the dignity of the person concerned, with no discrimination of any kind, whether in times of peace or conflict, or other emergencies.<sup>40</sup>

<sup>31</sup> Naz Modirzadeh, Comment, HLS PILAC, CHE Project, March 2017, p. 74.

<sup>32</sup> S.C. Resolution 2178 (2014), Preamble.

<sup>33</sup> Lewis et al, *supra* note 29, 144. While terrorist organisations might themselves ignore international law in targeting civilian populations, the obligations of IHL do not depend on reciprocity.

<sup>34</sup> See *US v. Shah*, 474 F.Supp. 2d 492, 498 (D.N.Y. 2007).

<sup>35</sup> ICRC, Customary IHL Database, Rule 25.

<sup>36</sup> ICRC Commentary on the Additional Protocols of 8 June 1977.

<sup>37</sup> *Ibid.* other organizations or individuals providing medical care independently are protected as civilians.

<sup>38</sup> Article 16(1) AP I; article 10(1) AP II; see also article 18(3) Geneva Convention I; ICRC, Customary IHL Database, Rule 26.

<sup>39</sup> [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf), para. 4686.

<sup>40</sup> Essex University, *supra* note 14.

### **Impact of counter-terrorism on humanitarian aid to civilian populations: prosecution**

35. It bears repeating that international humanitarian law applies to conflicts notwithstanding that acts of terrorism (also deemed unlawful) occur. The occurrence of acts of terrorism does not displace international humanitarian law.

36. Particularly problematic counter-terrorism prohibitions are those relating to the provision of services and funding to those deemed terrorists by one party to a conflict (A/HRC/23/39). The failure to clearly exempt humanitarian actors<sup>41</sup> inhibits humanitarian aid, as legitimate humanitarian activities might be deemed impermissible forms of support to “terrorists”. Donors have similar concerns about the funding they provide. This fear of prosecution prevents critical aid from reaching the populations controlled by “terrorist” organizations and is thus likely to result in greater harm to life and civilian deaths.

37. One of the most influential countries in this area is the United States, given its extensive role in the global banking system.<sup>42</sup> Its laws appear to criminalize effectively all aid and support that are deemed to benefit designated “terrorist” organizations, including medical aid to civilian populations they control. They prohibit providing “material support or resources to a foreign terrorist organization,” including “expert advice or assistance.” The statute excludes only medicine and religious materials from this prohibition (18 U.S.C. §2339A and §2339B). In 2010, the US Supreme Court ruled that the material support statute was constitutional, and explained that even support intended to “promot[e] peaceable, lawful conduct” could free up resources of terrorist organizations for other purposes and could give the terrorist organization legitimacy.<sup>43</sup> This so-called “fungible” argument has further lowered the evidentiary test by rejecting *specific intent* to further “terrorist” activities, and privileging the much lower threshold of *knowledge* about an organization's connection to “terrorism”.

38. Some States have accepted the proposition that humanitarian actors should be able to provide humanitarian services to those under the control of “terrorist” organizations, but their response is ad hoc and may rely solely on prosecutorial discretion. The United Kingdom, for example, has issued policy guidance indicating that the risk of prosecution for “legitimate humanitarian or conflict resolution work” is “low” – not zero.<sup>44</sup> These measures do not sufficiently protect humanitarians, as they are forced to rely on government discretion in determining whether they will be criminally charged.

### **Impact of counter-terrorism: funding and banking**

39. Bans on funding or providing economic resources to a “terrorist” organization have also proven problematic, and impose significant burdens on NGOs and individuals providing potentially vital assistance. Governments and even banks are empowered to make potentially arbitrary decisions concerning the assets of individuals and organizations, including humanitarian organizations. The United States, for example, has frozen the assets of numerous Muslim charities, and many Muslims are “afraid to give their money to charity groups in case they were suspected of providing material support to terrorism.”<sup>45</sup>

40. The Financial Action Task Force, an intergovernmental body established in 1989 to address the issue of money-laundering and “terrorist” financing, has failed to provide specific measures to protect civil society sector from undue restrictions. Task Force Recommendation 8 on non-profit organizations recommends that “countries review the adequacy of laws and regulations [to ensure that] entities are not abused for the financing of terrorism.” Very few,

<sup>41</sup> Humanitarian actors include health-care providers not associated with humanitarian organizations.

<sup>42</sup> Duke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* (2017).

<sup>43</sup> *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2725 (2010). This case dealt with human rights work provided directly to a designated terrorist organization. The Court indicated that Congress has “avoided any restriction” on “any activities not direct to, coordinated with, or controlled by foreign terrorist groups.” Para. 2711.

<sup>44</sup> <https://www.gov.uk/government/publications/operating-within-counter-terrorism-legislation/for-information-note-operating-within-counter-terrorism-legislation>.

<sup>45</sup> A/HRC/6/17, para. 42.

if any, instances of “terrorism” financing have been detected as a result of these supervisory measures, while Recommendation 8 has been misused by States to violate international law (A/HRC/23/39, para. 25).

41. Humanitarian organizations are now routinely monitored by banks and major donors who insert clauses into their agreements requiring compliance with Security Council resolutions, counter-terrorism laws, or other administrative or regulatory requirements. Donors and banks may require organizations to vet their local partners, and provide personal information on individuals and detailed reporting on activities. These demands are time-consuming and financially burdensome. Moreover, humanitarian organizations have expressed concerns that these requirements “undermine the[ir] neutrality [...] and make local acceptance harder to achieve”.<sup>46</sup> Banks can deny banking privileges at their discretion to any organization considered a legal risk under the counter-terrorism regime.<sup>47</sup> The resulting limited access to banking transactions is a particular problem for smaller as well as Muslim non-profits and has increased the dangers in the field as individuals might decide to travel with more cash.

42. Importantly, prohibitions on terrorism financing may capture not only payments to partners on the ground, but also a wide variety of operational expenditures, such as administrative fees, checkpoint payments or taxes, or purchase of fuel; all of which can be considered prohibited economic resources under counter-terrorism measures.<sup>48</sup>

43. In response to these concerns, some States point to licensing programs that would protect humanitarian actors from prosecution, but this bureaucratic, often lengthy process is inadequate to address the potentially fast-changing needs of populations or unanticipated payments based on local circumstances. Equally problematic is that obtaining a license may undermine the reputation for neutrality and can potentially endanger aid workers in the region, who might be perceived as agents of the licensing governments.

#### **Impact on affected populations**

44. The net effect of these burdens, and the increasingly risk-adverse responses of governments, banks, donors and humanitarian agencies, is a significant decrease in humanitarian aid to critically endangered populations. For example, the US shut down Al Barakat, the main organization providing money transfers into Somalia, an action that had “great humanitarian impact” on the region, even though the government never disclosed evidence of ties to terrorism.<sup>49</sup> Humanitarian organizations were asked to perform “pre-vetting finance checks, tracking systems, real-time monitoring, verification of partners’ shareholders, a bond system (requiring a deposit of 30% of the value of goods transported) and the contractual assumption of 100% of financial liability for shipments lost or stolen by contractors.” Funding to humanitarian organizations operating in Somalia declined by 50% from 2008 to 2011. Once the famine hit, the US Office of Foreign Assets Control eased requirements, indicating that “incidental benefits” to the designated terrorist organization Al-Shabaab, such as food and medicine, were “not a focus of OFAC sanctions enforcement,” but this was not clear protection against criminal enforcement.<sup>50</sup> A quarter of a million people starved in that famine.

45. In Gaza, relief efforts have been severely hampered since the election of Hamas, after the US and European Union designated it a terrorist organization. Non-profits need to apply for OFAC licenses on a project-by-project basis, with significant administrative burdens. Organizations cannot coordinate with government officials, which in turn leads to the Hamas government harassing humanitarian agencies for their perceived links to the United States and European Union. Many Islamic organizations have stopped their operations in Gaza to

<sup>46</sup> Humanitarian Policy Group, *Counter-terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, (October 2011), 8.

<sup>47</sup> Even though it has since been modified, early guidance from Task Force, in Recommendation 8 on the regulation of non-profit organizations, may have contributed to this risk-adverse banking climate.

<sup>48</sup> HPG, *supra* note 45, 8.

<sup>49</sup> A/HRC/6/17, para. 48.

<sup>50</sup> HPG, *supra* note 45, 9.

avoid prosecutorial scrutiny in the United States. International NGOs have developed their own independent relief programs, "to avoid the legal hurdles of partnering," causing parallel services and duplicated efforts.<sup>51</sup>

46. The potential abuse of counter-terrorism regimes is evidenced by the restrictions Myanmar has placed on aid to internally displaced persons in Kachin State, where it has in some instances effectively blocked all aid. An estimated 97,000 such persons, around 76 percent of whom are women and children, are spread across 140 displacement sites in Kachin State. The inability of humanitarian bodies to reach this population is causing widespread shortages in food, water, medical care, and other essential supplies, and human suffering. In the face of these shortages, on 21 May 2018, the Kachin State Minister of Security and Border Affairs sent a letter to the Kachin Baptist Convention, one of the largest providers of aid to displaced communities, threatening it with prosecution under Article 17/1 of the Unlawful Association Act for providing aid to communities in conflict-affected areas of Kachin State.

### **A solid exemption regime**

47. There is a sense of an international counter-terrorism regime out of control, its tentacles reaching every facet of political, financial and civic life. There have been some targeted efforts to mitigate the unintended consequences of counter-terrorism on humanitarian aid in particular regions,<sup>52</sup> though primarily through ad hoc and piecemeal exemptions.

48. For instance, Security Council resolution 1916 exempts from sanctions "the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners." But this measure does not apply to other humanitarian programmes and must be renewed repeatedly. The General Assembly, in its 2016 and 2018 resolutions on the United Nations Global Counter-Terrorism Strategy Review, has urged "States to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law".<sup>53</sup>

49. European Union Directive 2017/541 on combatting terrorism excludes from the scope of the Directive "[t]he provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law." This Directive has the potential to have a significant impact; Member States have until 8 September 2018 to make the necessary legal and regulatory changes to comply with it.

50. Certain States provide possible domestic models. Switzerland exempts funds "intended to support acts that do not violate the rules of international law on the conduct of armed conflicts."<sup>54</sup> Australia exempts from the ban on association with terrorist organizations those that do so "only for the purpose of providing aid of a humanitarian nature" but this exemption is absent from much of its broader counter-terrorism regime.<sup>55</sup> New Zealand's 2002 Terrorism Suppression Act provides that making property, or financial or related services, available to designated terrorist entities is prohibited unless a "lawful justification or reasonable excuse" exists, such as "where the property (for example, items of food, clothing or medicine) is made available in an act that does no more than satisfy essential human needs of (or of a dependent of) an individual designated under this Act."

<sup>51</sup> *Ibid.*, 10-11;

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23298&LangID=E>

<sup>52</sup> The United Kingdom initiated a "safer corridor pilot project" for remittance flows to Somalia, focused "on the ability of NGOs to send money to support their own operations." A/70/371.

<sup>53</sup> A/RES/70/291, operative para. 22; A/RES/72/284, operative para. 79.

<sup>54</sup> Chatham House, Humanitarian Action and Non-State Armed Groups, 12. Canada also excludes "an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law." Lewis et al, *supra* note 29, 112.

<sup>55</sup> Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, "Principles Guiding Humanitarian Action, *International Review of the Red Cross* (2016), 244-247.

51. These limited initiatives are unlikely to solve the global and daily encroachment on principles that have formed the backbone of international law and humanitarian actions. Rather than making vague references to international law, the Security Council should adopt a resolution expressly clarifying that humanitarian protection and assistance must never be conceptualized as support for terrorism and suppressed or criminalized on that basis. Additionally, it should mandate sector-wide exemptions within United Nations and Member States sanctions regimes. In the meantime, States should issue similar express clarifications, and clearly and unambiguously exempt humanitarian actions from their counter-terrorism measures at every opportunity possible, nationally, regionally and internationally.

## V. The targeting of humanitarian aid to migrants

52. Increasingly, States are relying on the triple pillars of militarization, extra-territorial border control and deterrence to shield their countries from irregular migration. An added tactic is deterring humanitarian services for migrants, at borders, to prevent life-saving rescue missions and transportation, and within countries, to impede the provision of food, shelter, medical care and other services. Deterrence is largely achieved through the criminalization of these humanitarian services. Emboldened by government actions, anti-migrant segments of the population threaten or attack those behind these humanitarian acts.<sup>56</sup>

53. Humanitarian services play a central role in preventing migrants' and refugees' unlawful deaths. Deterring these services through their criminalization or other measures violate States' obligation to prevent, combat and eliminate arbitrary killings and deprivation of life (A/RES/71/198). Such deterrence measures, grounded on the legal status of the beneficiaries, exacerbate risks to life even though States knew or should have known of these risks and the likelihood of death.

54. In adopting the Smuggling Protocol, in 2000, States committed "to the protection of the rights" of migrants who have been smuggled.<sup>57</sup> This protocol proclaims the need to provide migrants with "humane treatment" and "full protection of their rights."<sup>58</sup> It envisions cooperation with civil society, including coordinating with non-governmental organizations to ensure proper training of State personnel in the protection of migrants' rights.<sup>59</sup> It requires States to take "all appropriate measures" to "preserve and protect the rights" of migrants, including "*in particular the right to life*".<sup>60</sup> It obliges "States parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of an offence established in accordance with the Protocol".<sup>61</sup>

55. In September 2017, Member States reiterated their determination "to save lives" and committed to strengthening support for rescue efforts over both land and sea (A/RES/71/1). In July 2018, they committed to "*save lives, prevent migrants' death and injuries*", including through "*individual or joint search and rescue operations, standardized collection and exchange of relevant information, assuming collective responsibility to preserve the lives of all migrants*".<sup>62</sup>

56. In situations where States are unwilling or unable to provide humanitarian relief themselves, they must let others provide such services. A range of practices may put the lives, health and safety of migrants at risk, including cruel, inhumane or degrading reception

<sup>56</sup> A/HRC/72/335.

<sup>57</sup> United Nations, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000 (the UN 'Smuggling Protocol'), Article 4.

<sup>58</sup> *Ibid.*, Preamble.

<sup>59</sup> *Ibid.*, Article 14(2).

<sup>60</sup> *Ibid.*, Article 16 (emphasis added).

<sup>61</sup> See Legislative Guides, p. 365.

<sup>62</sup> Global Compact for Safe, Orderly, and Regular Migrations, July 2018.

conditions and the denial of humanitarian assistance.<sup>63</sup> For this reason, States must not "criminalize or otherwise penalize the provision of support or assistance to migrants."<sup>64</sup>

### **The protection of life at the border**

57. States are targeting those engaged in search and rescue, principally utilizing two primary tactics. The first is to accuse humanitarian organizations of colluding with smuggling networks, a crime under most domestic laws. For example, Italian Prosecutor Carmelo Zuccaro opened an investigation into possible collusion between rescue vessels and smugglers<sup>65</sup>; the Italian government confiscated the vessel of Jugend Rettet and accused its crew of collusion<sup>66</sup>; Moroccan authorities are investigating Helena Maleno for colluding with smugglers in directing rescue vessels to boats in distress<sup>67</sup>. To date, no evidence has been made public that any humanitarian actor charged has colluded with smugglers. It appears that government officials are harassing humanitarian actors with baseless investigations and prosecutions to convince them and others to cease their work.

58. The second tactic has been to place administrative burdens on, and sometimes even criminalize, humanitarian action on the border. To the extent any justification is given, States argue that rescue creates a *pull* factor. In effect, States have coopted the language of humanitarianism, claiming to protect lives by discouraging migrants from embarking on dangerous journeys. In making this argument, States ignore the *push* factors, the dangers within the countries of origin and transit. They ignore, and do not count, the deaths and suffering where migrants and asylum seekers would be forced to remain. This is an essentially out of sight, out of mind argument.

59. This second tactic includes Italy's or Malta's refusal to allow humanitarian vessels to dock, effectively keeping them out of commission while they wait to find a safe port to disembark migrants. It includes similar efforts by Thailand to deter sea rescues of Rohingya. It includes the refusal to grant permits to human rights defenders on the US border who wish to enter federal lands to leave water for migrants in the desert, as well as the prosecution of volunteers for littering when they succeed in leaving water. It includes a felony prosecution for harboring migrants by providing shelter in or near the US desert. All of these steps are designed to make rescue efforts more difficult.

60. These official actions and critiques of humanitarian actions, relayed by the media, have been said to incite anti-immigrant, anti-refugee and anti-rescue sentiment, which in turn prompt more official actions undermining rescue. As one NGO reported, there has been a "de-legitimation and criminalisation campaign" creating a "toxic narrative" that undermines rescue and that will result in more deaths.<sup>68</sup>

61. States that are attempting to prevent rescues on the discriminatory basis of the population's immigration status, and potentially its race, religion and ethnicity, are violating international human rights law (and maritime law for sea rescues). If other individuals – not undocumented migrants – needed help in the desert or at sea, States would encourage and direct *that* life-saving aid.

### **The provision of life-sustaining aid within countries**

62. Many humanitarian organizations and actors help migrants and refugees once they have crossed the border by providing food, water, shelter, medical aid and other services.

<sup>63</sup> A/HRC/37/34, para. 15.

<sup>64</sup> A/HRC/37/34, Annex A, Principle 1 Guideline 6, Principle 4 Guideline 3, Principle 4 Guideline 7, Principle 18 Guideline 1; see also Article 22 of Convention on the Rights of the Child.

<sup>65</sup> <https://blamingtherescuers.org/report/>.

<sup>66</sup> Institute of Race Relations, *supra* note 4, p. 12.

<sup>67</sup> <https://globalvoices.org/2018/01/31/spanish-activist-helena-maleno-trial-in-morocco-is-a-way-to-intimidate-human-rights-defenders-her-supporters-say/>.

<sup>68</sup> "Blaming the Rescuers, Criminalising Solidarity, Reinforcing Deterrence," Forensic Oceanography, <https://blamingtherescuers.org/acknowledgements/>.

Much of this aid consists of individuals simply responding to the needs of another person found within their community.

63. Such responses go by numerous names: the French Constitutional Court recently recognized the "*freedom to aid the other, for a humanitarian purpose, without consideration of the regularity of their stay within the nation*"; further insisting that the French notion of "fraternity" is a constitutional principle<sup>69</sup>. Pope Francis uses the language of encountering the other, and urges individuals to "*tear down the wall of 'comfortable and silent complicity'*"<sup>70</sup>.

64. In many countries around the world, but particularly in the so-called Global South, such humanitarian actions are both frequent and largely protected. The majority of refugees in the global South live in urban centres (58 per cent), outside formal camps. This includes four-in-every-five Syrian refugees in Jordan.<sup>71</sup> Along with migrants, refugees self-settle, thanks to host communities' gestures of life-saving solidarity. In fact, such acts of solidarity constitute the unspoken backbone of the international refugee assistance regime.

65. In the global North, in contrast, Governments have made it a crime to conceal or harbor "irregular" migrants and there is no stated exemption for humanitarian actors. For instance, in the United States they can receive up to five years in prison for "harboring" an undocumented immigrant, while those acting for "commercial advantage or private financial gain" receive up to 10 years.<sup>72</sup> One volunteer, Scott Warren, is currently being prosecuted under this statute for giving shelter to migrants in the desert. A recently adopted law in Hungary criminalizes "facilitating illegal immigration," human rights advocacy and litigation support.

66. Anti-immigrant "vigilantes" are also targeting human rights defenders, with officials often turning a blind eye to the harassment. In Lesbos, Greece, Philippa and Eric Kempson were spurred to action by migrants' deaths occurring near their home. They devoted time and money to saving lives and even rented a building to warm migrants arriving in boats to prevent deaths from hypothermia. In response, they have received death threats, have been threatened with prosecution, faced legal action against their use of the building, and are now apparently being evicted from their home.

67. States should exempt humanitarian assistance from illegal "assisted stay," on the basis that "simply providing the basics of human existence – food, water, shelter, sanitation and clothing – should not be criminalized."<sup>73</sup> In France, when the mayor of Calais attempted to ban the distribution of food to migrants, an administrative court in Lille overturned the ban. It also ordered the installation of toilets, showers and facilities for drinking water, and threatened the mayor with fines if he disobeyed.<sup>74</sup> As the court correctly found, "*The mayor has inflicted a serious and manifestly unlawful interference with the freedom to come and go, freedom of assembly and, by preventing migrants from satisfying basic needs, the right not to be subjected to inhuman or degrading treatment enshrined in Article 3 of the European Convention on Human Rights.*"<sup>75</sup>

68. In compliance with their obligation to respect and protect the right to life, States must eliminate laws and policies that prevent humanitarian aid based on the immigration status of

<sup>69</sup> The Court left it to the legislator to balance the constitutional principle of "fraternité" with the sovereign right to control the border.

<sup>70</sup> Holy See, *Message of his holiness Pope Francis for the "Second Holy See-Mexico Conference on International Migration"*, Vatican City, 14 June 2018: [https://w2.vatican.va/content/francesco/en/messages/pont-messages/2018/documents/papa-francesco\\_20180614\\_messaggio-migrazione.pdf](https://w2.vatican.va/content/francesco/en/messages/pont-messages/2018/documents/papa-francesco_20180614_messaggio-migrazione.pdf).

<sup>71</sup> <https://reliefweb.int/report/jordan/syrian-refugees-living-outside-camps-jordan>.

<sup>72</sup> 8 U.S.C. § 1324(a) (1)(B) 8 U.S.C. § 1324(a)(iii) (2012), 1324(a)(1)(C). Those who hire an undocumented minister or missionary are exempt.

<sup>73</sup> Institute of Race Relations, *supra* note 4, 16.

<sup>74</sup> *Ibid.*, 16-17.

<sup>75</sup> *Défenseur des Droits*, 22 March 2017, <https://www.defenseurdesdroits.fr/fr/communiqués-de-presse/2017/06/le-defenseur-des-droits-publie-ses-recommandations-sur-la-situation>.

the beneficiaries and ensure that government officials at all levels do not harass humanitarian actors. They must also protect them from unlawful threats and violence of private vigilantes.

### “Humanitarian” smuggling

69. Humanitarians helping migrants actually cross the border would appear to present the most difficult case, as international law clearly grants States the right to control their borders. This difficulty is illusory. Slaves were smuggled out of the United States South, Jews out of Europe, and dissidents out of the USSR. As the Canadian Constitutional Court found, “[h]umanitarian aid to fleeing people is not merely hypothetical; it is a past and current reality.”<sup>76</sup>

70. Those drafting the Smuggling Protocol recognized the need to protect humanitarian motivations by limiting the definition of smuggling to the procurement of illegal entry by a person who acts for a “financial or other material benefit.” Their specific intent was to exclude humanitarians from criminal prosecution:

*[The financial or material benefit threshold] was included in order to emphasise that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties*<sup>77</sup>.

71. Few governments comply with this demand. The European Union’s Facilitators’ Package, which encompasses Directive 2002/90/EC<sup>78</sup> and its accompanying Council Framework Decision 2002/946/JHA,<sup>79</sup> directs Member States to criminalize any person who intentionally assists entry “or transit across” a Member State. It does not incorporate the concept of financial benefit, except with reference to irregular stay.<sup>80</sup> Member States have the option not to impose penalties in instances of humanitarian assistance but are not required to do so (Article 2). The Directive also mandates that Member States prosecute a person who “for financial gain” intentionally assists an individual “to reside” unlawfully within a Member State. However, there is no explicit humanitarian exception. According to a report by the Fundamental Rights Agency, all 28 Member States criminalize the facilitation of irregular entry but only eight explicitly transpose the ‘optional humanitarian clause’ into their domestic law.<sup>81</sup>

72. The European Commission acknowledges that the Facilitators’ Package was intended to put “appropriate sanctions” in place, while “avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress”.<sup>82</sup> It concedes that interfering with humanitarian aid, and thereby failing to assist those in need, would breach the Charter of Fundamental Rights of the European Union.<sup>83</sup> Yet Member States have continued to criminalize humanitarian aid. A 2017 investigation in Europe documented the prosecutions of 45 individual “humanitarian actors” under anti-smuggling or irregular entry laws in 26 separate actions in 2015 and 2016.<sup>84</sup> But a European Parliament study concluded that data on

<sup>76</sup> R. v. Appulonappa, 2015 SCC 49, [2015] 3 S.C.R. 754, 770.

<sup>77</sup> United Nations Office on Drugs and Crime, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime, interpretative notes on article 3, p. 469.

<sup>78</sup> Council Directive 2002/90/EC of 28 November 2002.

<sup>79</sup> Council Framework Decision of 28 November 2002.

<sup>80</sup> Article 1(a). The decision not to require a financial benefit apparently stems from the “difficulties in tracing financial flows connected to migrant smuggling.” European Commission, REFIT evaluation of the EU legal framework against facilitation of unauthorized entry, transit and residence: the Facilitators Package, March 2017, 9.

<sup>81</sup> [http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf).

<sup>82</sup> European Commission, 2017, supra note 77, 30.

<sup>83</sup> Ibid., 35.

<sup>84</sup> [https://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism\\_the\\_unacceptable\\_face\\_of\\_solidarity.pdf](https://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism_the_unacceptable_face_of_solidarity.pdf).



the prosecution and conviction rates of those who provided humanitarian assistance to irregular migrants is largely lacking<sup>85</sup>.

73. The international community determined, in promulgating the Smuggling Protocol, that the real threat to global order is smuggling by criminal networks, not humanitarians. The Protocol exempts humanitarian acts to protect migrant rights. As the Supreme Court of Canada found, when it effectively added a humanitarian exemption to Canada's illegal entry law, "it would depart from the balance struck in the Smuggling Protocol to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid."<sup>86</sup> Only with a humanitarian exemption would the legislation "reflect [...] the values and principles of customary and conventional international law."<sup>87</sup>

74. It is unsustainable for States to prosecute and target people for acting on the human instinct to help others in need. Criminal laws are designed to encourage decent behavior, not prosecute it.<sup>88</sup> States must reconsider and base their policies on preventing arbitrary killings and unlawful deaths. Instead of targeting those who are protecting life, States should prosecute those endangering it, first and foremost the criminal networks who exploit and mistreat migrants and asylum-seekers. This would be the best policy of deterrence.

## VI. Criminalization of life-saving services to women and LGBTI persons

75. Humanitarian services to women and girls, as well as to lesbian, gay, bisexual, transgender, and intersex (LGBTI) populations have also been criminalized, deterred, or stigmatized. Laws, policies and practices that impede the work of those providing essential sexual and reproductive health services bring discriminatory consequences for the right to life of their beneficiaries. There is conclusive evidence that efforts to reduce or deter provision of quality contraceptive and antenatal services, HIV/AIDS treatment, and safe abortion care contribute to increased rates of otherwise preventable mortality, including preventable maternal and infant mortality, preventable deaths and injury from unsafe abortion.<sup>89</sup>

76. The most recent and wide-ranging example is of unprecedented scale. The so-called US Gag Rule, entitled "Protecting Life in Global Health Assistance (May 2017)," requires foreign actors receiving US global health assistance to certify that they do not use their own non-US funds to provide abortion services, counsel patients about it or refer them for abortion, or advocate for the liberalization of abortion laws. Exceptions to the rule, also in place under previous versions of the Global Gag Rule, are not widely known, understood, or acted upon. The Rule covers "health-related activities in about 60 low- and middle-income countries, including programs on HIV/AIDS, Zika, maternal and child health, malaria, nutrition and others."<sup>90</sup> Up to USD 9.5 billion of global health aid is subject to this new rule, with sub-Saharan Africa, the largest recipient being the hardest hit.

77. The global "Gag Rule", flawed on evidentiary and public health grounds<sup>91</sup>, imperils the work of health care providers, interferes with their freedom to practice to the level of recognized professional standards, and erodes the integrity of health systems and services. In low income settings, for example, integrated or co-located health programmes must now dismantle "all in one" services, dissolve integrated care networks while meeting an additional

<sup>85</sup> [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf).

<sup>86</sup> *R. v. Appulonappa*, 3 S.C.R. 754, 775.

<sup>87</sup> 3 S.C.R. 754, 774.

<sup>88</sup> Institute of Race Relations, *supra* note 4, 7.

<sup>89</sup> *Adding It Up: Investing in Contraception and Maternal and Newborn Health, 2017*; Guttmacher Institute.

<sup>90</sup> *When Antiabortion Ideology Turns into Foreign Policy: How the Global Gag Rule Erodes Health, Ethics and Democracy*; June 8 2017; <https://www.guttmacher.org/gpr/2017/06/when-antiabortion-ideology-turns-foreign-policy-how-global-gag-rule-erodes-health-ethics>.

<sup>91</sup> Jerome A Singh, Salim S Abdool Karim, Trump's "global gag rule": implications for human rights and global health, *The Lancet*; [https://doi.org/10.1016/S2214-109X\(17\)30084-0](https://doi.org/10.1016/S2214-109X(17)30084-0).

administrative burden of proving compliance with an overly broad, confusing, poorly defined policy whose obligations and methods of compliance are also unclear, as established by USAID's own evaluation.

78. The Gag Rule imposes an unconscionable "choice" on providers who depend on global health aid to deliver essential services: abandon provision of legal, technically sound and life-saving services and no longer provide adequate, accurate and unbiased information *or* face potentially drastic reductions in funding that would mean shutting down life-saving services, firing staff and closing clinics. Those who find the means to continue to provide services targeted by bans may also face – as do their clients – the additional social stigma and negative pressure from other providers and officials generated by this Gag Rule. In so doing, it also distorts the balance of care, seeking to silence those who wish to speak frankly and competently about, or who wish to advocate for, legal and safe abortion while giving advantage to those who wish to organize in opposition.

79. The main outcome of such policy is the likelihood of increasing unlawful deaths, particularly of women and girls, but not only<sup>92</sup>. The World Health Organization estimated in 2011 that over the last period of time under which the global Gag Rule was imposed far more narrowly, the average number of, largely unsafe, abortions rose 40 per cent in 20 countries.<sup>93</sup> Another study found that countries most affected by the Gag Rule had significantly increased rates of induced abortions.<sup>94</sup>

80. Laws criminalizing same-sex relations, transgender identity (through laws prohibiting cross-dressing), prostitution and sex work, and laws aimed at restricting public discussions of gender and sexuality, labelled by some States as 'propaganda' against so-called traditional family values, have created a range of administrative, legal and social barriers to the provision of services directed at LGBTI persons. The stigmatization or criminalization of such services have been interpreted by non-State actors as lending legitimacy to the violence they direct against humanitarian actors.

81. The criminalization or crackdown has hindered these organizations' ability to safely deliver their services (A/HRC/38/43, para. 59). They may be improperly charged with public incitement to crime or conspiracy.<sup>95</sup> Even if not explicitly criminalized, the hostile application of domestic policy can effectively block or heavily restrict their work. Criminalization and stigma can also stop LGBTI persons from receiving life-saving treatment. LGBTI patients can be reluctant to access health services such as HIV treatment, and medical providers may refuse treatment when they are at risk of arrest for providing services to them.<sup>96</sup>

## VII. Conclusion

82. **By failing to clearly and practically exempt humanitarian actors from anti-terrorism statutes, governments are knowingly reducing life-saving aid to desperate peoples. Such responses to terrorism also risk unwittingly erosion of a normative pillar of international law. By harassing and prosecuting volunteers who rescue migrants on dangerous terrains, or provide transportation, food and shelter to those in need, governments are knowingly endangering lives. By criminalizing, stigmatizing or otherwise inhibiting provision of sexual and reproductive services, States are knowingly depriving individuals, foremost, women, girls and LGBTI persons, from life-saving care.**

83. **In all these actions, governments are violating their obligations to respect and protect the right to life, under international human rights and humanitarian law. Humanitarian actors, defined as individuals and organizations providing life-saving**

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<sup>92</sup> See <https://www.hrw.org/news/2018/02/14/trumps-mexico-city-policy-or-global-gag-rule>.

<sup>93</sup> Bulletin of the World Health Organization, 2011, 89, 873-880, <http://www.who.int/bulletin/volumes/89/12/11-091660/en/>.

<sup>94</sup> <http://www.who.int/bulletin/volumes/89/12/11-091660/en/>.

<sup>95</sup> OEA/Ser.L/V/II.Doc.49/15.

<sup>96</sup> A/HRC/38/43, para 53-54

services and protection to vulnerable populations, are assisting States to meet their obligations to protect and fulfil the inherent right to life, without discrimination, and prevent arbitrary deprivation of life. Humanitarian exemptions from prosecution, adopted by some states, and recommended by international bodies, must be implemented as a matter of urgency. Harassment and stigmatization must cease. Saving lives is not a crime.

## VIII. Recommendations

### 84. Security Council:

- (1) Adopt a resolution exempting humanitarian actions from all counter-terrorism measures, including sanctions, insisting on the broad system of legal protection and normative safeguards under international human rights and humanitarian law;
- (2) In all counter-terrorism resolutions, provide that no organization or person providing humanitarian relief should be punished on account of providing such services to an alleged terrorist or a person who is a member of, associated with, or supportive of a terrorist organization and that access to medical care and other life-saving relief by the latter should never be denied on the basis of such designation;
- (3) Reaffirm in no uncertain terms the fourth pillar of the United Nations Global Strategy to Counter-Terrorism, and States' obligation to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.

### 85. General Assembly:

- (5) Include explicit language exempting and/or protecting humanitarian actions in resolutions on countering terrorism, migration and relevant topics.

### 86. Human Rights Council:

- (6) Include explicit language exempting and/or protecting humanitarian actions in resolutions on countering terrorism, migration and relevant topics;
- (7) Adopt a resolution calling for a thematic panel discussion on the human rights implications of the prevention of humanitarian work in the context of migration deterrence, countering terrorism or violent extremism, or sexual and reproductive health;
- (8) Recognize, in relevant resolutions, that access to medical care by an alleged terrorist or a person who is a member of, associated with, or supportive of a terrorist organization should never be denied on the basis of such designation, and that no person providing health services should be punished on account of the beneficiaries' designation.

### 87. United Nations Office of Counter-Terrorism:

- (9) Formally include civil society actors in all high-level United Nations counter-terrorism conferences;
- (10) Establish a United Nations mechanism for strategic and sustained engagement with civil society, including humanitarian actors, around the counter-terrorism and Preventing Violent Extremism agendas.

### 88. States:

- (11) Publicly champion the work of humanitarian actors, whether they provide services in the context of conflicts, migration, to women, LGBTI persons or other populations;

(12) Recognize humanitarian action as a constitutional or national value, the expression of the country treaty obligations and/or of common values of humanity;

(13) Adopt or revise domestic smuggling legislation that explicitly exempts humanitarian action, covering facilitation of irregular entry, transit and residence, and ensures that no investigation is opened and no prosecution pursued against private individuals and organizations assisting migrants for humanitarian reasons;

(14) Review and amend legislation and policies to counter and prevent terrorism and violent extremism that a) excludes from the scope of offences the provision of humanitarian services, b) protects humanitarian access and acts, c) ensures that access to medical care by an alleged terrorist, a member or supporter of a terrorist organization should never be denied on the basis of such designation, and that no person providing health services should be punished on account of the beneficiaries designation;

(15) Instruct armed forces and police that life-saving humanitarian services should never be denied and that individuals providing such care should not be arrested, harassed, or intimidated;

(16) Facilitate regular dialogue between humanitarian organizations, banks, financial regulators and other government departments to limit the impacts of counter-terrorism de-risking;

(17) Establish adequate systems to monitor the number of “humanitarian” prosecutions and convictions, as well as their effects;

(18) Remove impediments to quality provision of comprehensive sexual and reproductive health care, inclusive of provision of safe abortion services; Take all reasonable measure to enable health care providers to undertake their work without undue interference, intimidation or restrictions;

(19) Protect organizations and individuals providing life-saving services to LGBTI populations against arbitrary and discriminatory restrictions and interference in their work.

89. Donor Governments:

(20) Develop model safe harbors or exemptions to existing criminal and other laws; and reconcile disparate approaches to the provision of humanitarian assistance, particularly in those areas where “terrorist” groups control territory or access to a civilian population;

(21) Appoint individual experts or establish working groups to monitor the protection of domestic and international humanitarian services;

(22) Explore innovative ways of minimizing the impact of counter-terrorism measures on humanitarian actions;

(23) Amend all aid funding provisions that seek to restrict or otherwise impede or deter provision of and access to quality comprehensive sexual and reproductive health services, information and support;

(24) Continue efforts to narrow the funding gap for comprehensive sexual and reproductive health services and support humanitarian actors that provide such services, including safe and legal abortion and LGBTI-specific services;

(25) Monitor and report regularly on the impact of the “Global Gag Rule” and similar policies on actors providing sexual and reproductive services, and on the right to life of women and girls, LGBTI, and the population in general.

90. Donor countries and humanitarian actors:

(26) Establish joint forums where they don’t exist and engage in open and inclusive dialogue about the impacts of counter-terrorism measures and

**Preventing/ Countering Violent Extremism on humanitarian action, feeding into sector-wide policy developments.**

91. **Humanitarian actors:**

**(27) Engage in sector-wide dialogues; Develop sector-wide policies, proposals and advocacy positions on minimizing the impact of laws and measures seeking to prevent humanitarian services and access.**

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