

# **FIGHT AGAINST TERRORISM AND THE ENGAGEMENT OF ARMED GROUPS TO COMPLY WITH INTERNATIONAL HUMANITARIAN LAW**

## **INTRODUCTION**

The tragedy of 9/11 resulted in an unprecedented response to the threats posed by the international terrorism, subsequently shaped in the doctrine of the “war on terror” and declaration of a novel type of armed conflict and declaration of a novel type of armed conflict, whereby the different legal concepts were mixed up in the attempt to impose the idea of the global “war” without geographical and temporal frames. Moreover, the contemporary counter-terrorism context blurred the border lines between law enforcement operations against terrorist organisations and the situations constituting *de facto* armed conflicts involving non-state armed groups (“NSAGs”).

It is well-known that NSAGs have significant impact on the humanitarian matters and legal issues in the contemporary armed conflicts.<sup>1</sup> However, the cornerstone of the modern international legal order is the principle of the sovereign equality of states<sup>2</sup>, which makes states the primary subjects, decision-makers and duty-bearers of international legal obligations. States may pursue various political or other aims by refusing to qualify the situations of hostilities against NSAGs as armed conflicts and labelling them as anti-terrorist operations<sup>3</sup>, and, accordingly, by denying the legal status and role of the non-state party to an armed conflict. This definitely has enormous detrimental effect on the IHL protection of the civilian population affected by the situation of a *de facto* armed conflict, since one cannot expect that an NSAG applies law of armed conflict if one does not recognise it as a party to the conflict.

Furthermore, the collision between the legal matrix of international relations and the factual reality does demonstrate that there exists a serious normative concern whether NSAGs are

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<sup>1</sup> See BERNARD, V., ‘Editorial’ (2011) 93 International Review of the Red Cross 883, at p. 624. In fact, during 2011, there were at least 48 NIAC around the world.

<sup>2</sup> See, article 2 (1). Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), 59 Stat. 1031.

<sup>3</sup> For example, the Chechnya situation in Russia. See TERRY, J., ‘Moscow's corruption of the law of armed conflict: Important lessons for the 21st century’ (2006) 53 Naval Law Review 73, at p. 205.

bound by the rules that they neither have contributed to creating nor have formally declared their willingness to adhere to.<sup>4</sup>

The situation is additionally complicated because states, due to various reasons fail to address properly the issue of the humanitarian engagement of NSAGs.

A bright example of the efforts on engagement of NSAGs aimed at enhancing compliance of NSAGs with International Humanitarian Law (“IHL”) rules may be the activities of the Swiss non-governmental organisation (“NGO”) Geneva Call<sup>5</sup>, which activity gives NSAGs opportunity to express their adherence to humanitarian norms and to some extent to be held accountable for their pledge.

As it has already been stressed, the constructive engagement of NSAGs has a huge practical significance in light of their potential protective role towards the civilian population under their control or affected by their actions.

The present paper focuses on the challenges linked to the engagement of NSAGs to comply with the rules of IHL in the context of the response of the international community to the amorphous phenomenon of terrorism.

For the purposes of the present paper the term “NSAGs” covers all groups, despite their simultaneous designation as terrorist ones, which are sufficiently militarily organised for the criterion of “organisation” of a non-state party to a non-international armed conflict (“NIAC”) to be met. Thus, the term of “NSAGs” operates exclusively in the situations of an armed conflict to which IHL applies. Additionally, the notion of NSAGs is limited only to those entities which have an identity independent from any state.

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<sup>4</sup> See, BONGARD, P., ‘Engaging armed non-state actors on humanitarian norms: reflections on Geneva Call’s experience’, [2013] 58 *Humanitarian exchange magazine* <<http://www.odihpn.org/humanitarian-exchange-magazine/issue-58/engaging-armed-non-state-actors-on-humanitarian-norms-reflections-on-geneva-calls-experience>> accessed 16 October 2013.

<sup>5</sup> Geneva Call has established in 2000 with the aim to promote and enhance NSAGs compliance with IHL. It was initially focused on landmines, but it expanded its work on the protection of children in hostilities and to the prohibition on sexual violence in armed conflict. See <<http://www.genevacall.org/>> accessed 22 October 2013.

In light of politicization of the assessment of the activities of NSAGs and unwillingness of states to cooperate with them in order to avoid their “legitimation”, it is crucially important to distinguish the lawful acts of war (regulated by IHL rules) and the acts of terrorist nature (prohibited by International Law, IHL and domestic law).

Furthermore, in the context of counter-terrorism measures which affect the entities falling within the scope of the definition of NSAGs, there exists a conflation of the acts of terrorism in peacetime and the terrorist acts committed in the context of an armed conflict. The former are not considered by IHL the latter are.

However, the main emphasis of the present paper is made on the challenges accompanying the attempts to engage NSAGs to comply with IHL in light of the counter-terrorism measures, in particular because of the criminalization of the interaction with NSAGs, labelled as terrorist organisations.

For example, let’s take a situation when it is evident that NSAG has control over certain territory in the context of an armed conflict; accordingly, in order to provide effective humanitarian assistance and ensure respect for set of norms, governing non-international armed conflict it is critically important to interact with these groups for “reaching the population, negotiating distributions, and protecting staff”<sup>6</sup>. However, today the fact of such interaction places humanitarian organizations under the risk of criminal prosecution<sup>7</sup>. The national laws on counter-terrorism, therefore, are in conflict with the rules of IHL on humanitarian assistance<sup>8</sup>, and dissemination of IHL norms, preventing the engagement of the

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<sup>6</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny: Criminalizing humanitarian engagement’ (2011) HPCR Working Paper, at p. 3.

<sup>7</sup> See GUINANE, K., ‘Anti-Money Laundering: Blocking Terrorist Financing and Its Impact on Lawful Charities’, Written Statement before the Subcommittee on Oversight and Investigations House Committee on Financial Services (26 May 2010)

<[http://financialservices.house.gov/media/file/hearings/111/guinane\\_5.26.10.pdf](http://financialservices.house.gov/media/file/hearings/111/guinane_5.26.10.pdf)> accessed 20 September 2013.

<sup>8</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 1.

parties to an armed conflict and restricting the ways of establishing constructive IHL dialogue with them.

Several examples may illustrate this problem. For instance, the Indian Ocean tsunami in 2004 caused large destructions in Sri Lanka requiring an urgent need for humanitarian assistance<sup>9</sup>. But the aid agencies had a fear of facing criminal prosecution in the United States (“US”) as at that time (during the civil war), the north-eastern part of the country was controlled by Liberation Tigers of Tamil Eelam (“LTTE”) - an organisation, designated by the US as a Foreign Terrorist Organization (“FTO” or “DFTO”) and, therefore, the interaction with it was criminalized<sup>10</sup>. Obviously, the humanitarian assistance without interacting with LTTE was impossible<sup>11</sup>, but the US laws on the material support of terrorism did not take this into account.

Somalia has experienced 20 years of NIAC, resulting in over 1 million dead, 1.5 million internally displaced, 71% of its population under-nourished<sup>12</sup>. Al-Shabaab, an organization listed as a terrorist group, controlled the southern part. In 2011, the United Nations (“UN”) officially recognised the existence of famine in three provinces of Somalia controlled by that group. However, the humanitarian assistance was hampered by the restrictions of the US material support laws, according to which the interaction with Al-Shabaab and particularly an access to civilians in areas it controls was prohibited. Private aid agencies had to leave areas of the southern part of Somalia<sup>13</sup>.

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<sup>9</sup> ARULANATHANAM, A., ‘A Hungry Child Knows No Politics: A Proposal for Reform of the Laws Governing Humanitarian Relief and ‘Material Support’ of Terrorism”, American Constitution Society (2008), at p. 2 – 3 <<http://www.acslaw.org/files/Arulanatham%20Issue%20Brief.pdf>> accessed 20 September 2013.

<sup>10</sup> ARULANATHANAM, A., ‘Testimony at an Oversight Hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004’, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee (10 May 2005) <<http://www.aclu.org/national-security/aclu-testimony-material-support-terrorism-laws-section-805-patriot-act-and-section>> accessed 20 September 2013

<sup>11</sup> OMB Watch, ‘Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve’ (July 2008) <<http://www.ombwatch.org/files/npadv/PDF/collateraldamage.pdf>> accessed 22 September 2013.

<sup>12</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, ‘Conflict Displaces 63,000 Civilians in Southern Somalia so Far this Year’ (19 January 2010) <<http://www.unhcr.org/4b55ccf76.html>> accessed 22 September 2013.

<sup>13</sup> RUPP, G., ‘7 Ways the U.S. Can Fight Drought in Africa’, International Rescue Committee (29 July 2011) <<http://www.rescue.org/blog/7-ways-us-can-fight-drought-africa>> accessed 1 October 2013.

This Paper proceeds in three chapters. Chapter 1 provides an overview of the concept of the humanitarian engagement with NSAGs and it analyzes its applicable framework, in particular the rules of IHL regarding the humanitarian assistance in the context of NIAC. In addition, it deals with the role of the humanitarian organizations in delivery of the humanitarian assistance. Chapter 2 analyzes the counter-terrorism regulations that may affect humanitarian engagement with NSAGs. In particular, UN resolutions 1267 (1999) and 1373 (2001) and domestic counter-terrorism laws (especially from the US) criminalizing or otherwise regulating certain forms of engagement with listed NSAGs, in particular under the term “material support”. The US Material Support Statute and the US Supreme Court decision in the case *Holder v. Humanitarian Law Project Case* is important in this regard. The final main Chapter demonstrates that the prohibitions set out for the acts falling within the scope of the “material support” concept pose legal and practical barriers for the humanitarian engagement of NSAGs to comply with IHL and for the delivery of humanitarian assistance to the affected civilian population; furthermore, it demonstrates why, under IHL, the engagement of NSAGs should not be criminalized by counterterrorism measures.

The conclusion highlights that the engagement with NSAGs are extremely important for their compliance with IHL, which subsequently has significant impact on the protection of the civilian population, in particular to the possibility to provide the civilian population with humanitarian assistance. However, through recent counter-terrorism measures, states have been strictly limiting individuals and organizations from “supporting” terrorism. This approach has restricted the possibilities to establish constructive IHL dialogue with NSAGs which qualify as such under IHL, regardless of whether such “support” is given in compliance with humanitarian principles recognized in international law. Indeed, under this counterterrorism measures, humanitarian organizations would be seen as supporters to the terrorist organization and consequently there can raise a number of detrimental consequences. For humanitarian actors: the risk of facing not only travel bans and asset freezing, but also criminal liability and subsequent reputational damage. For humanitarian goals it will be impossible to facilitate relief access to civilians in need, to promote and enhance respect for IHL by NSAGs, to obtain safety guarantees for humanitarian workers.

For humanitarian action in general there will be significant funding cuts and subsequent end of any humanitarian activity of a particular organization in a particular region. Such sweeping measures would deny any hope to people in need where assistance is particularly vital. There is an overlapping point in both counter-terrorism legislation and IHL – they fight against attacks on civilian population, but they should not counter each other and put humanitarian actors before the choice between them. That’s why it is important reason that the engagement of NSAGs, lawful under IHL should not be criminalized by counterterrorism measures.

**CHAPTER 1**  
**ENGAGEMENT OF NON-STATE ARMED GROUPS TO COMPLY WITH**  
**INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED**  
**CONFLICT**

The possibility to undertake actions involving NSAGs is regulated by two sets of norms. The first category which relies on IHL promotes humanitarian engagement with NSAGs in NIACs for the purpose of promoting compliance with the international rules and assisting vulnerable civilian populations under their control. The second category, on the contrary, concerns counter-terrorism measures that through domestic laws and multilateral norms prohibit some acts which may in fact constitute such engagement, criminalize forms of material support, including technical training and co-ordination, to listed “terrorist” groups on security grounds, some of which may qualify as NSAGs under IHL<sup>14</sup>.

The simultaneous application of these sets of norms might give rise to contradictions. Moreover, serious difficulties arise due to the collision between the mentioned categories of provisions, for those engaged in the providing of humanitarian assistance in armed conflicts involving certain NSAGs designated as terrorist organizations. Particularly, “the autonomous negotiation between independent humanitarian organizations and *all* parties to conflict”<sup>15</sup>

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<sup>14</sup> See, MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape’, (2011) 93 *International Review of the Red Cross* 883, at p. 623 – 624.

<sup>15</sup> *Idem*, at p. 624.

may be problematic because it may be viewed as a sort of support to the terrorist objectives. This situation affects, therefore, the balance, previewed in IHL, between the security concerns of the parties to the conflict and the humanitarian interest of ensuring life-saving goods and services that reach those who are *hors de combat*.

This Chapter provides an overview of the concept of the humanitarian engagement with NSAGs. In particular, it outlines the general notions of engagement and the factors leading to non-compliance with the international legal requirements. Furthermore, it analyzes the applicable framework for the humanitarian engagement, particularly the rules of IHL regarding the humanitarian assistance in the context of NIAC<sup>16</sup>. In addition, it deals with the role of the humanitarian organizations in delivery of the humanitarian assistance and the rules governing such organizations' engagement with NSAGs.

## **1. Overview of the concept of engagement**

The majority of the contemporary armed conflicts are of non-international character<sup>17</sup>, *i.e.*, these armed conflicts involve NSAGs as parties thereto. The recent experience does indicate that the lack of compliance by such groups with legal requirements constitutes one of the main challenges for the protection of the civilian population in modern armed conflicts<sup>18</sup>.

In light of two opposite forces dominating in the current international legal order – the increasing role of NSAGs and state-centred system of International Law – the international community is facing an urgent need to identify the ways and specific measures to ensure the compliance with international legal standards by NSAGs.

The efforts directed at enhancing compliance with international legal requirements by NSAGs are frequently referred to as “engagement” of such groups. These measures are

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<sup>16</sup> A NIAC is a “conflict not of an international character occurring in the territory of one of the High Contracting Parties”. See, common article 3 to the Geneva Conventions of 1949. Furthermore, article 1 (1) of the Protocol Additional II to the Geneva Conventions regulates a more restrictive category of NIACs: armed conflicts between the armed forces of High Contracting Parties and “dissident armed forces or other organized armed groups which”.

<sup>17</sup> See, *supra*, at footnote 1. See SASSOLI, M., ‘Taking armed groups seriously...’, at p. 6.

<sup>18</sup> UN SC ‘Report of the UN Secretary-General on the Protection of Civilians in Armed Conflict’ (2010) UN Doc S/2010/579, at para. 8.

exercised through “a variety of direct or indirect means, especially awareness-raising, dissemination, persuasion, technical support/capacity-building, negotiation, dialogue, and advocacy.”<sup>19</sup>

## **2. Factors leading to non-compliance with legal requirements**

Among the most evident factors explaining the lack of compliance with international legal standards by NSAGs are the “strategic and tactical military reasons”<sup>20</sup>. There is indeed an asymmetry between states armed forces and NSAGs in size, military facilities and infrastructure, weaponry, financial and other resources. In addition, the employment of certain tactics which are in violation of IHL is seen by NSAGs as inevitable under the prevailing circumstances. Indeed, the adoption of the lawful course of action may amount for such groups to defeat or even annihilation<sup>21</sup>.

Furthermore, the lack of knowledge of international norms<sup>22</sup> is a common problem for the majority of NSAGs. Whereas states are bound to instruct and train their armed forces to comply with IHL,<sup>23</sup> the situation with NSAGs is quite different: most of them do not have a training structure and, in addition, their leaders often have less contact with the actual fighters, and consequently the choice of means and methods of warfare is left to the latter, who sometimes receive no training at all before being sent to the battlefield.<sup>24</sup> Such state of affairs has adverse consequences in practice:

“[I]n many non-international armed conflicts, bearers of arms with little or no training in IHL are directly involved in the fighting. This ignorance of the law significantly impedes efforts to increase respect for IHL and regulate the behaviour of the parties to the conflicts”<sup>25</sup>.

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<sup>19</sup> GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, “Rules of Engagement. Protecting civilians through Dialogue with armed Armed Non-State actors, (October 2011), at p. 4.

<sup>20</sup> See, *Idem* at p. 5.

<sup>21</sup> *Idem*

<sup>22</sup> *Ibidem*, at p. 6.

<sup>23</sup> See, articles 47, 48, 127, and 144 of the GC IV and article 83 of the AP I to the Geneva Conventions.

<sup>24</sup> SASSOLI, M., ‘Taking armed groups seriously...’, at p. 28-29.

<sup>25</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, *Increasing respect for international humanitarian law in non-international armed conflicts* (Geneva, ICRC, 2008), at p. 12 <[http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0923.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf)> accessed 3 October 2013.



In addition, IHL violations may be the result not of a lack of knowledge or training but of a deliberate political or religious ideology<sup>26</sup>, which provides its own views on how to achieve the military goals, including its own interpretation of who is a legitimate target and of the accepted means and methods of fighting.

Other central, normative, concerns which adversely influence the compliance with international norms by NSAGs is the prosecution and punishment of the fighters of NSAGs for the participation in hostilities during NIACs. Indeed, even though there has been a trend in state practice according to which “the traditional dichotomy between international wars and civil strife” is blurring in a number of aspects<sup>27</sup>, the issue of the status of combatants in an armed conflict of international character (“IAC”) and fighters, who are members of NSAGs in NIAC still remains regulated differently.

The term “combatants”, applied in the context of an IAC, refers to individuals who have “the right to participate directly in hostilities”.<sup>28</sup> This denotes that combatants can be neither prosecuted nor punished for engaging in hostilities,<sup>29</sup> including for killing combatants belonging to the adverse party. Thus, the combatant’s privilege granting immunity from prosecution to combatants who have committed lawful acts of war serves as a strong incentive for their compliance with IHL.

The status of combatant and the privilege from prosecution do not exist, however, in NIAC.<sup>30</sup> In explaining the fact that sometimes fighters in NIACs are called “combatants”, the International Committee of the Red Cross (“ICRC”) underlines that this term in the context of NIAC is only used in “in its generic meaning” and indicates that “these persons do not enjoy the protection against attack accorded to civilians, but this does not imply a right to

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<sup>26</sup> GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, “Rules of Engagement...”, at p. 6.

<sup>27</sup> *Tadic* Case (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-AR72 (2 October 1995), para. 83.

<sup>28</sup> See, article 43(2) of AP I.

<sup>29</sup> See, article 99, III GC.

<sup>30</sup> Inter-American Commission of Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), para. 70 <<http://www1.umn.edu/humanrts/iachr/terrorism-index.html>> accessed 28 June 2013.

combatant status”, as applicable in IAC<sup>31</sup>. Therefore, in NIAC a member of a NSAG may be punished for the mere fact of fighting, regardless of whether the person concerned complied with IHL or not.<sup>32</sup> Therefore, not so many legal incentives exist to motivate the fighters belonging to NSAGs to comply with IHL during an armed conflict.

Finally, another reason explaining the non-compliance by NSGAs with IHL provisions is the lack of a sense of “ownership”<sup>33</sup> regarding international standards. As the relevant treaties are open only to states, NSAGs are not entitled to ratify treaties, and are generally precluded from participating as full-fledged parties of treaty drafting bodies.<sup>34</sup>

### **3. Legal basis for the engaging NSAGs to comply with IHL**

Logically, compliance with IHL by armed groups presupposes that they are bound by these rules. There are different ways to explain the legal nature of IHL obligations imposed on NSAGs.

Some commentators focus on the principle of effectiveness whereby a NSAG exercising effective control over a part of the territory of a certain state is bound by the legal obligations of the state. Others argue that there exists a customary international law (“CIL”) rule according to which NSAGs bear the obligations accepted by the state against whose government they are fighting.<sup>35</sup> Finally some argue that NSGAs are bound through “the

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<sup>31</sup> HENCKAERTS, J.M. and DOSWALD-BECK, L., *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005) at p. 12, Rule 3.

<sup>32</sup> SASSOLI, M., ‘Possible legal mechanisms to improve compliance by armed groups with International Humanitarian Law and International Human Rights Law’ (2003), Paper submitted at the Armed Groups Conference, Vancouver, at p. 13, referring to the Constitutional Court of Colombia in Case No. C-225/95, at paras 41, 42 <<http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf>> accessed 19 August 2013.

<sup>33</sup> The term “ownership” is used by Professor M. Sassoli in particular in his articles “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, at p. 6 and in ‘Possible Legal Mechanisms to improve compliance by armed groups...’, at p. 5-6. The term has also been defined in Geneva Academy of International Humanitarian Law and Human Rights as “the capacity and willingness of actors engaged in armed conflict to set, and/or take responsibility for the respect of, norms intended to protect civilians as well as other humanitarian norms applicable in armed conflict”. GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, ‘Rules of Engagement...’ at 6, footnote 11.

<sup>34</sup> *Idem*, at p. 6.

<sup>35</sup> BOTHE, M., ‘Conflits armés internes et droit international humanitaire’ (1978) 82 R.G.D.I.P. at 91-93, referred to in SASSOLI, M., ‘Possible legal mechanisms to improve compliance by armed groups...’, at p. 9.

implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules”<sup>36</sup>.

All these approaches have the common disadvantage of linking NSAGs obligations to those accepted by the governments against which they are fighting.<sup>37</sup> Thus, it is considered preferable to receive a commitment by the group itself.<sup>38</sup> As Professor Sassoli explains, it is more effective to obtain respect of a rule by its acceptance by the group itself. Indeed, if a given armed group is familiar with the rules, this will encourage individuals within the group to respect the rules, and view this respect as essential for the credibility of their group<sup>39</sup>.

It is evident that IHL applicable in the context of NIAC binds non-state party: article 3 common to the Geneva Conventions of 1949 (“GCs” or “Conventions”) explicitly refers to “each party to the conflict,” *i.e.* NSAG and the governmental side<sup>40</sup>. Further, this article, in its paragraph 3, explicitly encourages the parties to a NIAC “to bring into force, by means of special agreements, all or part of the other provisions” of the Conventions. Thus, the parties to the conflict may conclude the “special agreements”. By doing so they would be bound by IHL rules and subsequently this would provide better protection to the civilian population.<sup>41</sup>

Some of such agreements have been concluded under the auspices of the ICRC and the UN.<sup>42</sup> They have the an advantage of increasing the obligations compared to those that would anyway apply under IHL of NIACs<sup>43</sup>. In this respect, it should also be specially underlined that formally, under common article 3(4), the application of IHL does never confer any legal status to NSAG.

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<sup>36</sup> *Ibidem*, p. 10 referring to *Commentary Protocols*, *supra* note 34 at para. 4444 and Georges Abi-Saab, “Non-international armed conflicts” in *International Dimensions of Humanitarian Law* (Geneva & Paris: Henry Dunant Institute & Unesco, 1988) 217 at 230..

<sup>37</sup> *Ibidem*, p. 10.

<sup>38</sup> SASSOLI, M., ‘Taking armed groups seriously...’, at p. 29 referring to *Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/2009/277*, 29 May 2009, para. 41.

<sup>39</sup> *Idem*, at p. 29-30.

<sup>40</sup> See, *e.g.*, PICTET, J. (ed), *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva, 1960), at p. 37.

<sup>41</sup> *Idem*, at p. 5. See SIVAKUMARAN, S., ‘Binding Armed Opposition Groups’ (2006) 55 *International & Comparative Law Quarterly*, at p. 369-394.

<sup>42</sup> For instance, in the armed conflicts in Sudan, Congo and Sierra Leone.

<sup>43</sup> SASSOLI, M., ‘Possible legal mechanisms to improve compliance by armed groups...’, at p. 30.

Following the aim of engaging NSAGs in a constructive dialogue aimed at influencing their behavior and enhancing of their compliance with international rules, Geneva Call, a neutral and humanitarian organization, proposes to NSAGs the Deeds of Commitment, whereby NSAGs have the opportunity to adhere to humanitarian norms. According to this NGO, the work with NSAGs “involves constructive and sustained dialogue to persuade them to sign the Deeds of Commitment”. Also, it observes that this work “continues after signature through implementation support and monitoring to ensure that commitments translate into actual practice”<sup>44</sup>. This includes training on IHL rules and advice on how to incorporate these rules into their codes of conduct and other internal regulations.

#### **4. IHL and humanitarian assistance**

Any NSAG should be involved in efforts to enhance compliance with humanitarian norms. In this regard, the primary concern of seeking to engage with NSAGs is the protection of the civilian population.

The international legal framework for engagement with NSAGs appears to be vague. States indeed have not given the power to them to restrict or grant humanitarian access in armed conflict<sup>45</sup>. As such, under IHL the role of NSAGs with regard to humanitarian assistance may seem limited. On the other hand, it can be argued that under IHL NSAGs should engage and co-operate with humanitarian organizations in the delivery of life-saving assistance as well as humanitarian organizations may engage with NSAGs as a means to prevent specific violations of IHL<sup>46</sup>.

##### **4.1. Definition of humanitarian assistance**

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<sup>44</sup> BONGARD, P., “Engaging armed non-state actors on humanitarian norms...’.

<sup>45</sup> However some changes are taking place in order to promote the engagement of NSAGs. For instance, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“the Kampala Convention”) has taken a step forward because implicitly recognizes the role of NSAGs in ensuring humanitarian access as well as the need for humanitarian organizations to operate in areas under NSAG’ control. See, its article 7(5).

<sup>46</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 627-628.

The legal framework regulating the delivery of humanitarian assistance in armed conflicts is IHL as contained mostly in the GCs and Additional Protocols to the GCs (“APs”). IHL has the aim to alleviate the effects of armed conflicts by restricting the means and the methods of warfare and protecting those not, or no longer, participating in the conflict. Also, IHL defines what humanitarian assistance is and determines the conditions under which access to the civilian population may be granted<sup>47</sup>.

IHL adopts a narrow definition of humanitarian assistance restricted to life-saving materials such as food, medical supplies, shelter, clothing, bedding, and other supplies essential to the survival of the civilian population.<sup>48</sup> This narrow definition “should not be read as a limit to what activities humanitarian organizations may undertake”.<sup>49</sup> Some have argued that such a restrictive definition is significant in the counter-argument because these assistance activities would not favor the action of terrorist organization in the territories under their control. Indeed, it would be difficult for a terrorist organization to use such assistance in their technological and tactical gains<sup>50</sup>.

In NIAC, article 18 of Additional Protocol II to the Geneva Conventions (“AP II”)<sup>51</sup> stated that humanitarian assistance is related to supplies essential for the survival of the civilian population; for instance, foodstuffs and medical supplies. The Commentary to article 18 of AP II has stated that it is impossible to draw up “an exhaustive list of criteria to determine at what point the population is suffering undue hardship”<sup>52</sup>. There is, therefore, the suggestion that the determination should be based on the effect of hostilities and the standard of living

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<sup>47</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States’ (2012) <<http://www.charityandsecurity.org/system/files/Safeguarding%20Humanitarianism%20Final.pdf>> accessed 20 October 2013.

<sup>48</sup> See, GC IV, article 55 (referring to “necessary foodstuffs, medical stores”); AP I, at article 69 (listing “clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population”).

<sup>49</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 40.

<sup>50</sup> HOLLAND, E., ‘*Holder v. Humanitarian Law Project* and the potential to cripple humanitarian assistance in armed conflict’, (2011), at 12 <<http://ssrn.com/abstract=1939008> or <http://dx.doi.org/10.2139/ssrn.1939008>> accessed 5 November 2013.

<sup>51</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 609.

<sup>52</sup> SANDOZ, Y., and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Geneva, 1987), 1479.

of the civilian population. Furthermore, IHL restricts the humanitarian assistance only to civilian population.

#### **4.2. Right of civilian population to receive humanitarian assistance**

Article 1 common to the CGs has established that states are bound to “respect and ensure respect” for these treaties and, consequently, for all their rules, including common article 3, “in all circumstances”. This obligation is not limited only to the parties to the conflict, but includes the requirement that all High Contracting Parties do all in their power to ensure that IHL is respected universally<sup>53</sup>.

In addition, under the GCs, states have primary responsibility for the well-being of the civil population.<sup>54</sup> Thus, there is a state’s obligation to provide this humanitarian assistance. However, a state may not be willing or able to satisfy the needs of the civilian population if it is engaged in an armed conflict. Thus, some argue that there is a right to humanitarian assistance on the part of the civilian population when conditions require it.<sup>55</sup> The Commentary to AP II reaffirms that external assistance is “complementary,” in so far as the primary responsibility is that of the state<sup>56</sup>. Indeed, under IHL, states have the discretion as whether to grant access to this external assistance, but this prerogative does “not reach so far as to allow arbitrary denial of access to humanitarian and impartial organizations offering to provide humanitarian assistance”<sup>57</sup>. In other words, the condition of state consent does not mean an absolute and unlimited freedom to refuse to grant access to other actor for humanitarian assistance. This can be done only if there exists valid reasons<sup>58</sup>.

#### **4.3. Right to initiative on the part of humanitarian and impartial organizations**

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<sup>53</sup> See, HENCKAERTS, J.M. and DOSWALD-BECK, L., *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005) at p. 12, Rule 44.

<sup>54</sup> See, SANDOZ, Y., and others (eds), *Commentary on the Additional Protocols...*’.

<sup>55</sup> See, JAKOVLJEVIĆ, B, ‘The right to humanitarian assistance – legal aspects’ (1987) 27 *International Review of the Red Cross* 260, at p. 476.

<sup>56</sup> See, SANDOZ, Y., and others (eds), *Commentary on the Additional Protocols...*’.

<sup>57</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 38.

<sup>58</sup> SANDOZ, Y., and others (eds), *Commentary on the Additional Protocols...*’ at p. 820.

IHL has recognized that humanitarian organizations are essential in providing lifesaving goods to civilian population and “have played an important role in ensuring that all to parties an armed conflict understand IHL”<sup>59</sup>. To do this, however, these organizations “must, operationally and under law, seek the consent of the relevant party or parties”<sup>60</sup> and “must negotiate their access with NSAG and, in most cases, NSAG’s cooperation in order to ensure the safety and integrity of an organization’s operations”<sup>61</sup>. Although, IHL does not expressly mention a right of humanitarian organizations to engage or negotiate with NSAGs as such, it provides a clear, although limited, basis for protection of the work of impartial, independent humanitarian organizations in armed conflict.<sup>62</sup>

Common article 3 has an important wording because it uses the term “parties”, as opposed to “High Contracting Parties”. The former term includes NSAGs. This article therefore creates several obligations for each of the parties. By virtue of its common article 3(2) provides legal grounds for impartial humanitarian organizations, such as the ICRC, to offer their services to the parties to the conflict, including NSAGs. In fact, such assistance may be offered to the state or NSAG, whichever the party controlling the territory is and depending on what population the humanitarian organization wishes to reach with humanitarian assistance<sup>63</sup>.

As Mr. Fraterman points out, article 3 common to the GCs allows humanitarian and impartial organizations, including the ICRC, to offer their services to all parties in a NIAC and, consequently, allows High Contracting Parties to accept such an offer.<sup>64</sup> Also, the fact of the

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<sup>59</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 4.

<sup>60</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 626.

<sup>61</sup> *Idem*, at p. 626.

<sup>62</sup> *Ibidem*, at p. 625.

<sup>63</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 40.

<sup>64</sup> FRATERMAN, J.A., ‘Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?’ (20 April 2013) New York University Journal of International Law and Politics (JILP), at p. 34. <<http://ssrn.com/abstract=1750963>> or <<http://dx.doi.org/10.2139/ssrn.1750963>> accessed 1 November 2013.

existence of a right of all impartial humanitarian organizations to offer their services<sup>65</sup>, does not mean that “there is no right of humanitarian organizations to provide –[them]”<sup>66</sup> As it note, “[i]t cannot strictly be said (...) that the Geneva Conventions confer rights or impose obligations upon humanitarian agencies”<sup>67</sup>.

Article 18(2) of AP II, on the contrary, does not mention the need to ask for the consent of NSAG. It seems, therefore, that humanitarian organizations only have to seek the authorization of the state for operations in such situations, not a consent from NSAG as party to the conflict<sup>68</sup>. In fact, the phrase of “actions for the civilian population (...) shall be undertaken subject to the consent of the High Contracting Party concerned”, implies a discretionary power of the state.

However, as it has been mentioned, under article 18(2) of AP II read in conjunction with article 14 thereof, the state, has a duty not to refuse assistance in the absence of “good grounds”. Otherwise, it “would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat”<sup>69</sup>.

“As a practical matter, however, if an NSAG is strong enough to exert control over a territory, their consent for NGOs or U.N. agencies to operate on the territory is a prerequisite to safe and predictable access.”<sup>70</sup>

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<sup>65</sup> HOLLAND, E., ‘*Holder v. Humanitarian Law Project* and the potential to cripple humanitarian assistance...’, at p. 13.

<sup>66</sup> FRATERMAN, JUSTIN A., ‘Criminalizing humanitarian relief: are US material support for terrorism laws...’ at p. 33.

<sup>67</sup> MACKINTOSH, K., ‘The Principles of Humanitarian Action in International Humanitarian Law’, Humanitarian Policy Group Report 5 (2000) at p. 4. See also WHITE, J., ‘IEEPA’s Override Authority: Potential for a Violation of the Geneva Conventions’ Right to Access for Humanitarian Organizations?’ (2006) 104 Michigan Law Review at p. 2030.

<sup>68</sup> The ICRC’s Commentary on the Additional Protocols states that article 18(2) “does not in any way reduces the ICRC’s right of initiative, as laid down in common Article 3 [of the GCs] since the conditions of application of the latter remain unchanged. (...) Consequently the ICRC continues to be entitled to offer its services to each party without such a step being considered as interference in the internal affairs of the State or as infringing its sovereignty, whether or not the offer is accepted”. SANDOZ, Y., and others (eds), *Commentary on the Additional Protocols...*’ at para. 4891 – 4892.

<sup>69</sup> *Idem*, at p. para. 4885.

<sup>70</sup> HOLLAND, E., ‘*Holder v. Humanitarian Law Project* and the potential to cripple humanitarian assistance...’, at p. 16.



Even though it seems that there is no need to engage with NSAGs in order to provide humanitarian assistance, there is a customary rule that imposes on the “parties to the conflicts” (states and NSAGs) a unilateral obligation to “allow and facilitate rapid and unimpeded passage of humanitarian relief (...) subject to their right of control”<sup>71</sup>. The ICRC study on Customary IHL recognizes as “self-evident” the requirement of seeking the consent of all parties involved, but it does not mention the necessity of negotiating this access, leaving the terms of humanitarian engagement undefined<sup>72</sup>.

#### **4.4. Humanitarian principles**

The humanitarian assistance requires some elements to be satisfied in order to qualify as legitimate.

The first one is that the organization and activities undertaken must be humanitarian, they, therefore, must be “concerned with the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional or other unit”<sup>73</sup>. The humanitarian character of the assistance can be deduced from the fact that “the action is aimed at bringing relief to victims”<sup>74</sup>. What is important in this respect is to “avoid deception (...) using the relief action for other purposes”<sup>75</sup>.

The second characteristic is that the organization must be impartial. In fact, the delivery of the assistance must be based on need and priority, and not on “prejudice or (...)”

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<sup>71</sup> See, HENCKAERTS, J.M. and DOSWALD-BECK, L., *Customary International Humanitarian Law...* at Rule 55.

<sup>72</sup> *Idem* (noting that “Both Additional Protocols I and II require the consent of the parties concerned for relief actions to take place. (...) [S]uch consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent”). Also, Sandoz explains that, although, the humanitarian actions would have to strictly comply with any conditions that might be imposed “[o]nce relief actions are accepted in principle, the authorities are under an obligation to cooperate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys”. SANDOZ, Y., and others (eds), *Commentary on the Additional Protocols...* at para. 4887 – 4888.

<sup>73</sup> PICTET, J. (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva 1958), at p. 96.

<sup>74</sup> SANDOZ, Y., and others (eds), *Commentary on the Additional Protocols...* .

<sup>75</sup> *Idem*. See, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, International Court of Justice, Merits Reports 1986, at p. 243.

considerations regarding the person of those to whom he gives or refuses assistance”<sup>76</sup>. There may be no diversion of humanitarian assistance or favoring of groups<sup>77</sup>.

In this regard, Jean Pictet marked out three elements. The first one requires the absence of objective non-discrimination on the basis of membership of a social “group”. Indeed, common article 3 present an open-ended list that included the distinction founded on “race, color, religion or faith, sex, birth or wealth, or any other similar criteria”. The second requirement is the proportionality. The assistance must “be afforded according to need”<sup>78</sup>. If the need is equal on two sides, the principle of impartiality should operate to ensure that humanitarian assistance is offered to both<sup>79</sup>. The third element demands absence of subjective distinction. In fact, “no individual decisions on whether the recipient is innocent or guilty, good or bad, and hence deserving or undeserving of assistance on any basis other than need”<sup>80</sup>.

The neutrality is not mentioned in the GCs, but principle has become the cornerstone of the activities of the ICRC. And the principle of neutrality has two aspects: on the one hand it includes the ideological neutrality, presumably as expressed through comment or operation. On the other hand, it covers the idea of non-participation in hostilities. Its aim is ensuring that the humanitarian assistance does not mean an advantage for the adverse party<sup>81</sup>.

These principles constitute the safeguards from the misuse of assistance, crafted and agreed to by states.

## **CHAPTER 2**

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<sup>76</sup> PICTET, J. (ed.), *Commentary: II Geneva Convention relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (International Committee of the Red Cross, Geneva 1960), at p. 68-69.

<sup>77</sup> SANDOZ, Y., and others (eds), *Commentary on the Additional Protocols...*’.

<sup>78</sup> MACKINTOSH, K., ‘The Principles of Humanitarian Action...’, at p. 8.

<sup>79</sup> (Pictet, 1958)

<sup>80</sup> MACKINTOSH, K., ‘The Principles of Humanitarian Action...’ at p. 8.

<sup>81</sup> *Idem*

**COUNTER-TERRORISM LAWS LIMITING ENGAGEMENT WITH NON-STATE  
ARMED GROUPS: CRIMINALIZATION OF THE MATERIAL SUPPORT FOR  
TERRORISM**

Since 9/11, there has been an increased tendency to use the “terrorist” label to define NSAGs through the use of blacklists maintained by international organizations and states. This listing of NSAGs as terrorists groups has produced counterproductive effects. For instance, the proscription of any contact with the terrorist organization or the provision of “material support” to them, even if its purpose is to engage NSAGs on humanitarian or conflict resolution grounds. Indeed, there has been an increased complex and overlapping network of domestic laws, particularly, criminal laws and administrative regulations around the world (including in a number of leading humanitarian donor countries, many with extraterritorial reach), as well as national and international policies that restrict the scope of engagement between humanitarian actors and NSAGs, including SC Resolutions requiring stricter counterterrorism regimes that “are serving to create a difficult-to-understand and far-reaching regulatory environment for humanitarian actors”<sup>82</sup>.

This chapter analyzes these issues through the prism of the counter-terrorism regulations that may affect humanitarian engagement with NSAGs. Particularly, UN SC counter-terrorism regimes – UN resolutions 1267 (1999) and 1373 (2001) – and domestic counter-terrorism laws (especially from the US) criminalizing or otherwise regulating certain forms of engagement with listed NSAGs.

With reference to the US, it must be said it has developed a counter-terrorism regime through its criminal law and administrative regulations that has put certain restrictions on humanitarian actors. The concern has dramatically increased, after 21th of June 2010, when the US Supreme Court delivered a decision in the case *Holder v. Humanitarian Law Project* Case (“*Holder v HLP*”), which upheld the constitutionality of the US Material Support Statute (“Statute”) criminalizing the provision of “training”, “expert advice or assistance” or

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<sup>82</sup> See, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 4.

“service” to listed terrorist organizations. However, it is necessary to mention that, outside the domestic US context, a plethora of international and domestic counterterrorism instruments, regulations, and mechanism also have the potential to significantly shape – and restrict - humanitarian engagement.

## **1. UN International law and policies**

Different types of terrorist acts have been prohibited for long time. But only since 1999, the UN Member States have been required to take legal actions against individuals considered as terrorists by the UN SC. Moreover, after the events of 11/9, the UN SC addressed the phenomenon of international terrorism as a “threat to international peace and security”<sup>83</sup>. Through its Resolutions, the UN SC has established two important regimes with sets of rules which are particularly significant for humanitarian engagement. The first one deals with targeted sanctions and the second one concerns the imposing of obligations of a general nature to be complied with by the UN Member States<sup>84</sup>.

### **1.1. UN SC Resolution 1267**

The counter-terrorism sanctions regime was first established by Resolution 1267 (1999)<sup>85</sup>. By virtue of this instrument and other subsequent resolutions<sup>86</sup>, the SC imposes the application of sanctions against designated individuals and entities associated with Al-Qaida, wherever located. These individuals and entities are placed on the Al-Qaida Sanctions List<sup>87</sup>. This List itself and the listing and de-listing of persons and entities against which sanctions have to be applied are administered by the “Al-Qaida and Taliban Sanctions Committee” (“Committee”)<sup>88</sup>. Furthermore, among the measures that UN Members States are required to

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<sup>83</sup> See, BIANCHI, A., ‘International Law, Counterterrorism and the Quest for Checks and Balances: Why the Calling Sirens of Constitutionalism Should Be Resisted’ in BIANCHI, A., and KELLER, A. (eds.), *Counterterrorism: Democracy’s Challenge* (Hart, Oxford 2008, p. 401. See UN SC Resolution 1368 (2001).

<sup>84</sup> The SC Resolutions represent binding obligations on UN Member States and must be implemented at the domestic level. See, articles 25 and 103 and Chapter VII of Charter of the UN.

<sup>85</sup> See, UN SC Resolution 1267 (1999).

<sup>86</sup> See, UN SC Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009) and 1989 (2011).

<sup>87</sup> See, the Al-Qaida Sanctions List up-dated on 24 July 2013 <<http://www.un.org/sc/committees/1267/pdf/AQList.pdf> > accessed 28 June 2013.

<sup>88</sup> See UN SC Resolution 1267 (1999), para. 6.

impose one can find the ban on travel, arms embargo and freezing of funds and other resources controlled by or on behalf of the individuals and entities designated in the List<sup>89</sup>.

UN Member States have an obligation to designate as terrorists those persons that are listed by the Committee and to freeze funds and other financial resources of listed persons. Further States may request that the Committee adds names to the “UN Consolidated List”. As Bianchi explains, “[t]he entries into the list are made at the suggestion of states and, often, the relevant information is provided by intelligence sources”<sup>90</sup>.

## **1.2. UN SC Resolution 1373**

The SC issued Resolution 1373 (2001)<sup>91</sup> which sets out general counter-terrorism obligations for the UN Member States, for instance, to “[p]revent and suppress the financing of terrorist acts”<sup>92</sup>. The UN SC Resolution requires states to prohibit their nationals and entities within their territories from making “any funds, financial assets or economic resources or financial or other related services” for the benefit of “persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts”<sup>93</sup>, of entities owned or controlled by them. It also requires Member States to “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorists acts (...)”<sup>94</sup>.

The implementation of this UN SC Resolution relies on the UN Member States; however the SC created the Counter-Terrorism Committee (CTC) in order to supervise the implementation, receiving reports from UN Member States on their compliance with the counter-terrorist obligations<sup>95</sup>. Subsequently, the UN SC established the Counter-terrorism Committee Executive Directorate through Resolution 1535 (2004).

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<sup>89</sup> *Idem*, para. 4(a) and (b).

<sup>90</sup> BIANCHI, A., ‘Security Council’s Anti-terror Resolutions and their Implementation by Member States’ [2006] *Journal of International Criminal Justice* 4, pp. 1056 – 1057. See SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 1267 (1999) AND 1989 (2011) CONCERNING AL-QAIDA AND ASSOCIATED INDIVIDUALS AND ENTITIES, ‘Guidelines of the committee for the conduct of its work’ (15 April 2013) <[http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf) > accessed 28 June 2013.

<sup>91</sup> See, UN SC Resolution 1373 (2001).

<sup>92</sup> *Idem*, para. 1 (a).

<sup>93</sup> *Ibidem* para. 1 (d).

<sup>94</sup> *Ibidem* para. 2 (a).

<sup>95</sup> *Ibidem* paras. 6 and 7.

Regarding to this, the UN Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights observed that there was a feeling within the humanitarian field that these UN SC Resolutions had a “chilling effect” on humanitarian assistance, due to the risk that humanitarian and impartial organizations would be identified as indirectly funding terrorist organizations<sup>96</sup>.

## **2. US Criminal and administrative law**

It is not new development that, at the domestic level, states have enacted legal and policy tools against to terrorism with significant effects for the engagement with NSAGs and the delivery of humanitarian assistance. However, after 11/9, the majority of humanitarian donor states have also augmented counterterrorism regulations. These “regulations interacted with international restrictions to create a significant impact on humanitarian action”<sup>97</sup>.

### **2.1. US Material Support Statute**

The Code of Laws of the US<sup>98</sup> has included three US Federal statutes intended to target the provision of material support or financing of terrorism.

The first is the 18 USC §2339A<sup>99</sup>. It makes it a criminal offence to provide material support or resources to individuals committing terrorist offences. The second is the 18 USC §2339B<sup>100</sup> which makes it a criminal offence to provide material support or resources to a

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<sup>96</sup> UN Department of Public Information, ‘Press Conference by Special Rapporteur on Protecting Human Rights While Countering Terrorism’ (26 October 2010) <[http://www.un.org/News/briefings/docs/2010/101026\\_Scheinin.doc.htm](http://www.un.org/News/briefings/docs/2010/101026_Scheinin.doc.htm)> accessed 16 September 2013. Also in the UN Global Counter-Terrorism Strategy, Member States agreed to “reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law”, including IHL. UN GA, ‘Uniting against terrorism: recommendations for a global counter-terrorism strategy’ (27 April 2006) Report of the Secretary-General, UN Doc A/60/825, article IV (2).

<sup>97</sup> *Idem*.

<sup>98</sup> The Code of Laws of US codifies the federal laws of the US. The Title 18 of the USC is the criminal and penal code and contains the federal crimes and criminal procedure. The latter has in its Chapter 113B the reference to the terrorism (paras. 2331–2339D).

<sup>99</sup> It was enacted by the Violent Crime Control and Law Enforcement Act of 1994 (9 P.L. 103-322, §120005, 108 Stat. 2022 (1994)). It has been amended by the USA PATRIOT Act of 2001 and the Intelligence Reform and Terrorism Prevention Act of 2004.

<sup>100</sup> It was enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-32, §§303, 110 Stat. 1250). It was amended by the USA PATRIOT Act of 2001 and the Intelligence Reform and Terrorism Prevention Act of 2004.

designated foreign terrorist organization (“DFTO”). The last is the 18 USC §2339C<sup>101</sup> which criminalizes the provision of funds used in the commission of a terrorist offence.

The “material support or resources” has been described as “any property (...) or service, (...) lodging, training, expert advice or assistance, (...) communications equipment, facilities, (...) and transportation, except medicine or religious materials (...)”<sup>102</sup>. Under the Statute, the term “training” means “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”<sup>103</sup>. Also, the term “expert advice or assistance” is defined as “advice or assistance derived from scientific, technical or other specialized knowledge”<sup>104</sup>. Further, “personnel” means a person that “has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization (...) to work under that terrorist organization’s direction or control (...)”<sup>105</sup>. Moreover, the exception referred to medicine and religious materials constitute a narrow humanitarian exemption. As we can see, critical elements as medical services, food, water, blankets, shelter, clothing and other materials essential for the survival of civilian population are not considered.

The prohibition of, the attempt to or conspire to provide material support or resources referred in §2339B (a) (1) concerns DFTOs<sup>106</sup> or organizations that engage or have been engaging in “terrorist activity” or “terrorism”. The offender does not need to have intended to further the terrorist aims of the group to violate the statute<sup>107</sup>. Also, the term of “engages in terrorist activity” involves the commission of terrorist acts, as well as their preparation, soliciting funds for terrorist activities and the provision of material support to others engaged in terrorist activity<sup>108</sup>.

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<sup>101</sup> It was created by the Terrorist Bombings Convention Implementation Act of 2001. See, See DOYLE, Ch., ‘Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B’ (19 July 2010) <<http://www.fas.org/sgp/crs/natsec/R41333.pdf>> accessed 1 August 2013.

<sup>102</sup> 18 USC 2339A (b) (1). See also 2339B (g) (4) and 2339C (e) (13).

<sup>103</sup> *Idem* 2339A (b) (2).

<sup>104</sup> *Ibidem* 2339A (b) (3).

<sup>105</sup> *Ibidem* 2339B (h).

<sup>106</sup> The DFTOs are designated by the US Secretary of State in accordance with section 219 of the Immigration and Nationality Act of 1953 (8 USC 1189). At 28 September 2012 there are 51 listed DFTOs <<http://www.state.gov/j/ct/rls/other/des/123085.htm>> accessed 20 June 2013.

<sup>107</sup> *Idem*.

<sup>108</sup> 8 USC § 1182(a)(3)(B)(iv).

It must be underlined that the Statute requires the knowledge as condition for the commission of the crime. Indeed the individual must have knowledge that the organization in question is indeed a DFTO, or that it has engaged or engages in terrorist activity or in terrorism. It is necessary to consider that this low intent standard would allow that any conduct may falls within the broad definition of material support, even if there is no intent to further the terrorist aims, and may incur in liability of the commission of a crime under the Statute<sup>109</sup>.

The sanction for transgression of these prohibitions is imprisonment for term of up to 15 years and/or a fine of not more than \$250,000 US dollars (“USD”). This quantity may increase until \$500,000 USD in the case of an organization<sup>110</sup>.

These measures can target any individual who committed the offense and who then is brought into or found in the US, even if both the conduct required for the offense occurs outside the US and the person is not a US national<sup>111</sup>. As explained in the Program on Humanitarian Policy and Conflict Research, “individuals may be held accountable in U.S. courts for material support provided to listed [NSAGs] for acts conducted anywhere in the world”<sup>112</sup>.

The Statute allows humanitarian organizations to apply to be exempted from prosecution, if the provision of that material support or resources to a foreign terrorist organization is approved by the US Secretary of State with the concurrence of the Attorney General<sup>113</sup>. However, it must be noted that this exemption, while legally available, “may prove elusive to obtain or practically infeasible to implement”<sup>114</sup>.

## **2.2. Executive Order 13,224**

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<sup>109</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 8.

<sup>110</sup> See 18 USC 2339B(a).

<sup>111</sup> See 18 USC 2339B (d)(1)(C).

<sup>112</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 3.

<sup>113</sup> See 18 USC 2339B (j).

<sup>114</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 21.



The Executive Order titled “Blocking property and prohibiting transactions with persons who commit, threaten to commit or support terrorism” or known as the “Executive Order on Terrorist Financing”<sup>115</sup> (“Executive Order 13,224”) is another legal response given by the US against terrorism. It provides the administrative basis for interrupting the financial support to the terrorist network by freezing assets, or in other words, blocking all property of designated individuals and organizations, including those determined to have committed, or to pose a significant risk of committing, terrorist acts<sup>116</sup>, and those entities that “assist in, sponsor or provide financial, material or technological support” to acts of terrorism or of designated individuals or entities<sup>117</sup>.

The Executive Order specifies that, the Secretary of the Treasury of the US may take other actions<sup>118</sup> as to prohibit any transaction in relation to those whose property has been blocked, including to the making or receiving of any contribution of funds, goods, or services to or for the benefit of the designated persons<sup>119</sup>.

The “financial, material or technological support” has been defined as “any property, tangible or intangible, including but not limited to currency (...) any other transmission of value (...) communications equipment (...) lodging (...) facilities; vehicles or other means of transportation; or goods”. Further, “property” is defined to include “goods, wares, merchandise, chattels (...)”<sup>120</sup>.

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<sup>115</sup> Executive Order No. 13,224, 66 Fed. Reg. at 49,709 8 (Sept. 23, 2001). Administrative regulations adopted in the Code of Federal Regulations expanded the scope of the Order (31 C.F.R. §594.101, 594.201 et seq. (2007) <<http://www.treasury.gov/resource-center/sanctions/Documents/13224.pdf>> accessed 28 November 2013.

<sup>116</sup> *Idem*. Section 1, a) and b). In fact, the U.S. Department of the Treasury, through its Office of Foreign Assets Control (OFAC), designates individuals and entities as terrorists and places them on its list of “Specially Designated Nationals” (SDNs).

<sup>117</sup> See Section 1, d) i) and ii). Also, by virtue of section 106 of the USA Patriot Act, the government may “block” assets and to criminalize its transactions “during the “pendency of an investigation”, without the designation of the individual or entity as an SDGT. Therefore, for imposing those effects, the US needs only to open an investigation into designating the entity.

<sup>118</sup> Section 5.

<sup>119</sup> Section 2 a).

<sup>120</sup> Code of Federal Regulations, Title 31, Part 594, Sub Part C “General Definitions” §§ 317 and 309.

In addition to freezing the assets, the regulations indicate the possibility of being punished by a fine of up to USD 250,000 and a prison sentence of up to 20 years for natural persons<sup>121</sup>.

Finally, under the International Economic Emergency Powers Act<sup>122</sup> (“IEEPA”), the President does not have the authority to regulate or prohibit “donations (...) of articles such as food, clothing and medicine, intended to relieve human suffering”. However, should the President of the US determine that such donations would impair his ability to deal with a national emergency, or that they are made in response to coercion or would endanger US armed forces in hostilities or in a situation of imminent hostilities, then he may invoke an override to this exemption<sup>123</sup>. In this case, section 4 of the Executive Order 13,224 provides him with this override authority, thereby prohibiting making such donations<sup>124</sup>.

In sum, the Executive Order 13,224 prohibits a wide range of engagements with FDTOs, including humanitarian assistance by prohibiting the making or receiving of any contribution of funds, goods, or services to or for the benefit of those FDTOs.

### **3. Holder v Humanitarian Law Project**

There have been different criminal processes under the material support legislation<sup>125</sup>. One of the most important among them is the *Holder v. HLP* case<sup>126</sup> indeed; its far-reaching terms caused a “shockwave” in the humanitarian community<sup>127</sup>. Particularly, the US Supreme Court has upheld the constitutionality of the Statute that makes it a crime to knowingly provide “material support” to DFTOs.

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<sup>121</sup> Executive Order No. 13,224.

<sup>122</sup> P.L. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. § 1701-1707)

<sup>123</sup> *Idem*

<sup>124</sup> Section 4.

<sup>125</sup> For instance, for running a website providing links to jihadist websites (resulting in acquittal); for rebroadcasting a television network run by a designated terrorist organization (resulting in a guilty plea); or in the case of a criminal defense lawyer, for communicating to a reporter a statement made by a leader of a designated group (resulting in a guilty verdict). See, FRATERMAN, JUSTIN A., ‘Criminalizing humanitarian relief: are US material support for terrorism laws...’ at p. 8.

<sup>126</sup> *Eric H. Holder, Jr., Attorney General, et al., Petitioners v. Humanitarian Law Project, et al.* (Holder v. Humanitarian Law Project), US Supreme Court, No. 08-1498, 130 S. Ct. 2705 (2010) decision of 24 June 2010.

<sup>127</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 4.

The case was decided by the US Supreme Court in 2010 regarding the US Patriot Act<sup>128</sup>. In particular, the question was “[w]hether 18 USC § 2339B(a)(1)’s criminal prohibitions on the provision of “training,” “expert advice or assistance,” “service,” and “personnel” to government-designated “terrorist organizations” are unconstitutional as applied to pure speech that promotes only lawful, nonviolent activities”<sup>129</sup>. In its decision, the Court upheld the constitutionality of that rule.

### **3.1. Arguments of the plaintiffs and government**

The plaintiffs were a group of organizations and individuals, among them, the Humanitarian Law Project (“HLP”). They wanted to know if the activities they wanted to engage in would violate the prohibition of material assistance or support to groups which are on the US terrorist list, and, if so, whether the Statute would contravene the US Constitution. The activities were: the training and teaching of members of the Kurdistan Worker’s Party (“PKK”) to use international law to peacefully resolve conflicts and to formulate petitions before international bodies such as the UN; and the engaging in political advocacy on behalf of Kurds living in Turkey or members of the LTTE living in Sri Lanka. Both, PKK and LTTE were DFTOs by the US.

The plaintiffs argued that certain constitutional protections, including freedom of speech and association, and due process of law (which prohibits vague criminal laws), precluded the US from enforcing the Statute against the HLP’s activities<sup>130</sup>. Particularly, they argued that the First Amendment to the US Constitution (about respect to freedom of speech) protected their intended activities, which they characterized as purely political speech, of a political, lawful and non-violent character<sup>131</sup>. Further, they challenged the criminal provisions affecting speech as they are unconstitutionally vague<sup>132</sup>. Apart from that, the application of the challenged rules is unconstitutional because they criminalize pure speech promoting lawful

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<sup>128</sup> The USA Patriot Act was signed by the then President George Bush on 26 October 2001 as a response to the events of 9/11.

<sup>129</sup> Holder v. Humanitarian Law Project, Opening Brief for Humanitarian Law Project, 16 November 2009, at p. i.

<sup>130</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 631.

<sup>131</sup> HLP, Holder v. HLP, Opening Brief..., at p. 17, 23-25.

<sup>132</sup> *Idem*, at p. 18. See, also pp. 25 – 43.

and nonviolent ends, and because they discriminate on the basis of content<sup>133</sup>. Further, the provisions also violated plaintiffs' freedom to associate<sup>134</sup>. Also, the plaintiffs argued that the US Supreme Court should interpret the Statute requiring proof that a defendant "intended to further a foreign terrorist organization's illegal activities"<sup>135</sup>.

The Government of the US ("Government") upheld the challenged terms because of the following arguments. First they claimed that the Statute is not void for vagueness" because it requires that a person "knowingly provide" that material to a DFTO. The person must know about it. That express requirement "diminishes any vagueness concerns. (...). The challenged terms rest on simple distinctions that are readily understood by persons of ordinary intelligence. (...)"<sup>136</sup>. In fact, the US has argued that the Statute is

"[N]ot vague simply because application of these terms to particular actions may sometimes be difficult. Vagueness lies not in occasional uncertainty about whether an incriminating fact has been proved, but in fundamental indeterminacy about what that fact is"<sup>137</sup>.

Indeed, the Statute is a "regulation of conduct, only incidentally affecting speech and applying irrespective of any expressive content"<sup>138</sup>. Finally, the Government has argued that the Statute does not infringe on associational rights, because it does not prevent petitioners from joining or associating with DFTOs<sup>139</sup>.

### **3.2. US Supreme Court ruling**

The US Supreme Court upheld the constitutionality of the Statute. According to Chief Justice Roberts, on behalf of the majority, the Supreme Court concluded that the Statute neither violates the First Amendment nor is unconstitutionally vague<sup>140</sup>. He affirmed that the "fighting terrorism was an important enough matter to warrant criminal sanction even for

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<sup>133</sup> *Ibidem*, at p. 20 and also 43-55.

<sup>134</sup> *Ibidem*, at p. 21 and also 56-59.

<sup>135</sup> *Ibidem*, at p. 22 and also 65-71.

<sup>136</sup> Holder v. HLP, Opening Brief for the Government (Respondents) at p. 13.

<sup>137</sup> *Idem*, at p. 14.

<sup>138</sup> *Ibidem*, at p. 15.

<sup>139</sup> *Ibidem*.

<sup>140</sup> Holder v. Humanitarian Law Project, Decision, p. 2.

forms of speech that would otherwise appear to fall under First Amendment protection”<sup>141</sup>. Consequently, it ruled that it is not unconstitutional to block speech and other forms of advocacy in support of DFTOs, even if such speech is only intended to support such a group’s peaceful or humanitarian actions<sup>142</sup>.

The Court has noted that while some DFTOs engage in political and humanitarian activities, such organizations “are so tainted by their criminal conduct that any contribution to an organization facilitates that conduct”<sup>143</sup>. Consequently, the Court said that the training of groups that use humanitarian and international law to resolve disputes would provide such groups with techniques that could be used as part of a broader strategy to promote terrorism, as well as, the human rights training to designated terrorists could potentially free up resources for terrorist acts<sup>144</sup>.

The Court hold that such activity may only be banned if it is coordinated with or controlled by the overseas terrorist group; individual advocacy or speech remains protected by the First Amendment, and therefore, may not be criminalized by the government. Specifically, the Court stated that:

“Congress has not...sought to suppress ideas or opinions in the form of “pure political speech.” Rather, Congress has prohibited “material support,” which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations”<sup>145</sup>.

The Court further limited the scope of its decision by stating that it was limited to the particular activities that HLP wished to pursue and that it does not “address the resolution of more difficult cases that [may] arise under the statute in the future”<sup>146</sup>. Also, beyond the specific activities in question (teaching members to use international law to resolve disputes

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<sup>141</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p 19.

<sup>142</sup> *Humanitarian Law Project*, 561 U.S. \_\_\_\_, at 2.

<sup>143</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 19..

<sup>144</sup> *Idem*, at p. 20.

<sup>145</sup> *Ibidem*, at p. 21.

<sup>146</sup> *Ibidem*, at p. 2.

peacefully and to petition the UN and other representative bodies, and engaging in political advocacy on behalf of members), “the majority declined to say what other humanitarian activities would violate the material support law”<sup>147</sup>.

Regarding humanitarian assistance, Justice Roberts noted that when it the 18 USC §2339B, Congress removed an exception that had existed for the provision of material support in the form of “humanitarian assistance to persons not directly involved in’ terrorist activity. That repeal demonstrates that Congress rejected the view that ostensibly peaceful aid would have no harmful effects”<sup>148</sup>. Indeed, the Department of Justice of the US indicated that humanitarian assistance agencies operating in areas controlled by DFTOs would be at risk of prosecution and would need to seek a waiver from the Secretary of State in order avoid falling afoul of the law<sup>149</sup>. In addition, the President’s invocation of the authority granted by IEEPA means that the statute’s humanitarian assistance exception is not applicable to Executive Order 13,224. This is an “explicit indication that, at least under Executive Order 13,224, humanitarian relief is one of the prohibited forms of material support”<sup>150</sup>.

However the decision was not unanimous. Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented stating that, while acknowledging the importance of giving the political branches deference in national security issues, the decision was too intrusive on the rights of the plaintiffs. They explained that “[n]ot even the ‘serious and deadly problem’ of international terrorism can require automatic forfeiture of First Amendment rights”<sup>151</sup>. They proposed a narrower interpretation of the material support law in the sense that, individuals should be subject to prosecution if they knowingly provided a service they had reason to believe would be used to further unlawful terrorist aims of the particular organization<sup>152</sup>.

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<sup>147</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 20.

<sup>148</sup> *Idem*, at p. 24.

<sup>149</sup> See Annex I: Audio recording of oral argument, Douglas N. Letter, Department of Justice, in *Humanitarian Law Project v. Gonzalez, en banc* hearing, US Court of Appeals for the Ninth Circuit, Pasadena, CA, December 14, 2004.

<sup>150</sup> FRATERMAN, JUSTIN A., ‘Criminalizing humanitarian relief: are US material support for terrorism laws...’ at p. at 20.

<sup>151</sup> Holder v. HLP, Justice Stephen Breyer, dissenting, at p. 5.

<sup>152</sup> *Idem*, at p. 17.

As a consequence of *Holder v. HLP*, the work of many humanitarian organizations that must interact directly with NSAGs that have engaged in armed conflict is threatened<sup>153</sup>. In fact, many acts of these humanitarian organizations would fall within the broadly defined provisions of the Statute, and consequently, they would also be prohibited under that instrument.

The US Supreme Court accepted the argument that any contribution to DFTO legitimizes the terrorist activities of such organizations. Also, the Supreme Court considered that the training, even in human rights, may facilitate the ability of DFTO to recruit persons, increase resources and money and persist in their aims for unlawful acts.

### **CHAPTER 3**

#### **CONTRADICTIONS BETWEEN COUNTER-TERRORISM MEASURES AND INTERNATIONAL HUMANITARIAN LAW RULES: WHY THE ENGAGEMENT OF NON-STATE ARMED GROUPS SHOULD NOT BE CRIMINALIZED**

Chapter 1 has demonstrated that cooperation and engagement with NSAGs is extremely important for their compliance with IHL, what has a significant impact on the protection of the civilian population. To this end NSAGs should co-operate and engage with humanitarian and impartial organizations in order to ensure the provision of life-saving assistance<sup>154</sup>, strengthen IHL knowledge and provide necessary safety guarantees for humanitarian actors. Chapter 2 has showed that some states,<sup>155</sup> however, have preferred to prohibit almost any

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<sup>153</sup> See, ‘The Supreme Court goes too far in the name of fighting terrorism’ *The Washington Post* (22 June 2010) <<http://www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104267.html>> accessed 28 June 2013; AMERICAN CIVIL LIBERTIES UNIONS, ‘Supreme Court rules “Material Support” Law can stand’ (21 June 2010) <<http://www.aclu.org/national-security/supreme-court-rules-material-support-law-can-stand>> accessed 8 June 2013; and COLE, D., ‘Chewing Gum for Terrorists’ *The New York Times* (21 January 2011) <[http://www.nytimes.com/2011/01/03/opinion/03cole.html?\\_r=3&](http://www.nytimes.com/2011/01/03/opinion/03cole.html?_r=3&)> accessed 23 June 2013.

<sup>154</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 627-628.

<sup>155</sup> Not all states have objected the dialogue with NSAGs. In fact, many have supported engagement efforts and have allowed humanitarian organizations, for instance, Geneva Call in Philippines, Senegal, Sudan and Colombia. BONGARD, P., ‘Engaging armed non-state actors on humanitarian norms...’.

contacts with certain NSAGs. In fact, some states facing internal armed insurgency have opposed NSAGs' engagement and have denied or restricted access of humanitarian organizations to areas where these groups operate. Other states and donors have introduced no-engagement conditions in their agreements, or have adopted measures that criminalize the dialogue with NSAGs that have been designated as "terrorist organizations"<sup>156</sup>.

Indeed, having enacted the Statute, the US Congress has believed that the DFTO "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct"<sup>157</sup>. That is why, this Statute does not only criminalizes the mere provision of property, services, lodging and transportation in favor to DFTOs; but it also criminalizes a broad range of conducts<sup>158</sup> that may "potentially target a wide array of otherwise innocent-seeming activities"<sup>159</sup> affecting the engagement with NSAGs and encompassing some activities associated with humanitarian assistance in the context of an armed conflict. As commentators have underlined, such measures will lead to "blanket restriction covering nearly all modes of interaction that could have the effect of cutting off humanitarian assistance"<sup>160</sup> including the providing medical care, food, shelter and clothing for vulnerable civilian population, as well as trainings aimed at raising of awareness of IHL.

This Chapter highlights the importance of the engagement of NSAGs for their compliance with IHL and for the delivery of humanitarian assistance to the affected civilian population; fundamental basis of the reasons of why, under this body of laws, such engagement should not be criminalized by counterterrorism measures. Furthermore it analyzes the main actions prohibited by the modern counterterrorism law, in particular, those rules included in the US Material Support Statute. It attempts to stress the areas of interaction of the two regimes and compare them mostly in regards to humanitarian and impartial organizations' work<sup>161</sup>.

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<sup>156</sup> *Idem*.

<sup>157</sup> See *supra* note 151.

<sup>158</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, 'Humanitarian action under scrutiny...', at p. 3.

<sup>159</sup> FRATERMAN, J., 'Criminalizing humanitarian relief: are US material support for terrorism laws...' at p. 19.

<sup>160</sup> HOLLAND, E., '*Holder v. Humanitarian Law Project* and the potential to cripple humanitarian assistance...', at p. 7.

<sup>161</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, 'Humanitarian action under scrutiny...', at p. 3.



## **1. Relevance of the engagement of NSAGs**

The international community acknowledges the important role of the engagement with NSAGs in enhancing their compliance with international legal rules and in promoting and ensuring the delivery of humanitarian assistance to the population in times of armed conflicts. Also, it is of extreme importance to recognize the essential role that humanitarian and impartial organizations play in the engagement with NSAGs, especially in armed conflict zones controlled or dominated by the latter. Humanitarian actors cannot avoid contacts and cooperation with NSAGs even in such issue as basic logistics of aid delivery. It is necessary for a wide range of steps, starting from need to explain the legal basis for such aid, exclude hostile attitude of NSAGs towards humanitarian activity, and going down to technical problems (*i.e.* how to obtain permits, pay road tolls or share technical advice)<sup>162</sup>.

Let's take humanitarian relief as example. Following the line of argument, on the one hand there is a humanitarian organization that is entitled by IHL to offer its basic services to vulnerable civilian population and, on the other hand we have an NSAG which have the possibility to facilitate the access of humanitarian consignments, equipment, and personnel to that vulnerable civilian population<sup>163</sup>. In such case, for providing the humanitarian assistance, "some form of engagement with these groups (NSAGs), their members, or their supporters is sometimes inevitable"<sup>164</sup>.

In this sense, the UN Secretary General ("UN SG"), in his 2009 Report on the Protection of Civilians, stated that in order to protect the civilian population from the effects of hostilities and to obtain access and to ensure safe operations "humanitarian actors must have consistent and sustained dialogue with all parties to conflict"<sup>165</sup>. In addition, he has underlined that it is

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<sup>162</sup> THE CHARITY & SECURITY NETWORK, 'Safeguarding Humanitarianism in Armed Conflict ...', at p. 8.

<sup>163</sup> For instance, the SC has provided a platform to engage with "all parties" to armed conflict, including NSAGs, in a dialogue for obtaining child protection and ensuring the implementation of action plans to prevent six grave violations against children in armed conflict, included the denial of humanitarian access. See, UN SC Resolution 1612 (2005) and Resolution 1882 (2009).

<sup>164</sup> *Holder v. Humanitarian Law Project*, 'Brief of Amicus Curiae...' at p. 26.

<sup>165</sup> UN SC, 'Report of the Secretary General on the protection of civilians in armed conflict' (2009) UN Doc S/2009/277, at para. 40.

essential that the UN Member States support, or at least do not impede, efforts by humanitarian organizations to engage with NSAGs in order to seek protection for civilians “even [with] those groups that are proscribed in some national legislation”.<sup>166</sup>

This constructive dialogue and engagement with NSAGs can be effective and can positively influence their behavior and enhance their compliance with international rules, which is win-win situation for everybody who cares about war victims. . In fact, to view NSAGs only as perpetrators of violations and ignore their potential protective role would “encourage repressive approaches, miss opportunities for constructive engagement and ultimately fuel more IHL violations”<sup>167</sup>. As the UN SG affirmed:

“While engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts”<sup>168</sup>.

Indeed, the “[p]rovision of humanitarian aid often requires working with and providing expert advice and technical assistance to local actors”<sup>169</sup>:

“[I]n an armed conflict setting, where humanitarian assistance may be the only reliable source of life-saving food, clean water, medical care, shelter, and clothing for civilians behind enemy lines, the capacity of humanitarian organizations to negotiate directly with parties to the conflict (...) is one of the most crucial tools for these organizations to maintain their neutral posture and to serve those in need”<sup>170</sup>.

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<sup>166</sup> *Idem*, para. 45. See, UN SC ‘Report of the Secretary General on the Protection of Civilians in armed conflict’ (2010) UN Doc S/2010/579, para. 52.

<sup>167</sup> BONGARD, P., “Engaging armed non-state actors on humanitarian norms...”.

<sup>168</sup> UN SC, ‘Report of the Secretary General on the protection of civilians in armed conflict’ (2009) UN Doc S/2009/277, at p. 9. Indeed, it is important to highlight the experience of Geneva Call. Regarding the ban on anti-personnel mines, more than 50 NSAGs have agreed to renounce these weapons, by signing the Deeds of Commitment. Consequently, the use of anti-personnel mines by NSAGs has been decreased. In 2000, there were 18 countries where NSAGs were using this weapon; at the present there are only 6. Certainly the “constructive engagement with (NSAGs) can be effective and can yield tangible benefits for the protection of civilians”. BONGARD, P., “Engaging armed non-state actors on humanitarian norms...”.

<sup>169</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 632 – 633.

<sup>170</sup> *Idem* at p. 642 – 643.

In regard to this, Geneva Call and its Deeds of Commitment constitute a bright example. This organization demonstrates that the process of persuasion of NSAGs to sign Deeds of Commitment aimed at better compliance with the IHL, always presupposes constructive and sustained dialogue with them. Even when the goal is reached and an agreement is signed by the group, there is a continuing support work addressed to these NSAGs, including trainings on IHL and expert advising on how to implement these rules into internal regulations<sup>171</sup>.

## **2. Face to face: IHL rules and counter terrorism measures**

As it has been underlined, IHL sets out the legal framework regulating the delivery of humanitarian assistance in armed conflicts<sup>172</sup>. It provides rules and principles that govern such assistance, including the conditions under which the assistance may be granted, the form of the humanitarian help and the role of the humanitarian organizations that provide such assistance<sup>173</sup>. The IHL considers that because of common article 1 to the GCs, which states that High Contracting Parties are bound to “respect and ensure respect” for IHL; moreover, under the GCs, they have the primary responsibility for the well-being of the civil population.<sup>174</sup> On the other hand, common article 3 to the GCs provides for the right of initiative on part of humanitarian organizations, by which they can offer their services to all the parties to the conflict, including NSAGs. There is, however, a saving clause: IHL provides that for such an offer and for humanitarian operations, such principles of humanitarian action as humanity, neutrality and impartiality must be observed. All these elements contribute to the harmonization between the needs of security and the humanitarian interest of ensuring that life-saving goods and services reach those who are *hors de combat*.

Counterterrorism measures do not take these elements into consideration. While, for a practical and strategic issue, the engagement with NSAGs constitutes a necessity, the Statute prevents all possible measures of engagement as long as we speak about enlisted organization

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<sup>171</sup> BONGARD, P., “Engaging armed non-state actors on humanitarian norms...”.

<sup>172</sup> See Section 4 of Chapter 1.

<sup>173</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’. See, HOLLAND, E., ‘*Holder v. Humanitarian Law Project* and the potential to cripple humanitarian assistance...’, at p. 11.

<sup>174</sup> See, SANDOZ, Y., SWINARSKI, C., and ZIMMERMANN, B., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Geneva, 1987), at p. 1479.

or person as terrorist. Some argued that this instrument does not prohibit such engagement; instead “most prohibitions focus on whether some form of material support is provided directly or inadvertently to the entity or those associated with [terrorism]”<sup>175</sup>. The problem is that when we speak about qualification of behavior the prohibited forms of contact, they involve modes of interaction that could be considered by an organization in the engagement. It is true; the Statute considers exceptions and provides some licensing procedures. However, the first are limited only to two elements (medicine and religious material), the second does not operate effectively. It takes a long time to obtain them and they are not always granted. Neither exceptions nor licenses include any criteria or reference to the IHL framework making the humanitarian assistance to be an exception rather than the rule<sup>176</sup>. Furthermore, the US counterterrorism laws do not respect the right of initiative for humanitarian and impartial organizations. Indeed, in circumstances described, it is extremely difficult for humanitarian impartial organizations to work with or through NSAGs, and consequently, these organizations are prevented from operating in areas controlled by those “DFTOs” or where they may be present. This renders impossible the access to vulnerable civilians and the civilian population living or trapped in territory of NSAG’s control, barring the provision of humanitarian assistance to them, not to speak about other forms of humanitarian engagement like IHL trainings and obtaining deeds of commitment.

### **3. The consequence of the problematic of the meaning of material support**

The Statute prevents all possible forms of engagement with NSAGs. The criminal risk to which the humanitarian organizations are exposed will depend therefore of the understanding of the meaning of the term ‘material support’ and the knowledge of what kind of conduct comes under the Statute’s purview. However, it is difficult to know what the meaning of these terms is. This was confirmed by the US Supreme Court which said that “the statute is

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<sup>175</sup> MACKINTOSH, K. and MACDONALD, I., ‘Counter-terrorism and humanitarian action’, (2013) Humanitarian Exchange Magazine 58 <<http://www.odihpn.org/humanitarian-exchange-magazine/issue-58/counter-terrorism-and-humanitarian-action>> accessed 16 September 2013.

<sup>176</sup> *Idem*. See also THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 52.

not void for vagueness just because the application of the terms ‘training’, ‘expert advice or assistance’, ‘personnel’, or ‘service’ may be difficult to define in some circumstances”<sup>177</sup>.

As it was mentioned in Chapter 2, the “material support” refers to the prohibition of any “property” or “service” related to “lodging”, “training”, “expert advice” or “assistance”, “communications equipment”, “facilities” and “transportation”, except “medicine” or “religious materials”<sup>178</sup>. But, generally speaking, we will see that the definitions of these terms remain broad. For instance, according to the US Statute, the term “training” means “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”<sup>179</sup>. But how to distinguish the teaching of “specific skills”, which are prohibited, from the allowed “general knowledge”? Furthermore, the term “expert advice or assistance” derived from “scientific, technical or other specialized knowledge”<sup>180</sup>; But what is the meaning of “other specialized knowledge”<sup>181</sup>. The US Supreme Court, in the *Holder v. HLP* case, did not make these distinctions. On the contrary, the situation has become worse because the US Supreme Court has declared non-violent advocacy or speech in coordination with, or directed by, DFTOs a crime<sup>182</sup>.

Indeed, the US Supreme Court ruled that it is constitutional to block speech and other forms of advocacy in support of DFTOs, even if such speech is intended to support such a group’s peaceful or humanitarian actions<sup>183</sup>. However, it is fully compatible with IHL to teach how to petition UN bodies for relief. Moreover it is direct action of dissemination of humanitarian principles settled by IHL. IHL is not an elite body of law which can be used only by armed forces of states. It is unique in its universality; every single state accepted the GCs and has to comply with customary law. Regarding to this, IHL recognizes that members of armed

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<sup>177</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 632.

<sup>178</sup> 18 USC 2339A (b)(1). See 2339B (g)(4) and 2339C (e)(13).

<sup>179</sup> 18 USC para. 2339A (b)(2).

<sup>180</sup> *Idem*, para. (b)(3).

<sup>181</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 20.

<sup>182</sup> *Idem* at p. 14 and 18. FRATERMAN, J.A., ‘Criminalizing humanitarian relief: are US material support for terrorism laws...’ at p. 8.

<sup>183</sup> *Holder v. HLP*, 561 U.S. \_\_\_, at p. 2.

forces and members of opposition groups are on the same footing when it comes to protection of civilian population and other persons *hors de combat*<sup>184</sup>.

Also, in the Statute, there are remaining ambiguities on what is “providing material support or resources to a terrorist organization”. The term “personnel” means a person that “has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (...) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization”<sup>185</sup>. Indeed, here the prohibition is ambiguous. It is not clear whether the material support concerns the “support” to that individual in his “personal” capacity as a member of, or affiliated to a DFTO<sup>186</sup> or, more generally if it concerns the support to the organization as a whole<sup>187</sup>. This could have fatal consequences for humanitarian organizations as in some cases there is no awareness, information or knowledge about what type of connection may exist between an individual and a NSAG listed as a terrorist organization<sup>188</sup>.

It seems that the content of the Statute in terms of meaning or definitions has raised a broad understanding that has as dangerous consequence that the majority of humanitarian activities could be understood as provision of material support or resources. In this context, the training programs on, for instance, IHL would be considered as “expert advice” or “training”. Humanitarian assistance activities could be viewed as “services” related to “expert assistance”. Property could be fulfilled with the provision of food, water, hygiene kits, shelter materials and blankets. Programs of family reunification need calls by telephone, mails and, even to transport someone to see his/her relatives, these actions would amount to the prohibited actions of “communications equipment” or “transportation”. Furthermore, the

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<sup>184</sup> *Holder v. HLP*, 130 US at 2738-39 (Breyer, J., dissenting) at p. 2738 – 2739.

<sup>185</sup> *Ibidem*, para. 2339B(h).

<sup>186</sup> SHANOR, A., ‘Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World’ 34 *Suffolk Transnational Law Review* 3, at p. 17.

<sup>187</sup> For example, the US Supreme Court in *Boim case* found that medical treatment of individual patients affiliated with a terrorist organization could be distinguished from providing medical assistance to the group as a whole. *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685,699 (7<sup>th</sup> Cir. 2008). Such interpretation may minimize risks for humanitarian organizations.

<sup>188</sup> HOLLAND, E., ‘*Holder v. Humanitarian Law Project* and the potential to cripple humanitarian assistance...’, at p. 10.

provision of shelter can be considered as “lodging” and the access to sanitation projects as “facilities”<sup>189</sup>.

In addition, the US Supreme Court has clarified that the Statute does not require proof that an individual intended to further the terrorist activities of the DFTOs. Instead, a lower standard of proof requires only “knowledge about the organization’s connection to terrorism”<sup>190</sup>. Consequently, in order to be found guilty the individual merely needed “to know that the organization was listed by the U.S. government or that the organization had committed acts of terrorism”<sup>191</sup>.

In sum, because of the broad meaning of the terms as well as the low threshold of knowledge requirement given in the Statute, humanitarian organizations would be at risk of criminal proceedings, freezing of assets and administrative fines, in case of engaging with DFTO or to individuals or entities who engage in terrorist activities, even when delivering humanitarian assistance is in compliance with IHL<sup>192</sup>.

#### **4. The exceptions in the US Material Support Statute**

The Statute has included two exceptions; one of these concerns to “medicines”. There is certain ambiguity however in what this term includes. Indeed, it does not indicate whether it includes the broader provision of forms of medical services (such as medical treatment, technical training, the giving of advice, the performance of surgical and other medical procedures, or the administration of public health services) and resources (such as medical supplies or equipment) or whether it is limited to the provision of medicines in a narrow sense<sup>193</sup>.

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<sup>189</sup> FRATERMAN, J.A., ‘Criminalizing humanitarian relief: are US material support for terrorism laws...’ at p. 21.

<sup>190</sup> *Idem* at p. 11.

<sup>191</sup> PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 3.

<sup>192</sup> FRATERMAN, J., ‘Criminalizing humanitarian relief: are US material support for terrorism laws...’ at p. 21-22.

<sup>193</sup> Fraterman provided two examples on the basis of the American jurisprudence. In *Boim case*, the Seventh Circuit included in the term “medicine” the provision of medical services more broadly construed. See, *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 699 (7th Cir. 2008). But, in *Sabir case*, the Second Circuit holds that the medicines exception “shields only those who provide substances qualifying as medicine to terrorist organizations. Other medical support, such as volunteering to serve as an on-call doctor

Some commentators point out that the exception for “medicine” seems to consider only medicine itself and consequently does not include what is associated with the provision of medical assistance<sup>194</sup>. Indeed, a narrow reading of the term could prevent the capacity of humanitarian organizations to deliver essential medical services as they would technically violate the US law and therefore, be at risk of criminal prosecution<sup>195</sup>. Arulanantham has argued that, in order to prevent outbreaks, humanitarian and impartial organizations must “provide (...) water purification systems, toilets, tents, and other such goods which are not “medicine” but nonetheless serve an absolutely critical medical function”<sup>196</sup>.

The right to offer services by humanitarian organizations in common article 3 is aimed at the alleviating of the suffering of the civilian population in need as consequence of armed conflicts. The IHL framework of humanitarian access and assistance, therefore, presupposes a degree of temporariness as it is applicable in exceptional and temporary circumstances<sup>197</sup>. The Statute imposes infinite and permanent bans which are indeed incompatible with IHL. The Statute does not take into account that the states already allowed humanitarian organizations some freedom of action when they exercise their right to offer services<sup>198</sup>.

Also, the exceptions under the UN law are wider than those contains in the Statute. In fact, they accommodate the security concerns but without compromising the aims of the humanitarian operations. The US SC Resolution 1556 (2004), for instance, contains in its paragraph 9 broad humanitarian exceptions concerning “supplies of non-lethal military equipment intended solely for humanitarian, human rights monitoring or protective use, and

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for a terrorist organization, constitutes of personnel and/or scientific assistance proscribed by law”. See, *US v. Sabir*, \_F.3d\_ (2D Cir. Feb 4, 2011), 27. *Idem*, at p. 8.

<sup>194</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 630.

<sup>195</sup> In fact, the US government has argued that the provision of medical assistance could, under the wrong circumstance, fall foul of the statute’s prohibitions. See *e.g.* oral arguments of Douglas Letter, US Department of Justice, *Humanitarian Law Project v. US Department of Justice*, 393 F.3d 902 (12 December 2004).

<sup>196</sup> See, ARULANATHANAM, A., ‘Testimony at an Oversight Hearing on Amendments to the Material Support for Terrorism Laws...’.

<sup>197</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 63.

<sup>198</sup> *Idem*, at p. 64.



related technical training and assistance”<sup>199</sup>. But, even when humanitarian organization operates according to this UN legal framework, it may contravene the US counterterrorism measures, as they do not reflect the UN approach<sup>200</sup>.

##### **5. Obligation not to interfere with the provision of humanitarian assistance**

Because of article 1 common to the CGs, states are bound to “respect and ensure respect” for these treaties “in all circumstances”. This obligation includes the requirement that High Contracting Party do all in their power to ensure that IHL is respected<sup>201</sup>. The US, as a High Contracting Party, has an obligation, therefore, to refrain from interfering with “the ability of other High Contracting Parties to fulfill their Convention and to refrain from interfering with the discretionary exercise of non-obligatory provisions”<sup>202</sup>.

This issue has practical implications with reference to the Statute. For instance, the US is bound to respect and ensure respect for common article 3 which permits the right of initiative mentioned<sup>203</sup>. Consequently, if as a result of the Statute, the US prosecutes members of humanitarian organizations then it may not only be violating its direct obligations under the GCs, but may also be preventing or hindering other Parties from fulfilling their obligations. So, the US would be in violation of its international legal obligations<sup>204</sup>.

##### **6. Humanitarian principles: humanity, impartiality and neutrality**

In their activity, humanitarian organizations should adhere to principles of humanitarian assistance. They require all providers of aid “to draw sharp lines between humanitarian activities, which they support, and military activities, which they do not”<sup>205</sup>. However, the

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<sup>199</sup> US SC Resolution 1556 (2004), para. 9. See also UN SC Resolution 1916 (2010) and UN SC Resolution 1844 (2008).

<sup>200</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 65.

<sup>201</sup> See Section 4.2 in Chapter 1.

<sup>202</sup> FRATERMAN, J., ‘Criminalizing humanitarian relief: are US material support for terrorism laws...’ at p. 4.

<sup>203</sup> ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (2003) at p. 52

<[http://www.icrc.org/eng/assets/files/other/ihlcontemp\\_armedconflicts\\_final\\_ang.pdf](http://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf)> accessed 28 June 2013.

<sup>204</sup> FRATERMAN, J., ‘Criminalizing humanitarian relief: are US material support for terrorism laws...’ at p. 1 and 25.

<sup>205</sup> *Holder v. Humanitarian Law Project*, ‘Brief of Amicus Curiae...’ at p. 25 – 26.

Statute appears to disregard humanity and impartiality principles compromising the ability of humanitarian organizations to delivery of humanitarian assistance<sup>206</sup>. For instance, in Somalia, the delivery of humanitarian assistance has discriminated between some villages because they are placed in areas controlled by Al-Shabaab<sup>207</sup>. This discrimination contradicts the principles mentioned.

Neutrality is another critical element to consider. Humanitarian organizations are exposed to attacks and kidnappings when there is a perception that there is a military or government approach. Humanitarian organization should, therefore, maintain the neutrality and the independence from military and political influence to the maximum extent possible<sup>208</sup>. But, the conditions stemming from the Statute would push humanitarian organizations to indirectly cooperate with the government. This US cooption or instrumentalization strategy<sup>209</sup> allows the incorporation of humanitarian organizations into the security agenda of the state<sup>210</sup>.

## **7. Balance between security and the humanitarian interest**

The objective of the broad definitions contained in the Statute was to avoid the indirect aiding to DFTO. This idea was reflected by the opinion of Justice John Robert and it was based in the Congressional Record<sup>211</sup>. Particularly, the Statute precludes the provision of humanitarian assistance to people where DFTO operate because any action could be used by DFTO to “[free] up other resources within the organization that may be put to violent ends”. This was clear with the famous phrase “foreign organizations that engage in terrorist activity are so

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<sup>206</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 71.

<sup>207</sup> See WILDER, A., *Perceptions of the Pakistan Earthquake Response: Humanitarian Agenda 2015 Pakistan Country Study* (Medford, Tufts University Feinstein International Center, 2008) <<http://www.eisf.eu/resources/library/Pakistan-Earthquake-Response.pdf>> accessed 20 November 2013.

<sup>208</sup> BRUGGER, P., ‘ICRC operational security: staff Safety in armed conflict and internal violence’ 91 *International Review of the Red Cross Reports and Documents* 91, 874 (2009).

<sup>209</sup> See, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny...’, at p. 28.

<sup>210</sup> *Idem*.

<sup>211</sup> See supra footnote 151. See also House of Representatives (“H.R”) Report 104-383 on Comprehensive Antiterrorism Act of 1995, at p. 43 and 81, 1995 <[https://www.fas.org/irp/congress/1995\\_rpt/h104383.htm](https://www.fas.org/irp/congress/1995_rpt/h104383.htm)> accessed 20 October 2013.

tainted by their criminal conduct that any contribution to such an organization facilitates that conduct”<sup>212</sup>.

This perspective however does not consider the pragmatic approach in IHL. Indeed, there is some acknowledgment that the cost of delivering humanitarian assistance to civilian population may result in incidental and indirect benefit to DFTOs. But there is also recognition that in the name of ensuring that humanitarian operations are taken in effective and efficient manner, an engagement with such groups would be necessary and unavoidable. IHL establishes a balance between humanitarian and military concerns<sup>213</sup>.

With reference to this, for instance, humanitarian negotiations “are a tool to enable, facilitate and sustain humanitarian action”<sup>214</sup> and they must be taken under the principles mentioned because in that sense, the action do neither legitimacy or recognition on NSAGs, nor do they mean a support the views of such group<sup>215</sup>. The Statute prohibit humanitarian negotiation when there is a FDTO, but it is contrary to IHL this approach and when

“[N]egotiating with an armed group is deemed a humanitarian necessity, then the designation of that group as a ‘terrorist’ group should not automatically preclude negotiations with the group”<sup>216</sup>.

## **8. Impact in the humanitarian environment**

As a result of the risk of criminal measures, the humanitarian organizations may decide to cut back on or halt their projects. For instance, “ceasing training activities, diminishing the scope of their proposals for government funding (...), or reconsidering priorities (...)”<sup>217</sup>. Commentators have described this issue in the following lines:

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<sup>212</sup> *Idem.*

<sup>213</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 69.

<sup>214</sup> McHUGH, G., and BESSLER, M., *Humanitarian Negotiations with Armed Groups: A Manual & Guidelines for Practitioners* (New York: United Nations, 2006) <[http://www.unicef.org/emergencies/files/guidelines\\_negotiations\\_armed\\_groups.pdf](http://www.unicef.org/emergencies/files/guidelines_negotiations_armed_groups.pdf)> accessed 20 November 2013.

<sup>215</sup> THE CHARITY & SECURITY NETWORK, ‘Safeguarding Humanitarianism in Armed Conflict ...’, at p. 68. See Section 3.2 of Chapter 3.

<sup>216</sup> *Idem.*

<sup>217</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 642.

“In Gaza, it appears that programmes are designed firstly to avoid contact with or support to Hamas, and only secondly to respond to humanitarian needs. In some cases, programmes exclude whole groups of people on the basis of their geographic location. The role of Palestinian NGOs has also diminished, with some refusing grants due to counter-terrorism clauses. Local NGOs may also be excluded as some donors focus on larger, international partners which are seen as better able to implement counter-terrorism precautions”<sup>218</sup>.

Consequently, the organizations may take a conservative approach for saving their programmes but it can be less beneficial to civilian populations, or they “may selectively limit their partner organizations, their staff or their co-operation, in order to avoid their exposure”<sup>219</sup>. Also, the expansion of laws criminalizing material support may affect governments’ funding choices. This has already occurred in Somalia with Al-Shabaab<sup>220</sup>.

#### **9. The engagement with NSAGs should not be criminalized**

Humanitarian engagement as a wide range of measures undertaken by humanitarian actors for assisting belligerents in their compliance with IHL is based on constructive dialogue with them through negotiations, trainings, humanitarian aid for persons in need. Without such dialogue one cannot facilitate access to affected civilians under the control of NSAGs. It is also impossible to promote and raise respect for IHL without direct contacts with NSAGs. Last but not least, effective humanitarian engagement of belligerents is necessary for the obtaining of safety guarantees for humanitarian operations as sometimes only NSAGs can guarantee this in the territories under their control.

The domestic counterterrorism legislation, in particular, the US Material Support Statute, is so broad in its prohibition of providing material support that stop humanitarian organization from engaging some activities that include the involvement with DFTOs. Under this legislation the humanitarian organizations would be seen as supporters of DFTOs. However,

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<sup>218</sup> MACKINTOSH, K. and MACDONALD, I., ‘Counter-terrorism and humanitarian...’.

<sup>219</sup> MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism...’ at p. 641-642.

<sup>220</sup> GETTLEMAN, J., ‘U.N. officials assail U.S. on limiting Somali aid’, in New York Times (18 February 2010).

“IHL does not draw a distinction between victims of war, while counter-terrorism laws suggest that helping a victim on the terrorist side may be a criminal act.”<sup>221</sup>

Such counterterrorism legislation may have a number of detrimental consequences for humanitarian actors and the whole humanitarian action. For instance, humanitarian actors risk facing not only travel bans and asset freezing, but also criminal liability and subsequent reputational damage. This would lead to further funding cuts and subsequent end of any humanitarian activity of a particular organization. Moreover, reputational damage would come not only from donor states, but also from NSAGs themselves. Selective discriminatory aid would undermine credibility of humanitarian actors in field. Not surprisingly, many commentators note that in the prevailing circumstances humanitarian actors will be discouraged to use the unconditional IHL right to offer their services to a wide range of NSAGs from the international or domestic terrorist lists. Donors, on the other hand, will seek assurances from their donor-organizations to avoid any contacts with listed persons and organizations, which has its negative impact on the IHL principle of neutrality, independence and impartiality. All this has already happened. Some donors have prohibited any interaction, for instance, with Hamas members in Gaza, others have asked for detailed reports on the beneficiaries of the aid and persons contacted while providing it.<sup>222</sup>

Taking into account that nowadays NIACs are clearly prevailing in numbers over IACs, as well as the fact that governments tend to declare their armed opposition groups to be of a criminal terrorist nature, the modern developments of counter terrorism measures are able to freeze humanitarian action, which is already quite fragile and fragmented<sup>223</sup>.

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<sup>221</sup> PANTULIANO, S., MACKINTOSH, K., ELHAWARY, S and METCALFE, V., ‘Counter-terrorism and humanitarian action: Tensions, impact and ways forward’ Humanitarian Policy Group’ HPG Policy Brief 43 (2011) at p. 6 <<http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7347.pdf>> accessed 25 November 2013.

<sup>222</sup> *Idem*.

<sup>223</sup> JACKSON, A., ‘Talking to the other side: Humanitarian engagement with armed non-state actors’ Humanitarian Policy Group’ HPG Policy Brief 47 (2012) at p. 3 <<http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7711.pdf>> accessed 25 November 2013.

In the meantime one should accept that if the main activities of a belligerent party are by definition contrary to the IHL (if a NSAGS perpetrated, for example, widespread and systematic violence against civilian population, commits robbery and seizing control over goods) then the humanitarian engagement is impossible due to lack of political will. It is impossible to build a positive attitude to IHL if the humanitarian principles are *a priori* denied. In this case it is important to remind that the goal of humanitarian assistance is to alleviate suffering of the civilian population and of persons *hors de combat*. Certain forms of assistance which can influence military potential of a belligerent, facilitate further violations of law may be prohibited or limited. In some instances, humanitarian actors may conclude that dialogue is simply not possible under the existing circumstances. In such cases such organizations can withdraw their services. And this has happened in a number of cases after a hard ethical choice<sup>224</sup>. However, it is important to ensure that such decisions are made on a case by case basis with careful balancing between needs and benefits of main beneficiaries and considerations of security.

Such sweeping measures undertaken at international and domestic levels, which are based on political choice of some governments to list certain groups and persons as terrorist and, therefore, transforming one party to a conflict in a criminal, would deny any hope to people in need where assistance is particularly vital.

## **CONCLUSSIONS AND RECOMMENDATIONS**

### **1. Conclusions**

The negotiation, cooperation and engagement with NSAGs are extremely important for their compliance with IHL, which subsequently has significant impact on the protection of the civilian population, in particular to the possibility to provide them with the humanitarian

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<sup>224</sup> CHWEIZER, B. 'Moral dilemmas for humanitarianism in the era of "humanitarian" military interventions', 86 International Review of the Red Cross (2004) 855, at p. 553; See ICRC, *Professional Standards for Protection Work carried out by humanitarian and human rights actors in armed conflict and other situations of violence* (Geneva, ICRC, 2009), at p. 20.

assistance<sup>225</sup> which “often requires working with and providing expert advice and technical assistance to local actors”<sup>226</sup>. This becomes even more evident when segments of civilian population are in the proximity to, or under control of, such groups.

IHL provides the legal basis for humanitarian engagement with NSAGs in NIACs. Indeed, article 3 common to the GCs encapsulates the right of initiative allowing humanitarian organizations to offer their humanitarian services (and by consequence coordinating and delivering such services) to all parties to the conflict, including NSAGs in order to address the needs of the civilian population. These services must be humanitarian by nature and must be based on the principles of neutrality and impartiality.

Despite the recognition by the states and international organizations of the importance of engaging with NSAGs, through recent counter-terrorism measures, states have been strictly limiting individuals and organizations from “supporting” terrorism. This approach has restricted the possibilities to establish constructive IHL dialogue (or engaging) with NSAGs which qualify as such under IHL, “regardless of whether such “support” is facilitated in compliance with humanitarian principles long recognized in international law”<sup>227</sup>.

In particular, the US Material Support Statute poses legal and practical barriers for the humanitarian engagement with NSAGs. Indeed, it criminalizes some form of material support provided to DFTO.

However, because of the broad and quite vague terminology used in the counter-terrorism national legislation, *e.g.* in the US, the concept of “material support” covers a wide range of acts which in fact constitute the humanitarian activities in general and humanitarian assistance in particular. This may prevent the humanitarian organizations from performing

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<sup>225</sup> SANDOZ, Y., “Droit” or “devoir d’ingérence” and the right to assistance: the issues involved’ (1992) 288 *International Review of the Red Cross*.

<sup>226</sup> *Holder v. Humanitarian Law Project*, Brief of Amicus Curiae of the Carter Center, Christian Peacemaker Teams, Grassroots International, Human Rights Watch, International Crisis Group, the Institute for Conflict Analysis and Resolution at George Mason University, the Kroc Institute for International Peace Studies at Notre Dame University, Operation USA, and Peace Appeal Foundation in Support of Humanitarian Law Project, 23 November 2009, 25-6.

<sup>227</sup> *Idem*, at p. 14.

their activities which are directed at better protection of and providing humanitarian assistance to the civilian population affected by an armed conflict.

This was evidenced in *Holder v. HLP case*. The US Supreme Court upheld the constitutionality of the criminalization of material support to terrorism and affirmed that the providing of training, expert advice or assistance, advocacy and lobbying on international rules from humanitarian impartial organization to DFTOs could constitute material support, putting them at risk of criminal and civil liability.

Consequently, there is a conflict of norms between rules of IHL underlying humanitarian assistance and criminal laws prohibiting the provision of material support or resources to listed “terrorist” groups. The US counterterrorism measures contradict the pragmatic right of initiative set out by IHL and the necessity of engagement to facilitate access. This is evident in light of the fact that even if humanitarian impartial organizations operating in NIAC provide the assistance to civilian population and observe principles and rules of IHL in their activities, but still may be considered to violate the US national law.

Under article common 1 to the GCs, states undertake to respect and to ensure respect for the GCs in all circumstances. This obligation is not limited to the parties to the armed conflict, but includes the requirement that states do all in their power to ensure that IHL is respected. States have curtailed the ability of humanitarian impartial organizations to provide needed assistance to civilian population. States should, therefore, refrain from to act jeopardizing or impeding the needed of humanitarian assistance. As state bound by international law, states must ensure that its domestic laws do not compromise its ability to act according with its duties.

Under IHL, the engagement of NSAGs should not be criminalized even in the name of fight against terrorism. The enactment of counterterrorism legislation prohibiting either the engagement with NSAGs or the offer of services by a humanitarian impartial organization to NSAGs, regardless whether such support is materialized, even respecting the humanitarian



standards under IHL, would be sufficient to constitute a violation the rules of IHL, in particular, the GCs, and could bring states into breach of its obligations under IHL.

## **2. Recommendations**

States should refrain from enacting legislation which undermines humanitarian engagement with NSAGs. Existing legal frames which seek to restrict such engagement should be reconsidered in light of the safeguards and international duties established by IHL. In order to remedy the discrepancy between counterterrorism measures and IHL there must be, at least, a respect the right of initiative for humanitarian impartial organizations, particularly in NIAC as well as the respect the neutrality and independence of these organizations.

Furthermore, states should provide exceptions for the humanitarian action under the domestic law so as not to hinder humanitarian work, not to undermine the role played by humanitarian actors in making response effective and to allow the engagement with NSAGs for humanitarian purposes. Also, with respect to the humanitarian relief, there must be set out the exceptions under the domestic law dealing *inter alia* with the care of the wounded and sick (including medicines and medical services and hospital stores); supplies essential to survival (such as water, foodstuffs, clothing, shelter and public services); objects necessary for religious worship; facilitation of communications among family members.

Further, states should reassess the domestic prohibition and should work with civil society to develop approaches that improve their counter-terrorism measures with regard to the duties established by IHL. In sum, the balance struck by IHL between security considerations and humanitarian concerns should be reflected in such domestic counter-terrorism measures.