

# **FROM SOLFERINO TO COUNTERTERRORISM: COMBATting THE PERCEPTION OF MEDICAL SUPPORT AS MATERIAL SUPPORT**

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## I. INTRODUCTION

Many people today perceive International Humanitarian Law (IHL) as a set of rules intended for the protection of civilians during armed conflict. However, its origins and first conventions focused on reducing the suffering of the sick and wounded soldiers, and as a consequence, the protection of those providing such medical assistance.<sup>1</sup> The drafters referred to it as the “neutralization” of medical support on the battlefield, a concept also known as “the spirit of Solferino.”<sup>2</sup>

Despite its international support, state practice suggests that the idea of neutralization of medical personnel was challenging to adhere to in practice. At the end of the Second World War, nurses from occupied countries who had volunteered to help on the Eastern Front were prosecuted for providing material support to the enemy.<sup>3</sup> As this Article will show, this practice identified a need for clarifying the rules in order to ensure complete neutralization of medical personnel, including protection against prosecution for providing medical assistance to the enemy.<sup>4</sup> This was achieved in the 1949 revision of the Geneva Conventions.<sup>5</sup> The new provision emphasized that providing medical support to fighting units of a country at war with your own state should be protected from prosecution, despite its perceived treasonous nature.<sup>6</sup>

Fast forwarding to the next millennia, doctors are still prosecuted for providing medical support to armed groups during armed conflict *inter alia*, in the United States due to the groups’ designation as terrorist organizations.<sup>7</sup> How can states treat medical assistance to certain nonstate armed groups involved in armed conflict as criminal material support to terrorism when the neutralization of medical personnel is at the core of international humanitarian law?

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1. See *Commentary on the First Geneva Convention: Convention (1) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field*, ICRC (1952), <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/1952> [hereinafter *1952 Geneva Convention I Commentary*] at 192; *Commentary on the First Geneva Convention: Convention (1) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field*, ICRC (2016), <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949?activeTab=> [hereinafter *2016 Geneva Convention I Commentary*] ¶ 1758.

2. 1952 Geneva Convention I Commentary, *supra* note 1; 2016 Geneva Convention I Commentary, *supra* note 1.

3. See generally 1952 Geneva Convention I Commentary, *supra* note 1; 2016 Geneva Convention I Commentary, *supra* note 1 (explaining some of the reasons for including a clear prohibition on prosecution in the treaty).

4. See *infra* Part VI (explaining the need for states to adhere to rule clarifications).

5. 1952 Geneva Convention I Commentary, *supra* note 1; 2016 Geneva Convention I Commentary, *supra* note 1, art. 18.

6. DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, MEDICAL CARE IN ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AND STATE RESPONSES TO TERRORISM 44 (HARV. L. SCH. PROGRAM ON INT’L L. & ARMED CONFLICT 2015).

7. *Id.* at 9–12.

This Article will explore the applicable rules, relevant case law, and discussions in search of an answer.<sup>8</sup> As will be shown, although the rights and duties of the IHL rules for international armed conflicts are increasingly expanded to non-international armed conflicts, states remain reluctant to share their rights and privileges with nonstate actors, even those as central to IHL as neutralization of medical support.<sup>9</sup>

The Article will initially delve further into the background of the current situation, before setting out in more detail the IHL rules on neutralization of medical personnel and the relationship between IHL and counterterrorism, including the direction and guidance given in United Nations (U.N.) Security Council resolutions.<sup>10</sup> It will, then, consider material support clauses in counterterrorism legislation and their application to medical support.<sup>11</sup> The concluding proposal is to interpret international law in light of its object and purpose, and to maintain the humanitarian goals of IHL even when dealing with terrorists.<sup>12</sup> After all, IHL was developed for “humanity’s darkest days,”<sup>13</sup> and has evolved to become “an indispensable compass that helps us maintain a basic humanity even in the shadow of war.”<sup>14</sup>

## II. BACKGROUND

Terrorism is far from a new problem,<sup>15</sup> yet states still struggle to find a way to combat it. As the cliché expression “one person’s ‘freedom fighter’ is another person’s ‘terrorist’” signifies, there is often a close link between terrorism and armed conflicts, and politics may influence the distinction.<sup>16</sup> Counterterrorism has long been a topic of international discussions; it was, inter alia, discussed by the League of Nations in the 1930s.<sup>17</sup> However, the focus has intensified after the 9/11 attacks, and counterterrorism is now extensively studied, debated, and written about.<sup>18</sup> The intention of this Article

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8. See *infra* Parts II–IV (showing how the law is changing to adapt to new questions and circumstances).

9. See LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 63.

10. See *infra* Parts II–IV (discussing Security Council resolutions).

11. See *infra* Part III (discussing how the Security Council addressed counterterrorism legislation).

12. See *infra* Part IV (explaining that IHL exists specifically to protect people in times of conflict).

13. This is a common way to explain the purpose of IHL. See, e.g., *In Times of Insecurity and Conflict, States Must Work Together to Uphold and Strengthen International Humanitarian Law*, ICRC (July 18, 2024), <https://www.icrc.org/en/news-release/times-insecurity-and-conflict-states-must-work-together> (noting that IHL protects individuals during world conflicts).

14. FORSVARET, MANUAL I KRIGENS FOLKERETT, FORWORD, FORSVARSSJEFEN (2025), <https://fhs.brage.unit.no/fhs-xmlui/handle/11250/3184017> (Author’s own translation of the Norwegian Chief of Defence’s foreword to the Norwegian Manual of the Law of Armed Conflict).

15. See LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 100; see generally Philip A. Thomas & Tony Standley, *Re Defining Terrorism*, 4 AUSTL. J.L. & SOC’Y 61 (1987).

16. Thomas & Standley, *supra* note 15, at 61.

17. See LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 100.

18. See MARINE BUISSONNIERE, SARAH WOZNICK & LEONARD RUBENSTEIN, THE CRIMINALIZATION OF HEALTHCARE 16–17 (SAFEGUARDING HEALTH IN CONFLICT, JOHNS HOPKINS

is not to contribute to this general debate, but rather to highlight the adverse impact counterterrorism efforts have on the access to medical care and particularly the right of medical professionals to help anyone in need. As others have pointed out, there is a tension between counterterrorism legislation and IHL, but the practical implications of these challenges are rarely set out.<sup>19</sup>

IHL, also known as the laws of war or the law of armed conflict, includes some of the oldest international customs and treaties. For instance, the well-known IHL principle of military necessity was set out in the 1868 St. Petersburg Declaration.<sup>20</sup> The Geneva Conventions of 1949 are the only universally ratified conventions, 175 states are parties to the Additional Protocol of 1977 (AP I) relating to international armed conflicts, and 170 states are party to the second Additional Protocol (AP II) relating to non-international armed conflicts.<sup>21</sup> These and other IHL treaties are complemented by 161 rules deemed by the International Committee of the Red Cross and many experts to amount to international customary law.<sup>22</sup>

By contrast, international counterterrorism efforts have struggled with the lack of a common definition and thus lack a general international treaty.<sup>23</sup> Instead, it is regulated by a number of topic-specific treaties, the first being the 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft.<sup>24</sup> Since 1963, eighteen more treaties have been negotiated,<sup>25</sup> including the International Convention for the Suppression of the Financing of Terrorism of 1999, which has reached 190 parties.<sup>26</sup> A number of regional instruments complement the international treaties.<sup>27</sup>

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UNIV., UNIV. OF ESSEX 2018), <https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf>.

19. See David McKeever, *International Humanitarian Law and Counterterrorism: Fundamental Values, Conflicting Obligations*, 69 INT'L & COMPAR. L.Q. 43, 44 (2020).

20. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297.

21. See *Treaties, States Parties and Commentaries Database*, ICRC, <https://ihl-databases.icrc.org/en/ihl-treaties> (last visited Sep. 23, 2025).

22. *Rules*, ICRC, <https://ihl-databases.icrc.org/en/customary-ihl/v1> (last visited Sep. 23, 2025).

23. A definition of terrorism is included in article 2 of the Draft Comprehensive Convention on International Terrorism, but the negotiations on this and the remainder articles have been ongoing since 1996. *Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, <https://legal.un.org/committees/terrorism/> (last visited Sep. 23, 2025).

24. Convention on Offences and Certain Other Acts Committed on Board Aircraft art. 1, Sep. 14 1963, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

25. *International Legal Instruments*, UNITED NATIONS, <https://www.un.org/counterterrorism/international-legal-instruments> (last visited Sep. 23, 2025).

26. U.N. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13075, 2178 U.N.T.S. 197.

27. See, e.g., Council of Europe, Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. NO. 196 (requiring states to criminalize public provocation, recruitment, and training for terrorism); Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Oct. 22, 2015, C.E.T.S. NO. 217 (addressing foreign terrorist fighters and strengthening preventive measures); Directive 2017/541, of the European Parliament and of the Council of 15 Mar. 2017 on Combating Terrorism and

The most relevant sources for the relationship between counterterrorism legislation and IHL are the resolutions of the United Nation's Security Council.<sup>28</sup> Since 9/11, the Security Council has taken an active role in combating terrorism, imposing obligations on states to criminalize terrorism related conduct and imposing an extensive sanctions regime on individuals and groups designated as terrorists.<sup>29</sup> The designation is done by the Security Council's "1267 Committee," named after the resolution which created it.<sup>30</sup> The resolutions commonly make reference to IHL and states' continued obligations to apply humanitarian considerations in their counterterrorism efforts.<sup>31</sup> Unfortunately, the Security Council's counterterrorism resolutions have not always been sufficiently clear on whether the obligations to implement the resolutions include exceptions for humanitarian considerations in accordance with IHL.<sup>32</sup> The Council has therefore been criticized for its lack of exemption mechanisms for medical care and that its responses "to terrorism risk unwittingly eroding a normative pillar of IHL."<sup>33</sup>

However, this changed with the 2022 Security Council Resolution, which makes explicit reference to such exceptions.<sup>34</sup> In fact, as will be shown below, the resolution appears to go further than IHL rules applicable to non-international armed conflicts to which AP II does not apply.<sup>35</sup> The ambiguity of the IHL obligations for these types of conflicts has made it challenging to determine state obligations, in particular when U.N. Security

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Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88), 6 (EU) (establishing criminal liability for public provocation to commit terrorist offenses); Organization of African Unity, Convention on the Prevention and Combating of Terrorism, July 14, 1999, 2219 U.N.T.S. 179 (defining terrorist acts and imposing obligations on member states to criminalize and suppress such acts); Treaty on Cooperation Among the States Members of the Commonwealth of Independent States in Combating Terrorism, May 14, 1999, 2867 U.N.T.S. 41 (promoting cooperation in investigations, information exchange, and joint anti-terrorist operations); UNITED NATIONS, *Convention of the Islamic Conference on Combating International Terrorism, in INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM* 410 (4th ed. 2019) (defining "terrorist crime" and creating obligations for member states to prevent and suppress it); Association of Southeast Asian Nations, Convention on Counter-Terrorism, Jan. 13, 2007, 3199 U.N.T.S. (promoting mutual legal assistance, extradition, information sharing, and regional counterterrorism capacity among ASEAN member states); *Text and Status of the United Nations Conventions on Terrorism*, UNITED NATIONS TREATY COLLECTION (last visited Sep. 23, 2025), <https://treaties.un.org/doc/db/terrorism/conv18-english.pdf> (committing member states to criminalize specified terrorist acts and to provide extradition and mutual legal assistance); *Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism*, (Jan. 6, 2004), <https://www.saarc-sec.org/index.php/resources/agreements-conventions/27-additional-protocol-to-the-saarc-regional-convention-on-suppression-of-terrorism/file> (enhancing the 1987 Convention by criminalizing terrorist financing and strengthening cooperative measures).

28. McKeever, *supra* note 19, at 46.

29. *Id.* at 46–47.

30. S.C. Res. 1267, ¶¶ 4–10 (Oct. 15, 1999).

31. *See id.* ¶ 6(c).

32. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at vii.

33. *Id.*; *see also* McKeever, *supra* note 19, at 70–71.

34. S.C. Res. 2664 ¶ 1 (Dec. 9, 2022).

35. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 30.

Council resolutions appeared “to consider providing medical assistance and supplies to al-Qaeda and its associates as at least a partial ground for designating those who facilitate such care as terrorists themselves.”<sup>36</sup> The explicit exemption in the 2022 Security Council Resolution raises the question whether national legislation criminalizing medical care to terrorist groups now are violating international law, thereby requiring an update of national counterterrorism laws lacking such exemptions.<sup>37</sup>

Both the criminalization of most forms of interaction with terrorist groups and the extensive sanctions regimes have been criticized for the detrimental effects they have had on humanitarian aid and assistance to areas where terrorist groups are active.<sup>38</sup> The focus of the criticism has, however, been on external or independent humanitarian actors’ ability to provide humanitarian assistance without the risk of prosecution or regulatory actions.<sup>39</sup> To the extent the ability of doctors to provide medical assistance is discussed, it is usually limited to international Non-Governmental Organizations (NGOs) such as Doctors Without Borders.<sup>40</sup> The focus here, on the other hand, is on medical personnel who either reside in the areas where the terrorist groups are active or travel to the area in order to provide medical assistance. Such doctors have been subject to criminal proceedings in the United States of America, Syria, Iraq, Nigeria and Pakistan.<sup>41</sup> The politicization of support to organized armed groups is, as will be elaborated on below, an old topic.<sup>42</sup> According to Françoise Bouchet-Saulnier from Doctors Without Borders, “[w]hat is new is that terrorist crimes are defined so broadly in the criminal law of most countries that usual humanitarian and medical activities are falling within these definitions.”<sup>43</sup>

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36. *Id.* at v, 15–16.

37. *See* S.C. Res. 2664, *supra* note 34.

38. *See, e.g.*, McKeever, *supra* note 19, at 46 (noting tension between counterterrorism laws and IHL); Justin A. Fraterman, *Criminalizing Humanitarian Relief: Are U.S. Material Support for Terrorism Laws Compatible with International Humanitarian Law*, 46 N.Y.U. J. INT’L L. & POL. 399 (2014) (same); KATE MACKINTOSH & PATRICK DUPLAT, STUDY OF THE IMPACT OF DONOR COUNTER-TERRORISM MEASURES ON PRINCIPLED HUMANITARIAN ACTION (NORWEGIAN REFUGEE COUNCIL & UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., July 2013), <https://www.nrc.no/global-assets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf> (explaining how counterterrorism laws impact humanity); Sam Adelsberg, Freya Pitts & Sirine Shebaya, Comment, *The Chilling Effect of the “Material Support” Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms*, 4 HARV. NAT’L SEC. J. 282 (2013) (explaining how material support laws impact humanitarian aid efforts).

39. McKeever, *supra* note 19, at 68.

40. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 12.

41. BUISSONNIERE, WOZNICK & RUBENSTEIN, *supra* note 18, at 18–21.

42. *Id.*

43. Françoise Bouchet-Saulnier, *How Counterterrorism Throws Back Wartime Medical Assistance and Care to Pre-Solferino Times*, 103 INT’L REV. RED CROSS 479, 508 (2021).

## III. THE NEUTRALIZATION OF MEDICAL CARE IN INTERNATIONAL LAW

As explained in the introduction, the protection of medical personnel has been at the center of IHL since the first Geneva Convention of 1864, a treaty which achieved fifty-seven ratifications, including the United States.<sup>44</sup> This convention sets out three main principles: (1) that relief to the wounded must be offered without any distinction as to nationality; (2) that medical personnel and medical establishments and units are to be recognized as neutral (inviolable); and (3) the introduction of the distinctive sign of the red cross on a white ground.<sup>45</sup>

The fundamental principle of neutrality is established in Article 1 and requires medical facilities to “be recognized as neutral, and as such, protected and respected by the belligerents.”<sup>46</sup> The treaty goes on to expand the recognition of neutrality to military medical personnel<sup>47</sup> and civilians who bring help to the wounded.<sup>48</sup>

The treaty marked the beginning of the International Committee for Relief to the Wounded, which later became the International Committee of the Red Cross (ICRC) and national Red Cross societies.<sup>49</sup> These organizations played an important role during the two World Wars, when Red Cross doctors and nurses would help soldiers and prisoners without discrimination.<sup>50</sup> However, the postwar trials, especially in European countries that German forces had occupied during the war, challenged the scope of the protections offered by the Geneva Conventions. Did the obligation to “protect[] and respect[],” which had been reiterated in Article 9 of the 1906 Geneva Convention concerning the wounded and sick,<sup>51</sup> include a duty not to prosecute those who had provided medical aid to the enemy, or was it limited to treatment during hostilities and capture? While some states argued the latter, the ICRC was of the view that the provision should not be narrowly interpreted.<sup>52</sup> In response to prosecution of medical personnel from

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44. By ratification 01.03.1882. *State Parties and Signatories*, ICRC, <https://ihl-databases.icrc.org/en/ihl-treaties/gc-1864/state-parties?activeTab=historical> (last visited Sep. 23, 2025).

45. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field art. 1, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377.

46. *Id.* “Ambulances and military hospitals shall be recognized as neutral, and as such, protected and respected by the belligerents as long as they accommodate wounded and sick.” *Id.*

47. *Id.* art. 2. “Hospital and ambulance personnel, including the quarter-master’s staff, the medical, administrative and transport services, and the chaplains, shall have the benefit of the same neutrality when on duty, and while there remain any wounded to be brought in or assisted.” *Id.*

48. *Id.* art. 5. “Inhabitants of the country who bring help to the wounded shall be respected and shall remain free. Generals of the belligerent Powers shall make it their duty to notify the inhabitants of the appeal made to their humanity, and of the neutrality which humane conduct will confer.” *Id.*

49. *See generally id.* (laying out the framework for neutral medical care in armed conflicts).

50. *Our History*, ICRC, <https://www.icrc.org/en/our-history> (last visited Sep. 23, 2025).

51. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 9, July 6, 1906, 36 Stat. 2227, T.S. No. 420.

52. ICRC Archives B CR 189-015, *Infirmières collaborationnistes: généralités*, Procès-verbal de la séance du 18 mars 1948 relative à la question du personnel sanitaire poursuivi pour collaboration avec

occupied countries who had volunteered to serve with partisans or the German Red Cross, the ICRC proposed a more precise formulation of the obligation for the new Geneva Conventions; neutralization must include protection from prosecution:<sup>53</sup> “No one may ever be molested or convicted for having nursed the wounded or sick.”<sup>54</sup>

As pointed out in the Geneva Convention I Commentary, this right is crucial to enable “the overall object and purpose of the Convention: in order to protect the wounded and sick, those who collect and care for them, including civilian volunteers and relief societies, must also be respected and protected.”<sup>55</sup> The prohibition set out in Article 18 makes reference to the civilian population, but has been interpreted to apply to any person who cares for the wounded and sick during armed conflict.<sup>56</sup> The United States Department of Defense *Law of War Manual*, for instance, stipulates that “[n]o one shall ever be molested or convicted for having nursed the wounded or sick. For example, persons should not be prosecuted for offenses of aiding the enemy because they tended to wounded members of enemy military forces.”<sup>57</sup>

This broad approach to the prohibition on prosecution is also stipulated in the two Additional Protocols.<sup>58</sup> An identical provision in both Protocols makes it clear that “[u]nder no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.”<sup>59</sup> It is clear from the text that the prohibition is absolute; there is no room for exceptions.<sup>60</sup>

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l'ennemi, entre le CICR et la Croix-Rouge norvégienne (citing Mar. 18, 1948) (on file with the International Committee of the Red Cross, Geneva) (discussing minutes from meeting between ICRC and the Norwegian Red Cross held 18 March 1948, where Mr. Pictet emphasised that the act of providing care can never be punishable in itself, and that the rule must apply equally to all sides of a conflict, and both state and partisan) [hereinafter ICRC Archives].

53. 2016 *Geneva Convention I Commentary*, *supra* note 1, ¶ 1758 (commenting on Article 18, paragraph three); *see also* FRANCOIS BUGNION, THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE PROTECTION OF WAR VICTIMS 478–79 (INT’L COMM. RED CROSS 2014) (detailing examples where medical personnel have been prosecuted and persecuted after hostilities have ended).

54. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)], art. 18, ¶ 3.

55. 2016 *Geneva Convention I Commentary*, *supra* note 1, ¶ 1758 (commenting on Article 18, paragraph three).

56. *See id.* ¶ 1761 (comments to Article 18, paragraph three).

57. U.S. DEP’T OF DEF., *L. OF WAR MANUAL* 456 (updated 2023); *see also* 2016 *Geneva Convention I Commentary*, *supra* note 1, ¶ 1761 (commenting on Article 18, paragraph three).

58. Protocol (I) Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 16, 10, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I], and Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts Preamble, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

59. AP I, *supra* note 58, art. 16; AP II, *supra* note 58, art. 10.

60. McKeever, *supra* note 19, at 55.

The prohibition is also included in the Customary International Humanitarian Law Database, in Rule 26.<sup>61</sup> Although the Additional Protocols are nearing universal ratification, customary law plays an important role in bridging the gap between those who are party to these protocols and those who are not.<sup>62</sup> In the current context, customary law is particularly relevant for non-international armed conflicts where the only treaty-based obligation not to prosecute for medical assistance is found in AP II.<sup>63</sup> However, some commentators have questioned whether the ICRC study meets the criteria for customary international law development on this topic as the practice cited is from Additional Protocol parties.<sup>64</sup> The practice set out in the next section also indicates that customary law status of the rule still lacks some clarity, in particular in relation to non-international armed conflicts.<sup>65</sup> This begs the question whether there are other ways in which IHL imposes obligations upon non AP II states or if the matter is left unregulated by IHL, thereby leaving a greater room for counterterrorism legislation to prevail.<sup>66</sup>

Although the majority of the provisions of the Geneva Conventions only apply during armed conflicts and to the parties to the conflict, Common Article 1 to the 1949 Geneva Conventions extends state obligations by emphasizing that states have a duty “to respect and to ensure respect for the present Convention in all circumstances.”<sup>67</sup> The exact scope of this provision is much debated, amongst others in relation to the duties of states cooperating with states suspected of committing war crimes.<sup>68</sup> However, it is clear that Common Article 1 includes an obligation not to directly interfere with the provisions of the Conventions, which includes the obligation in Common Article 3 to collect and care for all wounded and sick.<sup>69</sup> Common Article 3

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61. “Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited.” *Rule 26. Medical Activities*, ICRC, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule26> (last visited Sep. 23, 2025).

62. McKeever, *supra* note 19, at 55, 57–60.

63. *See id.* at 55–56.

64. *Id.* at 55; LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 90–92; for a contrary position *see, e.g.*, Fraterman, *supra* note 38, at 445–46 (discussing commentary from AP I).

65. *See infra* notes 75–112 (discussing confusion surrounding non-international armed conflicts).

66. *See infra* notes 75–112 (discussing IHL obligations on counterterrorism).

67. Article 1 Common to Geneva Convention (I-IV).

68. *See, e.g.*, Erica Gaston, *What Do Appropriate Due Diligence Measures for Nonstate and Substate Partners Look Like? Part I: Outlining Partnership Patterns and the Legal Debate*, OPINIOJURIS (June 14, 2021), <https://opiniojuris.org/2021/06/14/what-do-appropriate-due-diligence-measures-for-nonstate-and-substate-partners-look-like-part-1-outlining-partnership-patterns-and-the-legal-debate/> (explaining how western states have worked with nonstate groups and their obligations to adhering to IHL rules); Erica Gaston, *What Do Appropriate Due Diligence Measures for Nonstate and Substate Partners Look Like? Part II: A Sample of US Practice in Iraq, Syria, and Afghanistan*, OPINIOJURIS (June 14, 2021), <http://opiniojuris.org/2021/06/14/what-do-appropriate-due-diligence-measures-for-nonstate-and-substate-partners-look-like-part-ii-a-sample-of-us-practice-in-iraq-syria-and-afghanistan/> (giving examples of how states address nonstate violations).

69. Article 3(2) Common to Geneva Convention (I-IV), *see also* Fraterman, *supra* note 38, at 443–44 (stating obligations of Common Article 1 with Common Article 3).

does not mention who should collect and care for the wounded and sick, which some states have used as a basis for insisting that the treatment must be sought in state-run hospitals, where they could be arrested.<sup>70</sup> On the other hand, as Lewis *et al.* points out, such an obligation “would be largely meaningless without access to medical personnel and supplies,”<sup>71</sup> and this access cannot merely be theoretical. Common Article 3 applies to “armed conflict not of an international character,” and thus plays an important role in ensuring IHL regulation of non-international armed conflicts not fulfilling the criteria set out in AP II Article 1(2) or in relation to states not party to AP II.<sup>72</sup>

As will be further discussed below, there is a real risk that the criminalization of medical support to certain groups or persons involved in armed conflict, on the basis that they are designated as terrorists, violates this IHL obligation to ensure all wounded and sick are cared for.<sup>73</sup> This potential conflict between IHL and counterterrorism efforts is, however, not new.<sup>74</sup>

#### IV. IHL AND COUNTERTERRORISM

The expansion of IHL protections from safeguarding combatants *hors de combat* to offer protections to nonstate actors and resistance groups has challenged IHL since the beginning of its codification efforts.<sup>75</sup> The famous Martens Clause, for example, was introduced at the 1899 Peace Conference because states could not agree on the status, rights, and duties of armed resistance groups in occupied states.<sup>76</sup> Smaller European states, who had been the victims of occupation in the endless European wars, threatened to leave the conference if the text was not amended, which would have caused the conference to fail.<sup>77</sup> The major European states, on the other hand, “strongly opposed such a modification, arguing that recognition of the right of the population to resist would legalize acts of perfidy, treachery, and brutality against the members of invading or occupying enemy forces.”<sup>78</sup> In an attempt to save the convention and the work done to balance humanity and military necessity therein, the Russian representative, Fyodor Martens, proposed a

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70. Françoise Bouchet-Saulnier, *supra* note 43, at 495.

71. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 2–3.

72. *Id.*

73. See also Fraterman, *supra* note 38, at 445 (discussing the right of impartial humanitarian organizations to provide medical assistance).

74. *Id.* at 429–30.

75. Vitaliy Ivanenko, *The Origins, Causes, and Enduring Significance of the Martens Clause: A View from Russia*, 140 INT’L REV. RED CROSS 1708, 1708–24 (2022).

76. *Id.*

77. *Id.* at 1720.

78. *Id.* at 1719–20.

clause stipulating that those areas that were not yet subject to specific regulations would still be limited by “the laws of humanity.”<sup>79</sup>

State concerns over organized armed groups were also one of the main discussion points in the drafting of the 1977 Additional Protocols.<sup>80</sup> Once again, states sought to secure the rights of armed resistance groups, particularly those fighting for national liberation in the case of occupation.<sup>81</sup> And just like nearly a hundred years before, major states, such as the United States, opposed it on the basis that it would “encourage ‘terrorism.’”<sup>82</sup> However, unlike the 1899 negotiations, this time the result was to include such provisions,<sup>83</sup> a move the U.S. representative criticized as yielding “to the efforts of many delegations to politicize humanitarian law to the benefit of organizations with terrorist aims or tactics.”<sup>84</sup> These provisions are said to be among the main reasons the United States has not ratified AP I.<sup>85</sup>

The relatively high threshold of application of AP II and the limited scope of the rules also reflect the unwillingness of states to extend combatant rights and privileges. In relation to AP I, states with experience being occupied managed to secure the rights of their own future potential resistance forces.<sup>86</sup> In contrast, the groups that would benefit from AP II are nonstate actors.

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79. Preamble to Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, later incorporated in Hague Convention (IV) of Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, and reflected in the denunciation clauses of Geneva Conventions I–IV; 2016 *Geneva Convention I Commentary*, *supra* note 1, art. 63; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 62, Aug. 12, 1949, U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention (II)] art. 62; Geneva Convention Relative to the Treatment of Prisoners of War art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)] art. 142; Geneva Convention (IV), *supra* note 75, art. 158; in AP I, *supra* note 57, art. 1(2); and in the AP II Preamble].

80. YVES SANDOZ, CHRISTOPHE SWINARSKI & BRUNO ZIMMERMANN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 43–45 & art. 1 para. 4 (Int’l Comm. Red Cross 1987).

81. *Id.* at ¶ 1698, at 529.

82. Jelena Pejić, *Armed Conflict and Terrorism: There Is a (Big) Difference*, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 171, 178 (Ana María Salinas de Fras et al. eds., Oxford Univ. Press 2012).

83. See, e.g., AP I, *supra* note 57, art. 1(4) and art. 44(3) (providing general provisions that are applicable to combatants and protections of those with combatant status).

84. The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, published in Martin D. Dupuls, John Q. Heywood & Michèle Y.F. Sarko, *The Sixth Annual American Red Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT’L L. & POL’Y 415, 461 (1987).

85. See, e.g., Pejić, *supra* note 82; Michael N. Schmitt, *Lieber Papers Series – The United States and (Most of) the Rest: A Legal Interoperability Primer*, LIEBER INST. W. POINT (2024), <https://lieber.westpoint.edu/united-states-most-rest-legal-interoperability-primer/> (discussing the United States’s concerns with securing rights of armed groups and its decision not to ratify AP I).

86. Pejić, *supra* note 82; Schmitt, *supra* note 85.

The concern seems to be that the provision of rights to resistance groups and other armed groups would legitimize their fighting or way of fighting. Whereas such concerns can justify *inter alia* not providing prisoner of war status or combatant immunity, the access to medical assistance is arguably a different matter. Denying or hampering access to such assistance will in many cases be tantamount to a death penalty, and would likely be at odds with the obligation not to employ means or methods of warfare “of a nature to cause superfluous injury or unnecessary suffering.”<sup>87</sup> Perhaps this may seem justified by the group’s illegitimate fight or unlawful way of fighting; however, IHL is not a contract allowing states to disregard their obligations on the basis of the actions of others.<sup>88</sup> IHL applies to all armed conflicts, and as explained above, to some extent it also applies during peacetime.<sup>89</sup> As explained in the Geneva Convention commentary:

It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations ‘vis-à-vis’ itself and at the same time ‘vis-à-vis’ the others.<sup>90</sup>

In fact, IHL makes no reference to terrorism,<sup>91</sup> and designation as a terrorist does not affect the application of IHL in any way.<sup>92</sup> As pointed out in *Medical Care in Armed Conflict*, “[U]nder IHL no wounded fighter may be denied medical care due to a terrorist designation.”<sup>93</sup> IHL deals with combatants and civilians and stipulates that civilian immunity from attack is dependent on non-participation in hostilities.<sup>94</sup> At the same time, IHL neither precludes the designation of an organized armed group as terroristic under national legislation, nor prevents prosecution under national criminal law in situations where combatant immunity does not apply.<sup>95</sup> An individual or group involved in an armed conflict may in other words have a dual legal status: one under IHL and another under national law.<sup>96</sup>

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87. AP I, *supra* note 57, art. 35(2).

88. Both Article 1 and 3 Common to Geneva Convention I–IV stipulate that the obligations apply “in all circumstances.” There is also an exception for treaties of “humanitarian nature” in the general rules on termination or suspension of the operation of a treaty as a consequence of its breach Vienna Convention on the Law of Treaties art. 60(5), May 23, 1969, 1155 U.N.T.S. 331.

89. Article 2 Common to the Geneva Conventions (I–IV).

90. *1952 Geneva Convention I Commentary*, *supra* note 1, at 15 (comments to Article 1).

91. There is, however, a prohibition on terrorizing the civilian population in AP I art. 51(2).

92. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 32.

93. *Id.* at i.

94. AP I, *supra* note 57, art. 51(3).

95. See Fraterman, *supra* note 38, at 450.

96. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 32.

The challenge is that these legal regimes to some extent collide.<sup>97</sup> Under IHL, a member of an organized armed group would be entitled to medical assistance, while under counterterrorism legislation, anyone providing such assistance may face sanctions or prosecution for material support to terrorism.<sup>98</sup>

This dichotomy is not merely a matter of the relationship between national and international law.<sup>99</sup> As mentioned above, resolutions from the U.N. Security Council have, since 2001, been one of the main sources of international counterterrorism regulation.<sup>100</sup> These have been very comprehensive in their coverage, obliging states amongst others to

[e]nsure that any person who participates . . . in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.<sup>101</sup>

The obligation is repeated in later resolutions, such as Resolution 2178, which expressly applies during armed conflicts as well and seeks to prevent the increasing threat of foreign terrorist fighters.<sup>102</sup>

By 2018, the U.N. General Assembly and Security Council had become increasingly concerned with the challenges posed by counterterrorism efforts on IHL.<sup>103</sup> This led to, amongst others, the inclusion in resolutions 2462 and 2482 of 2019 of paragraphs urging states to take the effect counterterrorism measures had on humanitarian activities into account, including medical activities.<sup>104</sup> However, it was not phrased as an obligation.<sup>105</sup>

In situations where the U.N. Security Council imposes obligations that conflict with state obligations under other treaty regimes, Article 103 of the

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97. *Id.* at i.

98. *See, e.g., supra* notes 87–88, 92–93 and accompanying text (explaining consequences of denying medical assistance).

99. *See, e.g., infra* notes 101–04 and accompanying text (detailing international counterterrorism regulations).

100. *See infra* notes 101–03 and accompanying text (detailing the resolutions urging states to take medical assistance into account).

101. S.C. Res. 1373, ¶ 220 (Sep. 28, 2001).

102. S.C. Res. 2178, ¶ 2 (Sep. 24, 2014).

103. *See, e.g.,* G.A. Res. 72/133, ¶ 68133 (Jan. 16, 2018) (strengthening of the coordination of emergency humanitarian assistance of the United Nations); G.A. Res. 72/180 (Jan. 30, 2018) (protecting human rights and fundamental freedoms while countering terrorism); G.A. Res. 72/284 (July 2, 2018) (reaffirming the U.N. global counterterrorism strategy); G.A. Res. 73/139 (Jan. 17, 2019) (strengthening the coordination of emergency humanitarian assistance); G.A. Res. 73/174 (Jan. 17, 2019) (discussing terrorism and human rights).

104. S.C. Res. 2462 ¶ 5–6, 20 and 24 (Mar. 28, 2019); S.C. Res. 2482, ¶ 20 (July 19, 2019); *see also* McKeever, *supra* note 19, at 62–63 (explaining how these resolutions were significant by taking humanitarian activities into account).

105. *See also* McKeever, *supra* note 19, at 70–71 (showing how the Security Council did not make this an obligation).

U.N. Charter sets out that “obligations under the present Charter shall prevail.”<sup>106</sup> This includes the obligation under Article 25 to “accept and carry out the decisions of the Security Council.”<sup>107</sup> The national examples of prosecution of medical professionals volunteering for groups such as Al Qaeda—set out in the next Section—may have violated IHL obligations, but such violations could, in other words, be made legitimate by reference to the Security Council resolutions.<sup>108</sup> In fact, the Security Council’s 1267 Committee has used provisions of medical assistance as sufficient association with terrorist groups to designate someone as a terrorist.<sup>109</sup> Some argue that this could be interpreted to mean that “the Security Council itself perceives medical assistance as one form of impermissible support to terrorism.”<sup>110</sup>

This changed in 2022, when the Security Council included the following paragraph in a counterterrorism resolution:

Recalling the need for Member States to ensure that all measures taken by them to implement sanctions, including in the context of counter-terrorism, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, as applicable, and noting, in this regard, the rules of international humanitarian law, as applicable, regarding respect for, and the protection of, humanitarian personnel and consignments for humanitarian relief operations *and the non-punishment of any person for carrying out medical activities compatible with medical ethics.*<sup>111</sup>

Does this mean that nations are required to adapt national legislation to include an exception in their counterterrorism provisions? As the next Sections will show, counterterrorism legislation such as that found in the United States focuses on the question of material support challenging the IHL perception that healing soldiers and fighters, so that they can return to the battlefield, is not an act harmful to their opponents—a perception that has been coined “the ‘fiction of neutrality.’”<sup>112</sup>

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106. U.N. Charter art. 103, ¶ 1.

107. *Id.* art. 25, ¶ 1.

108. McKeever, *supra* note 19, at 69–73.

109. ALICE DEBARRE, SAFEGUARDING MEDICAL CARE AND HUMANITARIAN ACTION IN THE UN COUNTERTERRORISM FRAMEWORK 13 (INT’L PEACE INST. 2018), [https://www.ipinst.org/wp-content/uploads/2018/09/1809\\_Safeguarding-Medical-Care.pdf](https://www.ipinst.org/wp-content/uploads/2018/09/1809_Safeguarding-Medical-Care.pdf).

110. McKeever, *supra* note 19, at 71.

111. S.C. Res. 2664 (Dec. 9, 2022) (emphasis added).

112. Neve Gordon & Nicola Perugini, ‘Hospital Shields’ and the Limits of International Law, 30 EUR. J. INT’L L. 439, 457 (2019).

V. THE EXISTENCE (OR LACK) OF MEDICAL CARE EXCEPTION IN  
COUNTERTERRORISM LEGISLATIONS AND REGULATIONS

When states first agreed upon the neutralization of medical care during armed conflict, they “struck a balance—part practical, part moral—to keep medical care for the wounded and sick above the conflict.”<sup>113</sup> Despite the obvious benefits the opponent would gain from having access to medical care, states agreed they should nonetheless not perceive this as a hostile act.<sup>114</sup> It was a decision based on humanitarian considerations above military necessity and sought to insert a fragment of humanity on the battlefield.<sup>115</sup>

However, as mentioned earlier, states practice indicates that the agreement to “respect and protect” is not automatically extended to “not prosecute.”<sup>116</sup> In the years following the 9/11 attack, states struggling with the effects of terrorism enacted strict counterterrorism legislation which covers all forms of direct or indirect material support and assistance.<sup>117</sup> The U.N. Security Council strongly encouraged these efforts in its counterterrorism resolutions which, as explained, have for a long time failed to specify the need for humanitarian exceptions, thereby contributing to the tension between IHL and counterterrorism law.<sup>118</sup>

Commentators and U.N. bodies that have studied the humanitarian implications of the counterterrorism regimes have found numerous examples of medical personnel facing prosecution for their support to terrorist groups way of offering medical assistance.<sup>119</sup> According to David McKeever, for instance, the majority of states have not included exceptions for medical assistance in their counterterrorism legislation,<sup>120</sup> thereby leaving the matter for the courts to deal with. The majority of the State practice identified concerns state prosecution of medical personnel assisting suspected terrorists on the territory of the prosecuting state. By contrast, the practice of the United States has concerned extraterritorial cases, indicating both a wide-ranging

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113. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 3.

114. *1952 Geneva Convention I Commentary*, *supra* note 1, at 192 (“It follows that medical treatment, even where given to enemies, is always legitimate, and does not constitute a hostile act.”).

115. *Id.* at 193.

116. *See supra* notes 51–54 and accompanying text (discussing how the agreement has not protected medical personnel from prosecution).

117. Françoise Bouchet-Saulnier, *supra* note 43, at 501.

118. *Id.* at 486.

119. *See, e.g.*, LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 111–141 (outlining domestic proceedings against medical personnel by country); Françoise Bouchet-Saulnier, *supra* note 43, at 503–504 (discussing cases of criminal accusations against medical personnel); Debarre, *supra* note 109, at 30–33 (presenting case studies on national level implementation); McKeever, *supra* note 19, at 64–67 (discussing preventative measures in legislation; BUISSONNIERE, WOZNICK & RUBENSTEIN, *supra* note 18, at 15–22 (outlining how prosecution of medical personnel is not a new issue); LEONARD S. RUBENSTEIN, PUNISHING HEALTH CARE PROVIDERS FOR TREATING TERRORISTS 13 (HASTINGS CTR. REP. 2015) (discussing approaches to prosecution).

120. McKeever, *supra* note 19, at 65; *see also* LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 98 (outlining impartial wartime medical care norms).

(extraterritorial) legislation and willingness to prosecute anyone, anywhere suspected of material support to terrorism and terrorists.<sup>121</sup> Due to the significant potential for this legislation to conflict with IHL, the focus here will be on U.S. legislation and case law.

The relevant provisions are 18 U.S.C. § 2339A and § 2339B. Section 2339A, which, in short, “outlaws support [or concealing support] for the crimes a terrorist has committed or may be planning to commit.”<sup>122</sup> “Designated terrorist organizations” are those organizations the U.S. Secretary of State specifies as such,<sup>123</sup> whereas terrorism is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>124</sup>

Section 2339A is complemented by § 2339B, which in short “condemns providing material support to foreign terrorist organizations that engage in such offenses.”<sup>125</sup> According to Charles Doyle, § 2339B provides criminal liability against:

- (1) [W]hoever
- (2) knowingly
- (3) (a) attempts to provide,  
(b) conspires to provide, or  
(c) provides
- (4) material support or resources
- (5) to a foreign terrorist organization
- (6) knowing that the organization
  - (a) has been designated a foreign terrorist organization, or
  - (b) engages, or has engaged, in “terrorism” or “terrorist activity.”<sup>126</sup>

In addition, the defendant must have known that the entity was a designated terrorist organization or that the entity engaged in terrorism or terrorist activity.<sup>127</sup> Section 2339B applies to the extraterritorial conduct of both United States citizens and non-nationals,<sup>128</sup> although some United States

121. See Rubenstein, *supra* note 119, at 13.

122. CHARLES DOYLE, CONG. RSCH. SERV, R4133 TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. § 2339A AND § 2339B, at 2 (last updated Aug. 15, 2023).

123. 8 U.S.C. § 1189 (2012).

124. Fraterman, *supra* note 38, at 414 (citing Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 140(d), 101 Stat. 1331, 1349 (1987) (codified as amended at 22 U.S.C. § 2656f(d)(2) (2012))).

125. DOYLE, *supra* note 122, at 16.

126. *Id.* at 16–17 (citing 18 U.S.C. § 2339B(a)(1)).

127. *United States v. Wright*, 937 F.3d 8, 23 (1st Cir. 2019).

128. 18 U.S.C. § 2339B(d)(1)(A)–(D).

courts have taken the approach that some form of nexus to the United States must exist.<sup>129</sup>

“[M]aterial support or resources” is set out in § 2339A to mean

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>130</sup>

According to § 2339A(b)(3), “the term expert advice or assistance means advice or assistance derived from scientific, technical or other specialized knowledge.”<sup>131</sup> Section 2339A includes an exception for the provision of medical substances.<sup>132</sup> According to David McKeever, this used to extend to some forms of humanitarian assistance, but this was narrowed in 1996.<sup>133</sup> As a result, the exemption in the current provision has been held to not cover the provision of medical assistance.<sup>134</sup>

For medical personnel providing medical aid to nonstate armed groups that have been designated as terrorist organizations, their mere application of specialized medical knowledge may in other words amount to criminal material support, irrespective of their support or lack of support to the terrorist activities or goals.<sup>135</sup> Two related cases concerning Al Qaeda affiliated doctors confirmed this: *United States v. Shah*<sup>136</sup> and *United States v. Farhane*.<sup>137</sup> The courts found that the medicine exception only applies to those who provide medical substances, not those who provide medical support, for instance by “volunteering to serve as an on-call doctor for a terrorist organization.”<sup>138</sup> In another relevant case, *United States v. Warsame*, the court held that “the provision of English language lessons to nurses to assist in the medical treatment of injured Al Qaeda militants does not fall within the statutory exception for ‘medicine.’”<sup>139</sup>

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129. Doyle, *supra* note 122, at 28.

130. 18 U.S.C. § 2339A(b)(1).

131. *Id.* § 2339A(b)(3).

132. *Id.* § 2339A(b)(1).

133. McKeever, *supra* note 19, at 65 n.151.

134. *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir. 2011); *see also United States v. Shah*, 474 F. Supp. 2d 492, 497 (S.D.N.Y. 2007) (holding that exemption does not cover volunteered medical support to terrorist members).

135. *See Farhane*, 634 F.3d at 143; *Shah*, 474 F. Supp. 2d at 497.

136. *Shah*, 474 F. Supp. 2d at 499.

137. *Farhane*, 634 F.3d at 143.

138. *Id.*

139. *United States v. Warsame*, 537 F. Supp. 2d 1005, 1019 n.12 (D. Minn. 2008) (citing *Shah*, 474 F. Supp. 2d at 497).

The lack of exception for purely humanitarian activities was, as mentioned, intentionally removed, indicating that “Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.”<sup>140</sup> The only way to avoid the prohibition would be through a waiver from the Secretary of State.<sup>141</sup> For those without such waiver, the Court in *Holder v. Humanitarian Law Project* determined that mere knowledge of the terrorist nature of the armed group or its activities is sufficient; the government does not have to demonstrate that the defendant “intended to further a foreign terrorist organization’s illegal activities.”<sup>142</sup> The court stressed, however, that the prohibition would not cover an NGO offering similar medical assistance because it would not be “acting under the ‘direction or control’ of a designated foreign terrorist organization knowing that said organization engages in terrorism or terrorist activity.”<sup>143</sup>

Criminalizing medical help on the basis of knowledge of the criminal conduct of the wounded has been much criticized.<sup>144</sup> Justin A. Fraterman, for instance, points out that it is highly problematic for medical personnel to refuse assistance as it violates the principle of impartiality of medical care.<sup>145</sup> It also appears that the courts have struggled to balance these conflicting concepts.<sup>146</sup> When discussing whether § 2339B would prevent NGOs like the ICRC and Doctors Without Borders to offer assistance, part of the reason given for deciding against this interpretation was that the NGO “would be helping not a terrorist group but individual patients, and, consistent with the Hippocratic Oath, with no questions asked about the patients’ moral virtue.”<sup>147</sup> The NGO’s support could hardly be perceived as being of a terrorist nature.<sup>148</sup> In her minority opinion, Judge Wood criticized the court for introducing this “unprincipled exemption” . . . “for no apparent reason other than our own sense that organizations like the Red Cross and Doctors Without Borders are good and do good.”<sup>149</sup> The judge further argued that the most logical perception would be to perceive the patching up of terrorists as aiding terrorism.<sup>150</sup> Similar claims were made in *United States v. Shah*, where

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140. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 29 (2010).

141. Fraterman, *supra* note 38, at 469–70 (citing *Humanitarian L. Project v. Gonzales*, 393 F.3d 902 (9th Cir. 2004) (oral judgment)).

142. *Holder*, 561 U.S. at 16; *United States v. Mehanna*, 735 F.3d 32, 42 (1st Cir. 2013); *United States v. Al Kassar*, 660 F.3d 109, 129 (2d Cir. 2011).

143. *Shah*, 474 F. Supp. 2d at 499; *see also* LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 130–31 (explaining that doctors can treat terrorists without facing prosecution as part of an NGO).

144. *See generally* Debarre, *supra* note 109, at 9–10 (discussing civil and criminal penalties medical personnel may face for treating terrorists).

145. Fraterman, *supra* note 38, at 417; *see also* Françoise Bouchet-Saulnier, *supra* note 43, at 508 (explaining how offering impartial medical care to terrorists could subject providers to criminal liability).

146. *Mehanna*, 735 F.3d at 40.

147. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 699 (7th Cir. 2008); *see* LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 138.

148. *See Boim*, 549 F.3d at 669.

149. *Id.* at 711 (Wood, J., dissenting in part and concurring in part).

150. *Id.* at 710–11.

the court pointed out that “[m]uch as a military force needs weapons, ammunition, trucks, food, and shelter, it needs medical personnel to tend to its wounded.”<sup>151</sup>

Judge Wood’s insistence that there should be no distinction made between medical assistance medical personnel associated with the organized armed groups offer and that NGOs offer is in a way closer to the IHL provisions than the United States’ practice, albeit with the opposite outcome.<sup>152</sup> As previously explained, IHL makes no distinction between independent groups and those accompanying the armed forces when setting out their rights to be protected, respected, and not prosecuted—provided they act in accordance with the principle of non-discrimination and medical ethics.

The fact is that Judge Wood’s objections are the exact concerns the original Geneva Convention was developed to counteract.<sup>153</sup> Even though “repairing” wounded soldiers so that they can return to the battlefield offers a clear military advantage, states have decided to let humanitarian considerations prevail.<sup>154</sup> Unfortunately, the only universally applicable treaty-based obligation is found in the rules applicable to international armed conflicts, leaving non-international conflicts regulated by Common Articles 1 and 3 to the Geneva Conventions and customary international law where this is sufficiently established.<sup>155</sup> For the United States, not being a party to AP II, the question is whether there is sufficient evidence for a customary rule of non-prosecution in non-international armed conflicts, or alternatively, whether the interpretations set out previously concerning the Common Article 1 obligation to not undermine the right to medical assistance set out in Common Article 3 are sufficient.

The above-mentioned notion that exemption should be made at least for humanitarians acting in accordance with their Hippocratic Oath, set out in *Boim v. Holy Land Foundation*, concerned a civil statute rather than the criminal material support statute, and as such, is relevant but not directly applicable to the current discussion.<sup>156</sup> However, as the court explained, in *United States v. Shah*, when discussing hypotheticals the defendant raised, NGOs like Doctors Without Borders would be unlikely to face prosecution

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151. *United States v. Shah*, 474 F. Supp. 2d 492, 499 (S.D.N.Y. 2007).

152. *Compare Boim*, 549 F.3d at 711–12 (Woods, J., concurring in part and dissenting in part) (arguing there should be no distinction between medical care by NGOs and medical care by personnel associated with terrorist groups), *with Debarre*, *supra* note 109, at 4–5 (describing IHL requirements for treating wounded terrorists without regards to their terrorist status).

153. *See Boim*, 549 F.3d at 719–26 (Woods, J., concurring in part and dissenting in part).

154. *See 2016 Geneva Convention I Commentary*, *supra* note 1, art. 12.

155. *See Geneva Convention I-IV*.

156. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 140. For further discussion of medical exemptions in other areas of law, *see, e.g.*, US Citizen and Immigration Service Policy Memorandum, PM-602-0052 (Nov. 20, 2011), [https://www.uscis.gov/sites/default/files/document/legal-docs/11%2020%20implementation\\_voluntary%20provision%20medical%20care.pdf](https://www.uscis.gov/sites/default/files/document/legal-docs/11%2020%20implementation_voluntary%20provision%20medical%20care.pdf) (concerning U.S. immigration law).

for material support.<sup>157</sup> Anyone not connected with such well-renowned humanitarian organizations who are found to provide medical assistance to a foreign terrorist organization may still be liable to prosecution under § 2339B if they act under the direction and control of the group, akin to a military medic, or they know that the patient is a member of such an organization.<sup>158</sup> This includes the medics of nonstate armed groups in non-international armed conflicts, if the group in question has been designated as terrorist.<sup>159</sup>

All the cases mentioned were prosecuted before the 2022 Security Council Resolution, which explicitly recalls the IHL rule concerning “non-punishment of any person for carrying out medical activities compatible with medical ethics.”<sup>160</sup> The question is whether a new case would have to be dealt with differently. U.N. Security Council resolutions commonly make reference to existing treaty obligations, and it is not clear whether Resolution 2664 intends to refer to existing obligations, impose new ones, or even whether the reference suggests that the Security Council perceives the non-prosecution rule as part of customary law.

As explained, whereas the obligation not to prosecute is clear for international armed conflicts, it is less so for non-international armed conflicts where AP II does not apply.<sup>161</sup> Even if there is a customary law rule reflecting the AP II obligation, the practice of United States and other states that never ceased to prosecute medical personnel connected with nonstate armed groups perceived as terrorist organizations, could potentially amount to persistent objection.<sup>162</sup> This general international law rule prevents the application of customary law to states that have persistently objected to the rule in question.<sup>163</sup> However, it is clear from the relatively limited case law available that the prosecution of doctors for offering medical assistance does not sit entirely well with courts, suggesting that the objection is not as insistent and persistent as it ought to be in order to avoid customary law application. Furthermore, the U.N. Security Council’s increasing concern and strengthening in its language when referring to the need to take humanitarian consequences of counterterrorism efforts into account, could be evidence that the neutrality of medical personnel includes a prohibition on prosecution even for the few states that have not ratified AP II.<sup>164</sup>

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157. United States v. Shah, 474 F. Supp. 2d 492, 499 (S.D.N.Y. 2007).

158. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 140–41.

159. *Id.*

160. S.C. Res. 2664, ¶ 7 (Dec. 9, 2022).

161. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at 63.

162. *Id.* at 57.

163. On persistent objection in IHL, see, e.g., Camilla Guldahl, *The Role of Persistent Objection in International Humanitarian Law*, 77 NORDIC J. INT’L L., 51–86 (2008) (discussing the application of persistent objection to international humanitarian law).

164. See S.C. Res. 2482, ¶ 16 (July 19, 2019) (urging states to consider the effect of counterterrorism measures on humanitarian relief, including medical activities).

## VI. CONCLUDING COMMENTS

As this Article has shown, despite being at the very heart of IHL and one of its oldest rules, the application of the concept of neutralization of medical personnel, including the obligation not to prosecute, remains uncertain in the context of certain types of non-international armed conflicts.<sup>165</sup> Any arguments towards an international legal obligation upon non-AP II states not to prosecute those who give medical assistance to armed terrorist groups involved in armed conflicts, must be based on vague sources such as customary law, Common Article 1 obligations, or general humanitarian principles.<sup>166</sup> A good lawyer would be able to find strong and valid arguments against such a position.<sup>167</sup> The question is why anyone would fight for the right to undermine the principle of neutralization of medical assistance.<sup>168</sup> It need not be a question of catching bad guys; anyone worth prosecuting is likely to have become involved in other aspects of terrorist activities, which they could face prosecution for even if these crimes could be more challenging to prove.<sup>169</sup> The matter, therefore, seems more principled, suggesting “terrorists” have no rights, not even to medical care, as if offering such rights is akin to legitimizing their actions.<sup>170</sup> The principled approach states have committed to, however, is the opposite: “in adhering to the Geneva Convention, the [s]tates have agreed to sacrifice national interests to the dictates of conscience, and that the Convention, by the predominance which it gives to humanitarian sentiments, is a breach in the barrier of hostility between nations and their enemies.”<sup>171</sup>

As this Article has illustrated, counterterrorism efforts have, over a long period contributed to eroding IHL.<sup>172</sup> It has also been explained how IHL was created for humanity’s darkest days, to help states make the right decision even when faced with evil.<sup>173</sup> When the Security Council has provided

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165. See *supra* Part III and accompanying text (discussing the importance of protecting medical personnel from prosecution).

166. See *supra* notes 145–55 and accompanying text (discussing possible impositions of a universal treaty-based obligation not to prosecute medical personnel).

167. See *supra* notes 156–64 and accompanying text (describing the position of courts faced with prosecuting medical personnel).

168. See *supra* notes 113–15 and accompanying text (describing states approach to the neutralization of medical care).

169. Contrast *supra* notes 135–39 and accompanying text (distinguishing medical substances and medical support in applying the medical exception), with *supra* notes 145–48 and accompanying text (finding that the Hippocratic Oath requires medical personnel to provide support regardless of patient’s affiliations).

170. See *supra* note 135 and accompanying text (discussing that the application of medical knowledge to terrorist organizations, regardless of their support for the organization, will subject medical personnel to criminal prosecution).

171. 1952 *Geneva Convention I Commentary*, *supra* note 1, at 193.

172. LEWIS, MODIRZADEH & BLUM, *supra* note 6, at vii.

173. See *supra* notes 13–14 and accompanying text (describing the purpose of the IHL and the role it plays).

clarification on the rules' continued relevance even when dealing with terrorism, states should take this to heart and heed the Council's direction.<sup>174</sup> The best way to protect the "once radical belief that wounded enemies are entitled to care"<sup>175</sup> would first and foremost be to include explicit exceptions in domestic legislation, thereby preventing permissive prosecution and punishment.<sup>176</sup> This will also set an important precedent for potential future postwar trials of health professionals having provided medical assistance to the enemy.<sup>177</sup> In the meantime, anyone brought before a court on the charge assisting terrorists, when in fact they have acted in compliance with IHL and medical ethics, ought to be acquitted.<sup>178</sup>

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174. See *supra* notes 28–31 and accompanying text (discussing how the Security Council has addressed dealing with terrorism).

175. BUISSONNIERE, WOZNICK & RUBENSTEIN, *supra* note 18, at 29.

176. *Id.*; see also Bouchet-Saulnier, *supra* note 43, at 516 (describing how a handful of states have already enacted domestic violence).

177. See BUISSONNIERE, WOZNICK & RUBENSTEIN, *supra* note 18, at 29; Bouchet-Saulnier, *supra* note 43, at 516.

178. 2016 Geneva Convention I Commentary, *supra* note 1, at ¶ 1760; see also minutes from meeting with Pictet 18 March 1948, ICRC Archives, *supra* note 52 (explaining how someone administering medical care should never face prosecution).