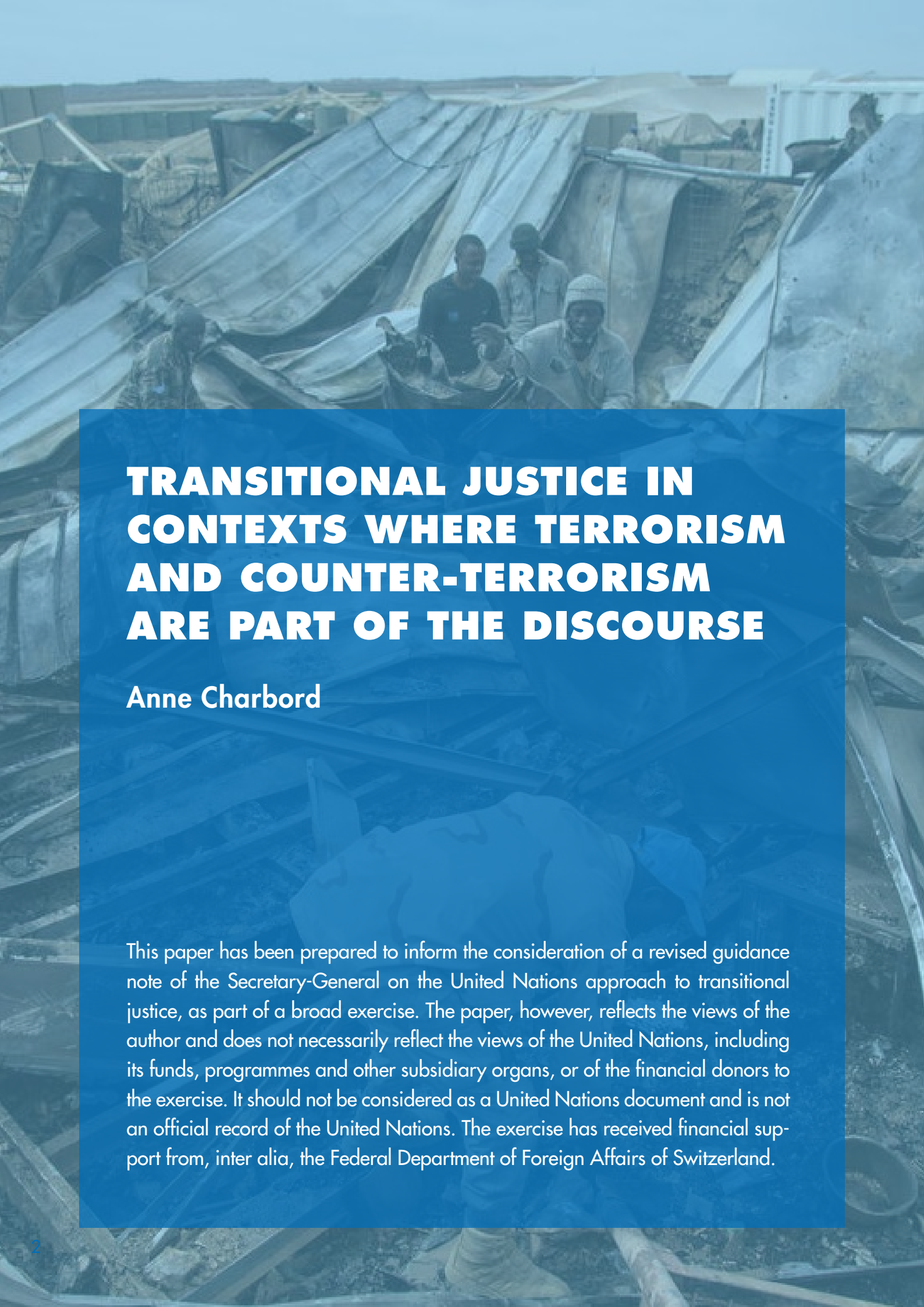


A blue-tinted photograph of a makeshift settlement, likely a refugee camp. The scene shows several people, including children, amidst a dense collection of tents and debris. The overall atmosphere is one of displacement and hardship. The text is overlaid in the center of the image.

**TRANSITIONAL  
JUSTICE IN  
CONTEXTS WHERE  
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COUNTER-TERRORISM  
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# **TRANSITIONAL JUSTICE IN CONTEXTS WHERE TERRORISM AND COUNTER-TERRORISM ARE PART OF THE DISCOURSE**

**Anne Charbord**

This paper has been prepared to inform the consideration of a revised guidance note of the Secretary-General on the United Nations approach to transitional justice, as part of a broad exercise. The paper, however, reflects the views of the author and does not necessarily reflect the views of the United Nations, including its funds, programmes and other subsidiary organs, or of the financial donors to the exercise. It should not be considered as a United Nations document and is not an official record of the United Nations. The exercise has received financial support from, inter alia, the Federal Department of Foreign Affairs of Switzerland.

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# Background



Over the past 15 years, efforts to further transitional justice have increasingly been considered in the context of exits from active conflicts and dealing with the past, and in laying the foundations for preventing renewed cycles of conflict. Considering also developments concerning conflict actors, which routinely include designated terrorist and violent extremist groups that are also parties to a conflict under international humanitarian law, together with an expanding counter-terrorism and countering and preventing violent extremism architecture, both the transitional justice and counter-terrorism lenses are increasingly relevant and being applied in various contexts where the United Nations is engaged.

As part of the system-wide project on renewing the United Nations approach to transitional justice, this paper explores how transitional justice and counter-terrorism discourses, frameworks and approaches may coexist and interact in some contexts; the policy and operational challenges that may arise in such situations; and possible lessons to be learned from the work of the United Nations in this area, particularly as they feed into the activities of the United Nations on broader peace, security and human rights agendas.<sup>1</sup>

<sup>1</sup> The present paper was informed by 14 interviews with staff from the Counter-Terrorism Committee Executive Directorate, the United Nations Office of Counter-Terrorism, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and United Nations peacekeeping operations.

# Introduction



To some extent, both the transitional justice and counter-terrorism frameworks are aimed at ensuring the protection of individuals and furthering their rights in fraught circumstances, while addressing issues of accountability, individual responsibility and the rights of victims. They also contain elements of preventing and resolving conflict. There are significant legal and conceptual differences between these two frameworks, however. The starting point for transitional justice is a wide analysis of the moral, political, economic and human rights-related causes and effects of a country's past and present violence as a basis for making decisions on addressing the legacies of violence in order to prevent its recurrence and to transition sustainably from violent conflict. Counter-terrorism approaches as developed through international frameworks and practised at the national level,<sup>2</sup> while including a recently introduced and hitherto less developed preventative focus, are largely based on a range of security and criminal justice measures against individuals suspected

of involvement in terrorism, or accused of acts of terrorism, as determined by national authorities.<sup>3</sup> Aspirationally, at least, transitional justice seeks social integration, while counter-terrorism has a narrower focus on protection. These differences have an impact on the tools deployed within both frameworks and on the stakeholders that are engaged in them.

## 1. GENERAL LEGAL CONCEPTS

### a. Transitional Justice

Transitional justice emerged in the 1980s as a means to address legacies of large-scale human rights violations. It is rooted in international law, particularly international human rights law and international humanitarian law. Binding international legal instruments spell out the rights of victims and the corresponding obligations of States regarding effective remedy and redress for serious human rights violations and abuses. These obligations pertain to

<sup>2</sup> Such frameworks include the Security Council, mitigated by the United Nations Global Counter-Terrorism Strategy in accordance with General Assembly resolution [60/288](#) and subsequent review resolutions. <sup>3</sup> "Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy: report of the Secretary-General" ([A/75/729](#)), paras. 16, 26 and 31.

the fulfilment of four tenets of human rights law, namely the rights to truth, justice and reparation, and the prevention of recurrence, which have become the four constituent and mutually reinforcing elements of transitional justice. It is recognized that criminal justice, while important, is insufficient to fully satisfy the justice claims of victims and to satisfactorily address legacies of large-scale abuse in affected societies. The transitional justice toolkit thus comprises both judicial and non-judicial instruments and mechanisms, such as trials, truth commissions, reparation in all its facets, vetting and lustration procedures, memorials, amnesty and rehabilitation, as well as broader institutional and societal reform processes to guarantee non-recurrence.

From a legal perspective, transitional justice is based on international human rights law, international humanitarian law, international criminal law and international refugee law. Transitional justice is thus a sub-frame of international law. Many United Nations programmes and policies in the field of human rights and international humanitarian law are relevant to or part of a transitional justice agenda, particularly in situations of conflict or immediate post-conflict or other crisis situations.<sup>4</sup> Both international humanitarian law and international human rights law are essential for holding perpetrators of violations accountable, including the perpetrators of acts committed when responding to violence.

Importantly, transitional justice is not (or is not supposed to be) a technocratic exercise or redress mechanism for victims only. It is, potentially, a strategic tool that can contribute to the broader and longer-term policy goals of trust-building, social cohesion, prevention, development and reconciliation.<sup>5</sup> The Security Council acknowledged that comprehensive transitional justice policies contribute to sustaining peace. As such, transitional justice is a problem-solving human rights instrument. The United Nations approach to transitional justice was outlined in a 2004 report by the Secretary-General and a 2010 guidance note (under review at the time of writing).

#### **b. Counter-terrorism**

While certain sectoral counter-terrorism conventions have been developed under the auspices of the United Nations since 1963, the involvement of the Security Council in developing new legal norms since 2001 fundamentally changed the legal landscape. Initially conceived as a response to the tragic terrorist attacks perpetrated on 11 September 2001, the United Nations framework for counter-terrorism and countering and preventing violent extremism has, over the past 20 years, become an expansive area of action by the United Nations that has regulated and informed national policies and legislation across the globe. The Security Council took resolute action under chapter VII of

<sup>4</sup> Many interlocutors stressed that they often could not distinguish between regular justice and transitional justice, and that much of the work grounded in human rights and the rule of law could qualify as transitional justice work. <sup>5</sup> See Human Rights Council resolution [51/23](#).

the Charter of the United Nations by qualifying terrorism in all forms and manifestations as one of the most serious threats to international peace and security,<sup>6</sup> and by requiring Member States to adopt a number of preventive and suppressive measures against terrorism. The obligations of Member States in this field were refined and clarified over the 20 years since the adoption of the Security Council's seminal resolution 1373 (2001), notably through progressive recognition by the Security Council that countering terrorism effectively requires the inclusion of a human rights and rule of law approach and the adoption of a series of more detailed documents, such as the United Nations Global Counter-Terrorism Strategy and the Secretary-General's Plan of Action to Prevent Violent Extremism.

The implementation of the global counter-terrorism framework, which comprises aspects derived from treaties, Security Council resolutions and soft law, suffers from serious human rights weaknesses, as was highlighted during the seventh biennial review of the Global Counter-Terrorism Strategy, and it remains severely criticized by civil society actors and human rights bodies, for reasons that will be examined in this paper.<sup>7</sup> It is important to note that the counter-terrorism regime continues to rest on tenuous foundations, which is due

in large part to a lack of internationally agreed definitions of terrorism and violent extremism.

The efficacy of the regime depends on national implementation of the various norms in compliance with applicable international humanitarian law and international human rights law to ensure the protection of individuals and their rights. The Security Council has consistently affirmed that all counter-terrorism measures undertaken by Member States shall comply with their obligations under international law, particularly international human rights law, international humanitarian law and refugee law. The application of counter-terrorism regulations in peacetime must be assessed against applicable human rights law.<sup>8</sup> In the event of an armed conflict, counter-terrorism measures must comply with both international human rights law and international humanitarian law. States often dispute whether the threshold conditions of armed conflict have been met for the application of international humanitarian law, or whether conflicts have remained exclusively internal disturbances or tensions regulated by domestic criminal law.<sup>9</sup> The framing of actions as "counter-terrorism" is often used to hide and displace the reality of complex armed conflicts to which international humanitarian law and international human rights law apply.

<sup>6</sup> Security Council resolution 1368 (2001). <sup>7</sup> See the "Technical recommendations on human rights & counter-terrorism for the 7th biennial review of the Global Counter-Terrorism Strategy (A/RES/72/284): mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", available at [www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/GlobalStrategy/TechnicalRecommendations.pdf](http://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/GlobalStrategy/TechnicalRecommendations.pdf). <sup>8</sup> See Security Council resolutions 2462 (2019) and 2482 (2019) and the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin (A/75/337), paras. 15 and 24. <sup>9</sup> International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions*, report of the thirty-third International Conference of the Red Cross and Red Crescent (Geneva, 2019).





Most terrorism offences under domestic legislation (when the international counter-terrorism framework has been incorporated in accordance with the principle of legality and legal certainty and is respectful of the principles of non-discrimination, necessity and proportionality) are indeed also violations or crimes under international humanitarian law and/or international human rights law. While the Rome Statute of the International Criminal Court does not currently list terrorism offences among the grave crimes that fall within its jurisdiction, conduct perpetrated by terrorist actors can also amount to the core international crimes of war crimes, crimes against humanity and even genocide, subject to the rules of international criminal law.<sup>10</sup>

## 2. APPLICATION IN ARMED CONFLICT SITUATIONS

The transitional justice and counter-terrorism agendas were initially developed within the United Nations only three years apart from each other, before many conflicts around the globe, particularly non-international armed conflicts, started to involve non-State armed groups that met both the criteria for being considered as a party to an armed conflict under international humanitarian law (Article 3 common to the four Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)) and that were designated as terrorist groups, either by the United Nations or at the regional or national level, as in Afghanistan, Burkina Faso, Iraq, Libya, Mali, Mozambique, the Niger, the Philippines, Somalia and the Syrian Arab Republic.<sup>11</sup> The use of these agendas in active conflict situations, and their application to such situations, has posed serious challenges to both frameworks. The transitional justice framework has also been particularly affected by the narrow application of terrorism-related language and normative frameworks relating to counter-terrorism, and by an overreliance on security institutions in conflict analysis.

<sup>10</sup> See, for example, Higher Regional Court of Hamburg, *Jalda A.*, Judgment, 27 July 2022; Higher Regional Court of Frankfurt, *Taha A.-J.*, 30 November 2021. See also the report of the Independent International Commission of Inquiry on the Syrian Arab Republic ([A/HRC/25/65](#)); and the second report of the Special Advisor and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant ([S/2019/407](#)). <sup>11</sup> The Security Council can designate groups as "terrorist", while at national level practices may vary, with national authorities also designating groups as "violent extremist" or, in some cases, more loosely, as "extremist".



A schematic analysis of conflicts can lead to very different understandings, depending on the framework adopted. In some conflict situations, a strict counter-terrorism approach would result in primarily engaging designated terrorist groups that pose a threat to the Government, State institutions and populations, the solution to which is the military defeat of the designated terrorist group and criminal law action under domestic counter-terrorism legislation. By considering any act of violence against the State as being “terrorist” by definition, such an approach sidesteps the legal and political significance of the non-international armed conflict and any assessment of the lawfulness of the act under international humanitarian law.<sup>12</sup> Such approaches are often accompanied by a perceived legitimization of actions by the Government in its fight against terrorism and by increased provision of security assistance to the Government by external actors.

From the transitional justice perspective, the same factual situations are understood as complex armed conflicts involving a multiplicity of actors, motives, interests and impacts, to which both international humanitarian law and international human rights law apply. The domestic counter-terrorism framework does not displace applicable international law. From this viewpoint, dysfunctional relationships between Governments, elites and local populations are sometimes exploited by non-State armed groups that are parties to the conflict in order to gain legitimacy among and control

over local populations and territory, using links with local communities and individuals who engage in a range of violent and non-violent roles because of ideological or opportunistic adherence. Under a transitional justice approach, resolution and prevention involves identifying the factors and motives for involvement in conflict and violence, and a determination of what structural and other reforms can lessen the risk of exacerbating or returning to violence.

The situation in Iraq and the north-east of the Syrian Arab Republic is illustrative of the complex issues that this paper aims to address. The picture in Iraq shows overlapping violent and complex armed conflicts, sustained persecution of numerous ethnic and religious groups over many years, a proliferation of designated terrorist and violent extremist groups and the stigmatization of entire communities based on perceived collective support for designated groups, combined with international intervention. There has never been an overall process to holistically resolve any of these conflicts, in which many serious human rights violations have been committed and have led to persistent grievances across communities. The north-east of the Syrian Arab Republic, in turn, is a microcosm of the overlapping challenges that the United Nations engages with in complex situations where designated terrorist groups have been active. This includes the situation of the thousands of men, women and children from Iraq, the Syrian Arab Republic and third countries who are internally

<sup>12</sup> [A/75/337](#), para. 13.

displaced and detained in camps such as Al-Hol and Roj or in one of the numerous detention centres, deprived of due process or judicial oversight and in need of humanitarian assistance, or those caught in the aftermath of what is a highly complex decade-long conflict, with various parts of the country still under the control of non-State groups. In such cases, the way in which the situation is approached, as a security emergency involving designated terrorist groups that are seen as solely or primarily responsible for the rise of violence, or as a complex political and armed conflict in which very serious violations and crimes have been committed by many parties – and considering the situation prior to the rise of the terrorist groups, including the political and economic grievances that contributed to the situation in the first place – will result in very different solutions in terms of potential peace processes and justice and accountability mechanisms.

### 3. LINKS TO THE PEACE AGENDA

Together with rule of law, access to justice and good governance, transitional justice is critical to the consolidation of peace and stability, as defined in the sustaining peace agenda of the United Nations and as endorsed by both the Security Council and the General Assembly in 2016.<sup>13</sup> For the United Nations, sustaining peace is a core task set by its Charter, and thus it must be a key thread running through all

its engagements, from preventive action to peacemaking, peace enforcement, peacekeeping and post-conflict recovery and reconstruction. Sustaining peace should span an essential combination of actions across the diplomatic, political, human rights, economic, social and security areas, with particular attention to addressing root causes.<sup>14</sup> Ultimately, the counterterrorism efforts of the United Nations and its work to prevent violent extremism feed into these renewed efforts to use common systems and capacities across the United Nations system to achieve inclusive sustainable development and to sustain peace “at all stages of conflict and in all its dimensions”.<sup>15</sup>

The Security Council has recognized that, while a response to terrorism can include a military component, law enforcement measures and intelligence operations, these are insufficient.<sup>16</sup> As noted in the report of the Advisory Group of Experts on the Review of the Peacebuilding Architecture, “violent conflicts around the world have become significantly more complex over the first decade-and-a-half of this century, with new conflict drivers layered on longstanding ones. International actors, including within the UN system, have yet to absorb fully how their tools and actions must adapt and, in general, too often prefer militarized responses. While these can prove effective in the immediate context of halting violence, they tend to address symptoms rather than root causes. The very nature of such re-

<sup>13</sup> General Assembly resolution [70/262](#) and Security Council resolution [2282 \(2016\)](#). <sup>14</sup> United Nations, *The Challenge of Sustaining Peace: Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture* (New York, 2015), para. 122. <sup>15</sup> General Assembly resolution [70/262](#) and Security Council resolution [2282 \(2016\)](#). <sup>16</sup> Security Council resolution [1963 \(2010\)](#).

sponses, with their emphasis on short-term security and their correspondingly heavy resourcing needs, can sometimes detract support and attention from achieving sustainable peace.”<sup>17</sup> This is also true in the context of terrorism. Military and security responses to a threat, including in situations of armed conflict, can exacerbate violence and can be counterproductive, not only by acting as a potent recruiting tool but by allowing various groups to take root among and gain the perpetual support of disenfranchised and marginalized populations, rendering military defeat illusory. There is a need to strengthen efforts to prevent and peacefully resolve prolonged conflict and to promote the rule of law, the protection of human rights and fundamental freedoms, good governance, tolerance and inclusiveness in order to offer a viable alternative to those who could be susceptible to terrorist recruitment and radicalization,<sup>18</sup> as there is a need for efforts to prevent and counter terrorism and violent extremism.<sup>19</sup>

Although the transitional justice models to be applied in either post-authoritarian or post-conflict contexts have not been sufficiently differentiated – which makes impact evaluation difficult – the consideration of aspects relating to peace, security, accountability and rights through transitional justice makes it a very useful framework for identifying the kinds of measures and policies that could be envisaged to implement these various aspects of Security Council resolutions. A transitional justice lens

helps complexify the overly simple action/reaction narrative, addressing individual responsibilities and issues relating to collective support – both for counter-terrorism and for terrorist groups – as well as the situation of communities who are victims of both. Such measures can include institutional and structural reforms to address exclusion and discrimination, which can make people vulnerable both to human rights violations by institutional actors and to recruitment by violent non-State actors; addressing human rights violations committed on a massive scale by various actors, including political actors; promoting accountability; affirming the rights of all victims; processes for truth, reparation, rehabilitation, reintegration and reform; and, ultimately, basing peace processes on respect for human rights. More specifically, the Security Council has supported transitional justice efforts in a number of contexts where designated terrorist groups are active, notably by giving mandates to the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and the United Nations Assistance Mission for Iraq (UNAMI) to support the design and implementation of transitional justice initiatives.

#### **4. CHALLENGES**

As was made clear by an initial mapping exercise showing the challenges that may arise when counter-terrorism, prevention

<sup>17</sup> United Nations, *The Challenge of Sustaining Peace*, para. 121 <sup>18</sup> Security Council resolution [1963 \(2010\)](#). <sup>19</sup> Security Council resolution [2178 \(2014\)](#).



of violent extremism and transitional justice approaches coexist where the United Nations is engaged in conflict and crisis contexts (and as was further illustrated by a range of interviews with United Nations staff regarding the implementation of counter-terrorism and violent extremism prevention programmes and work related to transitional justice) various tensions and unhelpful outcomes may transpire. Because transitional justice is (inaccurately and unhelpfully) seen by some as a “soft” framework, and also because it addresses the roles and responsibilities of a broad range of actors in crisis situations, the United Nations has been reluctant to use it openly as a policy tool in such contexts. This has been compounded by efforts by powerful States, donors and an expanding number of counter-terrorism actors, both within and on the periphery of the United Nations, to prioritize the counter-terrorism and prevention of violent extremism framework. This has been done with little regard to the impact on other aspects of the work of the United Nations that are more closely aligned with transitional justice, while filling transitional justice and other closely aligned spaces in such a way as to make them subservient to a security-led framing

and approach. When counter-terrorism and the countering and prevention of violent extremism are unduly applied in such a way as to displace international human rights law and international humanitarian law, the risk for the integrity of transitional justice must not be understated.

Given the role of the United Nations in assisting in the application of both frameworks, adjustments to some of the premises and methodologies are needed – or there is at least a requirement for policy and programmes in one policy area to be formulated in a manner that demonstrates awareness and sensitivity regarding the other. A further step involves understanding where both elements can mutually reinforce each other. This paper will briefly address the plural and multifaceted practices of the United Nations in counter-terrorism and the prevention of violent extremism (in section A), before assessing the analytical challenge posed by the framing of conflict and crisis situations (section B) and the impact of this on processes to resolve crisis and conflict situations (section C). The paper will then make a set of conclusions and recommendations (section D).

# A. United Nations practices of counter-terrorism and preventing violent extremism



This section first examines the United Nations architecture and legal and policy framework for counter-terrorism and the prevention of violent extremism (subsection 1) and then considers its implementation (subsection 2).

## 1. ARCHITECTURE AND LEGAL AND POLICY FRAMEWORK

### a. Description of the regulatory and institutional framework

The global regulatory framework that has been developed within the United Nations for counter-terrorism and countering and preventing violent extremism is both extensive and expansive, and a number of instruments, resolutions and bodies have been developed progressively over the course of the past two decades. In addition to the 19 universal sectoral counter-terrorism instruments that require accession by member States, the international legal framework for countering terrorism stems from Security

Council and General Assembly resolutions and a range of other policy documents, notably the Secretary-General's Plan of Action to Prevent Violent Extremism.

### *i. Security Council counter-terrorism resolutions*

The Security Council has adopted a series of wide-ranging resolutions addressing counter-terrorism, often under chapter VII of the Charter of the United Nations, containing binding obligations on all Member States. Those considered below are among the most critical.

**Security Council resolution 1373 (2001)**, a foundational resolution of the counter-terrorism framework adopted immediately after the attacks on the United States of America on 11 September 2001, requires Member States to criminalize various acts of terrorism as serious criminal offences in domestic laws, to prevent and suppress the financing of terrorism and to freeze the assets of individuals linked to terror-



ism.<sup>20</sup> By imposing general and permanent obligations on all States Members of the United Nations that are unconnected to a specific situation, the resolution establishes new binding rules of international law and is considered as the first “legislative” resolution of the Security Council. It fails to provide a definition of terrorism, however. Calls have been made by the international community to outlaw terrorism without fully and adequately defining it,<sup>21</sup> and this has meant that individual States have had to fill the space. It has been said that the Security Council has delivered a message that the international community wants strong action against “terrorism” however it may be defined,<sup>22</sup> even if this has a negative impact on a number of groups and on internationally protected fundamental rights and freedoms.<sup>23</sup> This has resulted in the international legitimization of the stifling conduct of oppressive regimes. The consequences of the lack of international, universally accepted definitions of terrorism and violent extremism in criminal law frameworks at the national level have been well identified.<sup>24</sup> Absent any comprehensive definition of terrorism, the imposition of obligations on States relating to terror-



ism not only limits their ability to determine their levels of proper compliance with the framework; it also has adverse consequences for human rights, including a failure to address risks and impacts such as arbitrary and discriminatory application or to ensure appropriate safeguards and remedies against violations. The Secretary-General, the United Nations High Commissioner for Human Rights and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, among others, have noted how this remains a challenge in many legal systems.<sup>25</sup> The recent systematic inclusion by the Security Council of the need

<sup>20</sup> In its resolution 1373 (2001), the Security Council decided that States should take measures to prevent acts of terrorism and to bring terrorists to justice, assisting each other with respect to criminal prosecutions of terrorist offenders, instituting effective border security measures and exchanging information related to movements of terrorist persons or networks and forged or falsified travel documents. <sup>21</sup> Elements of an international definition can be identified, notably in article 2 of the International Convention for the Suppression of the Financing of Terrorism, Security Council resolution 1566 (2004), the draft Comprehensive Convention on International Terrorism, and the best practice definition proposed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/51, practice 7, paras. 26–28). <sup>22</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (E/CN/4/2006/98), paras. 26–27. <sup>23</sup> “Counter-terrorism has continued to be invoked and counter-terrorism measures misused by some Governments to repress perceived dissent and human rights defenders, including instances of reprisal for engagement with the United Nations. Serious concerns remain over the lack in some jurisdictions of precise legal definitions of terrorism and violent extremism, and adequate safeguards to ensure that counter-terrorism measures are law-based, necessary, justified, proportionate and non-discriminatory, in compliance with international law.” A/75/729, para. 32. <sup>24</sup> “See reports of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/43/46 and A/HRC/31/65). <sup>25</sup> See, for example, A/75/729, para. 32; “Report on best practices and lessons learned on how protecting and promoting human rights contribute to preventing and countering violent extremism: report of the United Nations High Commissioner for Human Rights” (A/HRC/33/29); A/HRC/43/46; and the comments of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the legislation and policies of various States, available at [www.ohchr.org/en/special-procedures/sr-terrorism/comments-legislation-and-policy](http://www.ohchr.org/en/special-procedures/sr-terrorism/comments-legislation-and-policy).

for States to ensure that counter-terrorism measures comply with international human rights law has been insufficient to ensure such regulatory compliance in practice.

**Security Council resolution 2178 (2014)** requires States to enact legislation to prosecute persons who travel or attempt to travel to another State to perpetrate, plan, prepare or participate in terrorist acts or to provide or receive terrorist training, including persons who finance or organize the travel or recruitment of “foreign terrorist fighters”. States are also called on to take measures aimed at countering violent extremism, by preventing radicalization, recruitment and mobilization, and to engage relevant local communities and non-governmental actors. States are further required to cooperate in addressing the threat posed by foreign terrorist fighters, to enhance the effectiveness of mutual legal assistance agreements in criminal matters and to intensify and accelerate the exchange of operational information to prevent the entry into or transit through their territories of persons believed to be foreign terrorist fighters.

**Security Council resolution 2396 (2017)** requires States to establish advance passenger information systems to prevent the travel of foreign terrorist fighters and other designated individuals; to collect, process and analyse passenger name record data; to develop watch lists or databases of known and suspected terrorists, including foreign terrorist fighters, for use by law enforcement, border security, customs, military and intelligence agencies to screen travellers and conduct risk assessments and investigations; and to develop

and implement systems to collect biometric data in order to responsibly and properly identify terrorists, including foreign terrorist fighters.

**Security Council resolutions 2178 (2014), 2349 (2017) and 2396 (2017)** establish requirements for Member States to develop and implement comprehensive and tailored prosecution, rehabilitation and reintegration strategies for individuals where there are reasonable grounds to believe they are terrorists, including suspected foreign terrorist fighters, and their accompanying family members, spouses and children.

**Security Council resolution 2462 (2019)** requires Member States to enhance measures linked to the financing of terrorism, including investigations, prosecution and the exchange of financial intelligence, as well as terrorism sanctions regimes. Importantly, it calls on Member States to duly implement Financial Action Task Force recommendation 8, while taking into account the potentially negative effects of measures to counter the financing of terrorism on impartial humanitarian actors, including those conducting medical activities.

**Security Council resolution 2482 (2019)** addresses the links between international terrorism and organized crime. It calls upon Member States to ensure appropriate legislation regarding sexual and gender-based violence, and to ensure that all forms of trafficking, including by terrorist groups, are addressed. This includes enhancing border management measures such as advance passenger information and passenger name record data.

**Security Council resolution 1456 (2003)** introduced a human rights clause, according to which “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”. Such a clause has since been systematically included in all Security Council resolutions pertaining to counter-terrorism, but at a level of generality that fails to provide meaningful, sufficiently specific and concrete guidance to implementing States. The practice of States in the implementation of these resolutions shows that the human rights compliance provisions are largely disregarded.

**Security Council resolutions 1963 (2010) and 2178 (2014)** recognize that “terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone”. This acknowledges the need to address conditions conducive to the spread of terrorism, including through promoting the rule of law, the protection of human rights and fundamental freedoms, tolerance and inclusiveness so as to offer a viable alternative to those who could be susceptible to terrorist recruitment or radicalization, leading to violence. Further, the Security Council stresses that development, peace and security and human rights are interlinked and mutually reinforcing.

## ***ii. The United Nations Global Counter-Terrorism Strategy***

The **United Nations Global Counter-Terrorism Strategy and plan of action** was unanimously agreed by the General Assembly through its resolution 60/288 in September 2006. The plan of action contains four pillars of action: measures to address the conditions conducive to the spread of terrorism, measures to prevent and combat terrorism, measures to build State capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard, and measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

By stating that human rights are “the fundamental basis of the fight against terrorism” and “essential to all components of the Strategy”, the Strategy places human rights at its centre. The Strategy reaffirms the inextricable links between human rights and security by stating that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”. Importantly, the Strategy lists a number of “conditions conducive to the spread of terrorism” in pillar I, which include prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, an absence of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socioeconomic marginalization and a lack of good governance. Since its adoption, the Strategy has been

reviewed every two years by the General Assembly and has always been reaffirmed by consensus.<sup>26</sup>

In examining how the Global Counter-Terrorism Strategy has been implemented by various United Nations entities, the Secretary-General has been clear that pillars I and IV of the Strategy have often been overlooked. In advance of the seventh review of the Strategy, the Secretary-General noted that an urgent focus was needed to strengthen the promotion and protection of human rights and the rule of law in the implementation of all four pillars of the Global Strategy. He also highlighted the importance of gender equality, of upholding women's rights, enabling women's meaningful participation and avoiding their instrumentalization, and of protecting civic space in this context.<sup>27</sup>

### ***iii. Secretary-General's Plan of Action to Prevent Violent Extremism***

The starting point of this document<sup>28</sup> is that seeking to address violent extremism leading to terrorism primarily within the context of security-based counter-terrorism measures has been insufficient to prevent the spread of violent extremism. The Plan of Action calls for a more comprehensive approach that is not limited to security-based counter-terrorism measures, and that also focuses on systematic preventive measures that directly address the drivers of violent

extremism. The Plan of Action places a heavy focus on human rights, with simultaneous emphasis on how respect for human rights can prevent violent extremism and on how human rights violations can be a potent factor leading to violent extremism.<sup>29</sup> In particular, the document notes that violations of international human rights law committed in the name of State security can facilitate violent extremism by marginalizing individuals and alienating key constituencies, thus generating community support and sympathy for, and complicity in, the actions of violent extremists. Violent extremists actively seek to exploit State repression and other grievances in their fight against the State. Thus, the actions of Governments that exhibit repressive and heavy-handed security responses in violation of human rights and the rule of law tend to generate more violent extremists.<sup>30</sup> The Plan of Action also stresses that a lack of accountability in conflict areas contributes to an increase in serious human rights violations and crimes under international law. Finally, it recalls that efforts to address violent extremism must be respectful of the rule of law and comply with States' international legal obligations.<sup>31</sup> From a human rights perspective, key challenges include the lack of inclusion of a definition of "violent extremism", which renders it wholly context-dependent, and the lack of an oversight or accountability mechanism to monitor the consequences of support from the United Nations for capacity-building

<sup>26</sup> See General Assembly resolution [75/291](#). <sup>27</sup> [A/75/729](#), paras. 33–35. As of February 2018, entities of the United Nations system had only 17 projects under the human rights pillar (pillar IV) of the Strategy. See "Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy: report of the Secretary-General" ([A/72/840](#)). <sup>28</sup> See "Plan of Action to Prevent Extremism: report of the Secretary-General" ([A/70/674](#)), para. 4. <sup>29</sup> *Ibid.*, paras. 3–7 and 50. <sup>30</sup> *Ibid.*, para. 27. <sup>31</sup> *Ibid.*, para. 20.





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and technical assistance in countering and preventing violent extremism in a way that negates human rights.

#### **iv. Security Council terrorism sanctions regime**

In addition to the provisions of Security Council resolution 1373 (2001),<sup>32</sup> which provide a legal basis for regional and national listing mechanisms, the terrorism sanctions regime of the United Nations was initially set up through resolution 1267 (1999), which evolved into the broader ISIL (Da'esh) and Al-Qaida sanctions list.<sup>33</sup> According to this regime, an arms embargo, an asset freeze and a travel ban are imposed on individuals and entities designated by the sanctions committee as being "associated with ISIL or Al-Qaida".

This includes any form of support for the acts or activities of Al-Qaida or Islamic State in Iraq and the Levant and those associated with them, or of any cell, affiliate, splinter group or derivative thereof. A sanctions committee oversees the implementation of the terrorism sanctions regime. Following several court cases and decisions that found violations of substantive and procedural human rights,<sup>34</sup> a number of improvements have been introduced, most notably the creation of a position of Ombudsperson to the Security Council Committee, whose role is to examine and recommend delisting requests. However, as was recently highlighted by the resigning Ombudsperson in his final report, the impact of such long-term administrative measures on listed individuals and their families remains serious.<sup>35</sup>

<sup>32</sup> In para. 1 (c) of resolution 1373 (2001), Member States are called on to: "Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities". <sup>33</sup> See Security Council resolutions 1267 (1999), 1390 (2002), 1988 (2011), 1989 (2011), 2170 (2014), 2178 (2014), 2253 (2015) and 2368 (2017). <sup>34</sup> In European Court of Justice, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008, the Court found a violation of the applicants' right of defence, right to be heard and right to an effective judicial review. See also *Sayadi and Vinck v. Belgium* (CCPR/C/94/D/1472/2006), in which the Human Rights Committee found a violation of the applicants' freedom of movement under article 12 of the International Covenant on Civil and Political Rights and of their right to privacy and protection against unlawful attacks on their honour and reputation under article 17 of the Covenant; European Court of Justice, *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, European Commission and Others v. Kadi*, Judgment, 18 July 2013, in which the Court found a violation of the applicant's right of defence, his right to effective judicial review and his right to property; and European Court of Human Rights, *Nada v. Switzerland*, Application No. 10593/08, Judgment, 12 September 2012, in which the Court found a violation of the applicant's right to respect for his private life and his right to an effective domestic remedy. <sup>35</sup> The Ombudsperson stressed the enormous long-term effects that 10 to 15 years of listing and subsequent sanctions have had not only on the lives of listed individuals, but also on their spouses and children, who have borne poverty, lack of education and reputational damage. See [S/2021/676](#), para. 54.



## **v. Institutional framework**

The Counter-Terrorism Committee is a subsidiary body of the Security Council established by resolution 1373 (2001) to monitor national implementation of Security Council resolutions by receiving and analysing reports from Member States and promoting capacity-building efforts to counter terrorism at the national, regional and global levels. The Counter-Terrorism Committee is assisted by the Counter-Terrorism Committee Executive Directorate, which implements Committee decisions and works directly with Member States in the implementation of resolution 1373 (2001), including by facilitating the provision of technical assistance.

The United Nations Global Counter-Terrorism Coordination Compact aims to strengthen a common United Nations action approach to support Member States in the implementation of the United Nations Global Counter-Terrorism Strategy. As of April 2022, the Global Counter-Terrorism Coordination Compact brings together 45 entities as members or observers, including 41 United Nations entities, as well as the International Criminal Police Organization (INTERPOL), the World Customs Organization, the Inter-Parliamentary Union and the Financial Action Task Force. The United Nations Office of Counter-Terrorism, which was created in 2017 to ensure “due priority” for counter-terrorism and the prevention of violent extremism across the United

Nations system, serves as the Compact’s secretariat. The Office had only six staff in 2017 but employed 181 in 2021, largely through extra-budgetary resources from a small number of donor countries that fund the trust fund for counter-terrorism, which is aimed at providing technical assistance to States in this field.<sup>36</sup> The two human rights entities in the Compact are the Office of the United Nations High Commissioner for Human Rights (OHCHR), which coordinates human rights mainstreaming within the United Nations system and makes recommendations to other United Nations entities on the promotion and protection of human rights, and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, who is tasked with providing support and advice to United Nations entities. Given the numerous counter-terrorism outputs of the Compact, it is clear that neither OHCHR nor the Special Rapporteur have the resources or capacity to properly advise or make recommendations on the manifold human rights concerns that arise.

### **b. Other documents relevant to shaping the engagement of the United Nations on counter-terrorism and the prevention of violent extremism**

The twin General Assembly and Security Council resolutions on sustaining peace<sup>37</sup> “at all stages of conflict and in all its dimensions” are relevant to both countering terrorism and preventing violent extremism.

<sup>36</sup> Melissa Lefas, Junko Nozawa, and Eelco Kessels, *Blue Sky V: An Independent Analysis of UN Counterterrorism Efforts* (Washington, D.C., Global Center on Cooperative Security, 2020). <sup>37</sup> General Assembly resolution [70/262](#) and Security Council resolution [2282 \(2016\)](#).

ism. The resolutions stress the need for a comprehensive approach to transitional justice, promoting healing and reconciliation, a professional, accountable and effective security sector, including through its reform, and inclusive and effective demobilization, disarmament and reintegration programmes, including the transition from demobilization and disarmament to reintegration. All these are deemed critical to the consolidation of peace and stability, promoting poverty reduction, rule of law, access to justice and good governance, further extending legitimate State authority and preventing countries from lapsing or relapsing into conflict. Approaches to counter-terrorism grounded in the first and fourth pillars of the United Nations Global Counter-Terrorism Strategy are consistent with these efforts to sustain peace.

As part of the prevention agenda, the increased attention being paid to the linkages with violent extremism leading to terrorism and violent conflicts is helping to bridge the gap between transitional justice and counter-terrorism.<sup>38</sup> The rapid spread of violent extremism must be understood in the wider context of global insecurity, with violent extremist groups flourishing in contexts that have been affected by longer-term violent conflicts. The goal of preventing violent extremism provides a powerful rationale for resolving current violent conflicts and preventing new ones, as well as for the promotion of sustainable peace.

The human rights due diligence policy on United Nations support to non-United Nations security forces<sup>39</sup> provides the baseline for such support,<sup>40</sup> which must be consistent not only with the Organization's purposes and principles as set out in the Charter of the United Nations but also with its obligations under international law to respect, promote and encourage respect for international humanitarian, human rights and refugee law. According to these rules, where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law, and where the relevant authorities fail to take the necessary corrective or mitigating measures, there can be no support from the United Nations. The policy applies to all entities of the United Nations system providing support to non-United Nations security forces, which include national military, paramilitary, police and intelligence services, border control and similar security forces, national civilian, paramilitary or military authorities directly responsible for the management, administration or command or control of such forces, and peacekeeping forces of regional international organizations. It therefore applies not only to peacekeeping operations and special political missions, but also to all United Nations offices, agencies, funds and programmes that engage in such activities, including those engaged in the counter-terrorism programmes of the United Nations and work-

<sup>38</sup> World Bank and United Nations, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (Washington, D.C., 2018). On the definition of violent extremist groups in this context, see pp. 21–22. <sup>39</sup> See [A/67/775-S/2013/110](#). <sup>40</sup> This consists of direct and indirect support, including financial support, as defined in [A/67/775-S/2013/110](#), paras. 8 and 10.

ing for counter-terrorism entities, including the Counter-Terrorism Committee Executive Directorate, the Office of Counter-Terrorism and the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities (sometimes known as the 1267 Committee).

Particularly relevant to the work carried out by United Nations peace operations is the “Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people” ([A/70/95-S/2015/446](#)), which clearly states that United Nations peacekeeping missions are not suited to engage in military counter-terrorism op-

erations and should not be mandated to conduct counter-terrorism operations. In situations where a United Nations mission operates in parallel with counter-terrorism operations undertaken by the host Government, a regional force or an ad hoc coalition authorized by the Security Council, the respective role of each presence must be clearly delineated, and a clear division of labour and distinction of roles must guide the respective operations. The Security Council should ensure that, upon the exit of such forces, the United Nations is not required to assume residual tasks beyond its capabilities. The United Nations must maintain a strict adherence to its impartial commitment to the respect for human rights (paras. 119 and 123). The report also states that United Nations peace operations should address impunity through supporting appropriate mechanisms of transitional justice in situations where past violations have not been resolved and will be an obstacle to lasting peace (para. 158).

## **2. UNITED NATIONS COUNTER-TERRORISM ENGAGEMENT AND SUPPORT TO MEMBER STATES**

### **a. Various forms of United Nations counter-terrorism engagement**

In numerous countries around the world, various entities of the United Nations system, including the United Nations Office on Drugs and Crime (UNODC), the Counter-Terrorism Committee Executive Directorate, the Office of Counter-Terrorism, OHCHR, the United Nations Development Programme



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(UNDP), the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) and the International Organization for Migration are engaged in technical and capacity-building support as part of programmes and initiatives that are directly grounded in counter-terrorism and preventing violent extremism. A number of United Nations entities provide direct support to Governments through programmes aimed at preventing and countering violent extremism.<sup>41</sup> In 2020, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism reported that there were over 400 projects aimed at preventing and countering violent extremism implemented by 18 United Nations entities, benefiting more than 90 Member States in all regions of the world and addressing all seven priority areas set out in the Secretary-General's Plan of Action to Prevent Violent Extremism.<sup>42</sup> These include the provision of assistance in developing national and regional action plans on counter-terrorism and the prevention of violent extremism (such as in the Philippines), programmes to address violent extremism and radicalization leading to violence in prisons (such as in Kazakhstan), programmes on reintegrating violent extremist offenders (including in Indonesia), implementation of the United Nations Countering Terrorist Travel Programme and work with some

Governments to implement the Global Framework on United Nations Support to Member States on Individuals returning from the Syrian Arab Republic and Iraq (including in Iraq and Maldives), as well as various disarmament, demobilization and reintegration and prosecution, rehabilitation and reintegration initiatives (in Iraq, Somalia and the Lake Chad basin). Other examples include the delivery of human rights training to security officials as part of projects to prevent violent extremism. Many of these projects lack monitoring and evaluation, while others, such as the Countering Terrorist Travel Programme,<sup>43</sup> which is intended to support Member States in using advance passenger information and passenger name record data to detect travel by known or suspected terrorists through the provision of comprehensive assistance with legislative, operational and technical aspects and through engagement with the transport industry, have come under particular scrutiny from civil society because of the risk of technology and capacity being transferred to States that have histories of serious human rights violations, including through the misuse of counter-terrorism measures against minorities and civil society.

Iraq shows the complexity of multi-layered United Nations engagement in countries affected by multiple conflicts. UNAMI and a number of departments

<sup>41</sup> A/HRC/43/46, A/HRC/31/65. <sup>42</sup> A/HRC/43/46, para. 46. <sup>43</sup> The Programme "assists Member States in building their capabilities to detect and counter terrorists and serious criminals. This is achieved by collecting and using Advanced Passenger Information (API), and Passenger Name Record (PNR) data to improve the use of international databases, such as INTERPOL databases, with data relating to known and suspected terrorists and criminals. ... The Programme provides comprehensive assistance to Member States in legislative, operational, transport industry engagement, and technical areas. This includes the donation and deployment of the UN 'goTravel' software system." See [www.un.org/counterterrorism/countering-terrorist-travel](http://www.un.org/counterterrorism/countering-terrorist-travel).

and agencies of the United Nations are involved in post-conflict political, human rights, humanitarian, counter-terrorism and development activities in the country. Many of these focus on areas affected by the conflict with Islamic State in Iraq and the Levant (ISIL). UNDP, with the support of the Global Coalition against Daesh, established the Funding Facility for Stabilization to carry out activities in areas affected by the ISIL conflict. The International Organization for Migration is supporting the Government of Iraq to roll out its National Strategy to Combat Violent Extremism. The Global Framework on United Nations Support to Member States on Individuals returning from the Syrian Arab Republic and Iraq, which seeks to provide support through coordinated human rights-based and gender-responsive “whole-of-UN” responses to requests from national Governments, is led by the Office of Counter-Terrorism and the United Nations Children’s Fund (UNICEF). Many entities aim to adopt a broader approach, such as UNAMI in its human rights activities. The challenge in such environments is to ensure that an overwhelming focus on some activities and areas will not negatively impact on others.

## **b. United Nations operations in contexts of proximity with designated terrorist and violent extremist groups**

The Security Council’s framing of terrorism as a threat to international peace and security has led to peace operations becoming directly engaged in supporting States in their counter-terrorism operations and to the provision of capacity-building, technical assistance and support so that States can do this work themselves. The United Nations is requested to intervene in multiple contexts of crises and conflicts in which non-State armed groups designated as terrorist groups are active.<sup>44</sup> In the same contexts, the United Nations is also engaged in more traditional tasks of sustaining peace, transitional justice and human rights, including in contexts where humanitarian law is applicable.<sup>45</sup>

There are several challenging scenarios in which the United Nations itself or national forces operating under a United Nations banner provide some form of direct assistance to militarized counter-terrorism and violent extremism operations led by national Governments or external actors. United Nations operational mandates can contain a counter-terrorism agenda or tasks. In Mali, MINUSMA<sup>46</sup> was initially mandated to assist the country’s Government to

<sup>44</sup> Historically, when United Nations missions were deployed in areas where terrorist threats were present and terrorist groups were active, mandates were limited to maintaining a ceasefire in international conflicts, such as in the cases of the United Nations Interim Force in Lebanon and the United Nations Disengagement Observer Force. <sup>45</sup> MINUSMA, for example, has a full human rights component. It addresses security sector reform and supports peace initiatives for the establishment of local mechanisms for an amicable settlement of conflicts between communities, as well as making efforts to reduce community-based violence and to foster reconciliation. MINUSMA provides training to judicial authorities on military justice procedures and material jurisdiction to enhance investigations into crimes committed by the armed forces of Mali. It also provides support for the rule of law, to reinforce the trust and confidence of the population in State institutions, and to the country’s Truth, Justice and Reconciliation Commission. <sup>46</sup> Many of the examples in this section are drawn from Mali, as MINUSMA was the first United Nations mission that was deployed into a complex security environment with designated terrorist organizations. See Security Council resolution [2295 \(2016\)](#). On the risks involved, see the independent strategic review of MINUSMA ([S/2018/541](#), section IX).



control its territory and to deter violent extremist groups, and it was also tasked with more specific counter-terrorism roles, such as formal and informal cooperation with counter-terrorism operations deployed in the region, stabilizing key population centres, countering threats including asymmetric threats and taking steps to protect civilians.<sup>47</sup> Importantly, this includes support to the United Nations counter-terrorism sanctions committee, a task which was still included in recent resolutions.<sup>48</sup> The mandate of MINUSMA retained key elements of support for the stabilization and restoration of State authority, as well as support for other mechanisms, such as the Group of Five for the Sahel (G5 Sahel), although human rights and respect for the human rights due diligence policy hold a greater place in the relevant resolutions.<sup>49</sup> The United Nations Assistance Mission in Afghanistan (UNAMA) was deployed alongside a number of multinational forces charged, inter alia, with counter-terrorism, and it supported the Government of Afghanistan in fighting against terrorism and violent extremism.<sup>50</sup> The United Nations Assistance Mission in Somalia provides support to the African Union Mission in Somalia in its war against Al-Shabaab, and it supports the strengthening of the capacity of Somalia to pre-

vent and counter violent extremism through the implementation of Somalia's National Strategy and Action Plan for Preventing and Countering Violent Extremism.<sup>51</sup> The United Nations Support Mission in Libya was tasked with providing support to key national institutions and advice and assistance for efforts led by the Government of National Accord to stabilize post-conflict zones, including those liberated from ISIL.<sup>52</sup> Such scenarios are likely to develop in contexts such as Iraq, Libya and Somalia and, possibly, the Syrian Arab Republic.<sup>53</sup>

Stabilization mandates, in which the United Nations is tasked with providing support to Governments, are extremely problematic when the Government is engaged in countering terrorism and violent extremism.<sup>54</sup> By their very nature, such mandates introduce an element of offensive operations, which casts a shadow over the impartiality and legitimacy of the United Nations, contributing to the impression that the United Nations is a party to the conflict. Such support is particularly problematic when the Government's armed forces or security sector commits serious human rights violations and crimes in the context of counter-terrorism operations, feeding into the perception of United Nations complicity in the

<sup>47</sup> Security Council resolutions [2100 \(2013\)](#) and [2295 \(2016\)](#). <sup>48</sup> Under Security Council resolution [2295 \(2016\)](#), MINUSMA was mandated "to assist ... the 1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee and the Analytical Support and Sanctions Monitoring Team ... including by passing information relevant to the implementation of the measures in paragraph 2 of resolution 2253 (2015)". See also Security Council resolution [2640 \(2022\)](#), para. 27 (b). <sup>49</sup> See, in particular, Security Council resolution [2640 \(2022\)](#). <sup>50</sup> Security Council resolutions called upon the international community to assist the Government of Afghanistan in addressing the threat to the security and stability of the country posed by the Taliban, including the Haqqani Network, and by Al-Qaida, ISIL (Da'esh) affiliates and other terrorist groups and violent and extremist groups, and to develop, with the support of the international community, a comprehensive and integrated national strategy to counter terrorism and violent extremism as and when conducive to terrorism, all while recalling the recommendations and related technical assistance needs identified in the report on the focused visit of the Counter-Terrorism Committee to Afghanistan. See Security Council resolution [2405 \(2018\)](#), operative paras. 28–29. <sup>51</sup> Security Council resolution [2540 \(2020\)](#), operative para. 5. <sup>52</sup> Security Council resolution [2542 \(2020\)](#), operative para. 1 (vii) and (xi). <sup>53</sup> John Karlsrud, "Towards UN counter-terrorism operations?" *Third World Quarterly*, vol. 38, No. 6 (January 2017), pp. 1215–1231. <sup>54</sup> For example, MINUSMA provides support to the armed forces of Mali and national security forces. Together with UNODC, it provides specific technical support to the country's Specialized Investigation Brigade to combat terrorism and transnational organized crime.

commission of such violations. This point is possibly best illustrated by developments in Mali, where a private company based in a third State is allegedly engaged in counter-terrorism alongside the Government of Mali and has been accused of very serious human rights violations against civilians and war crimes.<sup>55</sup>

Complicating elements include operational or intelligence-sharing agreements through which United Nations field missions support and assist external forces engaged in counter-terrorism. These can include formal support to regional forces engaged in counter-terrorism, such as the support brought by MINUSMA to the G5 Sahel joint force,<sup>56</sup> and formal intelligence cooperation, such as that between the MINUSMA intelligence cell<sup>57</sup> and the French counter-terrorism operations – Operation Serval and Operation Barkhane. Similarly, the ambiguous role played by some States deployed under the blue flag of the United Nations can contribute to the perception that the United Nations is adopting a much more aggressive stance vis-à-vis threats in the mission area. Arrangements through which troop-contributing States simultaneously assist counter-terrorism

operations directly<sup>58</sup> are concerning, as they blur the lines between national and international mandates, creating structural inequalities such that troops with less operational means and less equipment are left to navigate alone in extremely volatile environments without the support of their better-equipped partners.<sup>59</sup> The perception of a counter-terrorism role for the United Nations can be compounded by the origins of the engagement of the United Nations, such as in 2013, when MINUSMA took over from the African-led International Support Mission in Mali (AFISMA), which had been mandated by the Economic Community of West African States to support the authorities of Mali in recovering areas under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations and associated extremist groups.<sup>60</sup> The perception that this change was not a substantive one is possibly best illustrated by the handover ceremony itself, when “AFISMA troops symbolically took off their hats and donned the UN blue berets”.<sup>61</sup>

In all of these cases, the United Nations is not seen as a neutral actor. A clear reflection on these issues is important, given

<sup>55</sup> See, for example, OHCHR, “Malian troops, foreign military personnel killed over 500 people during military operation in Moura in March 2022 – UN human rights report”, 12 May 2023, available at [www.ohchr.org/en/press-releases/2023/05/malian-troops-foreign-military-personnel-killed-over-500-people-during](http://www.ohchr.org/en/press-releases/2023/05/malian-troops-foreign-military-personnel-killed-over-500-people-during); and the final report of the Panel of Experts on Mali established pursuant to Security Council resolution 2374 (2017) (S/2023/578). <sup>56</sup> See Security Council resolution 2391 (2017), operative para. 13, which refers to the provision of “specified operational and logistical support through MINUSMA to the FC-G5S (‘the technical agreement’)”. See also resolution 00-01/2017 of the Group of Five for the Sahel. <sup>57</sup> The All Sources Information Fusion Unit was created in 2013. In 2016 it merged with the U2 intelligence cell of the force component, becoming the Military All Sources Information Cell. See “Mali : la Minusma ne trouve pas d’unités de renseignement pour sa garnison de Kidal” (“Mali: MINUSMA cannot find intelligence units for its Kidal camp”), *Jeune Afrique*, 21 July 2016, available at [www.jeuneafrique.com/mag/342200/politique/mali-minusma-ne-trouve-dunités-de-renseignement-garnison-de-kidal/](http://www.jeuneafrique.com/mag/342200/politique/mali-minusma-ne-trouve-dunités-de-renseignement-garnison-de-kidal/). <sup>58</sup> Such arrangements include agreements that allowed certain countries, during their MINUSMA deployments, to transport troops from the Operation Barkhane counter-terrorism mission and the MINUSMA intelligence surveillance and reconnaissance package, directly supported by special forces, helicopters and surveillance drones contributed by Western Governments. These troops were not in the traditional white of the United Nations, but remained in green camouflage with a blue United Nations logo, despite their full operational integration within the United Nations mission. See John Karlsrud, “For the greater good? ‘Good States’ turning UN peacekeeping towards counterterrorism”, *International Journal* 2019, vol. 74, No. 1 (March 2019), pp. 65–83. <sup>59</sup> Jemma Challenger, “The implications of stabilisation logic in UN peacekeeping: the context of MINUSMA”, *E-International Relations*, 10 April 2021. <sup>60</sup> See Security Council resolution 2085 (2012). <sup>61</sup> African Union, “AFISMA transfers its authority to MINUSMA”, press release, 1 July 2013.

the increasing number of conflicts in which terrorist groups are active and given the role of the United Nations in peace and security, which means that its engagement in contexts of close proximity to designated terrorist groups is likely to increase.

### **c. Practical impact of in-country counter-terrorism engagement**

During interviews, many interlocutors highlighted the commonalities between the transitional justice and counter-terrorism frameworks. They referred to United Nations framework documents that are undeniably relevant to the field of transitional justice,<sup>62</sup> which was born from the realization that purely judicial, criminal and punitive mechanisms were insufficient to remedy widespread human rights violations and violence or to prevent recurring cycles of violence and return to conflict in the future. This is pertinent to the increased use of transitional justice approaches to address situations of ongoing (sometimes protracted) conflict where terrorist groups are active. Several interviewees noted that the prevention of violent extremism can be seen as a series of measures to embrace guarantees of non-recurrence, while the prosecution and reintegration limbs of prosecution, rehabilitation and reintegration strategies have clear common ground with transitional justice approaches. Truth-seeking mechanisms and counter-narrative initiatives can be powerful tools to address the challenge of recruitment, while crimi-

nal justice can add value to truth seeking by putting forward facts and bringing evidence. Reparations can be granted for acts of terrorism, and in some cases, given the scale of terrorism acts in some parts of the world, such as Central and West Africa, where entire villages and resources have been destroyed, collective reparations can be envisaged. Although the rehabilitation aspect comes from a more securitized perspective, some have likened it to the “reckoning” aspect of transitional justice.

The numerous conceptual and practical challenges to the combination of the two frameworks were also raised in the interviews. The lack of sufficient attention paid to the impact that the implementation of the counter-terrorism framework has on human rights is a key concern, which can be traced back to the development of the framework. As noted by the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, it was developed without consultation, including with civil society, although this could have assisted in contextualizing the human rights impact of the measures. Successive Special Rapporteurs have called out the lack of specificity in determining the human right impact of the measures and the absence of guidance regarding how compliance with international law would be assessed in their implementation. While generic references to international human rights law have multiplied, the lack

<sup>62</sup> United Nations Global Counter-Terrorism Strategy in accordance with Security Council resolutions [1904 \(2009\)](#) and [2178 \(2014\)](#); Secretary-General’s Plan of Action to Prevent Violent Extremism.

of clear and explicit human rights guidance provided in the text of the framework remains problematic, particularly in light of the extensive human rights implications of actions mandated by some Security Council resolutions.<sup>63</sup> The confidentiality of the reports between the Counter-Terrorism Committee Executive Directorate and national Governments has prevented external stakeholders from assessing the manner in which human rights have been taken into consideration in determining the adequacy and international law compliance of national counter-terrorism measures.<sup>64</sup> In turn, the prioritization of counter-terrorism and countering and preventing violent extremism has led both States and the United Nations to magnify and overestimate terrorism and violent extremist threats over other prominent risks and threats, leading to funds and capacities being diverted away from other key aspects of the work of the United Nations.<sup>65</sup>

All three Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism have been clear that the broad human rights violations that have resulted from the implementation of the counter-terrorism framework are rooted, in part, in the post-2001 United Nations framework itself. This challenge was confirmed by numerous interlocutors – both those with expertise in counter-terrorism and those in-

involved in transitional justice. Those speaking from the counter-terrorism perspective highlighted the mandatory nature of their work and the legal grounding that came with it, notably through the designation of groups as terrorist groups by the Security Council. They noted their clear objectives and duties, mandated and justified by the Security Council, to help States “be better at countering terrorism”, highlighting that technical approaches often work better with Governments than human rights-based approaches, and that States have considerable freedom to engage with other agencies beyond the limited work on counter-terrorism and preventing violent extremism. They also noted that, where transitional justice approaches might be useful, it was up to Governments themselves to introduce them. More nuanced positions were also put forward, with many interviewees highlighting their expertise on the nexus between humanitarian assistance, organized crime, cultural heritage and counter-terrorism, taking into account the recommendations of human rights bodies.

Those working in areas linked to transitional justice noted the differences between their capacity and the capacity of the counter-terrorism entities. They highlighted that their calls for structural reforms were not easily heard when the counter-terrorism entities were offering “one size fits all” programmes that were simply “tick boxes” and

<sup>63</sup> Reports of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ([A/HRC/34/61](#), [A/67/396](#), [A/65/258](#), [A/73/361](#), [A/HRC/40/52](#), [A/HRC/37/52](#), and [A/70/371](#)). <sup>64</sup> Reports of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ([A/74/335](#), [A/73/361](#), [A/HRC/37/52](#) and [A/65/258](#)). Most reports by the Counter-Terrorism Committee Executive Directorate are available to members of the United Nations Global Counter-Terrorism Coordination Compact through a dedicated portal of the Office of Counter-Terrorism with a view to supporting the implementation of technical assistance programmes. <sup>65</sup> [A/HRC/40/52](#).

that did not necessitate long-term political engagement with the Government. They noted the reluctance of some parts of the United Nations, as well as of donors, to “start a programme that will bear fruit in five years’ time”, and the impossibility of separating the proper implementation of counter-terrorism and violent extremism prevention programmes without addressing system-wide reforms. They stressed the need to “move the discussion out of the counter-terrorism box to criminal justice and human rights perspectives” because of difficulties around raising the need to consider root causes and open space for dialogue with communities when counter-terrorism programmes have easy buy-in from the Government, notably through large-scale funding. They noted that, even where development programmes had been launched, they focused solely on rebuilding structures, not on the root causes of the conflict, which would make development sustainable.

The issue of the overwhelming concentration of funding for violent extremism prevention projects (to the detriment of other United Nations programmes and projects) was noted by many interlocutors from both areas. They highlighted the overwhelming impact of the prevention of violent extremism on the work of the United Nations (the comment sometimes being made that, “today, everything is PVE”), which led to the rebranding of United Nations action on core issues, such as human rights, development, the rule of law, education and community support, leading to their securitization and affecting the choice of civil society partners and beneficiaries of such programmes. As

was highlighted during one interview, “PVE engages groups because they are ‘radicalized’, not because they are marginalized”. Some interlocutors referred to the extrabudgetary nature of much of the funding for counter-terrorism and preventing violent extremism, highlighting that, in this area, the United Nations was “donor driven”, which gave it and its specific security interests an influence often unmitigated by core United Nations priorities and objectives.

The lack of coordinated United Nations action at the country level was also raised as a key concern. Many interviewees highlighted contrasts between overlapping programmes: strengthening criminal justice for terrorism offences versus judicial reform; programmes on reintegrating violent extremist offenders versus programmes focusing on the needs of the corrections system as a whole; and the needs of returnees versus the needs of the communities to which they return. They emphasized differences in understanding, in particular between the notions of reintegration and reconciliation. They also raised the matter of siloed approaches, with decisions on the implementation of counter-terrorism projects and programmes being made at Headquarters, with no attention paid to the impact on those already in country. A further issue mentioned by interviewees was a lack of attention to the needs of all victims. They additionally highlighted the importance of giving an enhanced role to the Resident Coordinator. Examples of good practices cited in this regard included the Peacebuilding Fund model, which requires sign-off by the Resident Coordinator, as well as common frameworks, which would



unify approaches and prevent institutional infighting.

Unchallenged United Nations support to national Governments and the lack of effective and transparent monitoring of national implementation by the United Nations were also highlighted as a cause for concern. Examples cited to the author include the fact that, while some United Nations actors are reluctant to push back against the hard-hitting security approaches of Governments, their designation of groups in counter-terrorism strategies, their qualification of conflicts solely as counter-terrorism (refusing to acknowledge the existence of armed conflict), their use of collective punishment against entire groups perceived as being associated with terrorist groups, and their equating of civil society with terrorist groups in their repression, other United Nations actors are left with the difficult role of monitoring human rights violations, denouncing overly broad definitions of terrorism, highlighting the existence of human rights in national constitutions and pushing for greater structural reform and comprehensive, victim-centred justice and accountability initiatives. As one interviewee put it, “the counter-terrorism people let the human rights people deliver the hard messages”. The duality of these approaches can make the United Nations look disjointed. By leaving unchallenged the use by national authorities of national definitions of terrorism and violent extremism and related frameworks, for instance, the United

Nations may be seen as condoning or enabling action that is in clear violation of basic human rights and fundamental freedoms, disregarding its own fundamental role in safeguarding international human rights law.<sup>66</sup> The support of the United Nations and its work with national authorities, which have framed security approaches under the global rubric of counter-terrorism and preventing violent extremism, can legitimize the pursuit of narrow domestic political priorities, in which political opponents are targeted, civil society is securitized and minorities discriminated against. This can give the impression that the United Nations has prioritized the Government’s policy framework over the needs and demands of communities across the country, including in the area of justice.<sup>67</sup>

Permeability between United Nations operations and counter-terrorism actors and operations can negatively impact public perceptions of the United Nations, affecting its impartiality and legitimacy. The risks are manifold. Where it is difficult, if not impossible, for local populations to differentiate between the United Nations and national, regional or external counter-terrorism operations – the visuals being important – the United Nations risks being internal to conflict dynamics, rather than external to them. Legally, overly close cooperation with a party to a conflict (including through information-sharing) can mean the loss of protected status under international humanitarian law. In practice, even a posture that is

<sup>66</sup> A/HRC/43/46, paras. 48–49. <sup>67</sup> Aries A. Arugay, Marc Batac and Jordan Street, *An explosive cocktail: Counter-terrorism, militarisation and authoritarianism in the Philippines* (London, Saferworld, 2021).

merely perceived as militarized makes the United Nations a prime target for reprisal attacks, placing all United Nations troops at risk and endangering all staff and their families, as well as those working closely or in partnership with the United Nations, while the “bunkerization”<sup>68</sup> of military, law enforcement and civilian staff inevitably affects the ability of the United Nations to interact with local populations.

Where United Nations operations are “tainted” by proximity with counter-terrorism operations, the Organization’s ability to simultaneously address transitional justice issues can be affected, in particular where the aim is to strengthen the rule of law, human rights, State-society relations, the security sector and justice sector reform. If the impartiality of the United Nations is undermined, space for building peace and engaging with partners, communities and civil society can be constrained. Mandates that create structural relationships with the Government leave little room for engagement with non-State actors that operate outside what the Government views as the legitimate political space. This can limit options for resolving crises and conflicts to militarized solutions<sup>69</sup> and can hinder the ability of the United Nations to call for justice and accountability for all crimes and human rights violations that are committed. Where the United Nations appears to lack legitimacy, its labelling and funding of projects

linked to preventing violent extremism risks stigmatizing target groups and distancing the United Nations from them, leading to further marginalization and isolation. This can simultaneously reinforce the rallying position held by a number of designated terrorist and violent extremist groups that the United Nations is solely an arm of the West’s counter-terrorism agenda. This gives the space to designated terrorist and violent extremist groups to place themselves as an alternative to existing regimes, with the support of the population.



UN Photo/Stuart Price

<sup>68</sup> Karlsrud, “Towards UN counter-terrorism operations?” <sup>69</sup> In the words of Assitan Diallo, President of the Association des Femmes Africaines pour la Recherche et le Développement (AFARD), “For us in Mali, stabilization means stabilization of the military status quo”. See <https://www.saferworld.org.uk/resources/news-and-analysis/post/953-eu-leaders-adopt-a5-billion-fund-to-train-and-equip-security-forces-and-militaries-worldwide-that-risk-fueling-armed-conflict>.

## B. Analytical challenges: framing conflict and crisis situations



This section will highlight issues linked to the use of the terms “terrorism” and “violent extremism” and some of the challenges that can arise when both frameworks coexist.

### 1. DISCOURSE AND QUALIFICATION

The question of how conflicts, groups and individuals are qualified is key to understanding the challenges posed by the counter-terrorism framework. The labeling of non-State armed groups as terrorist or violent extremist groups, whether by the United Nations, through resolutions and sanctions regimes, or by the Government, means introducing a generally permissive international framework grounded in exceptionalities and securitization, which empowers government action when countering terrorism or preventing violent

extremism, however these are defined. Words and phrases that are widely used by the Security Council and key to the international framework, such as “terrorism”, “terrorist”, “violent extremism”, “foreign terrorist fighter”,<sup>70</sup> “radicalization” and “associated with” (in the context of designated terrorist groups) are symbolic and context-dependent and are often used to stigmatize and delegitimize. The impact is evident in the steps taken by the Office for the Coordination of Humanitarian Affairs in Mali to ensure the strict circumscription of the use of such language so that the rhetoric does not have a negative impact on the Office’s work.<sup>71</sup>

The continued lack of semantic clarity pertaining to counter-terrorism and preventing violent extremism at the international level has very serious impacts on how they are invoked at the national level. Overly broad

<sup>70</sup> Security Council resolution [2178 \(2014\)](#) defines “foreign terrorist fighters” as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. This terminology is not known in international humanitarian law, and it has been noted that it “significantly blurs the lines between terrorism and armed conflicts not just rhetorically, but by creating legal consequences for ‘foreign terrorist fighters’ who intend to travel abroad”. Sandra Kraehenmann, *Foreign Fighters under International Law*, Academy Briefing No.7 (Geneva Academy, Université de Genève, 2014). <sup>71</sup> Office for the Coordination of Humanitarian Affairs, “Contexte humanitaire et diversité d’acteurs au Mali, Terminologie pour un langage commun” (“Humanitarian context and diversity of actors in Mali: terminology for a common language”) (2020). This manual notes that non-State actors should not be qualified as “extremists”, “terrorists”, “insurgents”, “radicalized”, “rebel groups”, “Islamist groups” or “Jihadists”, as this may imply a value judgement, it may be interpreted as a political declaration and it may have legal implications. Similarly, conflicts should not be qualified as “sectarian”, “religious”, a “Jihadi rebellion”, “terrorism” or a “fight against terrorism”.

and vague definitions of terrorism and violent extremism and a lack of adequate safeguards to ensure that counter-terrorism and violent extremism prevention measures that limit human rights have a legal basis and are necessary, proportionate and non-discriminatory<sup>72</sup> have allowed counter-terrorism and violent extremism prevention measures to be misused by some Governments to repress dissent as well as cumulatively marginalizing, stigmatizing, discriminating against and excluding members of minorities, women, children and civil society.<sup>73</sup>

The use by Governments of stigmatizing terms to qualify conflicts, groups or individuals often remains unchallenged by United Nations counter-terrorism actors. Reasons given for this include the preservation of access, the implementation of programmes and protecting the sensitivities of the Government. This is true even in cases where it is known that such a qualification has been made by the Government opportunistically in order to access counter-terrorism funds, for example. As one interviewee put it, "The narrative is never engaged head-on by the UN." The absence of push-back can, in turn, be seen as condoning the use of the securitized model.

This has a direct impact on United Nations human rights and humanitarian work, with an increased risk of violations of human rights and fundamental freedoms resulting from overly broad definitions and a more

hostile climate for monitoring and engagement on such issues. The application of the terrorism framework to civil society actors and their advocacy results in a narrowing of civic space, there are challenges to the applicability of international humanitarian law in those instances where the Government refuses even to qualify a situation as armed conflict, and there are specific repercussions for principled humanitarian action. A further consequence is the ensuing qualification for the extensive provision of tools and assistance by the United Nations under various counter-terrorism capacity-building and technical assistance agreements. Given the lack of meaningful oversight and red lines, there is a risk that, in such cases, the support provided by the United Nations for national counter-terrorism work, however it is defined, could result in a restriction of human rights at the national level.

The use of the qualifiers "terrorist" or "violent extremist" and the resultant repressive government action by way of counter-terrorism or prevention of violent extremism lies at the root of fundamental policy choices regarding the identification of the causes of conflicts and crises and their management and resolution. This is compounded by the lack of granularity of the Security Council framework, which hampers a nuanced approach to national, regional and local situations. The broad overarching agenda, which heavily relies on national qualifications, combined with strong

<sup>72</sup> [A/75/729](#), para. 32. <sup>73</sup> "Human rights impact of counter-terrorism and countering (violent) extremism policies and practices on the rights of women, girls and the family: report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin" ([A/HRC/46/36](#)); [A/73/361](#).





UN Photo/Stuart Price

political pressure from States backing a counter-terrorism agenda (including those with veto power on the Security Council) can lead to the counter-terrorism/prevention of violent extremism framework being imposed equally on very different conflict and crisis situations. As will be explored below, the counter-terrorism and prevention of violent extremism lens intrinsically modifies the way in which conflict and crisis situations are approached.

## **2. OUTLOOK ON CRISIS AND CONFLICT SITUATIONS**

The choice of words to define conflict and crisis situations and actors is key to the way in which they are viewed and addressed. By its very nature, the counter-terrorism framework, along with the use of the words “terrorism” and “violent extremism”, has come to impose a unitary lens on harms and drivers, providing an overly simplified analytical vision and framing that often fails to grasp the complexity of conflict and crisis situations. It has also tended to reinforce the legitimacy and authority

of existing regimes by locking actors into categories of legitimate (the Government) and illegitimate (non-State armed groups designated as terrorist or violent extremist groups), and it has favoured a securitized response that is often counterproductive.

### **a. Simplified outlook on causes and drivers**

The words “terrorism” and “violent extremism” come with a critical conceptual concern relating to what are referred to as the conditions conducive to terrorism and the drivers of violent extremism. In spite of the provisions under pillar I of the United Nations Global Counter-Terrorism Strategy and in the Secretary-General’s Plan of Action to Prevent Violent Extremism, national and regional approaches to crises and conflicts in which terrorist or violent extremist groups are engaged are often still based on the conviction that the solution is the defeat of such groups and the elimination of the “violent extremist ideologies” that underpin them. Yet many situations characterized by the presence of non-State armed groups designated as terrorist groups that are engaged in local and national conflicts, often of low intensity and asymmetric, point to drivers and factors that are not inherently and directly caused by designated terrorist groups or violent extremist ideologies.

One UNDP study shows that governance and human rights challenges are central drivers of violent extremism.<sup>74</sup> Another

<sup>74</sup> UNDP, *Journey to extremism in Africa: drivers, incentives and the tipping point for recruitment* (New York, 2017).



study shows that relative poverty and weak and fragile States that are incapable of projecting power based on the rule of law or human rights-compliant authority create ungoverned spaces, where violent extremist groups fill gaps in authority and sovereignty. These, too, can be factors leading to the proliferation of violent extremism.<sup>75</sup> A further study, focusing on the Sahel, highlights limited regional mobility, centralized rule across the region, lack of access to natural resources, climate change, desertification leading to extreme floods and droughts, and tensions between sedentary farmers and nomadic herders, with overcentralized States run by political elites and weak social contracts.<sup>76</sup> These dynamics of frustration and grievance, rather than ideology and religion, have been confirmed with interlocutors who have worked, inter alia, in the north of Cameroon and in Mali, the Niger and Nigeria.

Accordingly, conflict situations characterized by the presence of non-State armed groups designated as terrorist groups that are engaged in local and national conflicts, which are often of low intensity and asymmetric, cannot usefully be addressed solely through the military defeat of the group designated or qualified as a terrorist or violent extremist group. The failure of the military/law enforcement approach to designated groups such as Boko Haram, ISIL and Al-Shabaab corroborates this finding.

An overly simplified vision of the causes of crises and conflicts seriously challenges any ability to put an end to them and to prevent their recurrence. Furthermore, securitized responses contribute to the long-term (sometimes seemingly perpetual) nature of the conflicts by feeding into long-term patterns of violence and repression.

By analysing the legal, political, economic and social causes of violence, a comprehensive transitional justice approach can offer a more nuanced and contextualized understanding of its origins and drivers. Understanding the internal motives and external factors that lead to crises and conflicts can assist in addressing the real or perceived grievances and needs of those engaged in the conflict, as well as identifying and addressing the needs of all victims – which is a politically complex exercise in conflicts framed as “terrorist”.<sup>77</sup> Holistic transitional justice approaches, which ideally include short-, medium- and long-term measures, including a strong focus on diverse and context-specific guarantees of non-recurrence (e.g. institutional reforms, improved public policy, delivery of good governance and accountability of security and other institutions),<sup>78</sup> represent a far more effective recourse and a better policy response for counter-terrorism and prevention of violent extremism than a continued overconcentration on security-focused interventions.<sup>79</sup> This type of approach, which

<sup>75</sup> UNDP, “Root causes of radicalization in Europe and the Commonwealth of Independent States”, discussion paper (New York, 2015), p.5. <sup>76</sup> Olivier Guiryanan, Lucia Montanaro and Tuuli Rätty, *European Security Assistance: The search for stability in the Sahel* (London, Saferworld, 2021). <sup>77</sup> Ronald Slye and Mark Freeman, “The limits of punishment: transitional justice and violent extremism – framework paper” (Institute for Integrated Transitions and United Nations University Centre for Policy Research, 2018), p. 23. <sup>78</sup> See also Sustainable Development Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. <sup>79</sup> UNDP, *Journey to extremism in Africa*, p. 87.

challenges commonly accepted but often unempirical presumptions and assumptions about the drivers and underlying factors of terrorism and of violent extremism leading to terrorism, and which favours policy and programmatic choices that are grounded in context-specific empirical findings,<sup>80</sup> is in alignment with the under-implemented pillars I and IV of the United Nations Global Counter-Terrorism Strategy, as advanced in the Secretary-General's Plan of Action to Prevent Violent Extremism.

#### **b. Increased legitimacy for existing regimes**

By framing conflicts as a struggle between Governments and terrorist or violent extremist groups, or between legitimate and illegitimate – compounded by the question of who qualifies – approaches based on counter-terrorism can reinforce, support, protect and strengthen regimes in power against terrorist or violent extremist groups that have been accused of delegitimizing or challenging them. Counter-terrorism intervention and support, including aid, assistance and training, political support, stabilization mandates and fully fledged military intervention,<sup>81</sup> all of which rely on existing institutions to deliver security objectives, are therefore usually aimed at reinforcing the power and capability of Governments, the re-establishment of political order or the strengthening of territorial coverage in areas where State presence is weak. This includes contexts where the

adverse impact on human rights and civic space is significant, although policies put in place by the United Nations, such as the human rights due diligence policy and the minimum conditions of engagement set up under the Global Framework on United Nations Support to Member States on Individuals returning from the Syrian Arab Republic and Iraq can mitigate some of this impact.

Given the extent of power in the hands of the same Governments, elites and law enforcement and military structures that may have contributed to grievances, discrimination and injustice and to creating or fuelling conflicts and crises, such approaches can reinforce poor governance and corrupt or failed regimes. This can lead to investment in and funding of failed security sectors implicated in human rights violations, and to the repression of political protest, torture and corruption. More insidiously, where United Nations counter-terrorism funds are used by corrupt Governments, it can give the impression that these funds are intended to prop up those Governments, security forces and elites that have engaged in human rights abuse and that lack legitimacy in the perception of the public.

In more extreme cases, this may even incentivize Governments to nurture violent extremist and terrorist groups and conflict to justify national security narratives, to mobilize support for a counter-terrorism

<sup>80</sup> UNDP Oslo Governance Centre, "Assessing progress made, and the future of development approaches to preventing violent extremism: report of the United Nations Development Programme second global meeting on preventing violent extremism, 'Oslo II'" (Oslo, 2018), p.17. <sup>81</sup> Ricardo Soares de Oliveira and Harry Verhoeven, "Taming intervention: sovereignty, statehood and political order in Africa", *Survival*, vol. 60, issue 2 (March 2018), pp. 7–32.



agenda and to secure military and security resources.<sup>82</sup> Governments can fuel sectarian divisions to obtain violent responses and then use counter-terrorism finance laws and sanctions to block humanitarian and development aid. In turn, designated terrorist groups that prey on fragile States and marginalized groups can undermine Governments by highlighting their inability to protect the population, especially during crises such as the coronavirus disease (COVID-19) pandemic. By potentially increasing recruitment and support to such groups, such tactics can lock countries into a cycle of conflict.

### c. Security responses

As part of the unfolding pattern of security responses to terrorist and violent extremist violence, with invigorated legitimacy and no incentives to open up the political space, the State may fully prioritize its use of the security apparatus over a much-needed focus on addressing the conditions conducive to terrorism. The prevalence of such

an approach was confirmed in many interviews conducted by the author relating to contexts such as Burkina Faso, Indonesia, Mozambique, the Niger and the Philippines.

The acceptance that a conflict or crisis situation can be qualified as terrorism or violent extremism and that the government response can therefore be described as counter-terrorism or prevention of violent extremism increases the asymmetry between the actors involved and locks them into specific “right versus wrong” roles, which leave no room for challenging or reframing this initial analysis. By coupling the act (the terrorist offence) with the actor (the terrorist or terrorist group), crises and conflicts are politicized using the notion of “good and bad” sides, and certain actors are withdrawn from the political process. Non-State armed groups may also be designated as terrorist groups.

Unduly militarized solutions, authoritarian practices and serious violations of human

<sup>82</sup> “In conflating all anti-government groups, while consistently appealing to terrorism in its rhetoric, the Malian regime is able to capitalise on the global WOT frame as a discursive tool to delegitimise local grievances, and conflate these with jihadism.” Challenger, “The implications of stabilisation logic in UN peacekeeping: the context of MINUSMA”.

rights, which are often defining elements of counter-terrorism, do little more than sustain violence. This risk is increased by the asymmetric nature of the conflict, which can breach international humanitarian law, with profound legal consequences for the protection of civilians, and it can be further exacerbated by the limited options and capacities to resolve and navigate complex conflict situations. In addition, the use of counter-terrorism sanctions regimes, the overly broad definitions of various forms of support to terrorism, restrictions on donors and the vetting processes for humanitarian non-governmental organizations have all restricted the delivery of principled humanitarian assistance in areas where designated terrorist groups are active. As these are often places where State presence is most limited and needs are acute, one very negative consequence can be that individuals are pushed into supporting these groups for their own survival.<sup>83</sup>

According to research conducted among 495 former fighters from Al-Shabaab, Boko Haram, Islamic State and other groups, 71 per cent of respondents identified “government action”, mistrust in the conduct of the police, the military or the State security agency, the killing of a family member or friend or the arrest of a family member or friend among the critical events that finally pushed them to join a violent extremist group.<sup>84</sup> Studies conducted in the Sahel confirm that the experience (whether per-

ceived or actual) of abuse and maltreatment at the hands of different government institutions, including the political authorities, public services, the justice system and the security forces, as well as real or perceived State abuse and poor governance, are among the most influential factors in relation to vulnerability to violent extremism.<sup>85</sup> “Government action” in this context includes all national security agencies (military, police and intelligence) and all bodies assisting national Governments in counter-terrorism actions, including clan militias, although informal bodies of this nature often subscribe to no international standards of conduct, face no accountability for human rights violations and use child soldiers.<sup>86</sup>

According to the Secretary-General, “human rights violations committed in the name of countering violent extremism will give terrorists their best recruitment tools.”<sup>87</sup> Human rights violations, particularly in the context of counter-terrorism, are a key factor in creating new grievances that can lead to increased violence. It is therefore arguable that terrorist violence and counter-terrorist violence fuel one another, with military intervention and excessive use of force contributing to the continued use of terrorist violence, rendering the disentanglement of original responsibilities highly complex.<sup>88</sup> Examples include equating ethnic affiliation to membership of designated groups, resentment and fear caused by drone strikes and the

<sup>83</sup> [A/70/371](#) and [A/75/337](#). <sup>84</sup> UNDP, *Journey to extremism in Africa*. <sup>85</sup> Luca Raineri, *If victims become perpetrators: Factors contributing to vulnerability and resilience to violent extremism in the central Sahel* (International Alert, 2018), p. 49. <sup>86</sup> Vanda Felbab-Brown, “The limits of punishment: transitional justice and violent extremism – Somalia case study” (Institute for Integrated Transitions and United Nations University Centre for Policy Research, 2018). <sup>87</sup> Report of the Secretary-General on the situation in Mali ([S/2016/498](#)), para. 84. <sup>88</sup> Frédéric Mégret, “Transitional justice for the ‘war on terror’?” *Journal of Human Rights* (2023), pp. 1–17.



lack of accountability for so-called collateral damage. The “war on terror” and the accompanying use of torture and arbitrary, sometimes indefinite, detention, as well as foreign military intervention, all form part of this landscape.

Local populations and communities caught between a designated terrorist or violent extremist group and an overly militarized and abusive State response have few viable options for ending their association with the former. As noted by the Secretary-General, “In countries facing insurgencies led by violent extremist groups, community members have reported feeling more fearful of their Governments’ violations of human rights and abuse by security forces than of extremist groups.”<sup>89</sup> The strategic and poli-

cy counter-terrorism approach to such conflicts, which, at its most basic level, locks actors into a military or security approach to addressing their causes, and therefore reduces or even entirely discards the scope for political solutions and dialogue, needs to be questioned. Holistic, context-specific and victim-centred transitional justice approaches that include a focus on truth-seeking, prosecution and reparation, as well as an earnest reflection on guarantees of non-recurrence, may help complexify overly simple narratives and address individual responsibilities. Such approaches could also help tackle issues relating to collective support, both for countering terrorism and for terrorist groups, as well as addressing the situation of communities that are victims of both.



EPA/ZEIN AL-RIFAI

<sup>89</sup> Identical letters dated 2 March 2018 from the Secretary-General, addressed to the President of the General Assembly and the President of the Security Council (A/72/761-S/2018/86), para. 16.



## C. Impact on crisis resolution processes and armed conflict situations



The proscription of non-State armed groups, whether by the United Nations through resolutions and sanctions regimes or by national Governments, entails a consequential restriction of policy choices in seeking political solutions (subsection 1 below), achieving accountability (subsection 2) and securing the rights of all victims (subsection 3). This section also considers the complexities of membership of, support for and association with terrorist groups (subsection 4).

### 1. EXCLUSION FROM POLITICAL PROCESSES

The application of the “terrorist” and “violent extremist” labels to individuals, groups or situations, or their formal designation as such, can have far-reaching consequences, as this can express or evoke strong opprobrium, and it is often aimed at or results in the vilification of individuals and groups. Such a designation solidifies the position that those qualified as such are not worthy of being considered as a legitimate coun-

terpart or party to the conflict. Politically, the qualification renders even limited engagement with such groups or individuals impossible. It firmly locks the political conversation into a security paradigm, suggesting that the only possible solution is victory over the group and its members using military and other security forces.

However, the distinction between terrorist groups and non-terrorist groups can be fluid.<sup>90</sup> This is because these labels and designations can be used opportunistically to undermine credibility and limit participation in negotiated solutions to a conflict, but also because there are examples of groups that have used illegal violence being transformed into groups that become fully fledged participants in the political process. Further, while such designations may be intended to restrain the application of international humanitarian law, some designated groups that meet the requirements to be considered as parties to an armed conflict under international humanitarian law may commit acts of terrorism

<sup>90</sup> “In practice, distinguishing between ‘terrorist’ and ‘non-terrorist’ groups may be difficult – not least in Mali – given the fluidity of allegiances between transnational ‘terrorist’ groups and autochthonous groups with local grievances.” See United Nations, Department of Peacekeeping Operations, “DPKO brainstorming brownbag lunch: countering terrorism and violent extremism – implications for UN peacekeeping” (New York, 2015), quoted in Karlsrud, “Towards UN Counterterrorism Operations?”

under domestic law or under international humanitarian law and still retain the status of party to the conflict. Once established, however, the terrorism or violent extremism label is extremely difficult to overcome.

The proscription regimes enabled by Security Council resolutions<sup>91</sup> are a core aspect of the multilateral counter-terrorism framework. They articulate sanctions regimes and the ways in which States are to prevent and suppress “terrorist” acts. **By affecting the way the conflict is portrayed and circumscribed, labelling and proscription constrain the range of policy choices available.** This has an impact on mediation and negotiation efforts as part of a peace process, on various forms of reconciliation as an objective, including through the exclusion of amnesties, and on disengagement programmes.

#### a. Negotiation and mediation

As military and political victory in complex armed conflicts involving designated terrorist groups is often not a realistic prospect, negotiation and mediation to end such conflicts that includes a strong transitional justice perspective should not be completely ruled out. This can be illustrated by solutions found in Colombia and Spain, and in Northern Ireland.

While full reconciliation with certain designated terrorist groups will be impossible due to their unwillingness to abandon violence and their lack of respect for the most basic international standards of humanity, partial or conditional negotiations should always be an option, as provided for under international humanitarian law. Such negotiations, for example on ceasefires, prisoner treatment and humanitarian access, can reduce violence and assist civilians caught in conflict, and they can serve as building blocks towards a more comprehensive solution in the future.

Proscription virtually closes down the possibility of political accommodation. It allows Governments to justify non-engagement with a proscribed group in any political or peacemaking process, and it prevents third-party actors from engaging with the proscribed group for the purposes of the peace process, notably through outlawing various forms of support, including material support, to terrorism.<sup>92</sup> This can have a significant impact on individuals and organizations engaged in negotiation and mediation around the world.<sup>93</sup> Proscription could even rule out the possibility of proscribed actors engaging in transitional justice processes, undermining the key principle of inclusivity of all stakeholders and therefore reducing the chances of success.

<sup>91</sup> Under the United Nations terrorism sanctions regime or as provided for in Security Council resolution [1373 \(2001\)](#). <sup>92</sup> See, in particular, Supreme Court of the United States, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725, Opinion, 21 June 2010. In examining whether the provision of training on using humanitarian and international law to peacefully resolve disputes, petitioning various representative bodies, including the United Nations, and engaging in political advocacy, to organizations designated as foreign terrorist organizations by the Department of State (specifically, the Kurdistan Workers’ Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE)) constituted “material support”, the Court answered in the positive. See also [A/70/371](#), paras. 36–38. <sup>93</sup> See Program on Humanitarian Policy and Conflict Research, “Humanitarian action under scrutiny: criminalizing humanitarian engagement” (Cambridge, Massachusetts, United States, Harvard University, 2011), pp. 18–21; Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (United Nations Office for the Coordination of Humanitarian Affairs and Norwegian Refugee Council, 2013), pp. 40–42.

As research carried out in Colombia and in relation to conflicts elsewhere shows, while the proscription of armed groups can be effective by denying them resources, delegitimizing them and rationalizing harsh and sometimes unlawful security responses against them, the label and the vilification can be extremely difficult to roll back when parties to the conflict eventually decide to discuss peace.<sup>94</sup>

A more nuanced approach is clearly in line with pillar I of the United Nations Global Counter-Terrorism Strategy, which notes that the peaceful resolution of prolonged unresolved conflicts would strengthen the global fight against terrorism. Similarly, the General Assembly has called on Member States to ensure that counter-terrorism legislation and measures do not impede “engagement with all relevant actors”.<sup>95</sup> The Secretary-General has called for Member States to support efforts by humanitarian organizations to engage with armed groups (even those that are proscribed) to seek improved protection for civilians<sup>96</sup> and to refrain from adopting measures that impede or criminalize engagement with non-State armed groups.<sup>97</sup> In 2015, special envoys and mediators on the promotion of peace, security and stability in Africa stressed that political solutions must become central to comprehensive strategies to address ter-

rorism and violent extremism. As central tools in the basket of political responses, negotiation and mediation should always be considered and implemented on a case-by-case basis.<sup>98</sup>

## b. Amnesties

In conflicts labelled as counter-terrorism, the focus on prosecution for terrorist acts is such that amnesties are often kept off the table, even for less serious terrorist offences, such as belonging or membership.<sup>99</sup> While it is clear that amnesties are exceptions to the application of criminal law, and therefore impermissible for serious international crimes, carefully crafted, conditional or partial amnesties can nonetheless aid in conflict resolution and prevention, even in contexts where designated terrorist groups are active.<sup>100</sup> In the absence of political solutions, amnesties can play a role in encouraging defections, negotiated exits and subsequent demobilization. In the process of devising political solutions, they are a tool for finding negotiated settlements. Where political or military solutions exist, amnesties can be used to avoid mass prosecutions for limited engagement with designated groups.

Amnesties need to be carefully crafted and tailored to the situation. Because they

<sup>94</sup> Sophie Hapselagh with Dana Landau, “Proscribing peace: how listing armed groups as terrorists hurts negotiations,” *swisspeace*, podcast, 23 September 2021; Sophie Hapselagh, “US terrorist designation for Houthis is bad for Yemen even beyond crippling aid efforts”, *Just Security*, 25 January 2021. <sup>95</sup> General Assembly resolution [72/284](#). <sup>96</sup> Report of the Secretary-General on the protection of civilians in armed conflict ([S/2009/277](#)), para. 45. <sup>97</sup> Report of the Secretary-General on the protection of civilians in armed conflict ([S/2010/579](#)), para. 55. <sup>98</sup> African Union, 6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability in Africa, “Silencing the guns – terrorism, mediation and armed groups”, 21–22 October 2015 – the Windhoek Declaration, para. 14. <sup>99</sup> In Iraq, for example, amendments to the law on amnesty resulted in no member of ISIL being able to qualify. <sup>100</sup> It is recognized in Article 6 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) that, in such conflicts, “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

offer advantages to those who may have committed terrorist offences, they need to be based on clear and transparent eligibility criteria, justification and conditions to benefit from the support of the general population and victims.<sup>101</sup> In the Syrian Arab Republic, for example, a number of ad hoc reconciliation agreements were agreed with tribal figures for the release of individuals considered as low-risk members of ISIL who had a high chance of reintegration, who did not fight locally and who had joined the group for non-ideological reasons. Because these agreements were opaque concerning the screening processes and criteria used for eligibility and prioritization over other individuals who appeared to fit the same profile, they suffered from a lack of support, both from victims and from the general population. Such practices not only undermine justice and accountability; by exacerbating existing problems and contributing little to healing, they have a negative impact on local communities.<sup>102</sup> In Somalia, similarly, a number of processes were set up for handling Al-Shabaab defectors, detainees and others associated with the group, including government deals with high-value Al-Shabaab defectors. Although this was construed as a policy in 2015, there was no formal or systematic way of assessing who qualified, and processes and content remained secret. Because the beneficiaries of such deals – including top-level Al-Shabaab commanders – were granted

nearly complete impunity and a number of other privileges, such arrangements perpetuated a lack of accountability as well as impunity, leading to poor governance, further conflict and significant human rights abuses.<sup>103</sup>

Similarly, inconsistent amnesties can send controversial messages to individuals who may want to defect. The authorities in Somalia have experimented with a range of leniency measures, including amnesties for individuals who laid down their weapons. In the absence of an amnesty law, ad hoc presidential declarations were the main vehicle for amnesties. However, these were characterized by a lack of specificity and credibility. They were applied in short timeframes, and they sometimes appeared to be tools to gain political support. Consequently, they generated little traction among the militants, whose economic needs and broader grievances were not clearly addressed.<sup>104</sup> Overly generous, frequent or general amnesties can fuel the resentment of victims, leading to retaliation against those amnestied and their families, which can destabilize ongoing peace processes.<sup>105</sup> In the north-east of the Syrian Arab Republic, given the large number of prisoners and the lack of facilities, local authorities issued de facto amnesties in 2016 and again in October 2020, when 631 convicted terrorist offenders were released. It is reported that victims were unhappy at seeing ISIL convicts walk free.<sup>106</sup>

<sup>101</sup> Slye and Freeman, “The limits of punishment – framework paper”. <sup>102</sup> Haid Haid, “Breaking the cycle of violence: transitional justice for the victims of ISIS in Syria”, research paper (London, Chatham House, Royal Institute of International Affairs, 2020). <sup>103</sup> Felbab-Brown, “The limits of punishment – Somalia case study”. <sup>104</sup> Ibid. <sup>105</sup> Slye and Freeman, “The limits of punishment – framework paper”. <sup>106</sup> Haid, “Breaking the cycle of violence”; Tanya Mehra and Matthew Wentworth, “New kid on the block: prosecution of ISIS fighters by the Autonomous Administration of North and East Syria”, International Centre for Counter-Terrorism, 16 March 2021.

### c. Impact on disengagement programmes

#### i. Disarmament, demobilization and reintegration programmes

The question of connecting disarmament, demobilization and reintegration and transitional justice has been addressed in the project paper entitled “Coordination of DDR initiatives with transitional justice efforts in the context of sustaining peace”.<sup>107</sup> This section will focus on disarmament, demobilization and reintegration programmes only as specifically used for designated terrorist and violent extremist groups. Although the withdrawal of ISIL from the territory of Iraq and the eradication of its personnel are stated objectives – rather than rehabilitation – the country has not adopted disarmament, demobilization and reintegration or similar programmes to incentivize defections or as part of a peace deal.<sup>108</sup> Other countries, such as Afghanistan, Colombia, Libya, Mali and Somalia, have used disarmament, demobilization and reintegration. The efforts that are made in such contexts, which increasingly involve ongoing military and counter-terrorism operations against the very groups that disarmament, demobilization and reintegration programming is intended to engage with in support of a peace process, are not merely a means to address security threats, because they actively change the power dynamics on the battlefield, particularly if disarmament, demobilization and

reintegration programming also involves deradicalization processes and efforts to prevent violent extremism.<sup>109</sup>

The question arises as to whether there is scope for the United Nations to assist Member States in the development of such programmes, particularly in light of the very specific challenges that are raised by linking disarmament, demobilization and reintegration with counter-terrorism or processes to prevent violent extremism. First, there is a risk around the neutrality and impartiality of the United Nations, as the introduction of the words “terrorism” and “violent extremism” as defined at national level can be used to discredit certain groups, or they can be used overly broadly or vaguely, leading to overinclusion.<sup>110</sup> A second challenge involves increased risks for human rights, such as the possibility of unlawful detention (of individuals captured on the battlefield, or where defectors are given a choice between detention or participation in disarmament, demobilization and reintegration programmes) or the inclusion of some form of intelligence gathering. For example, in Somalia, the United Nations-backed disarmament, demobilization and reintegration programme for low-risk defectors (ex-fighters and individuals who, while living under Al-Shabaab rule, provided services such as cooking, cleaning or selling supplies to the group) has been severely criticized on human rights grounds, notably for its lack of clear legal

<sup>107</sup> Silke Rusch, “Coordination of DDR initiatives with transitional justice efforts in the context of sustaining peace” (part of the Renewing the United Nations Approach to Transitional Justice project). <sup>108</sup> Mara Redlich Revkin, “The limits of punishment: transitional justice and violent extremism – Iraq case study” (Institute for Integrated Transitions and United Nations University Centre for Policy Research, 2018). <sup>109</sup> Vanda Felbab-Brown, “DDR in the Context of Offensive Military Operations, Counterterrorism, CVE and Non-Permissive Environments”, in *UN DDR in an Era of Violent Extremism: Is It Fit for Purpose?*, James Cockayne and Siobhan O’Neil, eds. (United Nations University Centre for Policy, 2015). <sup>110</sup> [A/HRC/43/46](#).



basis, the lack of legally binding guarantees for participants against future prosecution, the involuntary nature of the process (with individuals given a choice between judicial processes often leading to the death penalty or disarmament, demobilization and reintegration programmes) and the opaque nature of the screening processes of the security services.<sup>111</sup>

The United Nations should deploy caution before engaging in such initiatives at the request of Member States, particularly under political and military terms put forward by the State, as this can lead to the perception that the United Nations is an accomplice to a particular national agenda. Reputational and ethical risks arise where elements of disarmament, demobilization and reintegration and preventing violent extremism are combined.

## ***ii. Prosecution, rehabilitation and reintegration strategies***

The concept and implementation of disarmament, demobilization and reintegration have evolved as these activities have increasingly been pursued in environments where armed conflict is ongoing, no peace agreement has been signed and armed groups designated as terrorist groups (whether by the Security Council or by Member States) are operating. This has led to proposals from the United Nations counter-terrorism architecture on the concept of prosecution, rehabilitation and reintegration, based on Security Council resolutions 2178 (2014) and



2396 (2017), calling on Member States to consider developing comprehensive prosecution, rehabilitation and reintegration strategies for “suspected individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters.” While the concept of prosecution, rehabilitation and reintegration is widely used by the United Nations counter-terrorism entities, the term is not fully defined and does not yet benefit from a comprehensive understanding of what policy measures and practices are best suited to implement the strategy. Because the United Nations assists Governments in implementing the strategy, its implementation largely

<sup>111</sup> On the disarmament, demobilization and reintegration programmes in Somalia, see Felbab-Brown, “The limits of punishment – Somalia case study”.

depends on the definition of terms, including “terrorism”, at national level, and on national implementation of the screening processes used to determine the track that an individual will go through, usually on the basis of security assessments.

In Iraq and the Syrian Arab Republic, many families have been displaced, both within each country and in neighbouring countries, and are living in camps or in informal settlements. Many of these individuals are fearful of returning home, while at the same time many communities are afraid of returnees. Stigma, security concerns and resentment, as well as more practical challenges such as destroyed or occupied homes, lack of employment opportunities, exclusion from schools and lack of identity papers, are all obstacles to return.<sup>112</sup> Reintegration and reconciliation are therefore key aspects of finding durable solutions to the conflict.

The example of United Nations engagement in the Lake Chad basin region is illustrative of the challenges involved. The United Nations has been assisting the Lake Chad Basin Commission and four of its member States (Cameroon, Chad, the Niger and Nigeria) to implement “disarmament, demobilisation, de-radicalisation, rehabilitation and reintegration initiatives, in line with strategies for prosecution, where appropriate, for persons associated with Boko Haram and ISIL,” as requested in Security Council resolution 2349 (2017).

One of the most developed initiatives is Operation Safe Corridor in Nigeria, launched in 2015, under which low-risk former Boko Haram combatants are sent to rehabilitation centres offering vocational training and psychosocial support before being transferred back into communities. However, this highly securitized operation does not involve communities or have buy-in from local leaders. There are serious questions regarding the effectiveness of the reintegration processes, with some local leaders arguing against the reintegration of former Boko Haram fighters – both reflecting and influencing some communities’ concerns. In the Niger, former fighters are reintegrated through a combination of formal and informal processes, which include traditional practices such as reintegration ceremonies,<sup>113</sup> the success of which is impossible to determine due to a lack of monitoring and evaluation processes.

In interviews with the author, interlocutors often highlighted the looming failure of prosecution, rehabilitation and reintegration strategies. **One key concern was the implementation of prosecution, rehabilitation and reintegration initiatives in contexts where the authorities are wholly unprepared to deal with such strategies and where no account is taken of the structural challenges in which they are implemented.** Where the justice system is already dysfunctional and underfunded, the prosecution limb will be very difficult to implement adequately. Some interviewees noted that

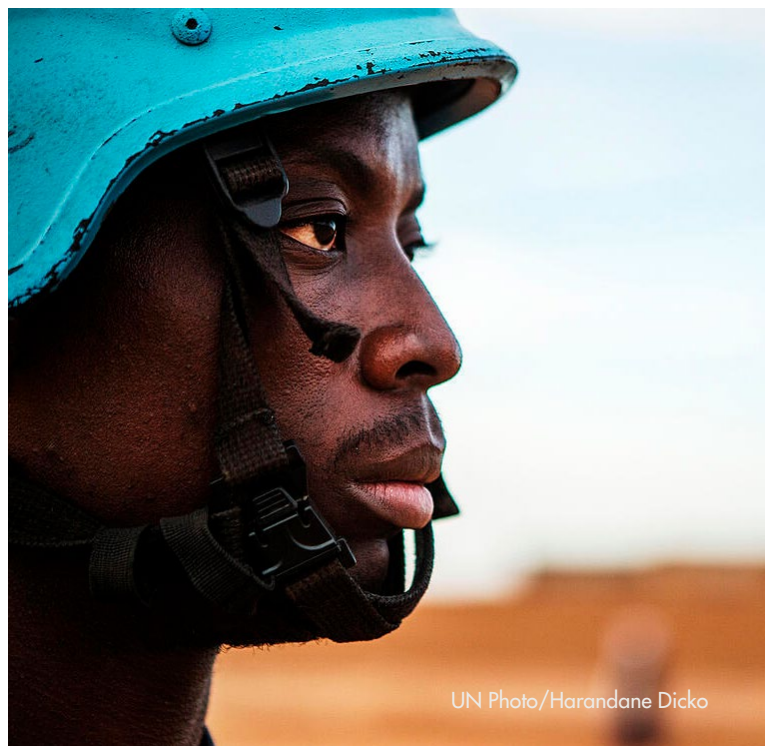
<sup>112</sup> Mara Redlich Revkin, “Pathways to reintegration: Iraq – families formerly associated with ISIL” (Baghdad, UNDP, 2021). <sup>113</sup> Agathe Sarfati and Phoebe Donnelly, “Protection dilemmas arising from the reintegration of former combatants and the impact of the terrorist designation” (International Peace Institute, 2022).

**rehabilitation** was extremely challenging in any context, but was rendered even more difficult in countries with very little resources. At the same time, it was often pointed out that **reintegration**, the most challenging limb of prosecution, rehabilitation and reintegration, is an area where exercises seeking truth and reconciliation, as envisaged in transitional justice processes, could be extremely helpful, and where the transitional justice and counter-terrorism lenses might converge and mutually reinforce each other. However, even in this area, where complementarity would seem obvious, differences of approach were hard to reconcile.

Overall, interlocutors noted that **the success of any reconciliation and reintegration initiative depends on knowledge and understanding of a context and on the ability to adjust to it. The identification of the right timing for reconciliation interventions requires long-standing in-country engagement, which is incompatible with short-term counter-terrorism programmes.** Some interlocutors highlighted the need for the United Nations to take a deeper **“root causes” analysis of conflict**, noting that reconciliation was not something that would happen through wishful thinking or simple hand-outs to communities. Other challenges include a **lack of coordination at national level**, with some entities of the United Nations focusing on prosecution, rehabilitation and reintegration, and others, in parallel, on processes of reconciliation and dialogue. There is little guidance on how these approaches could be combined or how they might fit under a common peacebuilding approach, with very

different levels of funding for the various programmes.

These concerns are to be taken seriously given the **risks of badly implemented reintegration strategies for individuals, families, communities and, more broadly, for peace processes.** In the context of Iraq, for example, interviewees highlighted the sheer magnitude of the caseload and the scale of the enmity between communities, fuelled by a Government for which the sectarian question is more central than that of terrorism as a key challenge. While responsibility for reintegration formally lies with ad hoc bodies associated with the Prime Minister’s office (which demonstrates its political importance and the Government’s engagement), there is still little to no engagement by the authorities on core grievances and structural issues, with disagreement between the Government and local communities on who has responsibility for rebuilding the fabric of society. The United Nations appears reluctant to suggest that these issues should be addressed from a holistic peacebuilding perspective





that includes a strong transitional justice component, because of the Government's clear rejection of this approach and the use of such terms.

## **2. IMPACT ON ACCOUNTABILITY, PROSECUTION AND TRIALS**

### **a. Prosecutorial strategies focused on terrorism offences**

Because many aspects of counter-terrorism operations often violate the applicable international frameworks and as they are aimed, first and foremost, at the physical elimination of individuals designated as "terrorists", efforts to bring counter-terrorism responses back into the criminal justice space, along with a focus on prosecution for terrorist crimes, undeniably represent an improvement in promoting human rights-based rule of law.<sup>114</sup> The counter-terrorism approach to justice and criminal prosecution comes with a number of shortcomings, however, which have a serious impact on accountability processes and the realization of the right to justice, as well as on the fulfilment of the right to truth.<sup>115</sup>

Prosecutorial strategies that favour and prioritize criminal prosecution for terrorist offences leave a wide range of non-terrorist but very serious crimes unaddressed, either because of the nature of the pepe-

trator (not a designated group) or because of the act committed (non-terrorism-related crime), for which individual responsibility is not sought. Accountability is often sought for a limited number of non-State actors – groups designated as terrorist groups – leading to a lack of consistent treatment across organizations and groups. The limited focus on the accountability of terrorist groups excludes the accountability of other actors, particularly State security actors and international actors, for violations committed in counter-terrorism operations and, more broadly, in complex conflict contexts. By way of example, since 2012 the authorities of Mali have failed to ensure justice for dozens of large-scale atrocities implicating ethnic militias and soldiers during counter-terrorism operations, including summary executions, enforced disappearances and incommunicado detentions by government security forces, although there has been some progress on prosecuting grave crimes by non-State actors.<sup>116</sup>

Importantly, such strategies leave core international crimes and large-scale, serious violations of international human rights law and international humanitarian law unaddressed. Terrorism offences that are often limited to "membership", "association" and "travel" and "combat roles" require little evidence (which may seem advantageous in light of the difficulties of gathering evidence and a limited forensic

<sup>114</sup> Mégret, "Transitional justice for the 'war on terror'?" <sup>115</sup> The right to truth should be understood as requiring States to "establish institutions, mechanisms and procedures that are enabled to lead to the revelation of the truth, which is seen as a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation" (A/HRC/24/42, para. 20), as is enshrined in a number of international instruments including the International Convention for the Protection of All Persons from Enforced Disappearance and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. <sup>116</sup> Human Rights Watch, "Mali: alleged 'disappearances,' executions by security forces", 22 October 2021.

capability), and they come with a reductionist view of the role of individuals within terrorist groups, which misses the nuances and the opportunities for meaningful exit and reintegration and for granting broad discretion to those in charge of applying the laws. With such a limited approach to prosecution, the gravity and depth of the crimes committed, which may include sexual violence, slavery, summary and arbitrary executions, disappearances, torture and theft, is not reckoned with. By failing to address both specific terrorism-related criminal acts and serious violations of international law beyond acts of terrorism, criminal convictions fail to assign clear responsibilities that could contribute to general deterrence, while only limited resources are used for individuals who could benefit from alternative processes.

The prioritizing of terrorism offences often leads to enhanced national and international support for terrorism courts. In Mali, for example, MINUSMA and UNODC provide support to the Specialized Judicial Unit to Combat Terrorism and Transnational Organized Crime and its Special Investigations Brigade. However, reports point to the risks of providing support to a system in which the death penalty is applied, trials are often held in absentia, evidence is sometimes obtained solely through confessions, and there have been extrajudicial releases of “detained Jihadists”.<sup>117</sup>

Critically, limited criminal prosecutions do not allow for an analysis and exposure of

the broader structural, institutional and societal factors that have contributed to violence. They contribute little to healing but can exacerbate perceptions of bias and injustice. This is why holistic accountability and multidimensional justice processes include a focus on truth, justice, reparation and guarantees of non-recurrence as inter-linked and mutually reinforcing elements. It is important, however, to caution against the use of seemingly “softer” transitional justice mechanisms as fig leaves for the absence of proper investment in and reform of judicial systems and accountability mechanisms. For transitional justice to have any sort of transformative effect, including in the sense of increased societal trust and cohesion, the process needs to be victim-centred, holistic and able to grapple with serious violations of human rights without selectivity, discrimination or political instrumentalization. Applying transitional justice labels in a counter-terrorism context without reflecting on the implication of the underlying principles risks the process being counterproductive. This could happen if the focus is only on those said to be “at risk” of terrorism or on those designated as “terrorists” without considering the wider human rights context and impacts. The Special Tribunal for Lebanon and the referral by Uganda of the situation concerning the “terrorist” Lord’s Resistance Army to the International Criminal Court are examples of initiatives that may have lacked a broader perspective.<sup>118</sup> Similar risks are evident in the mandated roles given to MINUSMA to engage with key judicial actors

<sup>117</sup> “Situation in Mali: report of the Secretary-General” (S/2020/1281), paras. 78–79. <sup>118</sup> Mégret, “Transitional justice for the ‘war on terror’?”.



specifically to advocate for accountability for serious crimes as a critical tool in stemming the cycle of violence and the spread of violent extremism, and to provide assistance and support to reinforce prison security in implementing the national policy on the prevention of and fight against violent extremism and terrorism in the country's prisons.<sup>119</sup> Similarly, UNAMA was tasked with encouraging the engagement of local communities, non-governmental actors and women's organizations in developing strategies "to counter terrorism and violent extremism as and when conducive to terrorism, including through countering incitement to commit terrorist acts".<sup>120</sup>

### **b. Impact on carceral systems**

The pressures on carceral systems, which are often wholly unprepared to quickly deal with a large number of individuals detained and charged with terrorism offences, can be severe. It is reported that there are approximately 10,000 third-country nationals detained and awaiting trial in the Syrian Arab Republic, in addition to 5,000 Iraqis and some 25,000 Syrians, and that these numbers are growing due to increased insecurity. Prisoners are held in overcrowded collective cells of 20 to 25 people in inhumane conditions,<sup>121</sup> with no judicial review or any legal process. Similarly, women and children are detained in camps in the north-east of the country on an

unclear legal basis and for indefinite periods, with no judicial review, for alleged association with individuals allegedly associated with designated terrorist groups. In addition to being in violation of non-derogable rights, this is ineffective as a counter-terrorism measure because it may increase support for designated groups inside the camps.<sup>122</sup>

In Iraq, a harsh and overly broad legal framework governing terrorism-related offences has enabled the mass incarceration of tens of thousands of individuals (both pre- and post-trial) whose connection to ISIL is often tenuous. According to a conservative estimate, at least 19,000 individuals have been detained on ISIL-related charges by the federal authorities of Iraq, and at least 4,000 individuals have been detained on ISIL-related charges by Kurdish regional government authorities. In most cases, the arrests and detention of men, women and children appear to be based on little or no evidence, but rather on suspicion of association with ISIL, simply on the basis of demographic traits (being a fighting-age male) or geographical proximity to Mosul or other contested areas. Many of these detainees were arrested in camps for internally displaced persons, where they were fleeing the fighting; some were detained simply for having a last name similar to one on a wanted list, or because they had been denounced (sometimes falsely) by

<sup>119</sup> "Situation in Mali: report of the Secretary-General" (S/2021/844), para. 53. <sup>120</sup> Security Council resolution 2405 (2018), operative para. 30. <sup>121</sup> Haid, "Breaking the Cycle of Violence"; Mehra and Wentworth, "New kid on the block". <sup>122</sup> See, for example, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "Technical visit to the northeast of the Syrian Arab Republic: end of mission statement", available at [www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/statements/EoM-Visit-to-Syria-20230721.pdf](http://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/statements/EoM-Visit-to-Syria-20230721.pdf).

other camp residents, or based on information provided by secret informants, along with intelligence extracted from detainees, often under conditions of duress or torture. Names have sometimes been added “because of tribal, familial, land, or personal disputes.”<sup>123</sup>

### **c. Unfair trials for terrorism offences**

The lack of fairness in terrorism trials in many systems is a key concern. In Mozambique, up to 60 individuals can be tried at the same time in special terrorism proceedings. In Iraq, the Government has convicted at least 8,861 individuals since 2013 in trials that have lasted as little as 10 minutes, with a conviction rate of around 98 per cent, resulting in at least 3,130 death penalties and at least 250 executions.<sup>124</sup> UNAMI and OHCHR have raised serious concerns regarding: (i) violations of fair trial standards relating to equality before the courts and the conduct of hearings, with ineffective legal representation, a lack of adequate time and facilities and limited opportunities to challenge prosecution evidence; (ii) an overreliance on confessions, with frequent allegations of torture or ill-treatment that were inadequately addressed by the courts; (iii) overly broad and vague definitions of terrorism and related offences, focused on “association with” or “membership of” a terrorist organization, without sufficiently distinguishing between

those who participated in violence and those who joined ISIL for their own survival or through coercion, and with harsh penalties that failed to distinguish between degrees of underlying culpability; and (iv) a mandatory death penalty for a wide range of acts that do not meet the “most serious crimes” threshold, following unfair trials. These factors all limited the likelihood that victims, their families and the general public would see the perpetrators being held to account, and the full range of crimes committed was not exposed.<sup>125</sup>

In the Syrian Arab Republic, reporting by civil society shows that the Counter-Terrorism Court, an exceptional security court lacking in independence and impartiality, heard at least 90,560 cases between its establishment in July 2012 and October 2020, and issued at least 20,641 prison sentences and at least 2,147 death sentences, mostly in absentia. With an overly broad definition of “terrorism” applied to regime opponents, there have been serious allegations of violations of the most basic standards of due process and fair trial, including arbitrary arrest, the extraction of confessions under torture as sole evidence, violations of the right of defence through rulings based on confidential security reports, imposition of the death penalty for participating in a protest or in media, political or human rights activism, and secret deliberations, judgments, indictments and lists of individuals referred to the court.<sup>126</sup>

<sup>123</sup> Redlich Revkin, “The limits of punishment – Iraq case study”. <sup>124</sup> Ibid. <sup>125</sup> UNAMI and OHCHR, “Human rights in the administration of justice in Iraq: trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL” (Baghdad, 2020). <sup>126</sup> Syrian Network for Human Rights, “At least 10,767 persons still face trial in counter-terrorism court, nearly 91,000 cases heard by the court and 3,970 seizures of property: a political / security court which aims at eliminating those calling for political change for democracy and human rights” (2020).

It is estimated that, in the Kurdish-held regions in the north-east of the country, where there was no judicial system and no terrorism law before 2014, the courts have already tried and sentenced around 8,000 Syrians suspected of belonging to ISIL and affiliated groups and to factions of the Turkish-backed Syrian National Army. It is also estimated that between 2014 and 2019, the Kurdish terrorism courts in Qamishli, Afrin and Kobanê had tried 1,500 local ISIL cases, with another 4,000 awaiting trial. If these figures are accurate, it would take 13 years to clear the backlog before focus could be turned to trying third-country nationals, a process which the authorities had said would start in 2021.<sup>127</sup>

Unfair trials can lead to the resentment of the families and communities of those individuals who have been charged and sentenced. In turn, by reinforcing the narratives of designated groups against the State, they can negatively impact on exit strategies. In contrast, fair treatment can increase the incidence of defection. Similarly, opaque screening processes for prosecution or prosecution strategies that cast the net too wide increase the level of uncertainty for low-level members of groups who might be tempted to defect but fear unfair treatment. In addition, the lack of transparency of criminal proceedings can increase the resentment of victims, who do not see justice being done for the violations they have suffered.

Criminal prosecutions always rely on well-resourced and stable environments to be credible. When security is an issue, identifying offenders and acquiring reliable evidence can be highly challenging, leading to an overreliance on witness testimony and confessions, which themselves encourage torture and false denunciations. This can take away resources from a judicial capacity that may already be limited, while at the same time potentially supporting ineffective or even counter-productive prosecutions and trials, rather than focusing on judicial reform, on increased resources for the entire judicial system and on all aspects of the right to a fair trial and greater accountability. As one interlocutor highlighted to the author, those with special counter-terrorism expertise will look at every case from that perspective, even when they have stopped working on counter-terrorism cases.

### **3. IMPACT ON REPARATIONS AND RIGHTS OF VICTIMS**

Placing victims at the centre of justice efforts is possibly the most important advance made by transitional justice. By giving victims a space in the public sphere, transitional justice aims to strengthen human rights-based rule of law. This is made possible by the recognition that there are many forms of victim in complex conflict situations. Although the counter-terrorism framework has highlighted the plight of victims of ter-

<sup>127</sup> Mehra and Wentworth, "New kid on the block".

rorism, including at the first Global Congress of Victims of Terrorism and through the adoption of the Model Legislative Provisions for Victims of Terrorism, which were jointly developed by UNODC, the Office of Counter-Terrorism and the Inter-Parliamentary Union,<sup>128</sup> a closer analysis shows that this framework is inadequate when it comes to the recognition and protection of all victims of violence and human rights violations in complex conflict situations in which terrorism is part of the discourse. By politicizing the recognition of victimhood, the counter-terrorism framework creates a hierarchy among victims and over-emphasizes victims of terrorism at the expense of other victims of violence and human rights violations who are not direct victims of terrorist groups. Individuals at the receiving end of counter-terrorism violence, individuals suffering from protracted exclusion and discrimination, persons loosely associated with terrorist groups or individuals who are themselves only allegedly linked to terrorism may not necessarily all be perceived as victims in this context. A striking example is that of children recruited by non-State armed groups also designated as terrorist groups in the north-east of the Syrian Arab Republic who, instead of being recognized as victims of a grave violation of international law, are separated from their mothers from the age of 10 or 12 to be detained

with other boys outside of any legal framework. This can be contrasted with national counter-terrorism legislation that often grants broad immunity to security officials carrying out counter-terrorism operations. Moreover, the failure of counter-terrorism justice efforts to give victims space to seek remedies, provide evidence or attend trials shows that the emphasis on victims of terrorism does not necessarily represent a shift to empower them as rights holders.

Transitional justice approaches to the question could complexify victimization in conflict situations in which designated terrorist groups are active. This includes aspects such as the diversity of situations and the various links between victims and perpetrators. Such an approach could be used to provide true agency to the victims and to provide a modicum of justice for all victims, particularly where accompanied by reparations, and it could highlight how societies and civilians, in armed conflict contexts, are often caught between terrorist groups on the one hand and government or international responses on the other. The International Criminal Court's Trust Fund for Victims could be used as an example of a mechanism that prepares and enables victims to engage in justice processes and reparations.

<sup>128</sup> The General Assembly has adopted a number of important resolutions that acknowledge the rights of, and the need to provide remedies for, victims and survivors of terrorism, and that recognize the dehumanization of victims of terrorism as one of the conditions conducive to terrorism. See General Assembly resolution [60/288](#) ("The United Nations Global Counter-Terrorism Strategy"), annex, pillar I, para. 8; General Assembly resolution [72/284](#) ("The United Nations Global Counter-Terrorism Strategy Review"), para. 60; General Assembly resolution [73/305](#) ("Enhancement of international cooperation to assist victims of terrorism"); "Progress made by the United Nations system in supporting Member States in assisting victims of terrorism: report of the Secretary-General" ([A/74/790](#)), para. 58. See also "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson: framework principles for securing the human rights of victims of terrorism" ([A/HRC/20/14](#)), section III: "State obligations corresponding to the human rights of victims of terrorism".

#### 4. THE COMPLEXITIES OF MEMBERSHIP, SUPPORT AND ASSOCIATION

Most independent research suggests that association with terrorist or violent extremist groups is a result of a combination of structural, societal and individual factors. Some individuals may be motivated for ideological or opportunistic reasons, while others are driven by economic motivations, particularly in conflict settings. In some cases, belonging to a designated terrorist group may have been prompted to ensure economic subsistence and because of limited livelihood alternatives.

In Somalia, Al-Shabaab recruitment strategies focused on injustice, abuse of power, specific instances of local misgovernance, corruption and grievances concerning the usurpation of public resources for private gain and corruption in the courts and in the political system, with a view that an elite-centric system perpetuates economic, political and social injustice. It is estimated that two thirds of members of Al-Shabaab joined it for economic reasons, because of a lack of legitimate economic opportunities or as a result of grievances against clan discrimination, abuses or the corruption of local authorities.<sup>129</sup>

Some recruitment is coercive and involuntary, such as forced marriage and the forced recruitment of children. The inter-linking between terrorist groups and local

communities can make any distinction tenuous, as groups can be embedded within the communities from which they come and recruited at the local level, while third-country nationals (or “foreign fighters”) can be assimilated through intermarriage, with group members fully becoming part of local families and communities. It is important to consider that terrorist groups can provide social and public services as well as protection to the population, particularly where the State is weak or inexistent or uses excessive force against certain communities. For example, in Somalia, where the formal judiciary is perceived as corrupt and dominated by certain clans, Al-Shabaab can be seen as delivering swift, effective and, crucially, non-corrupt and fair rulings on disputes on the basis on Sharia law – despite the human rights challenges. In some cases, groups associate to protect shared criminal interests, such as organized crime, people and arms smuggling, and trafficking.

Membership, association and belonging are not all on a par. The roles undertaken by individuals in each group can be violent (such as that of fighters), or non-violent (such as those of cooks, drivers and administrators). Control of territory is also a key factor to take into consideration. At some point, ISIL controlled a population of over 5 million in Iraq and 8 million in the Syrian Arab Republic. ISIL trained fighters in these countries, but also operated an administra-

<sup>129</sup> Felbab-Brown, “The limits of punishment – Somalia case study”.



tion, hospitals, schools, courts and municipal departments. Employees of these services often swore allegiance to the group and were part of its workforce, but many of them did not fight. They often had no choice but to cooperate with the group because opposition was equated with “apostasy” and was therefore punishable by death. This coercive power over civilians makes it difficult to distinguish between voluntary and involuntary cooperation. Many authorities – mostly in Iraq – viewed the presence of civilians under ISIL control as proof of complicity and imposed collective punishment against the mostly Sunni population under ISIL control, which fomented more resentment.<sup>130</sup> Similarly, family members of those in designated terrorist groups make up a social group that can be viewed as guilty by association, with kinship ties sufficient to provoke retaliatory violence by communities and extrajudicial treatment by the authorities, even of those who did not commit any crime. Women and girls who married ISIL members, who are usually forcibly detained, often have difficulty returning to their former communities upon their release, as do their children. It is important also to consider that much of the population living under ISIL rule suffered extreme violence and human rights violations.<sup>131</sup>

All of these factors render questions of belonging, membership and association extremely complex, and this requires nu-

anced approaches to the question of accountability. Approaches that cast the net too widely risk penalizing persons who had little choice but to develop some association with the terrorist groups present in their villages and towns, or those who had no association at all. In turn, this can lead to further alienation and grievances and new cycles of violence and revenge. Support from the United Nations or acceptance of government assessments by United Nations counter-terrorism bodies, including through the listing of terrorist organisations, can generate or perpetuate grievances and marginalization if these assessments are inaccurate or based on incorrect indicators (relating to family ties, clans, religious affiliation, gender or age). This can undercut efforts to entice defection, rehabilitate or reintegrate, and it can even lead to increased recruitment or retention by the group. Over-prosecution can lead to new cycles of alienation, whereas under-prosecution, where victims and communities feel that those responsible for serious crimes are walking out free, can lead to resentment. Any assessment must take into consideration the possibility of coercion. If a key objective of the approach that is taken is to encourage a sustainable exit from designated terrorist or violent extremist groups, then screening and prosecution practices must not undermine this.

<sup>130</sup> Redlich Revkin, “The limits of punishment – Iraq case study”. <sup>131</sup> Ibid.

## D. Reflections and recommendations on transitional justice in contexts where counter-terrorism is part of the narrative



The international legal and policy framework for counter-terrorism underscores the importance of human rights in its implementation. In practice, however, this has remained a challenge in many contexts, as amply documented in multiple reports, including from the United Nations High Commissioner for Human Rights and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. This paper highlights some of the challenges that arise in complex conflict situations characterized by the presence of non-State armed groups that are also designated as terrorist or violent extremist groups, specifically as they affect or relate to questions of justice and accountability.

A core issue in this regard remains the problematic definitions of “terrorism” and “(violent) extremism”, and how the application of these labels can be arbitrary and therefore easily instrumentalized for political or other reasons. Framing what are

often complex societal problems and manifestations of violence as “terrorist”, while in some cases warranted, has significant legal, political and social implications. Such framing affects the analysis and understanding of the root causes and drivers of conflict and violence, as well as the articulation of potential solutions and the policy choices available to pursue them. It influences power relations and dynamics, determining authority, stigma, legitimacy and opportunities to participate in public conversations on conflict resolution and peacebuilding. It can lead to the prioritization and overvaluation of security institutions, with consequences for resource allocation. This framing can also be used to repress dissent and human rights activism, and to restrict the civic space.

All of this has important implications for justice and accountability, and for how these are conceived, perceived and pursued. The counter-terrorism lens does not just come with an emphasis on military de-

feat and the securitization of society; there is also an expectation of the criminalization and (severe) punishment of perpetrators.

- This approach not only affects the ability of stakeholders to engage in mediation and negotiations; it also has an impact on discussions on the permissibility of amnesties and the role they may play in a society's stabilization and peacebuilding efforts, as well as influencing the scope and modalities of disengagement and rehabilitation programmes and how they can interlink with justice and reconciliation initiatives.

- It influences prosecutorial prioritization and the allocation of resources, emphasizing certain types of offences over others and thereby potentially contributing to perceptions of injustice and alienation. Such offences may include those committed by "terrorists", rather than violence at the hands of State authorities, or "easier-to-prove" terrorist offences such as membership, rather than complex acts of violence or human rights abuses against individuals and communities.

- It may lead to an overreliance on a criminal justice system that, in a complex situation affected by conflict, is likely to be underdeveloped, politicized or otherwise incapacitated, and hence to overly high rates of incarceration, prolonged and arbitrary detention and unfair trials.

- It will generally lead to limited space for victim participation, reparation and community healing, to limited recognition of the full range of political, social and cultural factors at play in the society concerned, and to limited recognition of what changes would be important in order to prevent the same type of violence from recurring.

In some contexts, such counter-terrorism framing and prioritization displaces or undermines more holistic approaches to questions of justice and accountability, closing the space for in-depth reflection on what society needs to comprehensively deal with legacies of conflict and serious human rights abuse, and to the role of justice in the stabilization of society and the consolidation of peace.

Transitional justice is a policy framework that was developed to respond to complex and large-scale justice demands in extraordinary circumstances, typically where a society transitions from conflict to peace and/or from authoritarianism to democracy. The framework is rooted in international law, especially international human rights and humanitarian law, and is built on an acknowledgement of the rights of victims to truth, justice and reparation, and on victims' and societies' aspiration of non-recurrence. It is this articulation of interlinked dimensions of "justice" that has drawn societies to transitional justice, helping them reconcile various rights, interests and expectations. Comprehensive, context-specific and victim-centred transitional justice policies are intended to contribute to peacebuilding and to sustaining peace

through their potential to: (a) foster interpersonal and institutional trust; (b) empower victims and communities; (c) mitigate grievances associated with exclusion, and enhance inclusion; (d) increase gender equality; and (e) identify root causes of conflict and violations, including marginalization and institutional malfunctions, to catalyse transformative reforms, prevent recurrence and pursue social integration.<sup>132</sup>

The question, then, is whether the application of a “transitional justice lens” can help societies that are affected by “terrorist” or “(violent) extremist” conflict and violence and related human rights violations and abuses to articulate coherent, credible and balanced justice policies that could help build a better future, while avoiding some of the challenges listed above. There are a number of potential benefits of using a transitional justice lens in such contexts:

- Transitional justice offers a framework of analysis and articulation of action in the justice and accountability space that is firmly rooted in international law and that relies on human rights and the corresponding legal obligations of States. International law remains applicable regardless of the labelling of a situation, group or individual as “terrorist” or “(violent) extremist”, thus providing an **analytical anchor and normative benchmark**.
- Transitional justice promotes victim-centred approaches, placing the inter-

ests, needs and expectations of victims at the heart of the design and implementation of justice responses, resulting in an emphasis on dialogue, consultation and participation. Such methods of work enhance trust, inclusivity, legitimacy and societal ownership, offering **guardrails against bias, selectivity and politicization**.

- Comprehensive transitional justice policies and programmes incorporate a preventive and transformative ambition, with the aim of identifying and understanding root causes of violence and human rights abuse and contributing to institutional, societal and cultural transformation to prevent recurrence. Such approaches, based on context-specific analysis, can help **complexify overly simple narratives, expand on questions of responsibility and victimhood and articulate more effective road maps for prevention**.
- Transitional justice’s more holistic conceptualization of justice, and its use of various pathways, instruments and mechanisms for achieving the inter-linked components of justice, can **provide inspiration and help expand the range of policy options**.
- In grappling with mass perpetration and victimization, and with its creative search for justice options in contexts of limited capacity and resources, transitional justice can assist in **finding**

<sup>132</sup> A/HRC/49/39, para. 52.

**achievable criminal justice strategies**, including transparent prioritization, leniency and alternative sentencing policies.

However, two notes of caution are warranted. First, this paper does not suggest that a typical transitional justice template (to the extent that this exists) is needed in each context where counter-terrorism is part of the narrative. The point is rather that the legal and policy framework of transitional justice – especially considering that it is rooted in the international legal obligations of the State, which remain applicable regardless of the labelling of a situation as “terrorist” – can assist in reflecting on and defining appropriate justice and accountability solutions, and in avoiding some of the pitfalls that come with a narrow counter-terrorism approach. As the Security Council has recognized and as practice has shown, purely militarized security solutions are not only insufficient for effective counter-terrorism; they can also be counterproductive. Second, just as the “counter-terrorism” label can be politicized

and instrumentalized, the same can happen with transitional justice, using a selective understanding of the concept either to promote or to discount certain approaches to justice. The concepts of “transitional justice”, “restorative justice”, “traditional justice” and “reconciliation”, and the norms, principles and approaches that accompany them, are variously understood and used, often interchangeably and confusingly. Conceptual clarity will be key in mitigating the risk of discourse instrumentalization.

This leads to a set of five key recommendations for United Nations actors supporting States in tackling questions of justice and accountability in contexts where terrorism and counter-terrorism are part of the narrative:

- **Framing.** The application of a counter-terrorism lens cannot and should not displace other applicable laws, including international human rights law and international humanitarian law, nor should it unduly restrict policy options. In all contexts where it operates, the United Nations should **promote conceptual clarity and richness, assisting stakeholders in navigating tensions and challenges regarding questions of justice and accountability with creativity and innovation**, based on applicable international law and the Organization’s experience in supporting justice processes across the globe. The way in which the United Nations itself uses vocabulary and frameworks should be guided by international law and should be human rights compliant, while challenging politicized, selective or instrumentalized



UN Photo/Fardin Waezi



labelling, framing and narratives. This is valid both for counter-terrorism and the prevention of violent extremism and for transitional justice-related terms and concepts. Accurate framing will more easily allow United Nations actors to engage with all stakeholders, to avoid perceptions of support for or collusion with State actors who lack legitimacy in the public view or who are complicit in serious human rights violations, and to consider a wider range of policy options. Given their well-documented misuse by some State actors, the United Nations should consider developing system-wide guidance on the use of labels such as “terrorist”, “violent extremist”, “direct membership” or “association with” when used in relation to a terrorist or violent extremist group, based on legally sound and clear criteria.

- **Methodology.** Given their potential to enhance trust, inclusivity and the legitimacy of the process, victim-centred and people-centred approaches to justice and accountability are more effective, both for responding to the needs and aspirations of victims and society as a whole and for peacebuilding and sustaining peace. In contexts where counter-terrorism is part of the narrative, the United Nations should **consistently advocate for victim-centred and inclusive approaches and methods of work, whereby victims of human rights violations are consulted about their prefer-**

**ences and can meaningfully take part in the process – regardless of their real or perceived affiliation in the conflict or violence.**

- **Analysis.** All United Nations programming, including on counter-terrorism and the prevention of violent extremism, should be based on a **joint and comprehensive conflict analysis that fully accounts for the complexity of the situation and incorporates a past-sensitive lens**, considering the role of past human rights violations and abuses as they may affect societal dynamics and underpin conflict in the present day. An in-depth examination of conflicts where serious crimes and abuses were committed by many parties, fully taking into consideration the situation prior to the rise of terrorist or violent extremist groups and the political and economic grievances that contributed to the use of violence in the first place – which may have included governance challenges and the marginalization of groups and communities – will help complexify overly simplistic action/reaction narratives. This could also lead to a deeper understanding of the root causes of conflict and crisis and of belonging or support to or association with a “terrorist” or “violent extremist” group, on the one hand,<sup>133</sup> and of victimhood and the needs of victims, on the other. The success of justice and reconciliation initiatives depends on knowledge and under-

<sup>133</sup> For girls and women, forced marriage, trafficking, sexual exploitation and enslavement and grooming should always be considered as forms of coercion, squarely placing the individuals concerned in the category of a victim of terrorism. Any “association” or recruitment of children by armed groups, including those designated as terrorist groups, is always considered as involving some form of coercion or constraint.

standing of such complex factors, and on the ability to adjust to them. A contextualized understanding of the legal, political, economic and social causes and drivers of violence, in combination with an analysis of what is required to achieve the policy goals of stabilization, sustaining peace and non-recurrence, will expand the range of available policy options and can help **move the discourse away from pre-existing templates and frameworks towards a comprehensive, tailored and coherent package of support initiatives.**

- **Coordination.** Engagement by the United Nations on counter-terrorism and the prevention of violent extremism in all its forms (including in peace operations, capacity-building and technical assistance programming) must be fully human rights compliant and conceptualized, and it should be planned in a coordinated and mutually beneficial manner with entities working in adjacent policy domains, under a common peacebuilding umbrella. At the very minimum, such engagement should not negatively impact, contradict or limit work in other areas supported by the United Nations. Overlapping programmes, siloed approaches and contradictory messaging can all undermine efficacy. Enhancing the coordination of United Nations entities in this area requires **greater collaboration in the design of projects under the leadership of the relevant resident coordinator or special representative of the Secretary-General, ensuring that programming is consistently aligned with advocacy and communication efforts as**

**part of an overall strategy.** There is also a requirement for a better understanding of how both counter-terrorism and transitional justice fit under the wider umbrellas of peacebuilding, sustaining peace and sustainable development (alongside other policy domains). Requests and proposals for assistance and support programming for counter-terrorism and preventing violent extremism should go through a consultative process with United Nations entities operating in country before they are designed and implemented. To mitigate human rights risks, the human rights due diligence policy must consistently be applied to counter-terrorism support, including by peacekeeping operations and special political missions, and by all United Nations offices, agencies, funds and programmes that engage in counter-terrorism activities.

- **Research.** Relevant United Nations entities should **engage in joint research** to attain a more granular understanding of how and under which conditions and circumstances counter-terrorism approaches contribute to peacebuilding and sustaining peace, and consequently a better understanding of how, in specific contexts of armed conflict and other types of violence where terrorism and counter-terrorism may be part of the narrative, the **counter-terrorism and transitional justice lenses can be leveraged in a mutually reinforcing manner to advance justice and accountability under a common peacebuilding umbrella** – as well as learning the lessons from such cases.



