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HUMANITARIAN ACCESS AND INTERNATIONAL LAW:

*A symposium for humanitarian
practitioners, researchers, trainers
and policy-makers*

SUMMARY REPORT | OCTOBER 2019

AUSTRALIAN RED CROSS INTERNATIONAL HUMANITARIAN LAW PROGRAM

With a mandate under international legal frameworks to promote international humanitarian law (IHL) and assist Government in ensuring respect for IHL, the Australian Red Cross IHL Program works with a wide range of stakeholders (including the broader network of the International Red Cross and Red Crescent Movement) to promote the laws of war in Australia. The Australian Red Cross IHL Program supports Australian organisations with operations in conflict zones to embed IHL into their organisational policies and capabilities to improve humanitarian outcomes for those

CENTRE FOR HUMANITARIAN LEADERSHIP

The Centre's vision is that disaster and conflict-affected communities aiming to achieve social and economic resilience and recovery will be supported by a humanitarian system that is characterised by leadership excellence. The Centre's mission is to develop and improve leadership in the humanitarian system through collaborative research and education, which enables transformative practice. The Centre is a partnership between Save the Children and Deakin University.

This report was written by the symposium conveners: Rebecca Barber, member of the Victorian International Humanitarian Law Advisory Committee with Australian Red Cross; and Yvette Zegenhagen, Head of International Humanitarian Law, Australian Red Cross.

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BACKGROUND

On 17 October 2019, Australian Red Cross (ARC) and the Centre for Humanitarian Leadership (CHL) held a symposium on international humanitarian law (IHL) and humanitarian access. The symposium brought together humanitarian practitioners, academics and others to explore how IHL could be better leveraged to improve humanitarian access to people in need.

The symposium was initially inspired by the identification in the 2018 *State of the Humanitarian System* report of three related trends:

- first, that bureaucratic restrictions were, for the first time, ‘the most important overall impediment to providing humanitarian support to people in need’, and that these restrictions were seen as a conscious tactic on the part of governments or non-state armed groups to prevent humanitarian aid from reaching particular areas.
- second, that ‘increasingly, humanitarian actors are working in situations where neither government nor non-state armed groups are prepared to follow IHL’, and where many non-state armed groups are not prepared to grant humanitarian access.
- and third, that ‘humanitarian staff and leadership do not fully understand the humanitarian principles and IHL, and so are unable or unwilling to apply and advocate for them’.¹

These three trends warrant attention because IHL contains important protections for humanitarian access, and if it is not being utilised due to lack of understanding, this represents a missed opportunity. This is of particular relevance to ARC, which aims to work with Australian organisations operating in conflict contexts to promote ‘IHL best practice.’

The symposium was further inspired by the existence of a significant body of new research on *why* access is denied, and what works and doesn’t work in access negotiations. These include ICRC’s *Roots of Restraint in War*,² Humanitarian Outcomes’ research on humanitarian access,³ research on counter-terrorism measures by the Harvard Law School Program on International Law and Armed Conflict,⁴ and forthcoming books by Abby Stoddard, Ashley Clements and Joe Cropp on, respectively, violence against aid workers, humanitarian negotiations with armed groups and the utilisation of IHL and humanitarian principles by humanitarian practitioners.⁵

Finally, there is now considerable support available to assist humanitarian practitioners with advocating and negotiating for humanitarian access. Because such support is relatively new, there is important work to be done to publicise what’s available and how to access it.

The symposium aimed to bring all these strands together and promote understanding in the Australian context about what protections exist within IHL, what constitutes good practice in access negotiations, what support is available, and what challenges we should be working collectively to address.

The symposium was held under the Chatham House rule, meaning that it was agreed that none of the comments made during discussions would be publicly attributed to individuals. As such, for the purposes of this report, many of the points made during the speakers’ presentations and the discussions that followed have been integrated into a discussion around common themes. The sections of the report that do attribute comments to individuals have been included with their permission.

OVERVIEW: INTERNATIONAL HUMANITARIAN LAW AND THE 'ACCESS PROBLEM'



The rules about access in international humanitarian law

The symposium opened with a presentation from Leonard Blazey, Head of Mission in Australia for the International Committee of the Red Cross (ICRC), regarding the rules of IHL on humanitarian access.

Under international law, states bear the primary responsibility for providing assistance and protection to crisis-affected populations. Where states are unable or unwilling to provide such assistance, international law provides that humanitarian actors may step in, and it contains a number of provisions that facilitate and regulate that assistance.

In **international armed conflict**, humanitarian assistance is regulated primarily by the Fourth Geneva Convention and Additional Protocol I. The Fourth Geneva Convention requires parties to conflicts to allow the free passage of 'all consignments of medical and hospital stores and objects necessary for religious worship' intended only for civilians, as well as 'essential foodstuff, clothing and tonics intended for children under 15, expectant mothers and maternity cases'.⁶ This is developed by Additional Protocol I, which says that if the civilian population does not have food and supplies essential for its survival, 'relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the parties concerned'.⁷ Additional Protocol I says further that offers of relief 'shall not be regarded as

interference in the armed conflict', that the parties 'shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel', and that relief personnel must be protected and assisted, subject to the approval of the party in which the relief is being carried out.⁸

In **non-international armed conflicts**, humanitarian assistance is regulated by Additional Protocol II, which provides that 'if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, ... relief actions ... which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent' of the state party concerned.⁹

The provision of humanitarian assistance is also protected by **customary international law**. The ICRC identifies two rules of customary international law regarding the protection of humanitarian assistance and relief personnel, both of which it regards as applicable in both international and non-international armed conflicts. They are:

That the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control; and

That the parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions, and only in case of imperative military necessity may their movements be temporarily restricted.¹⁰

Blazebly emphasised that while Additional Protocols I and II both require the consent of the parties (and the customary international law provisions allow the ‘right of control’), it is firmly established in IHL that humanitarian relief cannot be arbitrarily denied. He noted also that the effect of the above provisions is that humanitarian personnel and the objects used for humanitarian relief operations must be respected and protected, meaning in particular that they must not be attacked, and that parties to conflict must do their utmost to prevent relief from being diverted or looted and to ensure the safety of convoys. He noted finally that parties to conflicts should provide instructions to their armed forces regarding the protection of humanitarian relief, and about respect for the Red Cross and Red Crescent emblems.

The ‘access problem’

Following presentation of the rules of IHL regarding humanitarian access, the discussion turned to the challenges with their application. The discussion was led by Abby Stoddard, partner at Humanitarian Outcomes, and informed by Humanitarian Outcomes’ extensive research on humanitarian access.¹¹

Stoddard opened with the proposition that ‘humanitarian presence is thinner than we think’. Few providers work in conflict as opposed to more stable settings, and within conflict settings,

organisations cluster in areas that are easiest to access rather than where the need is greatest. The problem is compounded by the fact that host-states have incentives to downplay the number of people in need in conflict-affected areas, while aid organisations and donors have incentives to overstate their access to those people. Organisations want to be seen to be operationally effective, while donors want to be seen to be fulfilling their mandate of providing humanitarian assistance where it is needed most. In short, there is no sense of collective responsibility for measuring and ensuring access and coverage. If anything, there is a shared interest in *understating* the problem. The problem is further compounded by the over-emphasis of many donors on fiscal risk, and the prevalence of ‘zero-tolerance mindsets’ that disincentivise access and hinder collective negotiation.

Stoddard observed that while IHL provides some protection, there are significant loopholes, particularly in non-international armed conflicts which comprise the bulk of armed conflicts today. The strongest protection for humanitarian access in non-international armed conflict is provided by customary international law (rules 55 and 56 of the ICRC’s Customary Law Study), but the intent of those rules is critically undermined by the fact that everything is subject to the ‘right of control’. Many participants agreed that this ‘loophole’ makes it relatively easy for states to deny access in areas controlled by non-state actors – one participant referred to the ‘get out of jail free cards’ that governments can use to get out of their obligations.



CHALLENGES IN NEGOTIATING HUMANITARIAN ACCESS AND UTILISING INTERNATIONAL HUMANITARIAN LAW

The following section summarises common themes that arose throughout the day, both from the speakers' presentations and the discussions that followed, regarding the challenges of negotiating humanitarian access in conflict contexts. It draws in particular from presentations by Sean Healy, Head of Reflections with Medicans sans Frontières (MSF), Michael McGrath, Regional Director for Southeast Asia with Save the Children, and Ashley Clements, independent researcher and consultant on humanitarian access negotiations.

Declining respect for IHL and incentives not to comply with IHL

It was frequently noted that around the globe, humanitarian actors are seeing a movement away from acceptance of IHL as a common operating framework, and that this poses one of the most fundamental challenges to humanitarian access. There is no easy way to tackle this, and similarly, no easy way to approach negotiations with state and non-state actors who seek to violate IHL – by terrorising civilians, denying humanitarian access or both – as a deliberate part of their strategy. It was observed that armed actors have a range of incentives to violate IHL, including in some contexts to demonstrate their capacities, or to demonstrate that they comply with no law other than their own. In other contexts, parties to conflict may not violate IHL as a deliberate part of their strategy, but may nevertheless be impervious to international pressure to comply with IHL. As one participant observed: 'we're moving from an age where states said they believed in norms but didn't, to an age where states don't even bother to say that they believe in the norms.' Another participant said that 'IHL is a currency, but it stops being a currency when everyone violates it'. Several participants made the point that the more countries like the US, Australia and others either violate IHL or fail to speak out in response to violations by other states, the less incentive there is for others to comply.

While there was much discussion about declining respect for IHL, Clements queried whether we had 'ever really had a "golden era" in which IHL and humanitarian principles were well respected.' Clements noted that as a humanitarian sector we are continuing to 'push the boundaries of where and how we operate amid conflict', and suggested that 'it may not simply be that actors

are losing respect for IHL, but rather that we are looking to IHL to do more than we ever have before – and we are finding its limitations'.

Negotiations with non-state actors

There was considerable focus throughout the day on the challenge of negotiating with non-state actors. It was noted that recent decades have seen a proliferation of armed groups: fifty percent of today's conflicts involve more than two parties, and 22 percent involve 10 or more. Non-state actors have thus become significant interlocutors in access negotiations, and with this comes enormous challenges. Compared to a government's regular armed forces, non-state actors are typically less centralised, with more nebulously-defined hierarchies and weaker chains-of-command, and as such, 'reaching an understanding with one commander doesn't necessarily mean you've reached an understanding with the others.' It was observed that insurgent groups have a range of incentives to deny access and attack humanitarian personnel; and the point was also made that there may be some non-state actors that humanitarian organisations feel unable to negotiate with as a matter of principle. These problems are compounded by the fact that the obligations of non-state actors under IHL regarding humanitarian access are more nebulous than those of state parties to a conflict, meaning that negotiations with non-state actors are based on a weaker legal foundation to start with.

The lack of alternatives

One participant observed that while our use of the term humanitarian 'negotiations' suggests that there will be give and take on both sides, in fact humanitarians have 'terrible alternatives', and that 'when you're negotiating access, you don't have much to bargain with.' We were referred to the example of UNHCR announcing in 1993 that it was suspending operations in Bosnia until it could secure safe passage for humanitarian supplies, only to have its decision subsequently overturned by the then-Secretary General – needless to say, UNHCR was not left in a strong negotiating position with the parties to the conflict.¹²

THE PARTICULAR CHALLENGE OF COUNTER-TERRORISM MEASURES



A large part of the symposium was devoted to the particular challenges associated with counter-terrorism measures. The discussion was opened by Yvette Zegenhagen, Head of IHL at ARC, who explained that today's counter-terrorism regime has its origins in UN Security Council Resolution 1373 (2001), which required states to 'refrain from providing any form of support ... to entities or persons involved in terrorist acts.'¹³ The resolution did not provide any exception for humanitarian assistance. Two more recent Security Council resolutions urge states to 'take into account' the potential effect of counter-terrorism measures on 'exclusively humanitarian activities' carried out by 'impartial humanitarian actors' in a manner consistent with IHL,¹⁴ but it was the first resolution that provided the foundation for the development of national legislation.¹⁵

Zegenhagen noted that Security Council resolution 1373 and the counter-terrorism laws that have followed, some of which, in particular contexts, potentially give rise to criminal liability for conduct directed toward the otherwise lawful provision of humanitarian assistance, may have far-reaching implications for humanitarian organisations. But she observed also that the issue is not just the laws themselves: many government donors have adopted counter-terrorism policies and procedures that, to minimise risk, arguably go beyond what is required by the relevant national legislation. Participants noted that some

donors report being disinclined to fund high-risk contexts at all due to fear of contravening counter-terrorism laws; or if they do, they prohibit engagement with local actors to an unnecessary extent. This creates a disincentive for humanitarian agencies to operate in such contexts: agencies are not only concerned about the potential criminal liability of their staff; they are also concerned about their ability to abide by donor requirements and the administrative burden this will entail. These factors together are often referred to as the 'chilling effect' of counter-terrorism legislation on principled humanitarian action.

Zegenhagen also noted that the criminalisation by many counter-terrorism laws of the mere association or membership of a listed group, regardless of any actual action taken by an individual, may remove a critical incentive to comply with IHL. Why should a member of a non-state armed group bother to comply with IHL, if they will be subject to criminal prosecution anyway by virtue only of their association with that group? The proposition that counter-terrorism laws lessen the incentive to comply with IHL appears to be consistent with the declining respect for IHL amongst non-state actors mentioned by a number of symposium participants as one of the critical challenges to humanitarian access.

The Australian context

Part of the discussion on counter-terrorism measures focused on the Australian context. It was noted that in the decade since 2001 the Australian parliament has adopted over 50 pieces of counter-terrorism legislation – more than the UK, US or Canada.¹⁶ For Australian NGOs this has eroded not only humanitarian access, but also the opportunity to engage with non-state actors in conflict environments for purposes of promoting respect for IHL. Several participants noted the Australian Government's risk-averse approach to supporting NGOs to work in insecure environments (expressed not just through legislation but also in the Department of Foreign Affairs and Trade (DFAT) policy and practice), and observed that in some contexts this made it almost impossible for NGOs to operate.

Case Study: The Occupied Palestinian Territories

The symposium included a detailed discussion of the situation in the Occupied Palestinian Territories (OPT), and Gaza in particular, as a case study of the extent to which counter-terrorism measures can stifle both development and humanitarian action. Gaza falls under the administrative authority of Hamas, and as such, many NGOs operating in Gaza engage with Hamas to some degree. Some donors (including the US) have listed Hamas as a terrorist organisation, while others (including Australia) only list Hamas' armed wing, the Izz al-Din al-Qassam Brigades. For these latter donors in particular, there has been a lack of clarity regarding the status of the Hamas civil administration. The case study is a pertinent one for the Australian context, because several Australian NGOs have programs in Gaza, including programs funded by DFAT.

Participants heard from Norwegian Refugee Agency's (NRC) Country Director for Palestine, Kate O'Rourke, who described the significant implications of counter-terrorism measures for humanitarian organisations. In short, such measures expose agencies to contractual and reputational risk, expose humanitarian staff to the risk of criminal liability, force agencies to compromise on humanitarian principles, and reduce the efficiency and effectiveness of aid. Participants were referred to a survey conducted by the Association of International Development Agencies in the OPT in 2018, in which 23 percent of organisations surveyed reported that accusations related to association with terrorism had forced them to suspend, modify or terminate their programming, and 22 percent said that they had faced threats of, or actual, legal or administrative actions against them.¹⁷

O'Rourke discussed four case studies that highlight the extent to which counter-terrorism accusations, even unsubstantiated, can affect the operations of international organisations:

1. the arrest of World Vision's operations manager Muhammad el-Halabi in 2016, for allegedly channelling funds to Hamas. The claims were widely publicised, and World Vision's funding from several donors was suspended. The trial is ongoing, el-Halabi remains incarcerated, and World Vision's programs in Gaza remain suspended.
2. the allegation in 2018 that a staff member of one of Union Aid Abroad-APHEDA's local partners in Gaza was affiliated with a Palestinian political party, designated by Australia as a terrorist entity. APHEDA's funding from DFAT was (and remains) suspended.¹⁸
3. the allegation in 2017 that when Norwegian People's Aid (NPA) entered into a grant agreement with USAID for funding in South Sudan, it fraudulently declared that it had no association with a designated terrorist organisation. The allegation was based on the fact that in 2012 NPA had supported (albeit not with USAID funds) a democratisation project for youth in Gaza. The value of the claim was around USD 90 million; it was settled, with a payment by NPA of USD 2.02 million.¹⁹
4. and most recently, the allegation in September 2019 that Oxfam's agricultural programming in Gaza constituted 'material support' to a terrorist organisation (Hamas) contrary to its agreement with USAID. The agriculture project in question was not funded by USAID, but Oxfam receives USAID funds for programming elsewhere, and the complaint alleges that these funds were obtained 'by means of fraudulent certification that [Oxfam] does not support terrorism'.²⁰ The total claim is USD 160m.

O'Rourke said that there were understood to be at least five similar cases currently under seal in the US courts, all of which pose considerable financial, legal and operational risks not only to the agencies concerned but to all agencies operating in Gaza. One participant observed that if the Oxfam case were to be successful, it would 'effectively criminalise the delivery of aid in Gaza.'

One of the concerns stressed by participants was that once a case is made public, funding from donors (including from DFAT) is suspended, irrespective of whether the claim is substantiated and irrespective of the size of the claim relative to the overall size of an organisation's programming.

Counter-terrorism and localisation

A concern was raised regarding the tension between the counter-terrorism measures of many donors and the commitments made by those same donors to localisation. Two issues were discussed: first, counter-terrorism measures conflict with the localisation agenda when they prevent organisations from engaging with local authorities; and second, if the due diligence requirements are costly and burdensome for international NGOs, they are almost certainly prohibitive for local organisations. It was noted that national NGO forums and peak bodies have an important role to play in this regard, by developing and promoting standards which can provide donors with greater confidence in local organisations. It was observed that the International Council of Volunteer Agencies is providing some useful support for such work.

Counter-terrorism, humanitarianism and foreign fighters

On a very different subject, participants heard from Marnie Lloyd, who shared part of her research on ‘foreign fighters’ – armed individuals who travel internationally to join armed groups in the name of fighting terrorism, many of whom use humanitarian language to describe their motivations. We were referred by way of example to Briton Kimmie Taylor, who joined the Syrian Kurdish YPJ; and the so-called US ‘combat charities’ Humanitarian Defence Abroad, Sons of Liberty International and the Free Burma Rangers.

Lloyd focused on the use of humanitarian and counter-terrorism language by such armed actors, and the implications this has for principled and neutral humanitarian action. While

‘traditional’ humanitarians seek to provide assistance that is ‘exclusively humanitarian and impartial’ in nature, and it is this type of assistance that is protected by IHL, these ‘combat charities’ provide armed security and training to ‘vulnerable populations’ for what they describe as humanitarian purposes and protection from terrorism.²¹ Humanitarian Defence Abroad, for example, says it provides ‘the single greatest humanitarian need virtually ignored by all other humanitarian relief organisations ... security’.²² Lloyd discussed the predominant counter-terrorism framing of legal and political issues related to foreign fighting, and suggested that the counter-terrorism narrative not only demands action against unacceptable (terrorist) foreign fighters, but also creates and allows space for other types of foreign fighters – individuals fighting terrorism (the Kimmie Taylors of the world) – to take up arms and couch their actions in humanitarian language.²³

Lloyd also made reference to the CHL’s first working paper, ‘Vale the Humanitarian Principles’, which proposes that the humanitarian principles of humanity, impartiality, neutrality and independence be replaced with equity, solidarity, compassion and diversity. Lloyd sounded a note of caution regarding the principle of solidarity, which the working paper argues allows for a ‘greater range of styles and modes of response,’ and makes ‘direct action on behalf of those affected a clearer and explicit component of humanitarian responses.’²⁴ Lloyd observed that many of the armed actors covered by her research would likely identify solidarity as one of their driving principles, and that the implications for humanitarian space of adopting such a



OVERCOMING CHALLENGES

Best practice in access negotiations

Using what works, including IHL as an 'instrument not an ideal'

One of the most prominently emerging points of consensus throughout the day was the importance of taking a pragmatic approach to access negotiations. As put by one participant, 'IHL isn't enough. You need to negotiate to get access.' Several participants spoke of the importance of using IHL as an 'instrument, not an ideal', and it was noted that a number of organisations are already leading the way in doing this, among them the ICRC, MSF, NRC and the Centre for Competence on Humanitarian Negotiations (CCHN).

A number of participants emphasised the importance of focusing on the grassroots: 'universalising but at the same time *localising* the principles of IHL, and emphasising the ones that have the greatest resonance'. One participant highlighted that much of the positive work being done to promote respect for IHL was being done by 'individual organisations in localised settings' – organisations working at the local level to better understand the motivations and interests of local actors. Another participant, similarly, highlighted the importance of narrative:

We might be driven by the *intent* to ensure compliance with IHL, but that doesn't mean you have to refer to it. We need to be able to adapt our narrative for our counterpart. You start by finding out what *their* values are and then you look for points of convergence.

Reference was made to the ICRC's *Roots of Restraint* report, which looks at various types of armed forces and armed groups and what influences them, and concludes that 'an exclusive focus on the law is not as effective at influencing behaviour as a combination of the law and the values underpinning it', and that 'linking the law to local norms and values gives it greater traction.'²⁵ In line with this, the research recently conducted by the Humanitarian Advisory Group (HAG) into the impact of IHL training found that 'when people said they were drawing upon their knowledge of IHL, it didn't mean they were actually referring to the Geneva Conventions when speaking to people, such as armed actors, in the field.'

Relatedly, one participant suggested that strategies to promote humanitarian access should incorporate an increased focus on 'integrating norms into the work of local organisations, and

tapping into local charitable values.' With specific reference to Myanmar, for example, it was observed that 'the Tatmadaw won't change unless it comes from the domestic constituency.'

Several participants also spoke of the value of adopting a 'transactional approach' to access negotiations – focusing on 'what you're trying to get out of your negotiations', and using 'whatever you think will work'. As part of this transactional approach, several participants highlighted the value that state and non-state actors alike place on legitimacy. This has two aspects: legitimacy in the eyes of the international community; and legitimacy with local populations, obtained through the adequate provision of goods and services. It was noted that these two aspects of legitimacy will likely hold sway to differing degrees with different actors. Some states for example may believe it enhances their legitimacy if populations even in areas outside their control are provided with humanitarian assistance, while others may believe that such assistance enhances the legitimacy of whichever non-state actor has territorial control. Regardless, several participants felt that if the motivations of the parties to the conflict are understood, legitimacy can often be used as a 'selling point' for humanitarian access.²⁶

The necessity of compromise

Related to the above, there was a strong emphasis on the need for humanitarian organisations to 'be prepared to make meaningful compromises on humanitarian principles.' As described by one participant,

the norms of humanity are an offer or bid on our part – "we'll provide assistance in exchange for you letting us operate impartially". But sometimes this isn't possible. So you have a choice: either act impartially, or neutrally and independently.

Another participant said, similarly, that 'humanitarian negotiations are a transaction', and that 'if we're going to be negotiating, then it needs to be a real negotiation and that means we need to compromise on something that means something to us.' Another described access negotiations as 'shared problem solving, entailing give and take on both sides'.

It was acknowledged that this is a difficult issue for humanitarian practitioners and organisations as a whole, because humanitarian principles go to the heart of our missions and identities. Humanitarian negotiations thus pose an identity dilemma; but more

than that, because of the critical relationship between adherence to humanitarian principles and the maintenance of access and security for humanitarian operations, such compromises – which may be essential – can have severe consequences. One participant described how in one particular context:

We made a decision to compromise our neutrality and independence. We decided that the situation warranted it, but we also recognised that that decision could have long-term implications for the organisation.'

Another said that:

The role of the negotiator is to navigate the space between two positions, which is the space of compromise. Your counterpart won't be able to move all the way to your position. So you have conflicting objectives. You want to adhere to humanitarian principles but you also want solutions. The task of the negotiator is to be able to navigate the space of compromise while staying true to the organisation's true identity.²⁷

A regulatory/legislative environment at the national level that facilitates access

Finally, it was observed that in situations in which a national government appears impervious to international pressure focusing on compliance with IHL and humanitarian principles, there may still be opportunities to push for regulatory or legislative reform at the national (or sub-national) level. While much of the day's

discussion focused on field-level negotiations, it was recognised that an equally critical determinant of humanitarian access is the body of national/sub-national laws, policies and regulations that facilitate or constrain access to populations in need. Participants noted the importance of identifying local political champions, and of well-coordinated national-level advocacy.

Positive strategies for navigating counter-terrorism measures

The Occupied Palestinian Territories

In relation to the OPT, three key strategies were proposed for better navigating (and challenging) the impact of counter-terrorism measures on humanitarian access:

- first, the humanitarian sector as a whole, including donors, must acknowledge that counter-terrorism measures and terrorism-related accusations are a threat to our collective ability to deliver humanitarian assistance to people in need, and build consensus around the imperative to challenge those measures and accusations. As suggested by O'Rourke:

'We have a shared mission to deliver humanitarian assistance. If the implementing agencies are unable to deliver assistance, then the donors, too, will fail to deliver on their mandates.'



- second, humanitarian agencies must better inform themselves about the legality of counter-terrorism measures, and overcome misunderstandings. O'Rourke referred to a recently-commissioned legal analysis on the designation of Hamas in relation to counter-terrorism measures in the OPT, which discusses among other things the distinction between Hamas's armed wing and the Hamas civil administrative authority.²⁸ Such analysis can assist humanitarian agencies to defend themselves in court as well as publicly, and as such needs to be widely shared.
- third, humanitarian agencies must fight terrorism-related accusations not only in the courts of law, but 'in the court of public opinion'. One participant noted that although none of the cases referenced above have been adjudicated, the scandals have been extremely damaging for the organisations concerned. Another noted that 'the one dollar that reaches the terrorist organisation is much stronger than any argument we can make about the robustness of our activities', and that 'we need to think about how we promote the counter-narrative, to DFAT and MPs.' Participants discussed the need to be able to describe programs in as compelling a manner as possible. One participant said 'we need to show how we work and how it's not funding terrorist organisations'; another suggested looking for 'champions at the political level'; and several stressed the importance of coalition-building and joint advocacy.

Promoting compliance with the Financial Action Task Force Guidelines

Participants heard from the Australian Council for International Development (ACFID)'s Humanitarian and Human Rights Advisor Jen Clancy, who discussed the recommendations of the Financial Action Task Force (FATF) – and the need for humanitarian agencies to advocate for the application of FATF's proposed risk-based approach.

The FATF calls for a risk-based approach to counter-terrorism financing that is proportionate, protects legitimate non-profits and is consistent with international human rights and humanitarian law. In particular, it recommends that:

Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse...²⁹

FATF acknowledges that not all non-profit organisations (NPOs) represent the same level of terrorist-financing risk. As such, it encourages governments not to view NPOs as inherently at risk, but rather to value and validate any measures taken to prevent risk. It also underscores that in conflict contexts and humanitarian crises, there is no such thing as zero-risk.

With regards to Australian NPOs, Clancy referred to a 2017 assessment conducted by the Australian Charities and Not-for-profits Commission (ACNC) and the Australian Transaction Reports and Analysis Centre (AUSTRAC), which found that the overall terrorism financing risk for the NPO sector in Australia was 'medium'. The assessment also said that the 'value of suspected terrorism financing involving NPOs is low compared with the economic size of the sector', and that 'this highlights the importance of identifying the subset of high-risk NPOs, rather than looking at the issue through a broad sector-wide lens'.³⁰

Clancy noted that ACFID members are a small sub-set of the non-profit aid and development sector in Australia: of 8,000 NPOs with overseas activities, just 125 are ACFID members. These members sign a code of conduct, pursuant to which they commit to ensuring that funds and resources are 'properly controlled and managed', and to having policies and procedures which address the risk of counter-terrorism financing.³¹ ACFID members must not only have these things in place for themselves; they must ensure their implementing partners have them as well. ACFID members conduct self-assessments annually, and are assessed by ACFID every three years. In short, it can be assumed that ACFID members are at considerably lower risk of terrorism-financing risk than the NPO sector overall.

On this basis, ACFID recommends that donors take a *risk-based approach* to identifying and addressing the risk of terrorism financing. This means ensuring that measures intended to reduce risk are targeted (developed in line with an area's risk profile and the robustness of a funding recipient's risk management practices), reasonable (recognising that partners cannot make absolute assurances that their employees or volunteers are not engaged with terrorism, but they can take 'all reasonable measures' to ensure that they are not), effective and proportionate. ACFID also recommends that such measures do not impinge on legitimate charitable activity; and that donors consider the potential consequences of *not* programming in certain areas and not reaching certain populations, including the risk of increased radicalization. Finally, ACFID recommends that mutual understanding of risk and acceptable mitigation strategies be strengthened through multi-stakeholder dialogue between government, NGOs, regulators and the financial sector (building on experience from the UK, the Netherlands and Switzerland),

and that the sector work towards collecting and consolidating more robust operational evidence to inform policy dialogue.

Training and support

The symposium's final sub-theme was 'training, guidance and support' – for purposes of highlighting the level of support now available to humanitarian agencies and individuals regarding both IHL and access negotiations. This session was informed by presentations from Naïma Weibel from the CCHN, Michael Fletcher from the ARC, and Jess Lees from HAG.

Practitioners face enormous challenges in navigating the various dilemmas associated with access negotiations, particularly because of the criticality of the compromises sometimes required. Weibel provided the example of an agency granted access to a refugee camp to conduct a vaccination campaign, on the condition that they only vaccinate boys. Weibel observed that it can be difficult for individual practitioners to try and navigate such dilemmas on their own, and many practitioners understandably do not feel they have the necessary tools and skills to ensure that they're making the best decisions in each case. Weibel suggested that such dilemmas are best navigated using a structured approach.

The CCHN is one of the main providers of support with humanitarian access negotiations. As described by Weibel, the CCHN supports humanitarian practitioners by:

1. analysing best practice (used to inform workshops and the development of tools);
2. developing tools and methodologies;³²
3. facilitating the sharing of experiences, through workshops and communities of practice; and
4. providing targeted advice on how to utilise best practice, tools and methodologies to address particular access challenges.

Significant support is also available from the Red Cross and Red Crescent Movement (and in Australia, from ARC) with regards to the promotion and utilisation of IHL. ARC has committed to adopting and demonstrating best practice with regard to IHL. To this end, it has adopted the ARC IHL Action Plan, detailing the steps that ARC is taking, in response to seven Principles for IHL Best Practice, covering policies, the capacity and capability of its people, operations and commitments to transparency and accountability. ARC is keen to support Australian organisations operating in conflict contexts to adopt IHL best practice, by assisting them to review their own position using the Principles for IHL Best Practice as a reference, understand their rights and responsibilities under IHL and to identify and develop solutions

for IHL-related challenges.³³ ARC runs annual workshops on IHL, and is developing an online repository of resources such as checklists, case studies, model policies and e-learning modules aimed at supporting IHL best practice amongst humanitarian organisations.

Finally, Lees shared the results of a study on the impact of IHL training recently completed by HAG for the ARC. Based on interviews and surveys, the research found that:

1. IHL training can be linked to improved humanitarian outcomes (67 percent of interviewees identified specific ways in which they applied knowledge gained from training towards a better humanitarian outcome);
2. training on IHL is only one step in a learning process;
3. the application of IHL and humanitarian principles is supported if there is a critical mass of actors in the context that understand and support the principles;
4. training for field practitioners needs to be practical and contextualised; and
5. awareness of IHL and humanitarian principles mitigates individual and operational risks in the field.

This session wrapped up with a discussion about what constitutes effective training on IHL and humanitarian access. There was strong consensus on the importance of contextualised approaches, with a heavy reliance on case studies, the sharing of experiences (in particular the 'experience of people who have gone and done it the hard way'), group work and role-playing. One participant observed that 'there's nothing worse than an academic flow of information'; another talked about the importance of 'getting away from the Henry Dunant speech'.

WRAP UP

The symposium aimed to explore how IHL could be better leveraged to maximise humanitarian access. As such, it was based on an assumption, and a value proposition: that IHL *can*, if properly understood, promoted and utilised, assist humanitarian practitioners and leadership in negotiating and advocating for humanitarian access. We believe this proposition withstood the robust discussions of the day, and that despite the appropriate focus on practical approaches and meaningful compromise, there were some important points of consensus regarding the persisting relevance of humanitarian principles and legal frameworks for humanitarian assistance in armed conflict.

First, it is worth noting that at no stage during the discussions was there a suggestion that as a sector we are moving towards a rejection of humanitarian principles or IHL. Indeed, as one participant observed, we need to understand the principles of IHL in order to understand the foundations upon which we operate: then with that understanding, we can move forward and consider what works and doesn't in particular contexts. That said, there is no question that respect for humanitarian principles and IHL has declined and that this trend is continuing. So even if we as 'humanitarians' don't reject IHL and humanitarian principles, we must operate in an environment where others do; and moreover, we must sometimes cooperate with, negotiate with and advocate to those others. This poses enormous challenges for the humanitarian sector; challenges that we've not come up with any easy answers for.

Second, while the day's discussions were deliberately operational in focus, there was also a recognition that access is not just about field-level negotiations, but also about having a legislative and

regulatory environment that facilitates access. This includes the counter-terrorism policies and practices of donors, and the policies, laws and regulations of host governments. As humanitarian actors we need to be aware of the various components of the operating environment and the way in which they enable or constrain the delivery of humanitarian assistance, and to be able to identify possible entry points that can be leveraged to maximise access to people in need.

Third, it was recognised that humanitarian actors have a critical role to play in tackling these challenges strategically, collectively and with a clear and consistent voice on what it is that we seek to achieve, how and why.

Zegenhagen wrapped up the day by quoting ICRC President Peter Maurer, who in an address to the Human Rights Council in February 2019 stressed the importance of humanitarian action being 'free to be implemented without discrimination', and the impossibility of humanitarian organisations 'reach[ing] out to people in a timely and effective way if humanitarian action is at risk through criminalisation or a lack of awareness or respect for IHL.' Seventy years on from the Geneva Conventions, Maurer called for 'new conversations, a new consensus on these difficult issues'.³⁴ This symposium was held in the hope of starting one such 'new conversation' in the Australian context, and with the intention that the conversation be a continuing one.

ENDNOTES

1. Paul Knox Clarke, *The State of the Humanitarian System* (ALNAP/ODI, 2018) available at: www.alnap.org/our-topics/the-state-of-the-humanitarian-system.
2. Fiona Terry and Brian McQuinn, *The Roots of Restraint in War* (ICRC, June 2018) available at: www.icrc.org/en/publication/4352-roots-restraint-war.
3. See Adele Harmer, Abby Stoddard and Alexandra Sarazen, *Humanitarian Access in Armed Conflict: A Need for New Principles?* (Humanitarian Outcomes, 2018) and other research available at: www.humanitarianoutcomes.org.
4. See resources available at: pilac.law.harvard.edu/counterterrorism-and-humanitarian-engagement-project.
5. See Abby Stoddard, *Necessary Risks: Humanitarianism and Violence Against Aid Workers* (Palgrave Macmillan, 2020, forthcoming); Ashley Jonathan Clements, *Humanitarian Negotiations with Armed Groups: The Frontlines of Diplomacy* (Routledge, 2020, forthcoming); Joe Cropp, *The Humanitarian Fix: Navigating Civilian Protection in Contemporary Wars* (Routledge, 2020, forthcoming).
6. Fourth Geneva Convention, adopted 12 August 1949, art 23.
7. Additional Protocol I, adopted 8 June 1977, art 70(1)
8. Ibid, art 70, 71.
9. Additional Protocol II, adopted 8 June 1977, art 18.
10. ICRC 2005, *Customary International Humanitarian Law*, rule 55 and rule 56, available at: ihl-databases.icrc.org/customary-ihl/eng/docs/home
11. See references at above n 3.
12. A review of UNHCR's operations in Bosnia observed that 'in principle, humanitarian organisations can suspend or withdraw from an operation if their principles are not respected. In practice, however, assistance cannot be stopped if people will starve without aid or if political imperatives dictate that assistance will be provided. Consequently, humanitarian agencies have little ability to manoeuvre and stick their principles even when few, if any of them, are respected. It is increasingly clear that when humanitarian organisations provide aid in conflict situations they will be obliged to take an extremely pragmatic stance, and, when necessary, to bend their principles': UN Central Evaluation Section, *Working in a War Zone: A Review of UNHCR's Operations in Former Yugoslavia* (1994) available at: www.unhcr.org/en-au/research/evalreports/3bd41feb4/working-war-zone-review-unhcrs-operations-former-yugoslavia.html.
13. Security Council Resolution 1373 (28 September 2001).
14. See Security Council Resolutions 2462 (28 March 2019) and 2482 (19 July 2019).
15. Petra Ball and Yvette Zegenhagen 'Common article 1 and counter-terrorism legislation: Challenges and opportunities in an increasingly divided world', in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for IHL* (Routledge, forthcoming 2020).
16. Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011); George Williams, 'A Decade of Australian anti-Terror Laws,' *Melbourne University Law Review*, 2011, vol. 35(3), pp. 1136-1176.
17. The survey is available at OCHA OPT, 'Humanitarian operations undermined by delegitimization, access restrictions, and administrative constraints', 16 January 2019, available at: www.ochaopt.org/content/humanitarian-operations-undermined-delegitimization-access-restrictions-and-administrative.
18. See APHEDA, 'Crisis in Palestine set to worsen as aid organisations come under attack', 31 August 2018, available at: www.apheda.org.au/aid-orgs-under-attack-palestine/.
19. See NPA, 'Norwegian People's Aid reaches a settlement with the US Government', 3 April 2018, available at: www.npaid.org/News/News-archive/2018/Norwegian-People-s-Aid-reaches-a-settlement-with-the-U.S.-government.
20. See Ben Parker, 'Oxfam faces \$160 million legal threat over Palestine aid project', *The New Humanitarian*, 12 September 2019, available at: www.thenewhumanitarian.org/news/2019/09/12/NGO-counter-terrorism-Gaza-Palestine-oxfam-lawsuit.
21. See Sons of Liberty International, www.sonsoflibertyinternational.com.
22. See Humanitarian Defence Abroad, www.hda-usa.org/our-mission.
23. For discussion see Marnie Lloyd, "'Persistent tensions? International legal perspectives on "other" foreign fighters', *German Yearbook of International Law*, 2017, vol. 60, p.539; and Marnie Lloyd, 'Framing foreign fighting: Exploring the scope of prevention and the categorisation of fighters in international law', in Christophe Paulussen and Martin Scheinin (eds) *Human Dignity and Human Security in Times of Terrorism* (TMC Asser Instituut/Springer, 2020, forthcoming) pp.207-238.
24. Matthew Clarke and Brett Parris, *Vale the Humanitarian Principles: New Principles for a New Environment* (Centre for Humanitarian Leadership, Working Paper 1, August 2019).
25. Terry and McQuinn, above n 2.
26. This point is developed further in Ashley Clement's forthcoming book, above n 5.
27. For discussion on this issue of compromising on humanitarian principles see Hugo Slim, *Humanitarian Ethics: A Guide to the Morality of Aid in War and Disaster* (Hurst Publishers, 2015). Slim proposes that to be able to navigate dilemmas such as these, humanitarian practitioners need to be able to engage in 'ethical deliberation', which requires (among other things): involving others in the process, actively experimenting, and understanding and working within one's organisational culture; also Hugo Slim, 'Doing the right thing: Relief agencies, moral dilemmas and moral responsibility in political emergencies and war', *Disasters*, 2015, vol. 21(3), pp. 422-257.
28. Emanuela-Chiara Gillard, *Application of counter-terrorism measures to civil administration structures and civil servants in Gaza: Expert opinion* (October 2019).
29. FATF, *International standards on combating money laundering and the financing of terrorism and proliferation: The FATF recommendations* (2019), p.11 (Recommendation No. 8), available at: www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.
30. ACNC and AUSTRAC, *Australia's Non-Profit Organisation Sector: Money Laundering and Terrorism Financing Risk Assessment*, 2017, p.39, available at: www.acnc.gov.au/tools/reports/national-risk-assessment-not-profit-sector.
31. The ACFID Code of Conduct is available at: acfid.asn.au/code-of-conduct.
32. See, for eg, CCHN, *CCHN Field Manual on Front-line Humanitarian Negotiation* (2018), available at: frontline-negotiations.org/wp-content/uploads/2018/12/CCHN-Field-Manual.pdf.
33. For more information on ARC's IHL Action Plan and the principles for IHL best practice see: redcross.org.au/ihl-hub
34. Peter Maurer, 'The law does not discriminate: neither can we', President's address to the Human Rights Council, 26 February 2019, available at: www.icrc.org/en/document/law-does-not-discriminate-nor-can-we.