

***Breaking down barriers: Analysing the need to reform Kenya's Prevention of Terrorism
Act to ensure access to principled humanitarian aid.***

By Melissa Ikawa

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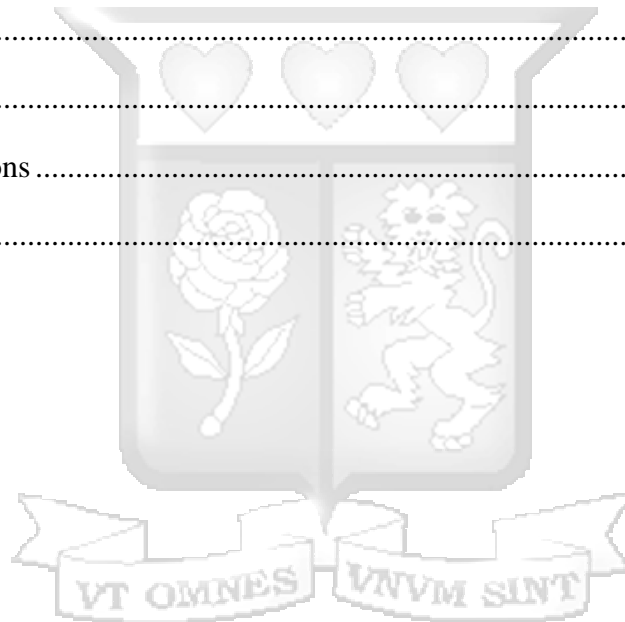
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Table of Contents

ACKNOWLEDGEMENT	iv
DECLARATION	v
ABSTRACT.....	vi
LIST OF ABBREVIATIONS.....	vii
CHAPTER 1: INTRODUCTION	1
1.1 Background of the problem.....	1
1.2 Problem Statement	3
1.3 Research Objectives	4
1.4 Research Questions	4
1.5 Hypothesis.....	4
1.6 Justification of study	5
1.7 Conceptual framework: The concept of Human security.....	5
1.8 Literature Review.....	7
1.9 Methodology	10
1.10 Limitations	10
1.11 Chapter breakdown	10
CHAPTER 2: THE PLACE OF HUMANITARIAN AID ORGANISATIONS WITHIN THE FIGHT TO COMBAT TERRORISM DURING NON-INTERNATIONAL ARMED CONFLICTS.....	12
2.1 Introduction	12
2.2 The nature of principled humanitarian action	12
2.3 The scope of the mandate of international humanitarian organisations in non- international armed conflict.	14
2.4 Conclusion.....	19
CHAPTER 3: THE POTENTIAL EFFECTS OF KENYAN COUNTERTERRORISM LEGISLATION ON THE PROVISION OF PRINCIPLED HUMANITARIAN ASSISTANCE.	21

3.1 Introduction	21
3.2 The likely effect of counterterrorism legislation on principled humanitarian action.....	22
3.3 Conclusion.....	26
CHAPTER 4 : LESSONS FROM THE EAST: A COMPARATIVE ANALYSIS OF THE PHILIPPINE’S COUNTERTERRORISM LEGAL FRAMEWORK.....	27
4.1 Introduction	27
4.2 Why Kenya should take a page out of The Philippines’ book.....	27
4.3 Conclusion.....	30
CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS	31
5.1 Introduction	31
5.2 Conclusions	32
5.3 Recommendations	32
BIBLIOGRAPHY	34



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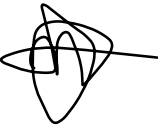
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DECLARATION

I, MELISSA FLORA ATIENO IKAWA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

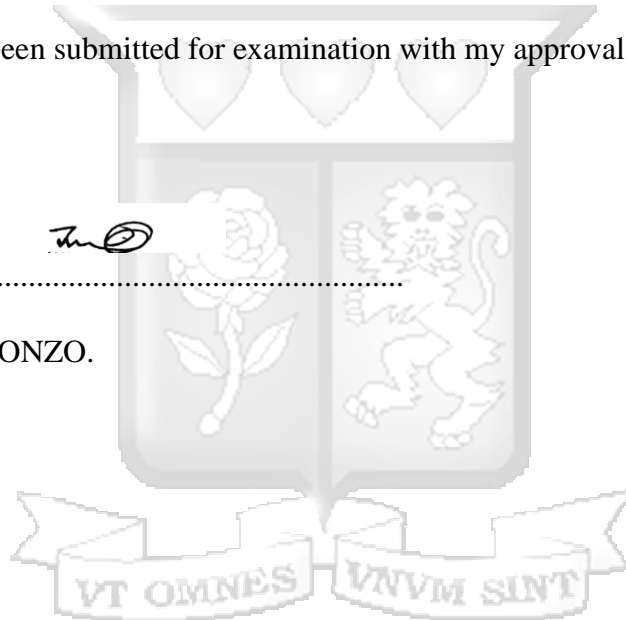
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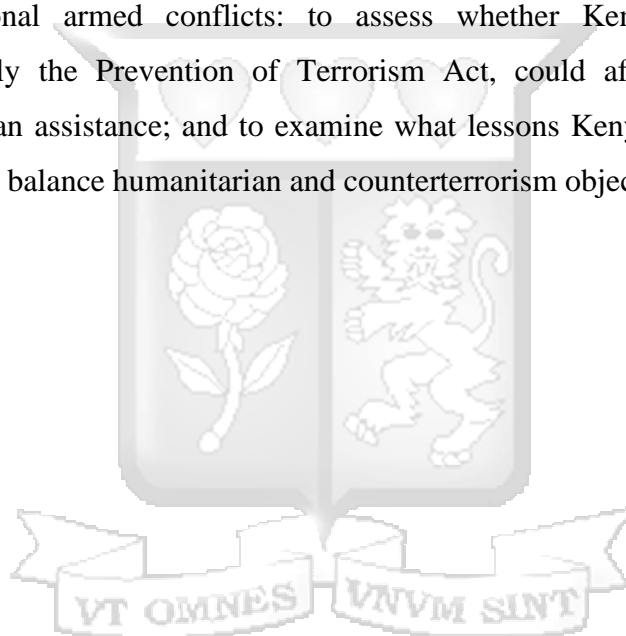
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ABSTRACT

Humanitarian aid organisations are tasked with ensuring that impartial neutral assistance is given to those who need it the most. Where armed conflict exists, humanitarian actors often have to engage with the armed groups in order to fulfil their mandate of providing relief where it is needed. Armed groups in internal conflicts tend to be deemed as ‘terrorists’ by the state. This means that engagement with them by the humanitarian workers can constitute a crime under domestic counterterrorism legislation. Based on the hypothesis that of Kenya’s Prevention of Terrorism Act may serve as a barrier to the provision of principled humanitarian aid in the event of armed conflict, this study is conducted based on 3 main objectives: To determine the place of humanitarian aid organisations within the fight to combat terrorism during non-international armed conflicts; to assess whether Kenyan counterterrorism legislation, specifically the Prevention of Terrorism Act, could affect the provision of principled humanitarian assistance; and to examine what lessons Kenya can learn from The Philippines in order to balance humanitarian and counterterrorism objectives.



LIST OF ABBREVIATIONS

ICRC - International committee of the Red Cross

IHL- International Humanitarian Law

PTA - Prevention of terrorism Act



CHAPTER 1: INTRODUCTION

1.1 Background of the problem

Following the Westgate attack of 2013, Kenya attempted to take a harsher approach to counterterrorism legislation in order to curtail terrorism in the region.¹ The 2014 Security Laws (Amendment) bill received a lot of criticism for potential human rights abuses in counterterrorism efforts.² While the Security Laws (Amendment) Act did not include some of the harsher rules,³ even without this more stringent policy, Kenya's counterterrorism legislation framework presents several challenges and concerns.

Kenya's ministry of interior and coordination of national government defines terrorism as 'the unlawful use of violence intended to advance ideological, political, religious or any other cause'.⁴ It includes the threat or actual use of force in order to put a section of the public in fear.⁵ The Prevention of Terrorism Act provides a similar definition regarding terrorist acts.⁶ This definition of terrorism draws no distinction between times of peace and times of armed conflict, meaning that where an armed conflict were to take place, some actions of non-state armed groups in non-international armed conflicts would qualify as 'terrorist acts' as per the Act.⁷ In other global regions where internal armed conflicts have ensued, the state often deems the rebel fighters as terrorists.⁸ This is because while the existence of an armed conflict invokes

¹ 'Kenya anti-terror law challenged in Nairobi court' BBC News on 23 December 2014 -< <https://www.bbc.com/news/world-africa-30592083>>- on 23 December 2014. See also: 'Kenya's Troubling New Anti-Terrorism Legislation' Council on foreign relations, December 31 2014 <<https://www.cfr.org/blog/kenyas-troubling-new-anti-terrorism-legislation>>- on 31 December 2014.

² 'Kenya anti-terror law challenged in Nairobi court' BBC News on 23 December 2014 -< <https://www.bbc.com/news/world-africa-30592083>>- on 23 December 2014.

³ *Security Laws (Amendment) Act* (Act No. 19 of 2014).

⁴ The Department of Interior, Ministry of interior and coordination of National Government, 'Negative effects of terrorism on the enjoyment of human rights and fundamental freedoms', 31 October 2017, 1.

⁵ The Department of Interior, Ministry of interior and coordination of National Government, 'Negative effects of terrorism on the enjoyment of human rights and fundamental freedoms', 31 October 2017, 1.

⁶ Section 2, *Prevention of Terrorism Act* (Act No. 30 of 2012).

⁷ Durham H, 'Counterterrorism, sanctions and war', 103(916-917), *International Review of the Red Cross*, 2021, 5.

⁸ Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 103(916-917), *International Review of the Red Cross*, 2021, 112- 113.

the application of international humanitarian law, it does not do away with the application of domestic legislation and policies.⁹

Often, where an armed conflict has ensued, the adverse party to the state in a conflict takes control over territory, and where it is non-international, this adverse party would be an armed rebel group otherwise called a non-state armed group.¹⁰ Humanitarian organisations guided by the principles of humanity and impartiality, such as the International Committee of the Red Cross, have the mandate to enter zones that have been impacted by the conflict in order to offer humanitarian aid.¹¹ This is in the form of medical assistance, food and clothing supplies, or other forms of humanitarian aid.¹² Regardless of whether these non-state armed groups, now deemed terrorists, have occupied or taken control of territory or not, humanitarian organisations are still required to ensure as best as possible that they can provide relief to the victims of war.¹³ This tends to involve meeting to negotiate with the occupiers or controllers of territory on the terms of their access or providing supplies to the territory even where it might fall into the hands of the armed group inevitably.¹⁴

This mandate is nonetheless dependent on the consent of any parties to the conflict affected by their assistance.¹⁵ As such, these organisations are still bound to the consent of states to provide assistance in their country.¹⁶ They are similarly bound to the agreement of the non-state armed groups to provide assistance in territory controlled by them, hence the need for meetings with the terrorist groups as part of their function.¹⁷ This leading to the problem brought about by the Prevention of Terrorism Act below.

⁹ Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 111.

¹⁰ Durham H, 'Counterterrorism, sanctions and war', 6.

¹¹ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 103(916-917), *International Review of the Red Cross*, 103(916-917), 2021, 475.

¹² Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 132. See also, Articles 10 and 18, *Protocol II Additional to the Geneva conventions*.

¹³ Wynn-Pope P, Zegenhagen, Y, and Kurnadi, F, 'Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation', 97(897-898), *International Review of the Red Cross*, 2015, 239. See: Lewis D A, "'Criminalization" of Humanitarian Action Under Counterterrorism Frameworks: Key Elements and Concerns', 112, *Proceedings of the Annual Meeting (American Society of International Law)*, 2018, 268.

¹⁴ Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 132.

¹⁵ Kurtzer J D, Flowers K, et al 'What is access?', 4-12. See also Articles 70 -71, Geneva convention IV.

¹⁶ Kurtzer J D, Flowers K, et al 'What is access?', 4-12.

¹⁷ Debarre A, 'Tensions between Counterterrorism Efforts and International Humanitarian Law in Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework', 4-10.

Section 5 of Kenya's Prevention of Terrorism Act criminalises the provision of any property, funds or service if one has any reasonable grounds to believe that they will be used by a terrorist group for any purpose.¹⁸ The use of the words "any purpose" make it clear that this is irrespective of whether or not the property or services are used in furtherance of terrorist acts. Additionally, section 25 of the Act states that it is illegal to organize or facilitate a meeting if one has reason to believe that the meeting shall be addressed by a person belonging to a terrorist group.¹⁹ Both of these crimes carry a penalty of a maximum of 20 years of imprisonment.²⁰ An issue then arises where workers for humanitarian aid organisations are faced with potential criminal penalties if they were to organize negotiations with the armed group in order to enter their territory or to provide supplies in such territory knowing it may fall into the hands of the armed group.²¹ The provision of medical care and other humanitarian necessities is also faced with the challenge that organisations such as the International Committee of the Red Cross are bound by the principle of impartiality and cannot refuse to offer aid where it is needed even where the aid may fall into the arms of the states 'enemy'.²²

1.2 Problem Statement

Sections 5(1)(b) and 25(b) of the Prevention of Terrorism Act provide that supporting and facilitating meetings with known terrorists are criminal offences. While these provisions are designed to create punitive measures for the aiding of terrorism and deter such activities, they carry with them an element of harm to the human population.²³ For humanitarian aid organisations, assistance often involves setting up meetings with the armed groups to ensure IHL compliance or providing of humanitarian assistance directly in their controlled territory.²⁴ Due to the breadth of the above provisions of the Prevention of Terrorism Act, these actions may constitute support for terrorism and as such create the possibility for criminal sanctions to humanitarian aid actors. This could prevent humanitarian access to those in need.

¹⁸Section 5(1)(b), *Prevention of Terrorism Act* (Act No. 30 of 2012).

¹⁹Section 25(b), *Prevention of Terrorism Act* (Act No. 30 of 2012).

²⁰Sections 5 and 25, *Prevention of Terrorism Act* (Act No. 30 of 2012).

²¹Wynn-Pope P, Zegenhagen, Y, and Kurnadi, F, 'Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation', 251.

²² Position Paper of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 'The Impact of Counter-Terrorism Targeted Sanctions on Human Rights', 2021, 13.

²³ Mackintosh K and Duplat P, 'Counter-Terrorism Measures on Principled Humanitarian Action', Norwegian Refugee Council, July 2013, 71.

²⁴ Debarre A, 'Tensions between Counterterrorism Efforts and International Humanitarian Law in Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework', 9.

As such, this dissertation seeks to study whether the Prevention of Terrorism Act should be amended to provide for access to principled humanitarian aid in times of armed conflict.

1.3 Research Objectives

1. To determine the place of humanitarian aid organisations within the fight to combat terrorism during non-international armed conflicts.
2. To assess whether Kenyan counterterrorism legislation, specifically the Prevention of Terrorism Act, could affect the provision of principled humanitarian assistance.
3. To examine what lessons Kenya can learn from The Philippines in order to balance humanitarian and counterterrorism objectives.

1.4 Research Questions

1. What is the place of humanitarian aid organisations within the fight to combat terrorism during non-international armed conflicts.
2. Whether Kenyan counterterrorism legislation, specifically the Prevention of Terrorism Act, could affect the provision of principled humanitarian assistance.
3. What lessons can Kenya learn from The Philippines in order to balance humanitarian and counterterrorism objectives.

1.5 Hypothesis

While not yet observed in practice, counterterrorism legislation in Kenya conflicts with obligations arising from international humanitarian law. Although created for the legitimate purpose of curbing terrorism in the region, the phrasing of the legislation encapsulates even those not engaged in terrorist activity. My hypothesis is that the provisions of Kenya's Prevention of Terrorism Act serve as barriers to the provision of principled humanitarian aid in the event of armed conflict and ought to be amended. If the scope of the provisions were to be narrowed or an exemption created specifically for humanitarian aid, then this barrier would no longer exist.

1.6 Justification of study

This study is quite important from an international humanitarian law perspective. More specifically, in the Kenyan space where the focus is on the discriminatory nature of counterterrorism in the region, as opposed to the current legislation which could cause an extensive amount of harm to a population in a time of need. My research will be of direct assistance to lawmakers as it will hopefully serve as a guide to the amendment of the law in order to cure this gap. In addition, it will be of use to adjudicators when tasked with the interpretation of the specific provisions of the Act that may lead to penal sanctions for humanitarian workers. Additionally, my research may be of help even beyond the humanitarian scope as an underlying theme is how the breadth of a legal provision can have widespread detrimental effects. The understanding of such a domino effect could help lawmakers in their drafting of legal instruments related to other fields of law. It may also be of some use to regional delegations of organisations such as the ICRC in pursuit of their mandate.

1.7 Conceptual framework: The concept of Human security

This dissertation shall approach the problem using the notion of human security as a conceptual framework. This is because it proposes that there should be protection from critical and pervasive threats to the person, such as lack of basic needs like food and healthcare, before protection to the state as a whole is considered.²⁵

In broad terms, human security can be defined as freedom from fear and freedom from want.²⁶ The original conception of the idea simply put, proposes the security of the people to be placed above other security concerns.²⁷ The security of the people here refers to the core of the human or rather, the fundamental rights that are core to the human person, such as food, healthcare and education.²⁸ While the concept rests on two limbs: that of protection and then the subsequent empowerment of the people,²⁹ this dissertation will focus primarily on the aspect of protection.

²⁵ Howard-Hassmann R E, 'Human Security: Undermining Human Rights?', 34(1), *Human Rights Quarterly*, 2012, 89.

²⁶ Newman E, 'Critical human security studies', 36(1), *Review of International Studies*, 2010, 78.

²⁷ Newman E, 'Critical human security studies', 78.

²⁸ Kaldor M, 'Human Security in Complex Operations', 2(2), *PRISM*, 2011, 4.

²⁹ Ogata S, 'Human Security: Theory and Practice', 1(2), *St Antony's International Review*, 2005, 12.

The concept attempts to look at security beyond the collective security of states, that is: security as protection from war or limitations on the use of force between states.³⁰ As such, the security of the human here would not be with regard to their safety from terror, but rather the protection of their human rights despite the existence of unsafety.³¹ This is because security ought to be oriented around the human and internationally recognized standards of human rights.³²

Kaldor offers a more insightful conception of human security defined in three parts. The first is that human security revolves around the protection of everyday individuals and their communities as opposed to the security of nations.³³ Secondly, that it is not only about protection from threats of foreign enemies, but rather the range of risks and dangers that occur in places of conflict, such as fear or want.³⁴ The third element is that lack of human security is interrelated in different places. She proposes that illness and resentment in one part of the world travels to other corners through terrorism and pandemics.³⁵

This idea proposes that human life and more generally human rights should be at the core of decisions made in places of conflict.³⁶ Often decisions in times of conflict are made with the national security at their core.³⁷ While this can be justified by the state of emergency, it has been proposed that even where such a situation exists, a focus on human security would ensure the total protection of the person, inclusive of national security concerns.³⁸ As such, human security is not in conflict with national security, but rather, they should be observed conjunctively to ensure that human rights violations do not occur as a result of an over emphasis on state security.³⁹ The main agenda of the concept of human security is the idea that the security of the people is the security of the state as well as the idea that security is not just military defence of states territory and interests.⁴⁰

Looking at the problem posed in this study through the lens of human security would thus provide a means for both state interests and humanitarian interests to be considered in making legislation. While the state is protecting its interests and safety through counterterrorism

³⁰Howard-Hassmann R E, 'Human Security: Undermining Human Rights?', 90.

³¹ Kaldor M, 'Human Security in Complex Operations', 11.

³² Newman E, 'Critical human security studies', 78.

³³ Kaldor M, 'Human Security in Complex Operations', 2.

³⁴ Kaldor M, 'Human Security in Complex Operations', 3.

³⁵ Kaldor M, 'Human Security in Complex Operations' 3.

³⁶Newman E, 'Critical human security studies', 85; Kaldor M, 'Human Security in Complex Operations' 6.

³⁷ Ogata S, 'Human Security: Theory and Practice', 15.

³⁸ Ogata S, 'Human Security: Theory and Practice', 12.

³⁹ Ogata S, 'Human Security: Theory and Practice', 12.

⁴⁰Howard-Hassmann R E, 'Human Security: Undermining Human Rights?', 90.

legislation, it does so in a way that has the potential to affect provision of necessities for human life, as such it follows the initial conception of security as opposed to human security. This new lens would allow the problem to be analysed from the perspective that while policy on counterterrorism can advance its aims on the protection of the state, it can simultaneously aim to do so in a way that promotes human security as opposed to restricting it. As such, removing bars to humanitarian access would be in promotion of human security which would have no impact on the continued protection of national security interests.

1.8 Literature Review

The current discussion surrounding the potential danger counterterrorism legislation could pose on humanitarian assistance focuses mostly on United Nations counter-terrorism frameworks and legislation.⁴¹ While some scholars have studied this problem in specific geographical regions in the world, none have addressed this specific problem from a Kenyan perspective.⁴²

In Kenya, the conversation revolves mostly around the effects of strengthening counterterrorism measures on human rights in the country, particularly in refugee camps in Northeastern Kenya where terrorists are believed to be recruited from.⁴³ More specifically, the issues of excessive police powers and discrimination.⁴⁴ Badurdeen, for instance, discusses the negative impact of counterterrorism legislation in Kenya and the effect of the broadly defined terms in the Prevention of Terrorism Act, however, she does so through the lens of its discriminatory nature towards Muslims in Kenya.⁴⁵

1.8.1 The impact of counterterrorism legislation on the principles that guide humanitarian access

⁴¹ Krähenmann S, 'The Interplay Between International Humanitarian Law, Terrorism and the "Foreign Terrorist Fighter" Regime', 112, *Proceedings of the Annual Meeting (American Society of International Law)*, 2018, 307–310; Durham H, 'Counterterrorism, sanctions and war'. See: Debarre A, 'Tensions between Counterterrorism Efforts and International Humanitarian Law in Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework', International Peace Institute, 2018, 4-10.

⁴²Wynn-Pope P, Zegenhagen, Y, and Kurnadi, F, 'Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation'. See: Mackintosh K and Duplat P, 'Counter-Terrorism Measures on Principled Humanitarian Action', Norwegian Refugee Council, July 2013.

⁴³ Brankamp H and Glück, Z, 'Camps and counterterrorism: Security and the remaking of refuge in Kenya', 40(3), *Environment and Planning D: Society and Space*, 2022, 528–548.

⁴⁴ Brankamp H and Glück, Z, 'Camps and counterterrorism: Security and the remaking of refuge in Kenya', 540.

⁴⁵ Badurdeen F A, 'Socio-legal implications of the laws to combat religious extremism in Kenya' in Green M C, Gun T J and Hill M (eds), *Religion, Law and Security in Africa*, African Sun Media, 2018, 105 - 130.

Mackintosh and Duplat, after conducting a case study on Somalia and Palestine, found that strong counterterrorism legislation led to a great deal of censorship and a straying away from the principles that guide humanitarian organisations, such as impartiality.⁴⁶ The organisations are forced to comply with the rules of the state even where their assistance may be greatly needed in certain territories.⁴⁷

According to Shaw, counter-terrorism measures should be balanced to ensure that the principles of human rights law and humanitarian law are adhered to.⁴⁸ International humanitarian law scholars, such as Fleck, agree that even where there is a war on terror, the fundamental rules and principles of the law of war ought to be adhered to, specifically the principle of humanity which faces great risk where analysed in the context of the problem this dissertation expresses.⁴⁹ Authors such as Debarre believe that the broad definition of the words ‘terrorism’ and what constitutes ‘support for terrorism’ is what affects humanitarian actors and bars them from performing their duties.⁵⁰ Where it is vaguely defined, there is room for interpretation in any way, potentially leaving certain actors vulnerable even where, contextually speaking, their actions are not criminal.⁵¹

1.8.2 The application of domestic law in a state of armed conflict and in relation to humanitarian aid organisations

First, with regard to the conflict between municipal and international law in Kenya, authors such as Ambani have argued that Kenya is neither a monist nor a dualist country.⁵² The argue that it follows somewhat of a hybrid system.⁵³ Some authors argue for the supremacy of international law in such scenarios as it was the intention of the constitution, especially considering Kenya’s history with domestic legislation being used as a tool for oppression.

⁴⁶ Mackintosh K and Duplat P, ‘Counter-Terrorism Measures on Principled Humanitarian Action’, Norwegian Refugee Council, July 2013, 71.

⁴⁷ Debarre A, ‘Tensions between Counterterrorism Efforts and International Humanitarian Law in Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework’, 4-10.

⁴⁸ Shaw M, *International Law*, 6th ed, Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, 2008, 1164.

⁴⁹ Fleck D, *The Handbook of International Humanitarian Law*, 2nd ed, Oxford University Press, New York, 2008, xiv.

⁵⁰ Debarre A, ‘International Humanitarian Law in the UN Counterterrorism Framework in Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework’, *International Peace Institute*, 2018, 13; Position Paper of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, ‘The Impact of Counter-Terrorism Targeted Sanctions on Human Rights’, 2021, 13.

⁵¹ Office of the United Nations High Commissioner for Human Rights, ‘Human Rights, Terrorism and Counter-terrorism’ December 2007, 40.

⁵² Ambani J and Kabau T, ‘The 2010 Constitution and the application of international law in Kenya’, 41.

⁵³ Ambani J and Kabau T, ‘The 2010 Constitution and the application of international law in Kenya’, 41.

⁵⁴Regardless of what approach is taken however, Debarre confirms that since even the Geneva conventions provide that humanitarian access is subject to the consent of the state, the mandate given to such organisations is automatically subjugated to the state, and therefore, domestic law.⁵⁵

1.8.3 The issue of humanitarian access in International Humanitarian law

Authors such as Kurtzer provide that while humanitarian access is dependent on the consent of the affected parties, this access cannot be deprived arbitrarily.⁵⁶ It has been argued that regardless of the existence of the responsibility to allow access at an international level, due to state sovereignty, states retain the ultimate right to grant access to humanitarian organisations.⁵⁷ While little discussion has been had on whether non state armed groups have a similar right to impede humanitarian access, the general consensus is that a state certainly maintains that right.⁵⁸

Such access, even if dependent on consent, cannot be denied arbitrarily.⁵⁹ Bothe discusses the issue of access denial through the lens of unlawful access denial, that is, 'arbitrary denial is any denial that is unlawful'.⁶⁰ This perspective, even if accurate, may face complexity where the denial is in pursuit of the law itself, as is the case with counterterrorism policy. Another suggestion is the idea that a denial would not be arbitrary where the refusal is valid even in light of the humanitarian purposes.⁶¹

More specifically, it has been argued by Bothe that an arbitrary withholding of consent is where it is ; in violation of other international obligations of the state; in violation of the principles of necessity and proportionality and; is done in a manner which is unreasonable or otherwise inappropriate.⁶² Bothe posits that while IHL prohibits the arbitrary deprivation of access, the fact that the scope of defining terrorism is left to the states, means that regardless of how wide

⁵⁴ Oduor M, 'The status of international law in Kenya' 2(2) Africa Nazarene University Law Journal, 2014, 124.

⁵⁵ Debarre A, 'Tensions between Counterterrorism Efforts and International Humanitarian Law in Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework', 5.

⁵⁶ Kurtzer J D, Flowers K, et al 'What is access?', *DENIAL, DELAY, DIVERSION: Tackling Access Challenges in an Evolving Humanitarian Landscape*, Centre for Strategic and International Studies (CSIS), 2019, 4-12.

⁵⁷ Kurtzer J D, Flowers K, et al 'What is access?', 4-12.

⁵⁸ Kurtzer J D, Flowers K, et al 'What is access?', 4-12.

⁵⁹ Labonte M T and Edgerton A C, 'Towards a Typology of Humanitarian Access Denial', 34(1), *Third World Quarterly*, 2013, 53

⁶⁰ Bothe M, 'Humanitarian Access', 112, *Proceedings of the Annual Meeting (American Society of International Law)*, 2018, 266-68.

⁶¹ The Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict --<<https://docs.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf>>-

⁶² Bothe M, 'Humanitarian Access', 266-268.

they set the scope of terrorism, states can prohibit certain acts to the extent that they are never permissible regardless of context.⁶³ As such, even the 3 part criteria for discerning arbitrary withholding of access, as discussed above may not be as helpful.

Contribution

My dissertation contributes to existing literature by offering a unique perspective on the issue. While previous studies have discussed the impact of counterterrorism legislation on principled humanitarian aid, this dissertation dives into the issue from a Kenyan perspective, offering a remedy that removes barriers to access in its Prevention of Terrorism Act. It also adds to the discussion on issues such as the coexistence (or lack thereof) between international humanitarian law and counterterrorism legislation and policy.



1.9 Methodology

This dissertation involves purely desktop research and takes a qualitative research approach. It does so relying mostly on secondary sources such as scholarly articles, reports and books. It also relies on primary sources such as the Constitution of Kenya, the Prevention of Terrorism Act, the Geneva conventions and other relevant legal instruments. This dissertation also entails a comparative analysis that focuses on Philippines as their history with combating terrorism mirrors that of Kenya. Lessons can be drawn from their inclusion of a humanitarian exemption clause in their Anti-terrorism Act to balance both security and humanitarian concerns.

1.10 Limitations

The research may be limited by the fact that this particular problem has not been faced in Kenya yet. There is limited material from a Kenyan context discussing the issue to the extent that this dissertation aims to do. As such, heavy reliance is placed on regional and international sources.

1.11 Chapter breakdown

⁶³ Bothe M, 'Humanitarian Access', 266-68.

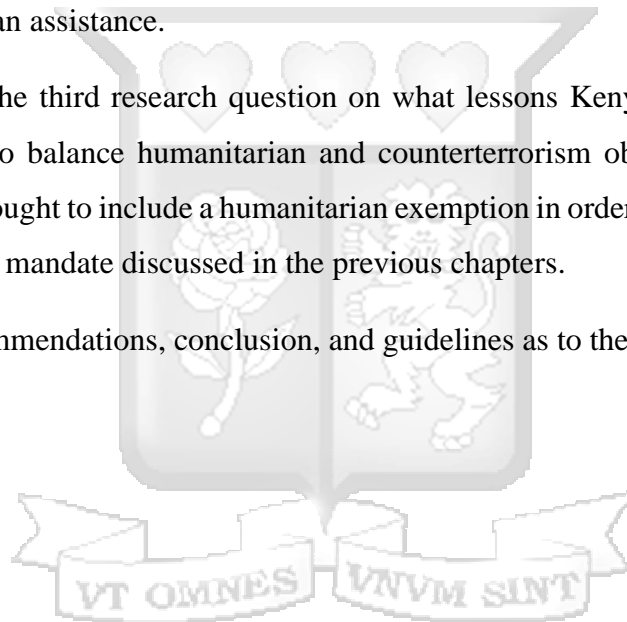
This research proposal forms the first chapter, it outlines the background of the study, the statement of the problem, the objectives of the study, the research questions, the hypothesis, the conceptual framework, the literature review, the justification for the study, the study's limitations, and the methodology.

Chapter two addresses the first research question on the place of humanitarian aid organisations within the fight to combat terrorism during non-international armed conflicts. It does so by assessing the relevance of terrorism in armed conflict together with the extent of the mandate humanitarian organisations have during this time.

Chapter three addresses the second research question on whether Kenyan counterterrorism legislation, specifically the Prevention of Terrorism Act, could affect the provision of principled humanitarian assistance.

Chapter 4 addresses the third research question on what lessons Kenya can learn from The Philippines in order to balance humanitarian and counterterrorism objectives. This chapter proposes that the Act ought to include a humanitarian exemption in order to allow humanitarian access in line with the mandate discussed in the previous chapters.

Chapter 5 offers recommendations, conclusion, and guidelines as to the implementation of the findings of this study.



CHAPTER 2: THE PLACE OF HUMANITARIAN AID ORGANISATIONS WITHIN THE FIGHT TO COMBAT TERRORISM DURING NON-INTERNATIONAL ARMED CONFLICTS

2.1 Introduction

Humanitarian aid organisations are tasked with providing assistance to those who need it most. Some organisations have a task under humanitarian law to go beyond the provision of aid and ensure compliance with IHL by both parties in an armed conflict. However, armed conflict and terrorism often overlap. This is because states have the liberty to determine who is and is not a terrorist while the existence of war is an objective fact.⁶⁴ It is important to understand the place that humanitarian organisations fall in this clash between their mandate under IHL and efforts to fight terrorism in the country and why this might pose some challenges. This chapter expounds on the mandate of humanitarian aid organisations and the nature of the access they require that may be deemed as involvement with terrorists. It also discusses the principled nature of humanitarian aid and how this prevents the organisations from discriminating against those who need aid, even where they may be deemed terrorists.⁶⁵

2.2 The nature of principled humanitarian action

Since there are overlaps between terrorism and IHL, it is imperative to understand the extent of involvement that humanitarian law requires from aid organisations that causes the problem presented in this dissertation.

Different humanitarian organisations from around the world are tasked with providing different forms of life-saving assistance.⁶⁶ While they do this generally for all types of humanitarian crises, this part of the dissertation focuses on the type of intervention required specifically in armed conflict. Humanitarian aid organisations have a mandate stemming from international humanitarian law to provide specific forms of assistance in armed conflict. In the provision of

⁶⁴ Office of the United Nations High commissioner for Human Rights, 'Human Rights, Terrorism and Counter-terrorism' December 2007, 39.

⁶⁵ Büthe T, Major S, Ade Me S, 'The Politics of Private Foreign Aid: Humanitarian Principles, Economic Development Objectives, and Organizational Interests in NGO Private Aid Allocation', 66(4), *International Organization*. 2012, 601.

⁶⁶ Rouleau K, Redwood-Campbell L, 'International development and humanitarian aid: in times of economic crisis, should Canada maintain its spending?', 55(6), *Can Fam Physician*, 2009, 575-7.

this aid, both non-state armed groups and government forces are meant to cooperate with the organisations.⁶⁷ Essentially all sides to a conflict are to assume that they are not a threat and should be given access to all areas where assistance may be needed.⁶⁸ However, for organisations such as the ICRC and Geneva Call, the extent of their intervention sometimes exceeds the basic provision of food, shelter and medical assistance.⁶⁹ The main task of organizations like Médecins Sans Frontières, Oxfam International, and CARE International is to act as a neutral intermediary.⁷⁰ They often have to engage in negotiation with non-state armed groups to encourage respect for the rules of International humanitarian law.⁷¹ The problem therefore exists that these non-state armed groups are usually deemed terrorists by the state in which the conflict is occurring.⁷² The mandate to provide this form of intervention that is given to them by international law clashes with domestic counterterrorism law that criminalises any involvement with a terrorist group.⁷³ In the previous chapter, this dissertation discussed how a terrorist group and non-state armed group can be one and the same, so where humanitarian aid organisations are providing relief to non-state armed groups, national legislation may deem it as cooperation with terrorists.

Humanitarian action is guided by four main principles; Humanity; Neutrality; Impartiality; and Independence.⁷⁴ All these principles prevent humanitarian actors from taking sides in a conflict and ensures that they provide aid where it is needed.⁷⁵ The principle of Humanity obligates them to address human suffering wherever it is found, paying the most attention to the most vulnerable.⁷⁶ The principle of Neutrality prevents them from favouring any side in a conflict

⁶⁷United Nations Office for the Coordination of Humanitarian Affairs” Civil-military coordination” - <https://www.unocha.org/civil-military-coordination> ; See also O Bogatyreva, ‘Humanitarian Diplomacy: Modern Concepts and Approaches’, 92(14), *Her Russ Acad Sci*, 2022, 1349–66.

⁶⁸ ICRC, ‘Principles under fire: does it still make sense to be neutral?’ On 31 December 2003 - <https://www.icrc.org/en/doc/resources/documents/article/other/5vueea.htm> -

⁶⁹ United Nations Office for the Coordination of Humanitarian Affairs” Civil-military coordination” - <https://www.unocha.org/civil-military-coordination> -.

⁷⁰ Bogatyreva O, ‘Humanitarian Diplomacy: Modern Concepts and Approaches’, 1349–66.

⁷¹ Bogatyreva O, ‘Humanitarian Diplomacy: Modern Concepts and Approaches’, 1349–66.

⁷² Gillard E C, ‘IHL and the humanitarian impact of counterterrorism measures and sanctions Unintended ill effects of well-intended measures’, Chatham House, September 2021, 6.

⁷³Ferraro T, ‘International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues’, 103(916-917), *International Review of the Red Cross*, 2021, 117.

⁷⁴ Rysaback-Smith H, ‘History and Principles of Humanitarian Action’, 9(15), *Turk J Emerg Med*, 2016, 5-7.; see also Weiss T G, ‘Principles, Politics, and Humanitarian Action’, 13(1), *Ethics & International Affairs*, 1999, 22.

⁷⁵ O’Leary E, ‘Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action’, 103(916-917), *International Review of the Red Cross*, 2021, 461.

⁷⁶ O’Leary E, ‘Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action’, 461.

despite their personal beliefs.⁷⁷ The principle of Impartiality provides that aid has be given without discrimination on the basis of need.⁷⁸ The last principle, independence, separates humanitarian goals and objectives from any other objectives.⁷⁹ All humanitarian actors are guided by these principles as they encompass the meaning of humanitarian aid in itself; “delivering life-saving assistance to those in need, without any adverse distinction”.⁸⁰ While such organisations are primarily concerned with ensuring civilian are saved form the effects of war, they cannot refuse to provide assistance where it is urgently needed.⁸¹

The ICRC code of conduct sets some standards that its actors must adhere to, often reflected in the codes of other organisations.⁸² The principles of conduct are mostly reflective of the four basic principles with the addition that the aid cannot be used to further any political or military standpoint and that they cannot act as an instrument of government policies. Ultimately, it is clear that they cannot be discriminatory across any lines.⁸³

2.3 The scope of the mandate of international humanitarian organisations in non-international armed conflict

There are multiple sources of law that give humanitarian organisations the mandate to provide assistance in armed conflict.⁸⁴ There are both those that explicitly allow for their assistance and those from which it can be implied that they ought to be allowed to provide aid.⁸⁵

Some provisions of IHL have implicit connotations that parties to a conflict have to consent to humanitarian intervention.⁸⁶ The prohibition on starvation as a means of warfare is one such example.⁸⁷ Parties to a conflict are prohibited from starving populations in war, essentially

⁷⁷ O’Leary E, ‘Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action’, 461.

⁷⁸ O’Leary E, ‘Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action’, 461.

⁷⁹ O’Leary E, ‘Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action’, 461.

⁸⁰ Rouleau K, Redwood-Campbell L, ‘International development and humanitarian aid: in times of economic crisis, should Canada maintain its spending?’, 575-7.

⁸¹ Rysaback-Smith H, ‘History and Principles of Humanitarian Action’, 6.

⁸² ICRC, March 2023, ‘Code of Conduct for Employees of The International Committee of The Red Cross’, See, A Borovecki, J Einarsdóttir, D O’Mathúna, P Pospieszna, O M Stern, N O Teles, ‘20 years of the ICRC Code of Conduct for Disaster Relief: what do we need to improve?’, 385(9976), *The Lancet*, 2015, 1391.

⁸³ T Ferraro, ‘International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues’, 153.

⁸⁴ Schwendimann F F, ‘The legal framework of humanitarian access in armed conflict’, 93(884), *International Review of the Red Cross*, 2011, 997.

⁸⁵ ICRC, ‘IHL and Humanitarian Assistance’ -<<https://casebook.icrc.org/law/ihl-and-humanitarian-assistance>>-

⁸⁶ ICRC, ‘IHL and Humanitarian Assistance’ -<<https://casebook.icrc.org/law/ihl-and-humanitarian-assistance>

⁸⁷ ICRC, ‘IHL and Humanitarian Assistance’ -<<https://casebook.icrc.org/law/ihl-and-humanitarian-assistance>

meaning that they cannot prevent humanitarian provision of food to areas where they are needed, even if they are occupied territories.⁸⁸ However, more commonly, the law explicitly provides the mandate for humanitarian organisations.⁸⁹ As per the first additional protocol, humanitarian assistance in the context of international armed conflicts requires the consent of all the states concerned, including that of the state receiving the aid.⁹⁰ Parties are permitted to deny access of humanitarian aid organisations where they have strong reason to believe that they are not intended for the civilian population.⁹¹ In such international armed conflicts, where territory is occupied, the occupying power is obligated to permit third party humanitarian assistance where they are incapable of meeting the humanitarian needs of the civilian population in the occupied territory.⁹²

Where internal, or non-international, armed conflicts are concerned, Article 18 of the second additional protocol to the Geneva conventions provides that impartial humanitarian assistance must be provided without adverse distinction.⁹³ It is evident that for non-international armed conflicts it is intended that humanitarian assistance does not segregate between who is and is not to receive it.⁹⁴ While article 18 does create the implication that the government needs to consent to such assistance, it has been construed as implying that all parties to the conflict are obligated to grant such assistance where it is essential for survival, i.e. foodstuffs and medical supplies.⁹⁵

Provisions requiring such consent should not be interpreted as meaning that states have the whim to deny access of aid in areas where it is desperately needed.⁹⁶ Provisions outlawing starvation as a means of warfare create the understanding that deprivation of access to foodstuff is similarly outlawed.⁹⁷ Additionally, the right to humanitarian assistance as envisioned by the additional protocols similarly creates the understanding that humanitarian access cannot be denied.⁹⁸ Such denial is only founded under law where it is strongly believed that it will not

⁸⁸ Article 54(1), *First additional Protocol to the Geneva conventions*; Article 14, *Second additional Protocol to the Geneva conventions*; Rule 53, Database for Customary International Humanitarian Law.

⁸⁹ Article 70, *First additional Protocol to the Geneva conventions*.

⁹⁰ Article 70, *First additional Protocol to the Geneva conventions*.

⁹¹ Art. 23, *The Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1949.

⁹² Article 56, *The Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1949.

⁹³ Article 18, *Second additional Protocol to the Geneva conventions*.

⁹⁴ Schwendimann F, 'The legal framework of humanitarian access in armed conflict', 1001.

⁹⁵ Schwendimann F, 'The legal framework of humanitarian access in armed conflict', 1001.

⁹⁶ ICRC, 'IHL and Humanitarian Assistance' - <<https://casebook.icrc.org/law/ihl-and-humanitarian-assistance>>-

⁹⁷ D'Alessandra F, Gillett M, 'The War Crime of Starvation in Non-International Armed Conflict', 17(4), *Journal of International Criminal Justice*, 2019, 815-847.

⁹⁸ Dinstein Y, 'The Right to Humanitarian Assistance', 53(4), *Naval War College Review*, 2000, 1.

reach a population in need and will instead work towards the betterment of the cause of one of the parties to the conflict.⁹⁹

The most commonly known body that has the mandate to address international humanitarian law is the International Committee of the Red Cross (ICRC), a neutral, impartial and independent humanitarian organization.¹⁰⁰ Their mandate is to protect and assist the victims of armed conflict.¹⁰¹ This is specifically conferred to them as an organisation by the four Geneva Conventions and their Additional Protocols.¹⁰² The ICRC's mandate and legal status sets it apart both from intergovernmental agencies, such as United Nations organizations, and other non-governmental organizations.¹⁰³ That is not to say that these organisations do not have the mandate under humanitarian law to assist in armed conflict, but rather that the ICRC has the official capacity to do so.¹⁰⁴ Its tasks include spreading knowledge of humanitarian law, monitoring compliance, drawing attention to violations, and contributing to the development of humanitarian law.¹⁰⁵ In monitoring compliance, the ICRC often has to engage in direct communication with the parties to the conflict.¹⁰⁶

While other organisations may not have the mandate to engage in direct communication with rebel groups, multiple organisations exist that are tasked with the provision of neutral and impartial humanitarian assistance. Doctors without borders for instance, is guided by the same principles as the ICRC and thus cannot discriminate against who they provide assistance to.¹⁰⁷ Geneva call provides assistance in the same manner as the ICRC and additionally engages in direct negotiations with rebel groups in order to ensure conformity with the rules of IHL.¹⁰⁸

⁹⁹ ICRC, 'IHL and Humanitarian Assistance' -<<https://casebook.icrc.org/law/ihl-and-humanitarian-assistance>>-

¹⁰⁰ Gasser H P, 'The International Committee of the Red Cross and its Development Since 1945 in Swiss Foreign Policy, 1945–2002', Palgrave Macmillan, London, 2003, 12.

¹⁰¹ Gasser H P, 'The International Committee of the Red Cross and its Development Since 1945 in Swiss Foreign Policy, 1945–2002', 12.

¹⁰² ICRC, 'The ICRC's mandate and mission' -<<https://www.icrc.org/en/mandate-and-mission#:~:text=Established%20in%201863%2C%20the%20ICRC,and%20other%20situations%20of%20violence>>-

¹⁰³ ICRC, 'What is the ICRC?' -<<https://www.icrc.org/en/campaign/discover-icrc/2-what-is-the-icrc.html#:~:text=Our%20mandate%20and%20legal%20status,%20and%20non%2Dgovernmental%20organizations>>-

¹⁰⁴ ICRC, 'What is the ICRC?' -<<https://www.icrc.org/en/campaign/discover-icrc/2-what-is-the-icrc.html#:~:text=Our%20mandate%20and%20legal%20status,%20and%20non%2Dgovernmental%20organizations>>-

¹⁰⁵ Gasser H P, 'The International Committee of the Red Cross and its Development Since 1945 in Swiss Foreign Policy, 1945–2002', 12.

¹⁰⁶ Naili H, 'Neutrality in Humanitarian Actions Means Talking to All Parties to a Conflict, On March 28 2022 - <<https://www.justsecurity.org/80882/neutrality-in-humanitarian-actions-means-talking-to-all-parties-to-a-conflict/>>-

¹⁰⁷ Médecins Sans Frontiers, 'An international, independent medical humanitarian organisation' <<https://www.msf.org/>>-

¹⁰⁸ Geneva call, 'Protecting civilians in armed conflict' -<<https://www.genevacall.org/>>-.

There are numerous other organisations with similar responsibilities, all whose staff and operations could be affected by counterterrorism legislation. In the modern day, the scope of what constitutes humanitarian assistance has changed drastically. While previous perceptions of aid refer to providing food, healthcare and medical supplies, the nature of humanitarian aid has spread beyond providing these bare essentials. In an era where war has extended beyond just being inter-state conflict, the type of trauma experienced by victims in spaces of internal warfare transcend just the provision of food and water.¹⁰⁹ Victims often suffer from additional problems such as recruitment of children into rebel groups and sexual trauma.¹¹⁰ This increases the role of humanitarian organisations. Additionally, as many victims are often displaced, children who belong to displaced populations require educational facilities for their continued development.¹¹¹ In fact, a lot of the work done by organisations such as the ICRC, Geneva call, save the children and others goes towards the protection of children.¹¹²

In working towards monitoring IHL compliance and ensuring children are safe and uninvolved in conflict, the organisations often have to involve themselves in potentially very dangerous negotiations with the leaders of the non-state armed groups themselves.¹¹³ The workers have to put themselves in the difficult position to set up meetings with and organise for the possible removal of children from those areas.¹¹⁴ Ultimately this requires what section 25 of the Kenyan PTA would refer to as setting up a meeting with a person with the knowledge that they belong to a terrorist group.¹¹⁵ While the workers are simply trying to operate within the parameters of IHL to save children from difficult situations, the law might not see it as such.

Evidently, they are at quite a disadvantage because they have no position of power with any side to the conflict and frequently have to bow to the whims of whoever is in charge of the territory they are in.¹¹⁶ Often, where they engage in such negotiations, the leaders of the non-

¹⁰⁹ Gasser H P, 'The International Committee of the Red Cross and its Development Since 1945 in Swiss Foreign Policy, 1945–2002', 12.

¹¹⁰ ICRC, Special Report 2021, 'Addressing sexual violence', 9.

¹¹¹ Hazer L, Gredebäck G, 'The effects of war, displacement, and trauma on child development', 10(909), *Humanit Soc Sci Commun* 10, 2023, 4.

¹¹² P Bongard and E Heffes, 'Engaging armed non- State actors on the prohibition of recruiting and using children in hostilities: Some reflections from Geneva Call's experience', 101(911), *International Review of the Red Cross*, 2019, 603–621.

¹¹³ Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 153.

¹¹⁴ Bogatyreva O, 'Humanitarian Diplomacy: Modern Concepts and Approaches', 1349–66.

¹¹⁵ Section 25, PTA (No 30 of 2012).

¹¹⁶ Arifeen A and Nyborg I, 'How humanitarian assistance practices exacerbate vulnerability: Knowledges, authority and legitimacy in disaster interventions in Baltistan, Pakistan', 54, *International Journal of Disaster Risk Reduction*, 2021, 5.

state armed group will demand confidentiality on the part of the organisation.¹¹⁷ Additionally, some aid organisations cannot disclose information they gain during their work in court.¹¹⁸ This prevents the workers from being able to properly defend themselves if they were to be prosecuted without breaching the guiding principles.¹¹⁹ In order to avoid this, the workers have to make a difficult choice between breaching their confidentiality, and potentially putting an end to the engagement with the non-state armed group and jeopardizing the operation they were working on, and keeping the confidentiality and potentially endangering their own lives and freedom.¹²⁰

While it may seem like governments would assume a non-threatening nature of a humanitarian aid organisation, this is not a fact.¹²¹ In times of armed conflict where tensions run high, some states have been known to place suspicion on humanitarian aid workers, especially where they are of an international character.¹²² In many cases, even tents and camps bearing the red cross logo have been subject to attack from parties to a conflict, despite the internationally understood fact they are neutral.¹²³

The principles of neutrality and independence preclude humanitarian organisations from aiding any party to the conflict so even where they set up negotiations with the ‘enemy’ these guiding principles should preclude them from accusations of ‘aiding the enemy.’¹²⁴ This might not be the case with other actions within their mandate. With regards to the provision of medical services, humanitarian organisations may find themselves having to give medical assistance to deemed terrorists if they desperately require it.¹²⁵ This would constitute assisting the ‘terrorist’ and would be an outright breach of section 5 of the PTA.¹²⁶ Yet, this is one of the objects that

¹¹⁷ ICRC Engagement with Non-State Armed Groups Why, how, for what purpose, and other salient issues ICRC Position Paper March 2021, 9.

¹¹⁸ Debuf E, ‘Tools to do the job: The ICRC’s legal status, privileges and immunities’, 97 (897/898), International Review of the Red Cross, 2016, 341.

¹¹⁹ Debuf E, ‘Tools to do the job: The ICRC’s legal status, privileges and immunities’, 341.

¹²⁰ O’Leary E, ‘Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action’, 467.

¹²¹ Ferraro T, ‘International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues’, 132.

¹²² Kriner S, ‘Slayings reveal inherent dangers facing Red Cross workers’, On 3 May 2001 -<<https://reliefweb.int/report/democratic-republic-congo/slayings-reveal-inherent-dangers-facing-red-cross-workers>>-

¹²³ Aljazeera, ‘Attack on Red Cross convoy in Sudan kills at least two, injures seven’, On 10 December 2023 -<<https://www.aljazeera.com/news/2023/12/10/attack-on-red-cross-convoy-in-sudan-kills-at-least-two-injures-seven>>-

¹²⁴ Rysaback-Smith H, ‘History and Principles of Humanitarian Action’, 6; see also T G Weiss, ‘Principles, Politics, and Humanitarian Action’, 22.

¹²⁵ O’Leary E, ‘Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action’, 464.

¹²⁶ Section 5, *Prevention of Terrorism Act* (No. 30 of 2012).

is internationally recognized as being within their mandate.¹²⁷ Additionally, in territories occupied by the rebel or ‘terrorist’ group, where aid is needed by the civilian population dwelling within, the organisation will have to enter the territory and offer its support there, also potentially in breach of Section 5 of the PTA which provides that a person who directly or indirectly provides a service knowing that it shall be used by a terrorist group is liable to imprisonment for 20 years.¹²⁸

With the increased role of humanitarian aid workers caused by the change in wartime dynamics over the years, the extent of communication that aid givers have to have with deemed terrorist is similarly increased.¹²⁹ As earlier mentioned, they often have to have negotiations regarding the safety of children, however, they are also additionally tasked with discussing the means and methods of warfare with the groups.¹³⁰ As dangerous as it seems, the ICRC often has to engage in discussions with the leaders of non-state armed groups in order to discuss any potential wartime offences in the hopes of reducing the effect of war on civilian populations.¹³¹ In fact, as of now, a handful of ICRC officials have died in such dangerous operations and some are still detained while the organisation attempts to find methods of release.¹³²

2.4 Conclusion

Humanitarian aid organisations have the mandate to provide assistance, especially during the emergence of armed conflict. However, the existence of armed conflict does not remove the state ability to declare whether a non-state armed group is a terrorist group. This means that in a bid to negotiate with armed rebel groups, the organisations could find themselves breaching counterterrorism legislation by meeting with or offering services to deemed terrorists.

The idea of local legislation being a barrier to aid is not particularly a new one. Other variations of it have existed across the world. While humanitarian aid in crisis should be awarded to those who need it, power dynamics exist between the states who wield the power and the organisations themselves, preventing them from carrying out their duties.¹³³ Organisations like

¹²⁷ Schwendimann F, ‘The legal framework of humanitarian access in armed conflict’, 1001.

¹²⁸ Section 5, *Prevention of Terrorism Act* (No. 30 of 2012).

¹²⁹ Bogatyreva O, ‘Humanitarian Diplomacy: Modern Concepts and Approaches’, 1349–66.

¹³⁰ Bogatyreva O, ‘Humanitarian Diplomacy: Modern Concepts and Approaches’, 1349–66.

¹³¹ Bogatyreva O, ‘Humanitarian Diplomacy: Modern Concepts and Approaches’, 1349–66.

¹³² ICRC ‘protecting the protectors’ <https://www.icrc.org/en/doc/resources/documents/statement/57jp2c.htm>

¹³³ Büthe T, Major S, Souza Ade Me, ‘The Politics of Private Foreign Aid: Humanitarian Principles, Economic Development Objectives, and Organizational Interests in NGO Private Aid Allocation’, 574.

the ICRC also depend largely on funding from donor states who can dictate where exactly the money they have donated is used, this means that their eventually becomes a political dictation of which conflicts receive the most funding, affecting the ‘principled’ nature of the assistance and the organisation itself.¹³⁴ Their prevented ability to carry out certain tasks with the fear that it constitutes a breach of counterterrorism legislation is yet another way in which humanitarian action’s principled nature is affected.¹³⁵

Ultimately, humanitarian aid organisations are constantly at a crossroads between their personal safety and the fulfilment of their mandate.¹³⁶ Kenya’s current counterterrorism regime and policy does not make this situation any easier as the risk of prosecution for attempting to save lives is still existent. The next chapter addresses the exact nature of this problem and how it can be resolved.



¹³⁴Büthe T, Major S, Souza Ade Me, ‘The Politics of Private Foreign Aid: Humanitarian Principles, Economic Development Objectives, and Organizational Interests in NGO Private Aid Allocation’, 574.

¹³⁵ Ferraro T, ‘International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues’, 134.

¹³⁶ Subotic J, ‘Review of Humanitarianism at a Crossroads, by Michael Barnett and Thomas G. Weiss’, 11(1), *International Studies Review* 11, 2009, 187–89.

CHAPTER 3: THE POTENTIAL EFFECTS OF KENYAN COUNTERTERRORISM LEGISLATION ON THE PROVISION OF PRINCIPLED HUMANITARIAN ASSISTANCE.

3.1 Introduction

The previous chapter established the interplay between armed conflict and humanitarian aid, and the reality that humanitarian aid organisations often have roles in armed conflict that may exceed the provision of food and medical care to civilians. This chapter explores potential impact of these realities in the Kenyan context.

Kenya's Prevention of Terrorism Act 2012 has two provisions in particular that could affect the provision of principled humanitarian assistance. These are sections 5 and 25. Both of these provisions have the effect of limiting the scope of activities within humanitarian organisations mandate as discussed under chapter 2.¹³⁷ While this is yet to cause any particular problem in Kenya, it has been established that such provisions can pose multiple negative effects.¹³⁸ The most common of these is risk aversion on the part of the humanitarian aid organisations themselves, causing them to avoid any engagement in acts that may constitute violations of these provisions.¹³⁹ However, other actors are affected by such provisions aside from the humanitarian organisations.¹⁴⁰ Risk averse donors and governments are similarly affected.¹⁴¹ This chapter explores how provisions such as those contained in the PTA can have far reaching consequences on humanitarian aid provision. It discusses the cumulative effect of all these parties being averse to the risk caused by such provisions is that populations affected by war ultimately do not get the extent of aid they deserve.¹⁴²

¹³⁷Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 103(916-917), *International Review of the Red Cross*, 2021, 117.

¹³⁸ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 103(916-917), *International Review of the Red Cross*, 2021, 461.

¹³⁹ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 461.

¹⁴⁰ Gillard E C, 'IHL and the humanitarian impact of counterterrorism measures and sanctions: Unintended ill effects of well-intended measures', Chatham House, September 2021, 10.

¹⁴¹ Williams G'Donor Approaches to Risk in Fragile and Conflict Affected States: Case Study Democratic Republic of Congo', The policy practice, Revised draft, 28 July 2013, 6.

¹⁴² Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 153.

3.2 The likely effect of counterterrorism legislation on principled humanitarian action

Humanitarian organisations and their staff could potentially face criminal sanctions under the Prevention of Terrorism Act. This is because both sections 5 and 25 impose a maximum imprisonment penalty of 20 years where they are found to be in violation of certain acts in the provisions.¹⁴³

i.) Section 5 of the PTA

This section makes it a crime to, *inter alia*, “directly or indirectly, collect, attempt to collect, provide, attempt to provide or invite a person to provide or make available any property, funds or a service intending, knowing or having reasonable grounds to believe that such property, funds or service shall be used by a terrorist group for any purpose”.¹⁴⁴ This is regardless of whether those items or services are actually used to commit terrorist acts.¹⁴⁵ Since humanitarian aid organisations have to provide assistance in a non-discriminatory and impartial manner, if they were to provide medical assistance to a person who is deemed terrorist by the state, even if such assistance was desperately needed, they would be in infringement of this provision and guilty of a criminal offence. Under this section, they would potentially face 20 years of imprisonment.

ii.) Section 25 of the PTA

This section prohibits “organising, facilitating or assisting in organising or facilitating a meeting knowing or having reason to believe the agenda of the meeting to be; (i) the support of a terrorist group; or (ii) the furtherance of the activities of a terrorist group; or (b) that the meeting shall be addressed by a person who belongs or professes to belong to a terrorist group”.¹⁴⁶ Humanitarian aid organisations that need to negotiate access with the known terrorist groups in order to effectively carry out their mandate would be guilty of an offence under this provision so long as they are aware that a meeting they are having is with a deemed terrorist.

This creates a mindset of risk aversion where humanitarian aid organisations and staff end up making operational decisions based around the need to accommodate the counterterrorism

¹⁴³ Prevention of Terrorism Act (No. 30 of 2012).

¹⁴⁴ Section 5, *Prevention of Terrorism Act* (No. 30 of 2012).

¹⁴⁵ Section 5, *Prevention of Terrorism Act* (No. 30 of 2012).

¹⁴⁶ Section 25, *Prevention of Terrorism Act* (No. 30 of 2012).

measures as opposed to humanitarian needs.¹⁴⁷ This is not only because they risk facing criminal prosecution,¹⁴⁸ but because even where they may not actually serve the prison sentences, they face the risk of losing funding from donors.¹⁴⁹ They also risk the possibility of affecting their reputation if they are charged with the crimes under the PTA.¹⁵⁰ This fear of reputational degradation exists for the donors just as much as it exists for the organisations.¹⁵¹

Donors have historically pulled their funding from causes they were supporting where they feared that their continued support would affect their reputation.¹⁵² In 2018, the United Kingdom's Department for International Development (DFID) suspended its monetary support for Northeast Syria due to the migration of a significant population from the Islamic state occupied zone.¹⁵³ This was due to the risks associated with the dispersal of potential Daesh members.¹⁵⁴ They feared that those moving from Islamic State-held areas were linked with the group and believed that they should not be financially supported, due to the potential for negative publicity and reputational damage if this were reported on.¹⁵⁵ In trying to negotiate with Al-Shabaab, for access to areas within their control, aid organisations stationed in Nairobi had to decline access where Al-Shabab insisted that they must pay a fee to them in exchange.¹⁵⁶ While some did admit to paying for the access, pressure from their donors ultimately meant that majority of the organisations had to pull out of the area as they could not accept this condition.¹⁵⁷

¹⁴⁷ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 462.

¹⁴⁸ Modirzadeh N K, Lewis D A, and Bruderlein C, 'Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape', 93(883), *International Review of the Red Cross*, 2011, 641.

¹⁴⁹ Modirzadeh N K, Lewis D A, and Bruderlein C, 'Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape', 641.

¹⁵⁰ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 462

¹⁵¹ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 465.

¹⁵² OCHA, 'Counter-Terrorism Frameworks and Safeguarding Humanitarian Space: Humanitarian Recommendations ahead of the UNGA High Level Side Event', On 23 September 2019 -

<https://reliefweb.int/report/world/counter-terrorism-frameworks-and-safeguarding-humanitarian-space-humanitarian> - .

¹⁵³ Middle East Monitor, 'UK cuts aid to northeast Syria citing fear of funding Daesh', On 23 April 2019 -

<https://www.middleeastmonitor.com/20190423-uk-cuts-aid-to-northeast-syria-citing-fear-of-funding-daesh/> >-

¹⁵⁴ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 466.

¹⁵⁵ Middle East Monitor, 'UK cuts aid to northeast Syria citing fear of funding Daesh', On 23 April 2019 -

<https://www.middleeastmonitor.com/20190423-uk-cuts-aid-to-northeast-syria-citing-fear-of-funding-daesh/> >-

¹⁵⁶ Jackson A and Aynte A, 'Talking to the other side Humanitarian negotiations with Al-Shabaab in Somalia, HPG working paper, December 2013', 8.

¹⁵⁷ Jackson A and Aynte A, 'Talking to the other side Humanitarian negotiations with Al-Shabaab in Somalia', 7.

Where donors are states or state agencies, they are also exceptionally protective of their reputation as it could have long lasting political fallout if it were to appear that they were funding the activities of terrorists.¹⁵⁸ Evidently, it is important to delimit the extent to which such organisations can interact with terrorist organisations without it being deemed as involvement in their activities.

Counterterrorism measures also have an impact on the way in which the organisations can carry out their humanitarian activities.¹⁵⁹ As mentioned in the previous chapter, humanitarian aid is principled in nature, it must be independent, impartial and neutral.¹⁶⁰ However, donor organisations, in a bid not to be associated with terrorist groups, may dictate the manner in which the organisations can carry out their duties.¹⁶¹ This fundamentally impacts their independence.¹⁶² Additionally, where donors require aid organisations to screen their beneficiaries in order to vet them and ensure that they do not appear on any sanctions lists, the impartiality and neutrality of the organisation is impacted.¹⁶³ If the organisation cannot assist those that are deemed terrorists where they are in dire need of it, then their aid is no longer in line with the principles that establish it.¹⁶⁴ Since some donors require this type of vetting in order to ensure compliance with counterterrorism measures and legislation, this is a direct effect of such measures on principled humanitarian assistance.¹⁶⁵ In 2020, this vetting requirement has been adopted by donors in the past and once affected the provision of nearly 15 million dollars in aid.¹⁶⁶ The aid organisation in this case was forced to forgo funds from a

¹⁵⁸Gillard E C, 'IHL and the humanitarian impact of counterterrorism measures and sanctions: Unintended ill effects of well-intended measures', 57.

¹⁵⁹ ICRC, 'Statement by the International Committee of the Red Cross (ICRC) at the United Nations General Assembly, 77th session, Sixth Committee Plenary Meeting on Measures to Eliminate International Terrorism', On 6 October 2022 -<<https://www.icrc.org/en/document/counter-terrorism-measures-can-impact-humanitarian-action-negatively#:~:text=When%20various%20forms%20of%20interaction,with%20their%20families%20%E2%80%93%20all%20humanitarian>>.

¹⁶⁰ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 465.

¹⁶¹ Proceedings of the Bruges Colloquium, 'Terrorism, Counter-Terrorism and International Humanitarian Law', 17th Bruges Colloquium 20-21 October 2016, 139.

¹⁶² Proceedings of the Bruges Colloquium, 'Terrorism, Counter-Terrorism and International Humanitarian Law', 139; O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 475.

¹⁶³ OCHA, 'Donor conditions and their implications for humanitarian response', On 16 April 2016 - <<https://reliefweb.int/report/world/donor-conditions-and-their-implications-humanitarian-response>>.

¹⁶⁴ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 475.

¹⁶⁵ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 475.

¹⁶⁶ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 475.

donor as the screening of beneficiaries of the funds was a condition.¹⁶⁷ In both Somalia and Palestine, donors that have sent aid to have done so with multiple counterterrorism conditions in place, affecting the extent of the scope of the type of aid given.¹⁶⁸

In addition to risk averse donors, counterterrorism legislation such as the Prevention of Terrorism Act, has a direct effect on the involvement of aid organisations in war stricken areas.¹⁶⁹ Where the organisation and their staff are risk averse in themselves, they avoid interaction with deemed terrorist groups in order to protect themselves from counterterrorism sanctions.¹⁷⁰ However, this again affects the principled nature of the assistance and how they are perceived by the parties to the conflict. If they avoid the non-state armed group for fear of being accused of assisting a terrorist group, then they will be seen as taking sides in the conflict and no longer be considered neutral or impartial.¹⁷¹ This could impact the extent of access they have to areas controlled by the non-state armed group, thus preventing the provision of aid to populations in need.¹⁷² These views have also had fatal effects on humanitarian staff workers as well. In Nigeria, humanitarian aid workers were killed with the justification that they were not neutral and were aiding the enemy and similar workers acting in Syria were targeted on the basis of their non-neutrality.¹⁷³

Total prohibition as the goal of states when it comes to counterterrorism tends to favour the security of the state as opposed to human security and general humanitarian concerns.¹⁷⁴ While the state has every right to address terrorism concerns and IHL allows them to take necessary measures to regain control over the country, these interests ought to be balanced with

¹⁶⁷ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 466.

¹⁶⁸ Mackintosh K and Duplat P, 'Counter-Terrorism Measures on Principled Humanitarian Action', Norwegian Refugee Council, July 2013, 47.

¹⁶⁹ ICRC, 'Statement by the International Committee of the Red Cross (ICRC) at the United Nations General Assembly, 77th session, Sixth Committee Plenary Meeting on Measures to Eliminate International Terrorism', On 6 October 2022 -<<https://www.icrc.org/en/document/counter-terrorism-measures-can-impact-humanitarian-action-negatively#:~:text=When%20various%20forms%20of%20interaction,with%20their%20families%20%E2%80%93%20all%20humanitarian> >-.</p></div>

¹⁷⁰ Gillard E C, 'IHL and the humanitarian impact of counterterrorism measures and sanctions: Unintended ill effects of well-intended measures', 3.

¹⁷¹ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 467.

¹⁷² E C Gillard, 'IHL and the humanitarian impact of counterterrorism measures and sanctions: Unintended ill effects of well-intended measures', 3.

¹⁷³ Médecins Sans Frontières, 'MSF condemns the killing of five aid workers in northeast Nigeria', On 23 July 2020 -<<https://www.msf.org/msf-condemns-killing-five-aid-workers-northeast-nigeria> >-.</p></div>

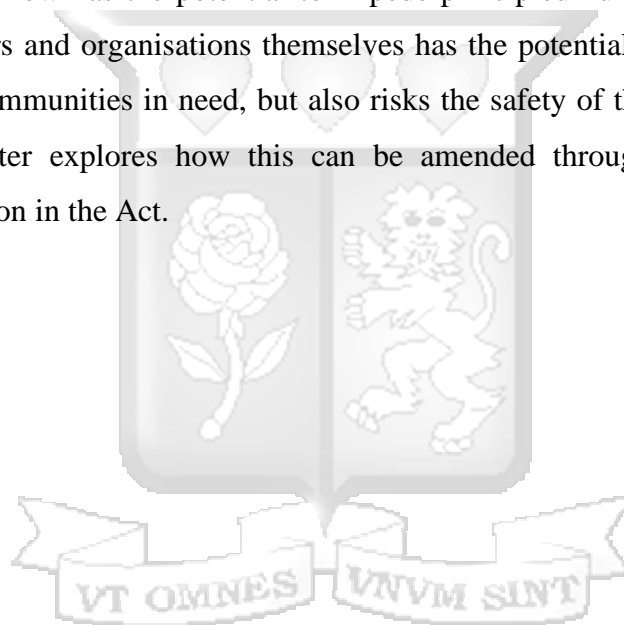
¹⁷⁴ Modirzadeh N K, Lewis D A, and Bruderlein C, 'Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape', 638.

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humanitarian concerns.¹⁷⁵ The effects of counterterrorism legislation not only affect the aid organisations themselves, they have a chilling effect on donors and ultimately cause harm to the civilian population, and sometimes aid workers themselves. They affect the operational capacity of humanitarian organisations in addition to largely affecting the impartial nature of the aid that they offer.¹⁷⁶ Seeing as these effects could become a reality in the current regime of Kenyan counterterrorism legislation, the next question is what amendments can be made to the Act that balance both counterterrorism and humanitarian objectives.

3.3 Conclusion

The PTA as it stands now has the potential to impede principled humanitarian action. Risk aversion on the donors and organisations themselves has the potential to not only affect the provision of aid to communities in need, but also risks the safety of the staff workers in the field. The next chapter explores how this can be amended through the inclusion of a humanitarian exemption in the Act.



¹⁷⁵Modirzadeh N K, Lewis D A, and Bruderlein C, 'Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape', 624.

¹⁷⁶ O'Leary E, 'Politics and principles: The impact of counterterrorism measures and sanctions on principled humanitarian action', 467.

CHAPTER 4 : LESSONS FROM THE EAST: A COMPARATIVE ANALYSIS OF THE PHILIPPINE'S COUNTERTERRORISM LEGAL FRAMEWORK.

4.1 Introduction

The effect of counterterrorism legislation on principled humanitarian assistance has been contemplated by other states worldwide.¹⁷⁷ The idea of incorporating an exemption clause within domestic counterterrorism legislation, is not a particularly novel concept.¹⁷⁸ It has been adopted by various states worldwide.¹⁷⁹ While different countries have taken different approaches to this, it is this dissertation's position that Kenya should adopt the approach taken by The Philippines in solving this particular problem. This is primarily due to the similarity in context between Kenya and The Philippines, specifically regarding the issue of combating terrorism. This chapter intends to prove that the Philippines' example would be a step in the right direction for Kenya in preventing the problem posed by this dissertation.

4.2 Why Kenya should take a page out of The Philippines' book

Different countries tackle the humanitarian exemption provision rather differently depending on context.¹⁸⁰ When deciding the approach that Kenya should take, it must be considered that Kenya has suffered quite a large blow in the past with regards to terrorism and has needed strong counterterrorism measures.¹⁸¹ Thus, vague exemption clauses that allow for a wide range of activity would not suit the Kenyan context.

To open up the ability for any organisation with a humanitarian purpose to rightfully associate with, and offer support to, known terrorist groups would certainly impact the rigorous counterterrorism measures in place.¹⁸² In addition to this, it may also open up avenues of escape

¹⁷⁷ Gillard E C, 'IHL and the humanitarian impact of counterterrorism measures and sanctions Unintended ill effects of well-intended measures', Chatham House, September 2021, 3.

¹⁷⁸ Proceedings of the Bruges Colloquium, 'Terrorism, 'Counter-Terrorism and International Humanitarian Law', 143; Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 154.

¹⁷⁹ Ferraro T, 'International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues', 149.

¹⁸⁰ Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Saving lives is not a crime (A/73/314), 6 August 2018, -<<https://reliefweb.int/report/world/saving-lives-not-crime-report-special-rapporteur-human-rights-council-extrajudicial> >-.</p></div>
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<p>¹⁸¹Shire M I, 'Provocation and Attrition Strategies in Transnational Terrorism: The Case of Al-Shabaab', 35(4), <i>Terrorism and Political Violence</i>, 2023.</p></div>
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<p>¹⁸² Castro L A M, 'The Humanitarian Exemption Challenge: Securing the Philippine Humanitarian Space in the Anti-Terrorism Act of 2020', <i>Asia-Pacific Journal of International Humanitarian Law</i>, 2021, 42-43.</p></div>
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from liability for current suspects of the crimes under sections 5 and 25 of the PTA.¹⁸³ With the current context of Kenya with regards to terrorism, it would be difficult to incorporate humanitarian exemptions in a similar manner to countries that do not have to make the same considerations. All organisations that purport to have a humanitarian end goal would be capable of abusing this ‘exempt’ status in a manner that is ultimately harmful to the end goal of curbing terrorist activity in the country.¹⁸⁴

This dissertation suggests The Philippines as the perfect example of a country whose counterterrorism legislation Kenya can borrow from. Contextually, Philippines and Kenya are remarkably similar considering that both countries have faced recent bouts of terrorist activity and have a somewhat hardline approach with regards to the eradication of terrorism.¹⁸⁵ The Philippines has recently had a substantial amount of its resources used to cater to counterterrorism operations in its south.¹⁸⁶ Similar to Kenya, its military forces have been almost constantly engaged in counterterrorism operations.¹⁸⁷ As recently as 2021, The Philippines suffered multiple large scale terrorist attacks causing an upward shift in the country’s focus on counterterrorism and the battle against violent extremism.¹⁸⁸ Similarly, Kenya has had a significant number of terrorist incidences in the 2010s the most notable ones being the Westgate attack, the attack on Garissa university and the Dusit D2 hotel attack.¹⁸⁹

With both countries being global south states attempting to achieve security against terrorism, the type of exemption that was implemented by The Philippines’ Anti-Terrorism Act is a solution that will be equally as beneficial to Kenya given its current fight against terrorism. The Philippines’ 2020 Anti-Terrorism Act takes a much narrower approach than the examples provided for above.

¹⁸³ Castro L A M, ‘The Humanitarian Exemption Challenge: Securing the Philippine Humanitarian Space in the Anti-Terrorism Act of 2020’, 42-43.

¹⁸⁴ Gillard E C, ‘IHL and the humanitarian impact of counterterrorism measures and sanctions Unintended ill effects of well-intended measures’, Chatham House, September 2021, 22.

¹⁸⁵ Permanent mission of the Republic of The Philippines to the United Nations and other international organisations, Geneva, ‘The Philippines government’s response to JOL PHL4/2020 dated June 2020 on comments on the Anti-terror Act 2020’, 2020, 1.

¹⁸⁶ Permanent mission of the Republic of The Philippines to the United Nations and other international organisations, Geneva, ‘The Philippines government’s response to JOL PHL4/2020 dated June 2020 on comments on the Anti-terror Act 2020’, 2020, 1.

¹⁸⁷ ICJ Legal briefing, ‘Danger in Dissent: Counterterrorism and Human Rights in the Philippines’, January 2022, 2.

¹⁸⁸ Rhoades A L, Helmus C T, ‘Countering Violent Extremism in the Philippines A Snapshot of Current Challenges and Responses, *DTIC*, 2020.

¹⁸⁹ Shire M I, ‘Provocation and Attrition Strategies in Transnational Terrorism: The Case of Al-Shabaab’, 35(4), *Terrorism and Political Violence*, 2023.

The Act provides for an exemption to only one crime. It states that the crime of ‘providing material support to terrorists’ does not apply to ‘humanitarian activities’ conducted by specifically selected organisations and entities.¹⁹⁰ It provides for the following as actors exempted from the offence: The ICRC (International Committee of the Red Cross), The Philippine Red Cross and ‘other state-recognized impartial humanitarian partners or organisations as per the rules of International Humanitarian Law’.¹⁹¹ The provision for state-recognised partners means that actors that are not the ICRC or the Red Cross do not qualify for this exemption unless they are specially recognised by the state as having the power.¹⁹² The Philippines Anti-terrorism council has to determine whether an organisation fits within the scope of the exemption on the basis of recommendations received for the same.¹⁹³ The use of the council to grant access to the exemption allows for some state control over a matter that could affect its counterterrorism measures.¹⁹⁴

The Anti-Terrorism Act exemption has been situated as being better than similar provisions in countries such as the United States, Australia, United Kingdom and the Netherlands, some of which exclude provision of medical aid in their exemptions.¹⁹⁵ The exemption has, however, been criticised for offering the exemption only under one crime meaning that other potential crimes under the Act may still have negative effects for humanitarian workers. The Act itself has also come under scrutiny for the manner in which it allows for people to be declared as terrorists. Nonetheless, this humanitarian exemption still remains one of the best, as it is still comparatively wider in scope than others, yet still narrow enough to prevent abuse.¹⁹⁶

Kenya should implement an exemption provision for both sections 5 and 25 of the PTA. This exemption should model after the Philippines example to the extent that it should specify which organisations are exempted from the offences of supporting terrorist organisations and meeting with known terrorists. As the ICRC is known to carry out these tasks with the end goal of humanitarian assistance in mind, and in accordance with the principles of neutrality and

¹⁹⁰ Section 13, The Philippines Anti-Terrorism Act (No. 11479 of 2020)

¹⁹¹ Section 13, The Philippines Anti-Terrorism Act (No. 11479 of 2020)

¹⁹² Section 13, The Philippines Anti-Terrorism Act (No. 11479 of 2020)

¹⁹³ Section 13, The Philippines Anti-Terrorism Act (No. 11479 of 2020)

¹⁹⁴ Castro L A M, ‘The Humanitarian Exemption Challenge: Securing the Philippine Humanitarian Space in the Anti-Terrorism Act of 2020’, 52.

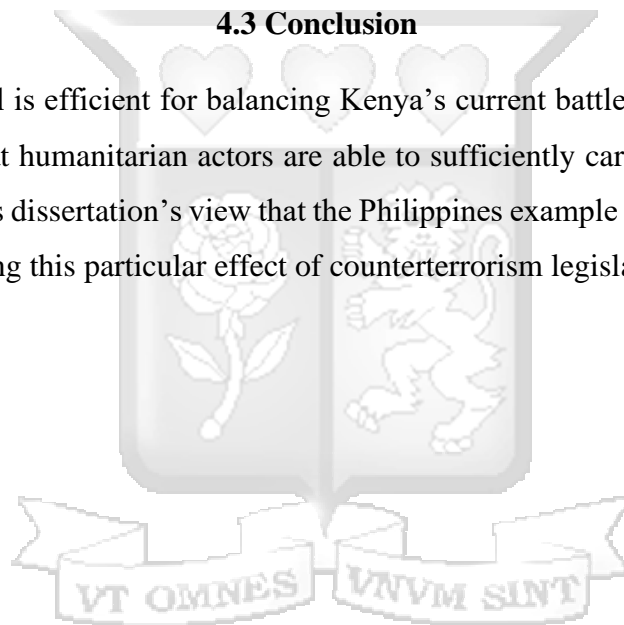
¹⁹⁵ Castro L A M, ‘The Humanitarian Exemption Challenge: Securing the Philippine Humanitarian Space in the Anti-Terrorism Act of 2020’, 52.

¹⁹⁶ Castro L A M, ‘The Humanitarian Exemption Challenge: Securing the Philippine Humanitarian Space in the Anti-Terrorism Act of 2020’, 52.

impartiality,¹⁹⁷ Kenya should provide that the ICRC is exempt from the offences under the provisions. National Red Cross and Red Crescent societies which fall under the ICRC umbrella should similarly be exempt as is the case in the Philippines example. Most importantly, in order to provide the state with control with regards to its counterterrorism measures and in order to be aware of which organisations are capable of legally interacting with deemed terrorist groups, the state should be able to decide which additional organisations are privy to this exemption. With the ICRC and red cross societies automatically having access to this exemption, humanitarian efforts that require the activities under sections 5 and 25 of the PTA would not be put on a standstill even if the state refuses to allow the exemption to other entities.

4.3 Conclusion

Ultimately, this model is efficient for balancing Kenya's current battle against terrorism with the need to ensure that humanitarian actors are able to sufficiently carry out activities within their mandate. It is this dissertation's view that the Philippines example is the best way forward for Kenya in addressing this particular effect of counterterrorism legislation.



¹⁹⁷ Gasser H P, 'The International Committee of the Red Cross and its Development Since 1945 in Swiss Foreign Policy, 1945–2002', Palgrave Macmillan, London, 2003, 12.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This dissertation was based on the hypothesis that the provisions of Kenya's Prevention of Terrorism Act serve as barriers to the provision of principled humanitarian aid in the event of armed conflict and ought to be amended. This hypothesis was proven true in the course of the dissertation.

The first chapter of this dissertation lay the foundation by giving a background to the problem and establishing the research questions that would be answered in solving the research problem. It set out the hypothesis, the dissertation's justification and the methodology used. The chapter also set out the conceptual framework of human security upon which the dissertation was based. Human security being a concept that ensures the protection of human needs besides the security of the state.

The second chapter addresses the first research question on what the place of humanitarian aid organisations is within the fight to combat terrorism during non-international armed conflicts. It thus, delved into the place of humanitarian aid organisations in the fight to against terrorism during armed conflict. The chapter explores the scope of the mandate of humanitarian aid organisations. This led to the conclusion that their work may involve the breaching of what would constitute crimes under sections 5 and 25 of the PTA.

The third chapter addresses the second research question on whether Kenyan counterterrorism legislation, specifically the Prevention of Terrorism Act, could affect the provision of principled humanitarian assistance. It does so by exploring the extent of the damage caused when humanitarian aid organisations are in conflict with counterterrorism legislation, leading to risk aversion from multiple players and ultimately preventing the provision of principled humanitarian assistance.

The fourth chapter addresses the third research question on what lessons can Kenya learn from The Philippines in order to balance humanitarian and counterterrorism objectives explored potential solutions. It does so by using the Philippines as an example of the ways in which Kenya can adopt the use of exemption clauses in its counterterrorism legislation, reducing the effects of the problem set out under chapter 3.

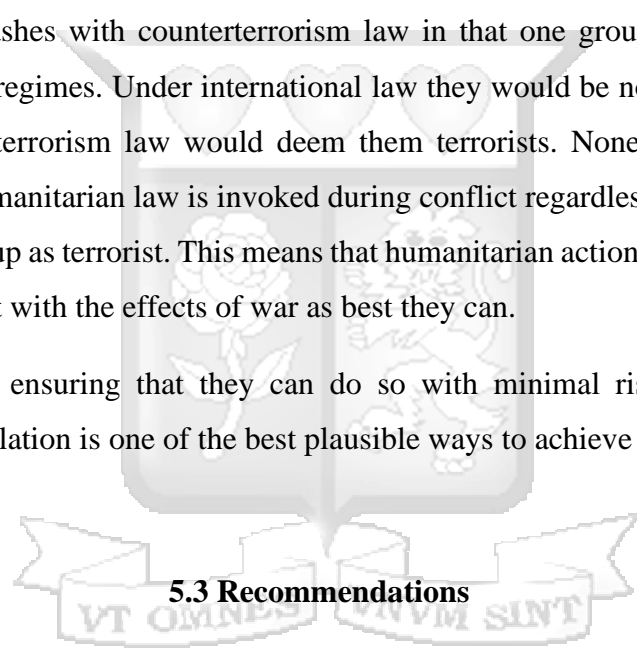
This chapter concludes the dissertation by expounding on the conclusions arrived at in the dissertation and offering recommendations.

5.2 Conclusions

In order to ensure a balance between state security measures and those of the people affected by armed conflict, Kenya needs to amend its PTA. This will achieve the effect of complying with the human security needs of the people, namely: food, medical assistance, and social safety. While counterterrorism measures are in place for a reason, where they criminalise actions that are part of the necessary humanitarian work of aid organisations, it has detrimental effects upon populations in need of humanitarian assistance.

Humanitarian law clashes with counterterrorism law in that one group can go by different names under the two regimes. Under international law they would be non-state armed groups yet domestic counterterrorism law would deem them terrorists. Nonetheless, this does not affect the fact that humanitarian law is invoked during conflict regardless of whether one state refers to the other group as terrorist. This means that humanitarian action workers have the task of ensuring they assist with the effects of war as best they can.

For the purposes of ensuring that they can do so with minimal risks, an exemption in counterterrorism legislation is one of the best plausible ways to achieve this result.



5.3 Recommendations

5.3.1 Amend the Prevention of Terrorism Act

The Kenyan parliament should amend the PTA in order to fit human security concerns. An exemption clause should be included in both sections 5 and 25 of the Act allowing the ICRC, National Red cross and crescent societies, and any other state approved humanitarian aid organisation to carry out the criminalised acts so long as they are for credible humanitarian functions. This prevents the existence of barriers to humanitarian aid during armed conflict.

5.3.2 Train police and other law enforcement actors on the scope of humanitarian organisations

As the National police service is tasked under the Kenyan constitution to training staff on the highest standards of respect for human rights and fundamental freedoms,¹⁹⁸ the police should be trained in the topic so as to be able to act with discernment in order not to penalize humanitarian staff while they carry about their legal mandate. As International humanitarian law applies in Kenya at the outset of armed conflict, the staff is technically carrying out a legal activity as they are mandated to do certain tasks under law. Negotiation to free internees and check on conformity of international humanitarian law by both parties to the conflict is within the range of activities they are tasked with doing. In order to prevent risk averse organisations who do not properly fulfil their mandate thus discriminating against populations in occupied areas, it would be of assistance to ensure that law enforcement actors are not trigger happy with regards to their prosecution.

5.3.3 Develop a focus on human security concerns

Beyond the specific problem highlighted in this dissertation, the state, and in particular the Anti-terrorism Police Unit, should try and maintain an approach where they balance any security concerns they have with the need to ensure human security. Peace should not be achieved at the detriment of the people and the state should tr and strive to ensure that the basic needs of the people are met even where they are actively seeking the security of the state from threat.

¹⁹⁸ Article 244, *Constitution of Kenya* (2010).

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