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**"UNVEILING THE LEGAL BATTLEFIELD:
NAVIGATING THE INTERPLAY BETWEEN
COUNTER-TERRORISM MEASURES AND
INTERNATIONAL HUMANITARIAN LAW"**

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Abstract

This research paper explores the intersection between counter-terrorism frameworks and international humanitarian law with the aim of looking into existing practices, and policy options for States to implement counterterrorism measures in compliance with international humanitarian law, focusing on the legal framework governing the use of force in counter-terrorism operations and the challenges associated with ensuring compliance with human rights standards. The analysis emphasizes the impact on humanitarian action, highlighting the need for a nuanced approach that preserves both security imperatives and fundamental human rights. The study calls for a careful calibration of counter-terrorism laws to avoid impeding humanitarian efforts and advocates for unimpeded access to conflict-affected regions, emphasizing the delicate balance required at the intersection of counter-terrorism and IHL.

As the world grapples with the evolving threat of terrorism, nations employ various strategies encompassed in counterterrorism operations, acknowledging armed conflicts under IHL. The study underscores the increased interoperability between international humanitarian law and terrorist activities, with a surge in armed groups engaged in non-international conflicts categorized as terrorist organizations.

The United Nations Security Council, through Resolution 1373, urges states to enhance international cooperation in preventing and suppressing terrorism, emphasizing the importance of compliance with IHL. However, the implementation of counterterrorism measures presents challenges to humanitarian action, impacting access to conflict zones and posing constraints on aid delivery.

Keywords- International humanitarian law, Counter-Terrorism, Geneva Convention, Security Council

Introduction

The entire world confronted a new form of violence known as terrorism at the very beginning of the twenty-first century. The frameworks that nations use to combat terrorism are known as "counterterrorism operations," and they are acknowledged as armed conflicts under International Humanitarian Law. The term "counterterrorism operation" refers to the methods, military strategies, tactics, and techniques that the government and intelligence services undertake in the battle against terrorism. Interoperability between international humanitarian law and terrorist activities increased. International humanitarian law, sometimes referred to as the "law of war," governs how parties to an armed conflict engage and recognises the right of humanitarian actors to offer vital assistance to war victims. A major part of international humanitarian law is contained in the four Geneva Conventions of 1949.¹ In recent years, there has been an upsurge in the number of armed groups that are engaged in non-international armed conflicts that have been categorised as terrorist organisations. Because of the consequences of complex crises including terrorist activities in the context of armed conflict sometimes transcend national boundaries, they also have a severe influence on regional or global peace and security as they pose the danger of engulfing entire areas in armed bloodshed. To combat this kind of violence, states and intergovernmental organizations have put into effect what are known as counterterrorism measures.

Security Council adopted Resolution 1373, which contains provisions demanding States to supplement international cooperation by taking additional measures to prevent and suppress, within their borders, the financing and preparation of any acts of terrorism, as well as to criminalize, prosecute, and punish any activities that provide support to the person identified as a terrorist. Council resolutions on counter-terrorism consistently require Member States to implement counter-terrorism measures in accordance with international law, including international humanitarian law. In its relevant resolutions, the Council also reaffirms that those responsible for terrorist acts and for violations of international humanitarian law or violations or abuses of human rights must be held accountable. The impact of armed conflict on civilians,

¹ ICRC, *What is International Humanitarian Law*, (2004), Available at https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf.

particularly terrorism, has been minimized as a result of the increased regulation of the conduct of armed non-state actors under international humanitarian law about protecting civilians.²

In compliance with Security Council resolutions, states are required to bring charges against terrorists for offenses that amount to grave breaches of international humanitarian law and serious breaches or abuses of human rights. However, impunity for abuses and violations committed by State or non-State actors is frequently the result of weak, insufficient, or nonexistent rule-of-law institutions and the pervasive nature of violence and criminality. Generally, international humanitarian law governs acts of violence in armed conflict, both legal and illegal. IHL provides particular guidelines on terrorism, including prohibitions against acts or threats of violence that incite fear among civilians, such as mass killings, the use of human shields, and the use of explosive weapons in crowded areas.³

The impact of counter-terrorism measures on humanitarian action

Armed conflicts frequently have humanitarian repercussions and are the primary cause of complex catastrophic events that arise from an amalgamation of man-made and natural factors. Violent actions against international humanitarian law by parties to a rivalry, including terrorist organizations, may escalate humanitarian crises and jeopardize humanitarian efforts by putting humanitarian actors in danger and making it more difficult for them to carry out their work.⁴

The Security Council has expressed concern about the "adverse impact of such violence, including on humanitarian access"⁵ as well as the "long-term effects resulting from such attacks for the general public and the healthcare systems of the countries concerned"⁶ and frequently denounced attacks on medical and humanitarian personnel, their means of transportation and equipment, hospitals, and other medical facilities entitled to protection under international humanitarian law. As a result, it has requested that all parties to an armed conflict strictly adhere to their duties to respect and safeguard humanitarian workers and supplies utilised in

² Nsabimana, Contemporary Challenges Posed by Counterterrorism Measures to IHL, SSRN Electronic Journal (2021). Available at <http://dx.doi.org/10.2139/ssrn.3876853>

³ ICRC, "International Humanitarian Law and the challenges of contemporary armed conflicts" Report, 2015; Available at <https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf>

⁴ See also Global survey of the implementation of Security Council resolution 1373 (2001) and other relevant resolutions by Member States (S/2021/972), para. 713 ff

⁵ S/RES/2175 (2014).

⁶ S/RES/2286 (2016), para. 1

humanitarian assistance operations as stipulated by international humanitarian law.⁷ Under some situations, domestic counterterrorism laws have either made these kinds of operations illegal or created ambiguity in the law regarding their extent. Humanitarian organizations such as the International Committee of the Red Cross (ICRC) have issued warnings about a chilling effect in this situation, saying that it “hinders or prevents frontline responders from reaching populations in need.”⁸ The provision of humanitarian aid to victims of terrorism, armed conflict, and other serious breaches or violations of human rights or serious infringements of international humanitarian law may be impacted by such constraints.

Broadly conceived or badly implemented counterterrorism measures can have a detrimental effect on the capacity of humanitarian actors to function in armed conflict situations including terrorist groups, and therefore on the people who require humanitarian protection and aid. The consultations sought input on the impact of counter-terrorism related measures taken by (a) host States; (b) States of registration of humanitarian organizations; (c) States of nationality of staff of humanitarian organizations; and (d) donor States. Information gathered during the discussions facilitated by **Office for the Coordination of Humanitarian Affairs (OCHA)** revealed that humanitarian organizations frequently saw counterterrorism measures having an impact on their activities in a variety of settings. Humanitarian organizations informed OCHA about direct restrictions on humanitarian activities in certain areas or for certain populations, originating from (a) host Governments, through national rules or practices; (b) donor agencies, through funding conditionality or unilateral decisions or policies; and (c) jurisdictions other than the host or donor States, through various laws and sanctions regulations.⁹

The speed and efficiency with which humanitarian action could be carried out was significantly impacted by procedures related to the control and monitoring of humanitarian operations with the goal of preventing aid diversion, according to reports from humanitarian organisations to Office for the Coordination of Humanitarian Affairs. This resulted in items being damaged or spoiling,

⁷ See e.g., S/RES/1502 (2003); S/RES/1674 (2006); S/RES/1894 (2009); S/RES/2175 (2014); S/RES/2286 (2016); S/RES/2573 (2021); S/PRST/2019/8; S/PV.7779

⁸ Counter-terrorism measures must not restrict impartial humanitarian organizations from delivering aid, INTERNATIONAL COMMITTEE OF THE RED CROSS (2021), <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations>.

⁹ UNSCC-CTED, *The interrelationship between counter-terrorism frameworks and international humanitarian law*, 18 (2022), https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2022/Jan/cted_ihl_ct_jan_2022.pdf.

as well as higher costs for implementing organisations. States occasionally placed limitations on the amount of specific goods, like fuel. For communities that are already struggling, the effects may be fatal. In one instance, these limitations resulted in the hospital's temporary shutdown since there was not enough gasoline available. In certain situations, there has also been a reduction in the freedom of movement for humanitarian workers, often combined with heightened monitoring of local employees, partners, and other individuals connected to humanitarian organisations. According to the consulted organizations, counter-terrorism-related donor conditionality increasingly included direct restrictions on the ability of funding-recipient humanitarian organizations to engage with specific groups through “no-contact policies”. Humanitarian organisations have pointed out that the pool of qualified local contractors and service providers may be significantly reduced as a result of donors' counterterrorism-related risk management criteria and clearance procedures. In rare instances, the government could forbid regional suppliers or service providers from offering goods or support to aid agencies functioning in regions where officially recognised non-state armed groups have a sizable presence and influence.¹⁰

Challenges posed by counterterrorism measures to the humanitarian

Parties to a conflict are required under international humanitarian law to permit and facilitate the prompt and unimpeded delivery of impartial humanitarian aid to civilians in need, subject to appropriate controls. Since 9/11 attacks, counter-terrorism measures adopted by states has raise a chains adverse impact on humanitarian assistance in armed conflict involves by non-state actors designated as terrorist. The states implement security council resolutions 1373 (2001) and resolution 2178 (2014) under chapter VII of UN Chapter. For example, state like United States and Australia have adopt anti-terrorism framework that may interpreted as criminalizing certain form of humanitarian assistance and protection as well. Numerous laws are intended to be applicable outside national borders and without regard to the nationality of the perpetrator or the victims. Generally, these rules forbid giving any kind of direct or indirect assistance to a terrorist group.¹¹

¹⁰ *Id.* at page 19

¹¹ Dustin A. Lewis, “Criminalization” of Humanitarian Action Under Counterterrorism Frameworks: Key Elements and Concerns, 112 PROCEEDINGS OF THE ASIL ANNUAL MEETING 269 (2018).

Due to the legal consequences and the impact of such restrictive laws, the growing administrative difficulties placed on humanitarian actors have caused them to self-limit. Thus, in certain locations where they are required, the humanitarian players stop their work. The civilians, their belongings, and other hors de combat are the victims of those limitations. Additionally, they prevent cooperation and coordination among these humanitarian players out of fear of being terrorists' sympathisers. International humanitarian law becomes obstructed, as do future peace talks and attempts at reconciliation, if all legitimate actions of war are classified as terrorist activities. Granted that the Islamic State group and its linked armed organisations, like Boko Haram, openly reject International Humanitarian Law (IHL) and the principles that underpin it, it is true that the debate regarding the incrimination of all acts by non-state groups is difficult to hear these days. According to the International Committee of the Red Cross (ICRC), it is critical to guarantee that, in terms of IHL compliance, counterterrorism measures do not jeopardise efforts to engage with organised armed non-State organisations.¹²

Legal Framework for Regulating the Use of Force in Counter-Terrorism Operations

Rules of international humanitarian law governing non-international armed conflict include article 3 common to the 1949 Geneva Conventions and relevant rules of customary international law applicable in non-international armed conflict. Common article 3 applies to all non-international armed conflicts and two criteria must be fulfilled. Firstly, the hostilities must reach a minimum level of intensity. Secondly, armed groups involved in the conflict must be considered as parties to the conflict, and possess organized armed forces.¹³

Common article 2 of the four Geneva Conventions states that for violence to be designated as an IAC conflict, it must occur when one or more States use armed force against another State, regardless of the motivations behind the conflict or the severity of the altercation. Even in the absence of open hostilities, relevant international humanitarian law laws may still be in effect. There is no need for a formal declaration of war or circumstance acknowledgment.¹⁴

¹² Nsabimana, Contemporary Challenges Posed by Counterterrorism Measures to IHL, SSRN Electronic Journal (2021). Available at <http://dx.doi.org/10.2139/ssrn.3876853>

¹³ ICTY, The Prosecutor v. DuskoTadic, Judgment, IT-94-1-T, 7 May 1997, para. 561-568

¹⁴ Common article 2 to the four Geneva conventions

Additional Protocol II to the 1949 Geneva Conventions applies to a subcategory of non-international armed conflicts which take place between government armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the State's territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.

Self-defense in international law refers to the inherent right of a State to use of force in response to an armed attack. Self-defense is one of the exceptions to the prohibition against use of force under article 2(4) of the UN Charter and customary international law. However, whether the armed attack that gives rise to self-defence should originate from another state (as opposed to an armed group) and whether the attack should actually materialize to lawfully invoke self-defense are ongoing conundrums for scholars. The concept of self-defence and defence of others is also used in criminal law as a defence to justify a necessary and proportionate use of force against an unlawful attack. Such conduct by civilians does not constitute direct participation in hostilities.¹⁵

The concept of legality in criminal law necessitates that the implementation and consequences of laws be reasonably predictable. In order to give effective protections against arbitrary prosecution and punishment, as well as to enable those impacted by the law to anticipate the repercussions of their actions, this needs a sufficient level of clarity and accuracy. In this regard, the Counter Terrorism Committee has repeatedly underlined the necessity for States to guarantee adherence to the legality principle and to "adopt a clear and precise definition of terrorism that corresponds to the requirements of the international counter-terrorism instruments to which they are Parties, the relevant Security Council resolutions, and other applicable international law norms and standards, including international human rights law." Many countries have attempted to reduce potential conflicts between international humanitarian law and local counterterrorism frameworks by including armed conflict or humanitarian exemption provisions into their domestic legislation, including criminal codes. Certain states have incorporated provisions that exclude actions carried out in the context of an armed conflict and in accordance with applicable international humanitarian law from the purview of crimes connected to terrorism. Principled humanitarian actions carried out in compliance with relevant international humanitarian law have

¹⁵ Self-defence | How does law protect in war? - Online casebook, casebook.icrc.org, https://casebook.icrc.org/a_to_z/glossary/self-defence.

been excluded from the definition of terrorism-related offences by other authorities.¹⁶

Relationship between international humanitarian law and the counter-terrorism legal framework

National counterterrorism laws have the authority to criminalise actions that are not covered by IHL, such as violating the environment, compromising public safety without causing harm to individuals, or committing security-related offences in occupied territory or non-international armed conflicts. Compared to international humanitarian law, national law frequently covers offences related to terrorist organisations, providing or receiving terrorist training, and possessing deadly goods with the intent to commit terrorism before a crime is undertaken. More comprehensive and extensive duties to suppress terrorist acts are placed on States by international counterterrorism agreements and Security Council resolutions than they are under International Humanitarian Law. There is an obligation to "extradite or prosecute" and to give mutual aid only in cases of "grave breaches" of international humanitarian law (IHL) in international armed conflict; other war crimes in international conflict or other war crimes in non-international conflict are not subject to this obligation.

IHL does not include the same duty to prevent violations that counterterrorism legislation does. States are required under the counterterrorism agreements to communicate information, take "all practicable measures to prevent preparations" for offenses inside or outside of their borders, and coordinate administrative and other counterterrorism actions. In comparison to war crimes legislation, national counterterrorism laws may be more appealing for dealing with terrorist offenders since they frequently feature robust, specific law enforcement capabilities, particularly during the investigation and prosecution stages.¹⁷

¹⁶ UNSCC- CTED, *The interrelationship between counter-terrorism frameworks and international humanitarian law*, 18 (2022), https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2022/Jan/cted_ihl_ct_jan_2022.pdf.

¹⁷ COUNTER-TERRORISM IN THE INTERNATIONAL LAW CONTEXT COUNTER-TERRORISM LEGAL TRAINING CURRICULUM 1 A D V A N C E C O P Y, https://www.unodc.org/pdf/terrorism/CTLTC_CT_in_the_Intl_Law_Context_1_Advance_copy.pdf.

Conclusion

This comprehensive research paper seeks to provide a thorough examination of the impact of counter-terrorism measures on international humanitarian law, addressing the challenges of ensuring compliance with human rights standards. This study aims to contribute valuable insights to the ongoing discourse on striking a delicate balance between safeguarding nations and upholding the universal principles that safeguard human dignity. Regardless of whether the act was carried out during or after an armed conflict, counterterrorism generally targets the subset of violence known as terrorism. Whether or if an armed struggle is also considered terrorism, it is covered by international humanitarian law.

Therefore, the paper addresses some issues pertaining to the effect of counterterrorism measures on humanitarian action carried out in situations of armed conflict in a way compliant with international law, without offering a comprehensive analysis. States must operate under the confines of the legal framework, which is defined by the United Nations Charter and international humanitarian law, in order to effectively address the challenges posed by counterterrorism. This framework's essential elements are the ban on the use of force and the right to self-defence.

It is crucial to take into account actions that will improve global collaboration, fortify accountability frameworks, and promote a sophisticated comprehension of the fine balance that must be struck between security requirements and human rights when determining the path forward. Fundamentally, the way that counterterrorism tactics affect international humanitarian law necessitates reevaluating our goals and reaffirming our dedication to the values that guide our common humanity. In the face of adversity, the international community must uphold the fundamental principles of the ideals we want to defend by strengthening the legal structures that protect human rights. This is our responsibility as we negotiate the challenges presented by the always changing danger landscape. Not only is it morally and legally necessary to strike a careful balance between security and human rights, but our decisions will also determine the future course of a society in which justice, liberty, and dignity are not given up on the altar of fear.