

The Humanitarian Exemption Challenge: Securing the Philippine Humanitarian Space in the Anti-Terrorism Act of 2020

*Leandro Anton M. Castro**

ABSTRACT

The interaction between counter-terrorism law and international humanitarian law has long been the subject of extensive legal discourse. Concomitant issues include whether international humanitarian law applies in the context of terrorism, the determination of which legal regime applies and how to reconcile them in particular contexts, among others. One of the most contentious topics in the area is the prohibition of the provision of material support to terrorist individuals or organizations and its conflict with rights and obligations provided by international humanitarian law. The most common remedy to such conflict is the integration of humanitarian exemptions in counter-terrorism legislation. The Philippines is no stranger to these issues having included both a prohibition against the provision of material support to terrorists and a humanitarian exemption the Anti-Terrorism Act of 2020, its latest counter-terrorism measure.

This Article analyses the material support provision and the humanitarian exemption in the Anti-Terrorism Act of 2020. More particularly, the Article tackles how the material support provision puts humanitarian organisations at risk of criminal prosecution and the inadequacy of the humanitarian exemption in the law. A problematic aspect of the Philippine exemption is the requirement of state-recognition which appears stricter than the standards provided by international humanitarian law .

The Article also endeavours to confront the challenge of balancing the demands of combatting terrorism and the needs of the humanitarian sector and their beneficiaries. The Article provides a comparative analysis of humanitarian exemptions in various jurisdictions and goes on to recommend the improvement of the Philippine exemption through the adoption of commendable practices by other States and the avoidance of potential pitfalls and threats. Ultimately, the Article aims to contribute to the wide discussion on counter-terrorism and international humanitarian law in hopes of improving the protection of the Philippine humanitarian space as the country simultaneously shores up its legal armaments to combat terrorism.

* Student of Juris Doctor in the University of the Philippines College of Law. Concurrently, he is a research assistant in the Institute of International Legal Studies of the University of the Philippines Law Center. He graduated with a Bachelor's degree in Journalism from the University of the Philippines College of Mass Communication.

Keywords: Humanitarian Exemption, Anti-Terrorism Act of 2020, Counter-terrorism laws, International Humanitarian Law

I. Introduction

On 3 July 2020, President Rodrigo Duterte signed into law Republic Act No. 11479,¹ the Anti-Terrorism Act of 2020 (ATA).² It is the Philippines' latest counter-terrorism law, which took effect on 18 July 2020. According to Duterte, the statute was enacted as an affirmation of the government's commitment to eliminate terrorism³ and is pursuant to the Philippines' commitments to the objectives of the United Nations (UN).⁴ The ATA repealed the earlier Human Security Act of 2007,⁵ which according to proponents was replete with gaps, lapses and inadequacies⁶ in the face of terrorist threats and acts that have become "more serious, violent and undertaken in a complicated and systematic manner."⁷

At present, however, the ATA faces strong opposition. Thirty-seven petitions assailing its constitutionality are before the Philippine Supreme Court.⁸ Aside from the constitutional issues, one aspect of the ATA that concerns petitioners is the impact of the ATA on the humanitarian sector.⁹ Particular provisions of concern include Sections 12 and 13 thereof; Section 12 punishes the provision of material support to terrorist organisations, while Section 13 exempts humanitarian organisations from criminal prosecution under Section 12. These are the provisions of the ATA that this Article aims to engage. It will consider the impact of the ATA on international humanitarian law (IHL) and on the humanitarian sector. It will also

¹ Hereinafter referred to as RA 11479.

² Hereinafter referred to as ATA.

³ Office of the Presidential Spokesperson, *On Republic Act No. 11479*, available at: <https://pcoo.gov.ph/OPS-content/on-republic-act-no-11479/>.

⁴ Darryl John Esguerra, "Duterte defends anti-terrorism law in debut speech before UN General Assembly", *Inquirer.net*, 23 September 2020, available at: <https://newsinfo.inquirer.net/1338790/duterte-defends-anti-terror-law-in-un-general-assembly-debut>.

⁵ Rep. Act No. 9372.

⁶ H. No. 2082, 18th Cong., 1st Sess., Explanatory Note (2019).

⁷ H. No. 551, 18th Cong., 1st Sess., Explanatory Note (2019).

⁸ Rey Panaligan, "37 petitions filed with SC against Anti-Terrorism Act", *Manila Bulletin*, 8 October 2020, available at: <https://mb.com.ph/2020/10/08/37-petitions-filed-with-sc-against-anti-terrorism-act/>.

⁹ See Coordinating Council for Development and Governance, Inc. (CPDG), et al. v. Duterte, et al. Petition for Certiorari and Prohibition under Rule 65 with Prayer for Status Quo Ante Orde or Temporary Restraining Order/Writ of Preliminary Injunction, 2020, para. 151-163.

discuss concepts relating to material support and humanitarian exemptions, the interaction between them and suggestions for the development of an adequate humanitarian exemption.

Part II also provides a substantive discussion on the interaction between the regime of IHL and counter-terrorism, while also looking at the material support provision of the ATA. Part III discusses the State practice of adopting humanitarian exemptions, which are well-integrated in counter-terrorism laws as a protective measure for workers in the humanitarian sector. However, several provisions for humanitarian exemption, including that of the ATA's, suffer from defects which end up endangering humanitarian work rather than protect it. Part III provides a conceptual discussion on humanitarian exemptions, and a discussion on the ATA exemption *vis-à-vis* the relevant provisions of the Geneva Conventions, of customary IHL, and of laws of other jurisdictions. Part IV engages the humanitarian exemption challenge, in particular, that of crafting an adequate humanitarian exemption in domestic counter-terrorism measures. It also provides good practices that may be emulated and discusses gaps to be addressed in the present ATA. Finally, Part V concludes the Article with the following submissions: that material support provision of the ATA and its adjunct exemption are replete with gaps and loopholes; that although it is still subject to extensive debate, humanitarian exemptions are necessary; that from a comparative examination of humanitarian exemptions in other jurisdictions, here are good practices that may be emulated and adopted.

II. International Humanitarian Law and Counter-Terrorism

The interaction and tension between IHL and counter-terrorism laws have long been the subject of extensive discussion. It has in fact been argued that the two are not merely in tension but are actually in conflict with each other, because applying either IHL or counter-terrorism measures to the same set of facts would yield different outcomes.¹⁰ According to Debarre, theoretically, IHL and counter-terrorism are not contradictory legal regimes. Both are geared towards the protection of civilians. Their difference lies in their respective “underlying rationales and assumptions.”¹¹ IHL is the set of rules applied during an armed conflict and its object is to limit the effects of

¹⁰ See David McKeever, “International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations”, *International and Comparative Law Quarterly*, Vol. 69, 2019, pp. 68-71, available at: <https://doi.org/10.1017/S0020589319000472>.

¹¹ Alice S. Debarre, “Countering Terrorism and Violent Extremism: The Risks of Humanitarian Action”, *International Peace Institute*, 22 May 2019, p. 203, available at: https://www.ipinst.org/wp-content/uploads/2019M/07/Extremism_Risks_-Humanitarian_-Action.pdf.

an armed conflict.¹² On the other hand, counter-terrorism law has been developed to prevent and prohibit terrorist acts, association with and support to terrorist organizations as well as to ensure the prosecution and punishment of those who commit terrorist acts.¹³

The tension between IHL and counter-terrorism can be understood in four aspects: the lack of a globally accepted definition of terrorism; the lack of a definition as to what constitutes a terrorist act; the conflicting duties and prohibitions under IHL and counter-terrorism laws respectively on the treatment of designated terrorists; and the issue of what constitutes support to terrorism.¹⁴ This part of the Article covers the third aspect—particularly the conundrum between punishing material support and allowing humanitarian assistance. A conundrum exists because the concept of punishable material support often overlaps with that of humanitarian activity, which is protected under international law.

A. The Conundrum: Punishing Material Support and Allowing Humanitarian Assistance

Provisions which penalize the provision of material support and related acts such as terrorist financing are common in counter-terrorism statutes. The United States,¹⁵ Australia¹⁶ and New Zealand,¹⁷ among others, have such provisions. In the Philippines, the provision of material support is criminalized under the ATA as follows:

Sec. 12. *Providing Material Support to Terrorists.* – Any person who provides material support to any terrorist individual or terrorist organization, association or group of persons committing any of the acts punishable under Section 4 hereof, knowing that such individual or organization, association, or group of persons is committing or planning to commit such acts, shall be liable as principal to any and all terrorist activities committed by said individuals or organizations,

¹² International Committee of the Red Cross, “What is International Humanitarian Law”, July 2004, available at: https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf.

¹³ Alice S. Debarre, “Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework”, *International Peace Institute*, September 2018, p. 5, available at: <https://www.ipinst.org/2018/09/safeguarding-humanitarian-action-in-un-counterterrorism-framework>.

¹⁴ *Ibid.*, pp. 5-8.

¹⁵ 18 U.S. Code § 2339A(b)(1).

¹⁶ Aust. Criminal Code Act (1995) 102.2 - 102.8.

¹⁷ Public Act 2002 No. 34, §10.

in addition to other criminal liabilities he/she or they may have incurred in relation thereto.¹⁸

Further, the statute defines material support as:

Sec. 3(e) – *Material Support* shall refer to any property, tangible or intangible, or service, including currency or monetary instruments or financial security, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation¹⁹

As currently drafted, the ATA’s material support provision puts many humanitarian workers in a precarious situation. Humanitarian organizations are easily exposed to criminal liability under the ATA and other counter-terrorism legislation because the nature of their work can easily fall within the concept of material support.²⁰ Section 12 in relation to Section 3(e), by its broad and loose drafting, encroaches upon the humanitarian space because humanitarian acts can easily be construed as material support.

Retired Supreme Court Associate Justice Carpio and his co-petitioners against the ATA argued that Section 12 “enlarges discretion”.²¹ As presently defined under the ATA, the concept of material support encompasses properties, services and personnel, among others. As argued by Justice Carpio, lawful activities such as seminars on peaceful negotiations and the provision of legal assistance may be considered as providing material support.²² Furthermore, the Coordinating Council for People’s Development and Governance (CPDG) and their co-petitioners also argued that Section 12 legitimizes the threat against humanitarian and development workers. Humanitarian programs can be tagged as providing “material support”.²³

¹⁸ Rep. Act No. 11479 (2020), § 12.

¹⁹ Rep. Act No. 11479 (2020), § 3(e).

²⁰ Abdel Jamal Disangcopan, “Re: Humanitarian Work and Sec. 12, 13 and other provisions of the Anti-Terrorism Act of 2020”, 2020, pp. 2-6.

²¹ Antonio T. Carpio, et al. v. Anti-Terrorism Council, et al. Petition for Certiorari and Prohibition under Rule 65 of the Rules of Court with: 1) Urgent Application for Status Quo Ante Order and/or Temporary Restraining Order and/or Writ of Preliminary Injunction and 2) Motion for Special Raffle and Oral Arguments, 2020, paras. 117, available at: <https://law.upd.edu.ph/wp-content/uploads/2020/07/ATB-Petition-for-Certiorari-and-Prohibition.pdf>.

²² *Ibid.*, para. 119.

²³ CPDG v. Duterte, above note 9, paras. 151-163.

From a constitutional standpoint, Section 12 also violates the due process clause,²⁴ as it ambiguously defines the act it proscribes. The provision suffers from vagueness because it fails to set standards by which it would be implemented.²⁵ It sends a chilling effect to humanitarian organisations because humanitarian work can easily fall within the provision. What is necessary is a penal provision that clearly defines the offense, and a humanitarian exemption that is comprehensive and wide so as to allow humanitarian organizations to operate without fear of prosecution.

It is important to consider that IHL uses general terms in providing for “protected acts”. Generally, IHL guarantees humane treatment and care for combatants and non-combatants in an armed conflict. Common Article 3 provides that an impartial humanitarian body may offer its services to Parties to a conflict.²⁶ According to the International Committee of the Red Cross (ICRC), “services” is meant to be broadly construed so as to include all activities that address the needs of all persons affected by an armed conflict.²⁷ An observation similar to the construction of Common Article 3 can be made on Article 17(1) of the First Additional Protocol which uses the word “care” instead of “medical assistance” so as not to be restrictive.²⁸ The provision reads:

The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross [...] Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas.

²⁴ See *Carpio v. Anti-Terrorism Council*, above note 21, paras. 117-125.

²⁵ A. Disangcopan, above note 20, p. 4.

²⁶ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 3; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 3; Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 3; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 3; see Debarre, above note 13, p. 6; D. McKeever, above note 10, pp. 49-50.

²⁷ International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, 2020, para. 846.

²⁸ D. McKeever, above note 10, p. 57.

No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.²⁹

Per the commentaries of the ICRC, humanitarian activities “are all activities that ‘prevent and alleviate human suffering wherever it may be found’, and the purpose of which is to ‘protect life and health and to ensure respect for the human being.’”³⁰ In an armed conflict, “humanitarian activities are those that seek to preserve the life, security, dignity and physical and mental well-being of persons affected by the conflict, or that seek to restore that well-being if it has been infringed upon.”³¹ Humanitarian activities can be further classified as humanitarian protection activities or humanitarian relief or assistance. Humanitarian protection activities in the context of IHL “refer to all activities that seek to ensure that the authorities and other relevant actors fulfill their obligations to uphold the rights of individuals. Protection activities include those that seek to put an end to or prevent the (re)occurrence of violations of humanitarian law (for example by making representations to the authorities or by making the law better known), and those which seek to ensure that the authorities cease or put a stop to any violations of the norms applicable to them.”³² Humanitarian relief or assistance “refers to all activities, services and the delivery of goods carried out primarily in the fields of health, water, habitat (the creation of a sustainable living environment) and economic security (defined by the ICRC as ‘the condition of an individual, household or community that is able to cover its essential needs and unavoidable expenditures in a sustainable manner, according to its cultural standards’), which seek to ensure that persons caught up in an armed conflict can survive and live in dignity.”³³ Humanitarian relief encompasses both medical and non-medical assistance. Non-medical forms include visits and material assistance to detainees and IHL dissemination, among others.³⁴

The discussion above shows the wide range of humanitarian activities protected under IHL: from protection activities to relief and assistance activities. These activities are performed not only by the ICRC, but also by other humanitarian organizations.

²⁹ Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 17(1).

³⁰ International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, para. 848.

³¹ *Ibid*, para. 849.

³² *Ibid*, para. 853.

³³ *Ibid*, para. 859.

³⁴ D. McKeever, above note 10, p. 56.

There is tension between the IHL and material support provisions in counter-terrorism laws because provisions which prohibit support, services, assistance to and even association with designated terrorists are often worded without qualification and drafted with overbreadth such that they threaten the activities of humanitarian organizations.³⁵ The application of overbroad provisions which prohibit support is aggravated by the fact that the humanitarian activities that IHL protects are by themselves difficult to encapsulate, as demonstrated through the ICRC commentaries above. Prohibited support may include forms of IHL-protected acts. There is a threat against impartial humanitarian organisations to either completely cease operations, risk criminal prosecution³⁶ or to simply perform their work inconsistently with the humanitarian principles of impartiality and neutrality. As explained by Debarre:

[...] IHL also protects (inter alia) all those in armed conflict who are wounded or sick, whether combatants or civilians. Designating persons as “terrorist” does not weaken this protection. However, under some counterterrorism laws, medically treating a designated terrorist may be criminally prohibited as a form of support to terrorism. Such approaches go against both the principle of impartiality in humanitarian action, which requires assistance to be given solely on the basis of need, and the entitlement of all wounded and sick, including fighters, to medical care, which are among the foundational safeguards laid down in IHL. Indeed, the growing trend to treat all individuals and groups designated as “terrorist” as criminals, without regard for internationally accepted legal protections and the code of medical ethics, threatens to erode fundamental normative commitments in IHL.³⁷

The UN has noted that material support provisions have restricted humanitarian workers’ access to conflict areas. Humanitarian organizations have faced incidents of harassment, arrest, and prosecution under material support prohibitions. Furthermore, these incidents occur not only against humanitarian workers but also towards civil society actors. What enables these incidents are not only “overly broad” definitions of terrorism under counter-terrorism legislation³⁸, but

³⁵ A. Debarre, above note 13, pp. 7-8.

³⁶ A. Debarre, above note 13, p. 5.

³⁷ A. Debarre, above note 13, pp. 7-8.

³⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the role of measures to address terrorism and violent

also poorly and loosely drafted provisions which penalize related acts that come under the notion of “material support”.

It is also worth noting that similar to IHL, “humanitarian assistance” is defined broadly under Philippine law. The Special Protection of Children in Situations of Armed Conflict Act defines humanitarian assistance as:

any aid that seeks to save lives and alleviate suffering of a crisis-affected population. Humanitarian assistance must be provided in accordance with the basic humanitarian principles of humanity, impartiality, independence and neutrality. Assistance may be divided into three (3) categories: direct assistance, indirect assistance, and infrastructure support, which have diminishing degrees of contact with the affected population.³⁹

This broad definition of humanitarian assistance favours humanitarian workers as it provides their work a larger blanket of protection. Similar to the ICRC commentaries on the Geneva Conventions, the use of the phrase “any aid” arguably manifests the legislative intent to not confine humanitarian assistance to mere food or medical aid.⁴⁰ This is to enlarge the scope of protection and to avoid restriction of what may fall under humanitarian acts. The only caveat to the definition above is that it may be construed to only cover humanitarian relief activities and not humanitarian protection activities.

Lastly, it is significant to note that the definition of material support in the ATA is a verbatim lifting from the US definition,⁴¹ the only difference being that the latter expressly exempted “medicine and religious materials”. Decisions of United States courts on material support must be taken to account in light of the verbatim reproduction and because United States cases are often cited in Philippine jurisdiction especially in instances where there is no jurisprudential precedent.⁴²

The landmark decision in the United States is *Holder v. Humanitarian Law Project*⁴³ where the Court held that activities such as IHL trainings and legal services,

extremism on closing civic space and violating the rights of civil society actors and human rights defender, U.N. Doc., A/HRC/40/52, 18 February 2019, para. 34.

³⁹ Rep. Act No. 11188 (2019), § 5.

⁴⁰ A. Disangcopan, above note 20, p. 5.

⁴¹ 18 U.S. Code § 2339A(b)(1).

⁴² Dante Gatmaytan, *Legal Method Essentials 2.0*, University of the Philippines College of Law, 2014, p.184, citing Southern Cross Cement Corporation v. Cement Manufacturers Association of the Philippines, G.R. No. 158540, August 3, 2005.

⁴³ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

when provided with knowledge that the recipient are designated terrorists, fall within the material support provision. The Court held that the law prohibits “knowingly” providing material support. To violate the provision, what is merely required is knowledge that the receiving organization is either a designated terrorist organization, or is an organization engaged or is engaging in terrorist activity, or that the organization has engaged or engages in terrorism. Intent is immaterial. One may be held liable so long as he had knowledge that the receiving party has or is engaged in terrorism.

III. Securing the Humanitarian Space

Part II of the Article demonstrated the tension between counter-terrorism legislation and IHL particularly in the aspect of prohibiting the provision of material support and allowing humanitarian activities. In Part III, the Article discusses the common route taken by States in addressing the tension: the integration of humanitarian exemptions in their counter-terrorism statutes. This Part takes off with a discussion of the concept of a humanitarian exemption, the common arguments concerning it and ends with a discussion on the humanitarian exemption in the Philippines found in Section 13 of the ATA.

A. Humanitarian Exemptions: Concept and Common Arguments

Humanitarian exemptions are measures that secure the humanitarian space within counter-terrorism frameworks. They exempt humanitarian activities of impartial humanitarian organizations from counter-terrorism measures.⁴⁴ Humanitarian exemptions may be in favour of individuals or of a sector.⁴⁵ Exemptions granted to individuals are those extended to designated terrorist individuals. Exemptions of this nature allow designated individuals to receive humanitarian assistance based on specific needs and on a case-by-case basis.⁴⁶ Sectoral humanitarian exemptions are for humanitarian organisations and workers. These exemptions allow them to provide principled aid without the risk of violating counter-terrorism laws or UN

⁴⁴ International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2019, p. 60 available at: <https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>.

⁴⁵ Katie King, Naz K. Modirzadeh, and Dustin A. Lewis, “Understanding Humanitarian Exemptions: U.N. Security Council Sanctions and Principled Humanitarian Action – Working Brief Memorandum”, *Harvard Law School Program on International Law and Armed Conflict Counterterrorism and Humanitarian Engagement Project*, April 2016, pp. 7-8, available at: https://dash.harvard.edu/bitstream/handle/1/29998395/Understanding_Humanitarian_Exemptions_April_2016.pdf?sequence=1.

⁴⁶ *Ibid.*

sanctions.⁴⁷ Sectoral exemptions can be decision-specific exemptions⁴⁸ or standing ones. Decision-specific sectoral exemptions are those which require prior authorization before a humanitarian organization can operate. They are likened to licensing which readily implies government regulation. Exemptions of this nature are in effect partial sectoral exemptions.⁴⁹ Decision-specific exemptions are common in UN Sanction Regimes such as those decreed for Somalia, Eritrea and Libya.⁵⁰

In contrast, prior authorization is not necessary for a standing humanitarian exemption.⁵¹ An exemption of this kind affords humanitarian organisations efficiency.⁵² As to why standing sectoral exemptions are preferred, Gillard’s comparison is insightful:

First, they make it clear from the outset that humanitarian activities do not fall within the scope of the sanctions, and that operations can be conducted wherever there are needs, in accordance with the humanitarian principle of impartiality. Second, obtaining licences is time-consuming and expensive – even licensing authorities recognize this. Third, separate licences are necessary from every state that has a connection with a relief operation, including the state of nationality of the humanitarian organization and those through which the relief goods must transit and where the operations will be conducted. Fourth, and paradoxically, as far as the banking sector is concerned, licences have proved counterproductive.⁵³

However, Gillard also adds that “omnibus” or “self-standing” exemptions, while theoretically ideal, may be difficult to attain in the level of the UN Security Council (UNSC) because the Council still prefers addressing situations on a case-to-case basis.⁵⁴ Gillard’s analysis is applicable in the Philippine context. Considering the current socio-political climate in the Philippines, it seems that the Government is bent to implement the ATA with little regard for groups such as the humanitarian sector.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, pp. 10-11.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, citing UNSC Res. 2009, 16 September 2009 and UNSC Resolution 1916, 19 March 2010.

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 8.

⁵³ Emanuela-Chiara Gillard, “Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action”, *Chatham House*, August 2017, pp. 5-6, available at: https://www.chathamhouse.org/sites/default/files/publications/research/CHHJ5596_NSAG_iv_research_paper_1708_WEB.pdf.

⁵⁴ *Ibid.*, pp. 9-10.

It is with this context that Congress may not be ready to integrate an omnibus exemption. However, as Gillard also wrote, “confidence in exemptions for humanitarian action needs to be built gradually.”⁵⁵ The humanitarian sector must continue to engage and lobby government for a more comprehensive exemption. Ultimately, a standing humanitarian exemption allows for the efficient provision of humanitarian aid as organizations are spared from additional administrative requirements.

Are Humanitarian Exemptions Necessary?

There are opposing views as to whether humanitarian exemptions are necessary.

Those who advocate for express humanitarian exemptions argue that they are necessary for legal clarity.⁵⁶ The Norwegian Refugee Council considers humanitarian exemptions as “one of the most efficient methods” of protecting the humanitarian sector from counter-terrorism laws.⁵⁷ On the other hand, those who object to having humanitarian exemptions argue that first, humanitarian exemptions will hamper humanitarian assistance. Some argue that humanitarian exemptions will ultimately limit humanitarian work “either by prohibiting particular activities or by implying that exemptions are always necessary.”⁵⁸ There is the fear that humanitarian exemptions may be used to proscribe activities or limit humanitarian assistance to certain activities. There is also the fear that all humanitarian work may end up depending on the existence of a humanitarian exemption. If there is no express exemption, then there is no humanitarian work. Furthermore, there is also the apprehension that States would require prior recognition through humanitarian exemptions which may restrict the aid and affect the principled work of humanitarian organizations.⁵⁹

The second argument against humanitarian exemptions is State security. It is argued that exemptions may become loopholes in counter-terrorism laws.⁶⁰ Among the fears is that terrorist organisations may exploit exemptions by posing as humanitarian organizations to be able to assist terrorist groups. In the case of the

⁵⁵ E. Gillard, above note 53, p. 10.

⁵⁶ K. King, N. Modirzadeh, and D. Lewis, above note 45, p. 8.

⁵⁷ Norwegian Refugee Council, *Principles Under Pressure: Impact of Counterterrorism Measures and Preventing/Countering Extremism on Principled Humanitarian Action*, 2018, p. 29, available at: https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/1nrc-principles_under_pressure-report-screen.pdf.

⁵⁸ *Ibid.*

⁵⁹ K. King, N. Modirzadeh, and D. Lewis, above note 45, p. 9.

⁶⁰ *Ibid.*

Somalia Exemptions, the UN Monitoring Group observed several instances of aid diversion in favour of terrorist militia and businessmen, but ultimately, these instances turned out to be mere allegations with little evidentiary support.⁶¹

Amidst these debates, it is significant to note that the UNSC has manifested the importance of making domestic counter-terrorism legislation sensitive to a State's international law obligations, particularly those under IHL, International Human Rights Law and International Refugee law, among others. In Resolution 2462, the UNSC made the following pronouncements:

5. *Decides* that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense the willful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;⁶²

6. *Demands* that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law;⁶³

24. *Urges* States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including

⁶¹ National Model United Nations – New York, “Humanitarian Exemptions in Sanction Regimes”, *Montana Model United Nations*, p. 19, available at: http://hs.umt.edu/mun/documents/topic Guides/NY2018_BGG_SC-Sec2-Sanction_Reg_Exc.pdf.

⁶² UNSC Res. 2462, 28 March 2019, para. 5.

⁶³ *Ibid.*, para. 6.

medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.⁶⁴

In relation to the foregoing, it is submitted that humanitarian exemptions are necessary because they provide legal clarity.⁶⁵ Poorly drafted counter-terrorism legislation blurs the line between what one can and cannot do. The common argument against the ATA is that it creates a chilling effect.⁶⁶ This chilling effect would extend to humanitarian workers because the nature of their work inevitably exposes them to potential liabilities under the material support provision.⁶⁷ Humanitarian exemptions, especially if drafted adequately, protect and secure humanitarian workers. Furthermore, humanitarian exemptions clear the first hurdle of resolving whether humanitarian assistance is criminal or not under counter-terrorism laws. The only issue left is the determination of whether a particular act is humanitarian in nature and falls within the exemption.

As to the fear of humanitarian exemption provisions becoming loopholes, it is submitted that it must not be the sole reason for rejecting exemptions. Leaving the subject of humanitarian assistance in legal grey area will be prejudicial to communities and conflict areas where aid spells the difference between life and death.⁶⁸ The fear of humanitarian exemption being exploited by terrorist organisations is one clearly outweighed by the obligations of States to allow the conduct of humanitarian activities. Governments must balance the provision of humanitarian aid while ensuring that exemptions are not exploited.

B. Humanitarian Exemption in the Anti-Terrorism Act

Section 13, which contains the humanitarian exemption in the ATA, reads:

Humanitarian activities undertaken by the International Committee of the Red Cross (ICRC), the Philippine Red Cross (PRC), and other state-recognized impartial humanitarian partners or organizations in

⁶⁴ *Ibid.*, para. 24.

⁶⁵ K. King, N. Modirzadeh, and D. Lewis, above note 45, p. 8.

⁶⁶ See *Kabataang Tagapagtanggol ng Karapatan, et. al. v. Executive Secretary, Petition for Certiorari and Prohibition with Prayer for Issuance of a Temporary Restraining Order and Writ of Preliminary Injunction*, 2020; *Doyo, et al v. Medialdea, Petition for Writs of Certiorari and Prohibition under Article VIII, Sec. 1 of the 1987 Constitution with Application for Temporary Restraining Order and Preliminary Injunction*, 2020; *Carpio v. Anti-Terrorism Council*, above note 21.

⁶⁷ A. Disangcopan, above note 20, pp. 2-6.

⁶⁸ *Ibid.*

conformity with International Humanitarian Law, do not fall within the scope of Section 12 of this Act.⁶⁹

Section 13 of ATA is a partial sectoral humanitarian exemption. It is a sectoral humanitarian exemption because it generally exempts the ICRC and PRC from Section 12. It is also a decision-specific or partial exemption because aside from the standing exemption in favour of the ICRC and PRC, the statute requires State recognition for other organisations. It is submitted that Section 13 of the ATA is an inadequate exemption that puts the Philippines in a position to potentially violate its IHL obligations. The Philippines is a State Party to the Geneva Conventions and its Additional Protocols.⁷⁰ Common Article 3 of the Geneva Conventions guarantees the right of impartial humanitarian bodies to offer services to parties in an armed conflict.⁷¹ As discussed in Part II.A, what is contemplated by Common Article 3 is the provision and protection of a wide range of humanitarian activities in the form of humanitarian protection activities, and humanitarian relief activities.⁷² Common Article 9 of the Geneva Conventions (Article 10 of the Fourth Geneva Convention) also provide that the Conventions shall “constitute no obstacle” to the activities of the ICRC and of impartial humanitarian organizations.⁷³ Article 17, Part I of Additional Protocol I states the humanitarian imperative: the principle that all citizens of all countries have the right to receive and offer humanitarian assistance.⁷⁴

Laws have also been enacted in support of the Philippines’ IHL obligations. The PRC Charter provides that the State shall at all times act in conformity with the Geneva Conventions and the Additional Protocols, and the Statutes of the International Red Cross and Red Crescent Movement.⁷⁵ Furthermore, the PRC charter adopted the humanitarian principles of humanity, neutrality, impartiality and

⁶⁹ Rep. Act No. 11479 (2020), § 13.

⁷⁰ International Committee of the Red Cross, *Treaties, State Parties and Commentaries: Philippines*, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PH.

⁷¹ Common Art. 3 to the GC, above note 26.

⁷² See International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, paras. 844-850

⁷³ Geneva Convention (I), above note 26, Art. 9; Geneva Convention (II), above note 26, Art. 9; Geneva Convention (III), above note 26, Art. 9; Geneva Convention (IV), above note 26, Art. 10.

⁷⁴ Protocol Additional (I) to the Geneva Conventions, above note 29, Art. 17(1); International Committee of the Red Cross, “Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief”, available at: <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-1067.pdf>.

⁷⁵ Rep. Act No. 10072 (2010), § 2.

independence, as well as voluntary service, unity and universality.⁷⁶ The definition of humanitarian assistance in the Special Protection of Children in Situations of Armed Conflict Act likewise includes the humanitarian principles.⁷⁷ The Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity also provides that the Philippines adopts as part of its legal system “the generally accepted principles of international law, including the Hague Conventions of 1907, the Geneva Conventions on the protection of victims of war and international humanitarian law, as part of the law our nation.”⁷⁸ Customary IHL also guarantees the unimpeded passage of humanitarian relief.⁷⁹ Parties to a conflict “must refrain from deliberately impeding the delivery of relief supplies,”⁸⁰ otherwise they would violate international law.⁸¹

Based on the foregoing, it can be concluded that the Philippines is obliged to ensure that humanitarian aid reaches those in need without unnecessary impediment. In an attempt to uphold its obligations and guarantee humanitarian assistance yet ensure security from terror threats, the Philippine Congress included Section 13 in the ATA. However, Section 13 is an inadequate exemption. It “creates a false sense of protection,” and is in conflict with Philippine laws and the country’s international obligations.⁸² Instead of securing the humanitarian space, Section 13 poses a potential hurdle for humanitarian organizations with the prior State recognition requirement for humanitarian organizations other than the ICRC and the PRC. Prior State recognition is arguably a more stringent standard than what IHL provides. Common Article 3 merely requires that the organisation providing support is both impartial and humanitarian in nature. Common Article 3 does not expressly require prior State recognition.⁸³ The same can be observed in Common Article 9 (Article 10 of the

⁷⁶ Rep. Act No. 10072 (2010), § 2.

⁷⁷ Rep. Act No. 11188 (2019), § 5(u) Humanitarian assistance refers to any aid that seeks to save lives and alleviate suffering of a crisis-affected population. Humanitarian assistance must be provided in accordance with the basic humanitarian principles of humanity, impartiality, independence and neutrality. Assistance may be divided into three (3) categories: direct assistance, indirect assistance, and infrastructure support, which have diminishing degrees of contact with the affected population.

⁷⁸ Rep. Act No. 9851 (2009), § 2(d).

⁷⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules* 193-200 (2005), Rule 55, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, citing Protocol Additional (I) to the Geneva Conventions, above note 29, Art. 70 (1) and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 18(2).

⁸² A. Disangcopan, above note 20, p. 6.

⁸³ Common Art. 3 to the GC, above note 26.

Fourth Geneva Convention) of the Geneva Conventions, which grants impartial humanitarian organisations the right to offer humanitarian activities to parties to an international armed conflict. It reads:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.⁸⁴

For non-international armed conflicts, a similar right is granted by Article 18 of the Second Additional Protocol. The provision reads:

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.⁸⁵

Substantively, the only standards required to be met in order to fall within the protection of IHL is that the acts to be performed are humanitarian and impartial in nature. For international armed conflicts, consent of the Parties to the conflict concerned is necessary. For non-international armed conflicts, consent is necessary “if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.”⁸⁶

⁸⁴ Common Art. 9 to the GC, above note 26.

⁸⁵ Protocol Additional (II) to the Geneva Conventions, above note 81, Art. 18.

⁸⁶ Protocol Additional (II) to the Geneva Conventions, above note 81, Art. 18(2).

As to the standards of being humanitarian and impartial, activities are said to be humanitarian when the object of the activities is to “prevent and alleviate human suffering wherever it may be found,”⁸⁷ and the purpose of which is to “protect life and health and to ensure respect for the human being.”⁸⁸ Impartiality refers to the requirement that assistance be provided without “any ‘discrimination as to nationality, race, religious beliefs, class or political opinions’ or, for that matter, any other similar criteria.”⁸⁹

However, the prior State recognition requirement in the ATA may alternatively be justified as an exercise of the State’s consent in accepting humanitarian assistance which IHL allows. The ICRC has explained that humanitarian aid may be declined if it is unnecessary, not humanitarian in nature or is offered by an impartial body.⁹⁰ Likewise, IHL still recognizes the Parties’ entitlement to verify the nature of aid and to even limit or restrict activities when necessary.⁹¹ As stated by the ICRC:

Under IHL, the obligation to allow and facilitate relief schemes is without prejudice to the entitlement of the relevant actors to control them through measures such as: verifying the humanitarian and impartial nature of the assistance provided, prescribing technical arrangements for its delivery or, as mentioned above, limiting/restricting activities of relief personnel in case of imperative military necessity.⁹²

It may be argued then that the State recognition requirement in Section 13 is only an exercise of the State’s consent, and it is in the State’s best interest to verify the humanitarian and impartial nature of offered assistance in the name of national security. However, this justification may be rebutted in two fronts: first, that IHL allows the provision of humanitarian service on the own initiative of the civilian population organisations; and second, that States may not arbitrarily withhold consent. On the first point, with no mention of State consent, IHL allows the civilian

⁸⁷ International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, para. 1321.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, para. 1343.

⁹⁰ D. McKeever, above note 10, p. 56 citing International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, 32IC/15/11, 2015.

⁹¹ International Committee of the Red Cross, “International Humanitarian law and the Challenges of Contemporary Armed Conflict in 2015”, 2015, para. 149, available at: <https://casebook.icrc.org/case-study/icrc-international-humanitarian-law-and-challenges-contemporary-armed-conflicts-2015>.

⁹² *Ibid.*

population, in both international and non-international armed conflicts to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas.⁹³ The necessary implication is that even without the consent of States, civilians, in their individual capacity, may provide humanitarian aid to those in need, and that such is a right granted under IHL. Furthermore, in some instances, the act of individuals providing humanitarian aid warrant the protection of the parties to the conflict.⁹⁴ Secondly, and in relation to Section 13, IHL prohibits States from arbitrarily withholding consent to the provision of humanitarian aid⁹⁵ and unfortunately, Section 13 of the ATA provides a leeway for such. Under IHL, consent to receive humanitarian assistance becomes imperative when the Parties concerned cannot satisfy the humanitarian needs on the ground. To do otherwise would be tantamount to an arbitrary withholding of consent. This is why IHL requires that Parties assess in good faith, with consideration of their international law obligations and with the necessity for assistance, offers of humanitarian assistance.⁹⁶

What is “arbitrary” in international law is not only confined to “unrestrained decisions made purely by discretion or on a whim.”⁹⁷ Whether the withholding of consent is arbitrary or not may be determined by resolving three tests: first, whether or not the act of withholding consent violates the State’s obligations under international law; second, whether there is failure to comply with the principles of necessity and proportionality; or third, whether the conduct is unreasonable in all circumstances such that it is not in accordance with the principles of IHL or of International Human Rights Law, or that the act would lead to injustice or lack of predictability.⁹⁸ Section 13 of the ATA fails to hurdle the third issue.

Under the third test, denial of humanitarian assistance is considered arbitrary when to do so would cause “inappropriateness, injustice and lack of predictability.”⁹⁹ Withholding of consent to humanitarian assistance without stating the reasons for such or when the basis of the withholding is erroneous is arbitrary.¹⁰⁰ The requirement to provide the reason for withholding consent is a procedural obligation

⁹³ See Protocol Additional (I) to the Geneva Conventions, above note 29, Art. 17; Protocol Additional (II) to the Geneva Conventions, above note 81, Art. 18.

⁹⁴ See Protocol Additional (I) to the Geneva Conventions, above note 29, Art. 17(2).

⁹⁵ See International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, para. 1304.

⁹⁶ *Ibid.*

⁹⁷ Dapo Akande and Emanuela-Chira Gillard, “Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict”, *International Law Studies*, Vol. 92, 2016, p. 493, available at: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1696&context=ils>.

⁹⁸ *Ibid.*, p. 494

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, p. 501.

that must be performed.¹⁰¹ A blanket withholding of consent is also considered arbitrary as it would lead to a lack of predictability. Furthermore, the withholding of consent to humanitarian assistance when the conditions for acceptance have been met is also considered arbitrary.¹⁰²

Section 13 fails to hurdle the third test because the provision could be a precursor to acts that would lead to injustice or lack of predictability. Neither the statute nor its implementing rules provide for the nature or actual process of State recognition. The effect is that humanitarian organisations may be refused recognition based on capriciousness, or that because the intended beneficiaries would be groups identified or designated as terrorists by the State. The problematic wording and the lack of safeguards of the humanitarian exemption exposes it to multiple possibilities and permits the exercise of Government's unchecked and unbridled discretion. The possibilities are limitless and there is no predictability as to how the State would act in relation to humanitarian organisations.

These imperfections set dangerous implications. First, perception of humanitarian organizations as neutral and independent parties may be compromised if prior State recognition is required. State-recognized organizations may be seen as government partners rather than as impartial entities.¹⁰³ According to Debarre:

aligning with in-state or donor counterterrorism frameworks may require organizations to operate in ways that are at variance with the humanitarian principles of impartiality and neutrality and may also have an impact on the perception of a humanitarian organization's neutrality.¹⁰⁴

Second, State recognition entails additional administrative and bureaucratic hurdles which may result in inefficiencies¹⁰⁵ as well as redirection of supplies and services.¹⁰⁶ The ICRC, commenting on Common Article 9, also stated that "an offer of services and its implementation may not be prohibited or criminalized by virtue of

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Sara Pantuliano, et al., "Counter-terrorism and humanitarian action: Tensions, impact and ways forward", *Humanitarian Policy Group Policy Brief*, No. 43, October 2011, p. 8, citing *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 93 (7th Cir. 2008), available at: <https://cdn.odi.org/media/documents/7347.pdf>.

¹⁰⁴ A. Debarre, above note 13, p. 5.

¹⁰⁵ *Ibid.*

¹⁰⁶ Reinna Bermudez, "The humanitarian imperative and the threat of the Anti-Terror Bill", *Rappler*, 14 June 2020, available at: <https://rappler.com/voices/ispeak/opinion-humanitarian-imperative-threat-anti-terror-bill>.

legislative or other regulatory acts.”¹⁰⁷ Arguably, Section 13 permits these evils which IHL aims to prevent.

According to Bermudez, Section 13 “gives broad powers to the implementers of the law to determine which groups can provide aid without incurring penal liability, and which ones will be under potential pain of penalty under Section 12 [...]”¹⁰⁸ She further writes that Section 13 may create a chilling effect that could impair the conduct of humanitarian work.¹⁰⁹ Compliance with recognition requirements “could be as mundane as filing paperwork to actually choosing which side to provide aid to.”¹¹⁰ Ultimately, this will be prejudicial to vulnerable communities where humanitarian assistance is needed. Lastly, as stated by the CPDG:

These provisions of the law [Section 12 and 13] constitute a direct intervention and intrusion into internationally accepted development and humanitarian law that is being upheld and protected under IHL. The law will jeopardize impartial humanitarian assistance to communities by placing state recognition and state arbitration as the basis for the provision of humanitarian services.¹¹¹

C. A Sober Perspective: Situating the Philippine Exemption Among Various Jurisdictions

While the previous section has demonstrated the weaknesses and inadequacies of the humanitarian exemption in the ATA, this section aims to situate the Philippine exemption as among other examples from foreign jurisdictions, through a comparative analysis that will provide a more balanced perspective in identifying the strengths, loopholes and opportunities to develop the Philippine exemption. Off the bat, it is submitted that the Philippines is better situated in terms of legislating humanitarian exemptions than other States. Although certain aspects of the ATA in relation to IHL remain to be strengthened, the Philippines fares better than States like Nigeria, Iraq and Syria, which have no humanitarian or medical exemptions in their

¹⁰⁷ International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, para. 1317.

¹⁰⁸ R. Bermudez, above note 106.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ CPDG v. Duterte, above note 9, para. 162-163.

counter-terrorism statutes.¹¹² As will further be shown, the Philippine exemption likewise appears to have a wider scope than those provided in countries which have their own exemptions such as the United States, Australia, United Kingdom and the Netherlands.

Humanitarian exemptions in the United States stems from its material support law¹¹³ and the International Emergency Economic Powers Act (IEEPA).¹¹⁴ In this jurisdiction, the provision of, the attempt or the conspiracy to provide material support or resources to a foreign terrorist organization, is prohibited and punishable if committed with knowledge that the receiving party is a designated terrorist organization or one that has engaged or is engaging in terrorism.¹¹⁵ The law exempts medicine and religious materials. The definition of material support reads:

the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, *except medicine or religious materials*,¹¹⁶

As previously discussed in Part II.A, the material support provision in the ATA is a verbatim lifting from the US statute quoted above, sans the humanitarian exemption in the latter which only exempts medicine or religious materials. Thus, insofar as the exemption from the offense of providing material support is concerned, the Philippine exemption has a wider scope than that of the United States as the latter covers only medicine and religious materials unlike the former which makes no classification. The coverage of the exemption was an issue in *United States v. Farhane*¹¹⁷ which affirmed *United States v. Shah*.¹¹⁸ In *Farhane*, the United States Court of Appeals held that only substances which qualify as medicines fall within the exemption. Other activities such as volunteering to be a doctor for a terrorist organization is prohibited. Fortunately, the Philippine exemption suffers from no

¹¹² See A. Debarre, above note 13.

¹¹³ 18 U.S. Code § 2339A(b)(1).

¹¹⁴ U.S. 50 U.S.C. 1701 (1977).

¹¹⁵ 18 U.S. Code § 2339B(A)(1).

¹¹⁶ 18 U.S. Code § 2339A(b)(1), (Emphasis supplied.).

¹¹⁷ *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011).

¹¹⁸ *United States v. Shah*, 474 F. Supp 2d 492 (S.D.N.Y. 2007).

stringent qualification that limits the exemption to medicinal supplies and religious materials.

Under the International Emergency Economic Powers Act or the IEEPA,¹¹⁹ the United States President is authorized to freeze assets of “specially designated terrorists”.¹²⁰ The law exempts donations such as food, clothing and medicine intended to be used to relieve human suffering.¹²¹ However, the exemption may be subjected to the President’s override powers if he determines that the donations would seriously impair his ability to deal with any national emergency; or that the donations are in response to coercion against the proposed recipient or donor; or that they would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances.¹²² In 2001, United States President George W. Bush exercised his override authority through Executive Order 13224. The Order authorized the United States government to designate and freeze the assets of individuals who commit or pose the risk of committing terrorist acts.¹²³ In 2019, United States President Trump issued Executive Order 13886 which expanded Executive Order 13224.¹²⁴ The override powers given to the President in IEEPA and its exercise through Executive Order 13224 have been widely criticized. According to the Charity and Security Network, Executive Order 13224 is effectively a cancellation and repeal of the humanitarian exemption in the IEEPA.¹²⁵ Furthermore, it has been argued that the IEEPA authorizes a breach of IHL.¹²⁶ According to White, while both the Geneva Conventions and the IEEPA prohibit terrorist funding, the latter “goes beyond what is necessary and limits legitimate and

¹¹⁹ U.S. 50 U.S.C. 1701 (1977).

¹²⁰ K. King, N. Modirzadeh, and D. Lewis, above note 45, p. 12.

¹²¹ U.S. 50 U.S.C. 1701 (1977), § 1702(b)(2).

¹²² U.S. 50 U.S.C. 1701 (1977), § 1702(b)(2).

¹²³ U.S. Department of State, *Executive Order 13224*, available at: <https://www.state.gov/executive-order-13224/>.

¹²⁴ See Daniel Andreef and Terence Gilroy, “Trump Administration Expands Counter Terrorism Sanctions Authority and Designates 28 Persons as Specially Designated Global Terrorists”, *Baker McKenzie*, 23 September 2019, available at: <https://sanctions.news.bakermckenzie.com/trump-administration-expands-counter-terrorism-sanctions-authority-and-designates-28-persons-as-specially-designated-global-terrorists/>.

¹²⁵ Kay Guinane, “19 Years Later, EO13224 Continues to Block Humanitarian Aid. It’s Time for An Update”, *Charity and Security Network*, 24 September 2020, available at: <https://charityandsecurity.org/blog/19-years-later-eo-13224-continues-to-block-humanitarian-aid-its-time-for-an-update/>.

¹²⁶ Jennifer R. White, “IEEPA’s Override Authority: Potential for a Violation of the Geneva Conventions’ Right to Access for Humanitarian Organizations?”, *Michigan Law Review*, Vol. 104, Issue 8, 2006, pp. 2026-2035.

necessary aid”.¹²⁷ Under IHL, the standard is only that organizations be humanitarian and impartial.¹²⁸ However, in the IEEPA, being impartial and humanitarian in nature are not sufficient to guarantee protection because the exemption in the statute is subject to presidential override.¹²⁹ According to White, the IEEPA allows unchecked “sweeping prohibitions” and the disregard of IHL and international law.¹³⁰ The IEEPA “creates an environment in which the President can eviscerate these [IHL] protections for non-combatants, placing the United States in violation of international law.”¹³¹

In comparison, the ATA suffers from a similar defect. Essentially, the State recognition requirement in Section 13 vests the Government with the same executive discretion in the IEEPA. The only difference is that the IEEPA grants override powers which necessarily means that override follows the allowance of aid. In contrast, the State recognition requirement may prevent the provision of humanitarian assistance altogether in the event that an organization fails to obtain recognition. Still, the overall effect would be the same. As demonstrated in the previous section, prior State recognition and override measures require more stringent measures than what IHL provides and can adversely affect the work of humanitarian organisations.

Another class of exemptions which are arguably more stringent and limited than the Philippine exemption are those found in Australia, the United Kingdom and in the proposed amendments in the Netherlands. All three States integrated their exemptions only in particular offenses. In Australia, association with terrorists¹³² has an exemption for the provision of aid which is “humanitarian in nature”.¹³³ However, in other acts such as the provision of training and funding¹³⁴ and travelling to “declared areas”¹³⁵ there is no humanitarian exemption. In the United Kingdom, the Counter-Terrorism and Border Act of 2019 provides for a humanitarian exemption

¹²⁷ *Ibid.*, p. 2028.

¹²⁸ See Common Art. 3 to the GC, above note 26; Common Art. 9 to the GC, above note 26.

¹²⁹ J. White, above note 126, pp. 2028-2029.

¹³⁰ *Ibid.*, p. 2031.

¹³¹ *Ibid.*

¹³² Austl. Criminal Code Act (1995) Div. 102.8; see Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi. “Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation”, *International Review of the Red Cross*, Vol. 97, 2015, available at https://international-review.icrc.org/sites/default/files/irc_97_1-2-10.pdf

¹³³ Aust. Criminal Code Act (1995) 102.8(4); see P. Wynn-Pope, Y. Zegenhagen and F. Kurnadi, above note 132.

¹³⁴ P. Wynn-Pope, Y. Zegenhagen and F. Kurnadi, above note 132, p. 245-247; Australian Criminal Code Division 101.2, 102.5, 102.6.

¹³⁵ *Ibid.*; see Austl. Criminal Code Act (1995) Div. 119.2.

only on the offense of entering or remaining in a designated area.¹³⁶ The Netherlands is similarly situated as only the offense of entering or remaining in a designated area incorporates a proposed exemption.¹³⁷

Arguably, the Philippine exemption provides for a wider protection as it covers a class of offenses which may fall under the definition of providing material support so long as the acts are compliant with Section 13, as opposed to specific acts in the Australian, United Kingdom and Dutch laws. As previously discussed in Part III.A, the practice of only incorporating exemptions in particular provisions and omitting them in others manifests one of the apprehensions of the humanitarian sector: that exemptions imply that they are always necessary and must be expressly provided. The inevitable interpretation is that there is no exemption for acts where there is no express exemption. *Casus omissus pro omissis habendus est* – “a person, object or thing omitted from an enumeration must be held to have been omitted intentionally.”¹³⁸ This is despite the fact that these acts may be performed by impartial humanitarian organizations.

Even though the Philippine exemption appears to provide a wider exemption than those found under other States’ laws, there are still gaps and weaknesses which may be addressed by emulating the good practices of other States. For example, New Zealand’s Terrorism Suppression Act 2002 prohibits making available property, or financial, or related services to designated terrorists, but it exempts those made available with “legal justification” or with “reasonable excuse”. An example of a reasonable excuse is the provision of items such as food, clothing or medicine which “does no more than satisfy essential human needs” of a designated individual. The statute also grants the Prime Minister the power to authorize the provision of property and services to designated individuals and groups.¹³⁹ According to Mackintosh and Duplat, “New Zealand criminal law incorporates the full principle”¹⁴⁰ as it provides for “a specific exemption from the crime of material support.”¹⁴¹ Furthermore, it is submitted that the particular strength of the exemption in New Zealand is the use of the terms “legal justification” and “reasonable excuse”,

¹³⁶ U.K. Counter-Terrorism and Border Security Act (2019), § 4(58B).

¹³⁷ Neth. Amendments to the Criminal Code and the Code of Criminal Procedure to criminalize of staying in one by a terrorist organization controlled area (criminalization of staying in one by one terrorist organization controlled area) (2019-2020), art. 134(B).

¹³⁸ D. Gatmaytan, above note 42, p. 251 citing COA of Province of Cebu v. Province of Cebu, G.R. No. 141386, Nov. 29, 2001.

¹³⁹ Public Act 2002 No. 34, §10.

¹⁴⁰ Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Norwegian Refugee Council and United Nation Office for the Coordination of Humanitarian Affairs, July 2013, p. 118.

¹⁴¹ *Ibid.*

as well as the express provision of an example of a reasonable excuse which is the provision of food or medical aid. The effect of these clauses in the exemption is a larger blanket of protection because of the general terms used. Further, acts which can be interpreted to be within food and medical aid can easily be protected. In contrast, what Section 13 of the ATA provides is a reference to IHL which, as will be discussed in the next section, is not sufficient.

Other good practices that may be considered are the recently adopted humanitarian exemptions in the counter-terrorism laws of Switzerland and Chad. The Swiss statute exempts humanitarian services provided by an impartial humanitarian body in accordance with Common Article 3 from criminal prosecution.¹⁴² According to Bouchet-Saulnier of *Medecins Sans Frontieres*, the reference to Common Article 3 is important because it provides more space for humanitarian organizations in providing assistance and even entering into agreements with all Parties to a conflict—agreements which may well be criminally proscribed by sole application of domestic law.¹⁴³ The humanitarian exemption in Chad, on the other hand, exempts “activities of an exclusively humanitarian and impartial character carried out by neutral and impartial organizations”¹⁴⁴ from criminal prosecution of terrorist acts. The strength of both the Swiss and the Chadian exemptions is that the only standard to be met to be protected is that the activities be impartial and humanitarian in character. This is among the effects of expressly mentioning Common Article 3 in the Swiss provision, and by expressly providing for the humanitarian and impartial standards in the Chadian exemption. In contrast, the humanitarian exemption in the ATA additionally requires State recognition as a prerequisite to be exempted. It deviates from the minimum standards set by IHL and adopted by Chad and Switzerland.

Lastly, non-binding instruments such as the European Parliament and Council’s Directive 2017/541 and the Humanitarian Assistance and Peacebuilding Protection Act (HAPPA),¹⁴⁵ a proposed amendment to the IEEPA in the United States are also worth noting with regard to crafting exemptions. European Parliament

¹⁴² Federal Decree, art. 260.

¹⁴³ Geneva Academy of International Humanitarian Law and Human Rights, “Swiss Counter-Terrorism Laws: What are the Legal and Policy Challenges?”, 2020, available at: <https://www.youtube.com/watch?v=oYKIHyzNges&t=1757s>.

¹⁴⁴ Law No. 003/PR/2020 concerning the repression of acts of terrorism in the Republic of Chad.

Art 1(4) Activities of exclusively humanitarian and impartial character carried out by neutral and impartial humanitarian organizations are excluded from the scope of application of the present law.

¹⁴⁵ U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015).

and Council's Directive 2017/541 is one of the considered good humanitarian exemptions.¹⁴⁶ Recital 38 of the Directive states:

The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case-law of the Court of Justice of the European Union.¹⁴⁷

Gillard notes that the mental threshold for the offense under the Directive is high.¹⁴⁸ Knowledge of the receiving party's intent to use the support to further terrorism is an element of the offense of providing material information or resources¹⁴⁹ or terrorist financing.¹⁵⁰ This is a higher standard than what United States law provides where mere knowledge is the measure.¹⁵¹ Again, the construction of the United States material support law may find application in Philippine jurisdiction. Aside from the higher mental threshold, the Directive is good practice because it adopts a standing sectoral exemption with less stringent recognition requirements. Furthermore, Recital 37¹⁵² of the Directive expressly reaffirms the obligations of Member States under IHL. On the other hand, the HAPPA is an attempt to amend the IEEPA. It expands the exemption in the IEEPA by exempting transactions of humanitarian organizations with foreign persons who are subject to sanctions so long as the transactions are performed "in good faith and without intent to further the aims or objectives of the foreign person and has used its best efforts to minimize any such transactions."¹⁵³

D. Note on the Implementing Rules and Regulations

Section 54 of the Anti-Terrorism Act of 2020 mandated the Anti-Terrorism Council and Department of Justice to promulgate the implementing rules and regulations (IRR) of the statute.¹⁵⁴ In Philippine jurisdiction, administrative rules may be in the

¹⁴⁶ D. McKeever, above note 10, p. 74.

¹⁴⁷ EU Directive 2017/541 (2017), Recital 38.

¹⁴⁸ E. Gillard, above note 53, p. 18.

¹⁴⁹ EU Directive 2017/541 (2017), art. 4.

¹⁵⁰ EU Directive 2017/541 (2017), art. 11.

¹⁵¹ *See Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

¹⁵² EU Directive 2017/541 (2017), Recital 37.

¹⁵³ U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015), § 5(b).

¹⁵⁴ Rep. Act No. 11479 (2020), § 14.

nature of legislative rules, interpretative rules or contingent rules. Legislative rules implement a statute and provide details on the implementation. Interpretative rules interpret, clarify or explain the operation of an administrative body. Contingent rules are those issued to address particular factual circumstances which affect the implementation of a statute.¹⁵⁵ The IRR, more particularly Rule 4.14 thereof which implements Sections 12 and 13, are arguably legislative rules aimed at providing details on the implementation of the counter-terrorism measure. Rule 4.14 provide:

Rule 4.14. *Providing material support to terrorists* – It shall be unlawful for any person to provide material support to any terrorist individual or terrorist organization, association, or group of persons committing terrorism as defined under Section 4 of the Act, knowing that such individual or organization, association, or group of persons is committing or planning to commit such acts.

“Material support” shall refer to any property, whether tangible or intangible, or service, including:

- a. Currency or monetary instruments or financial securities;
- b. Financial services;
- c. Lodging
- d. Training;
- e. Expert advice or assistance, including information related to movement and activities of government forces or to the situation in surrounding areas that are possible targets and basis for terroristic attack;
- f. Safe houses
- g. False documentation or identification
- h. Communications equipment
- i. Facilities
- j. Weapons
- k. Lethal substances
- l. Explosives;
- m. Personnel (one or more individuals who may be or include oneself); and
- n. Transportation

¹⁵⁵ Republic v. Drugmaker’s Laboratories, Inc., G.R. No. 190837, March 5, 2014.

Humanitarian activities undertaken by the International Committee of the Red Cross, the Philippine Red Cross, and other state-recognized impartial humanitarian partners or organizations in conformity with International Humanitarian Law, as determined by the ATC, do not fall within the scope of the crime providing material support to terrorists under Section 12 of the Act.

The ATC may adopt a mechanism involving relevant government agencies and/or private entities for the purpose of assisting the ATC and submitting recommendations on whether or not an organization is a state-recognized impartial humanitarian partner or organization as referred to in this Rule.

Any such person found guilty therefor shall be liable as a principal to any and all terrorist activities committed by said individuals or organizations, in addition to other criminal liability he/she or they may have incurred in relation thereto.¹⁵⁶

The rule cited above however fails to fill in the details needed for the implementation of Sections 12 and 13. Both provisions were merely substantially reproduced in the IRR. As a legislative rule, Rule 4.14 should have filled in the details on what constitutes the provision of material support and on what the State-recognition procedure will be. The Rule failed on both fronts. The provision which criminalizes the provision of material support remains susceptible to interpretation which may be prejudicial to humanitarian organizations; and the process of State-recognition remains to be a question mark. The rule only provides that the Anti-Terrorism Council (ATC), with the help of other agencies, will be the body to formulate and adopt the mechanism for State recognition.¹⁵⁷ The actual process remains to be absent and the vulnerability to State intrusion remains imminent. Even assuming that the IRR and Rule 4.14 specifically are interpretative rules, they still fail to satisfy the necessity of clarifying what State recognition entails. As stated above, Rule 4.14 was merely a substantial reproduction of Sections 12 and 13. The IRR failed to address what it needed to address.

¹⁵⁶ Department of Justice (DOJ) and Anti-Terrorism Council (ATC), The 2020 Implementing Rules and Regulations of Republic Act No. 11479, otherwise known as The Anti-Terrorism Act of 2020 (2020), Rule 4.14.

¹⁵⁷ Department of Justice (DOJ) and Anti-Terrorism Council (ATC), The 2020 Implementing Rules and Regulations of Republic Act No. 11479, otherwise known as The Anti-Terrorism Act of 2020 (2020), Rule 4.14.

VI. Crafting the Humanitarian Exemption Provision in Philippine Counter-Terrorism Measures

This Part tackles the challenge of crafting a humanitarian exemption, and attempts to resolve the following inquiries: whether a humanitarian exemption provision is necessary for the Philippines' domestic counter-terrorism framework; if in the affirmative, what model should the humanitarian exemption emulate; and what should be the features of the humanitarian exemption and/or the counter-terrorism law.

A. Defining Humanitarian Assistance

As a preliminary and fundamental matter, the term “humanitarian activities” must be defined in any counter-terrorism measure, especially in those which include a humanitarian exemption. The ATA does not define “humanitarian activities” despite reference to the term in Section 13. A statute containing a humanitarian exemption must clearly provide what it exempts in view of the fact that humanitarian activities of humanitarian workers can be easily construed as material support. Defining humanitarian activities or humanitarian assistance should be treated as an “indispensable element”¹⁵⁸ in counter-terrorism laws. The concepts of material support and humanitarian activities exist in a grey area which the law must delineate. “Humanitarian assistance” is already defined in the Special Protection of Children in Situations of Armed Conflict Act as cited. The same definition may be adopted in the ATA.

However, it is ideal for humanitarian assistance to be defined in a way that encompasses all humanitarian activities—humanitarian protection activities and humanitarian aid and relief, as contemplated under IHL and as discussed above. As the definition in the Special Protection of Children in Situations of Armed Conflict Act only covers humanitarian relief activities, a definition that would include humanitarian protection activities must be seriously considered. A comprehensive definition of what constitutes humanitarian activities in Section 13 would serve as a backbone for a more adequate humanitarian exemption. It likewise goes without saying that to adopt such a comprehensive definition would make the ATA more sensitive to the country's IHL obligations.

¹⁵⁸ Abdel Jamal Disangcopan, “Submission of Position Paper of the Philippine International NGO Network (PINGON) To the Technical Working Group – Development of the Proposed Implementing Rules and Regulations of The Anti-Terrorism Act Of 2020”, 2020, p. 8.

B. Necessity for a Standing Sectoral Humanitarian Exemption

As previously discussed in Part III.A, an express humanitarian exemption is preferred because it clarifies the bounds of the humanitarian space in the counter-terrorism framework. It dispenses with the issue of determining whether humanitarian assistance is punishable. What only needs to be addressed is the issue of whether an act is humanitarian or not.

Furthermore, an adequate exemption not only protects humanitarian workers but also ensures that aid reaches the most vulnerable communities. Humanitarian assistance is invaluable in the Philippines being among the most disaster-prone countries in the world and in which territory numerous non-international armed conflicts are currently ongoing.¹⁵⁹ From 2008 to 2019, around 3.6 million Filipinos were internally displaced annually due to natural disasters. There were 183,000 new displacements due to armed conflict in 2019 alone.¹⁶⁰ As of May 2020, there have been 374,130 displaced individuals in Mindanao, the hotbed of armed conflict in the Philippines. UN data further shows that as of July 2020, there have been 300,000 Filipinos in need of humanitarian assistance in the country.¹⁶¹ If humanitarian organizations will be left to second-guess whether or not their work is criminal, then humanitarian aid may not reach those who need it. This is why an express humanitarian exemption provision is necessary, as it will prevent humanitarian organizations from hesitating to provide aid. An express exemption allows for legal clarity which will ultimately benefit the communities in need. However, as earlier argued, Section 13 is inadequate as it appears to be a partial humanitarian exemption. It is thus submitted that a standing sectoral exemption should be considered. A standing exemption provides humanitarian organizations more space to conduct their work with little intervention from the State. While arguably State intervention cannot be totally discarded, it should only be the exception rather than the rule. Section 13 provides for a blanket exemption for the ICRC and the PRC but leaves to the State whether to exempt other organizations. Aside from potential IHL violations, consequences may span from the erosion of the impartial and independent perception towards humanitarian organizations to ultimately, State intrusion and aid redirection.

¹⁵⁹United Nations Population Fund, *Philippines Humanitarian Emergency*, available at <https://www.unfpa.org/data/emergencies/philippines-humanitarian-emergency>.

¹⁶⁰Internal Displacement Monitoring Centre, *Philippines*, available at <https://www.internal-displacement.org/countries/philippines>.

¹⁶¹United Nations Population Fund, above note 159.

C. Essential Features of a Counter-Terrorism Law in Relation to a Humanitarian Exemption

As cited in Part III.A, the UN Security Council in Resolution 2462 manifested that counter-terrorism endeavours must be made sensitive to and compliant with the States' obligations under international law, including IHL, international human rights law and international refugee law.¹⁶² Several legal scholars hold a similar position as the Security Council: domestic counter-terrorism legislation must reflect the State's obligations under international law. Pantuliano, et al., Gillard and McKeever wrote that domestic counter-terrorism legislation must reflect a State's IHL obligations¹⁶³ "even if this may result in differing standards for humanitarian agencies that work across multiple states."¹⁶⁴ McKeever also submitted that counter-terrorism legislation must be sensitive to its nuances with IHL: first, the different treatment IHL affords to medical and non-medical humanitarian aid¹⁶⁵; second, the implementation of due diligence measures for non-medical assistance to ensure their impartial nature; third, the endeavour of humanitarian sector to initiate their own due diligence measures, otherwise, it is the State who would be imposing;¹⁶⁶ fourth, the making of a distinction between humanitarian organizations who travel to conflict zones to provide humanitarian assistance impartially and those who travel to conflict zones with the knowledge and intent of exclusively aiding terrorists.¹⁶⁷ McKeever writes that "simple references to IHL or to 'impartial humanitarian organisations'" is insufficient.¹⁶⁸

Customary IHL and the Philippines' ratification of the Geneva Conventions and its Additional Protocols; its enactment of domestic laws implementing its IHL obligations all ensure that humanitarian assistance is protected. However, the ATA's reference to IHL can be further expanded in a manner where the ATA and any other counter-terrorism measures that the Philippines will adopt in the future will reaffirm the country's IHL obligations. The Swiss exemption in particular may be emulated on this front as it made an express reference to Common Article 3—a notable feature according to experts. The Chadian exemption is also worth noting on this end as although there is no express reference to IHL, the exemption expressly adopted the

¹⁶² See UNSC Res. 2462, 28 March 2019, paras. 5-6, 24.

¹⁶³ S. Pantuliano et al., above note 103, pp. 11-12; E. Gillard, above note 53, p. 15; D. McKeever, above note 10, p. 74.

¹⁶⁴ D. McKeever, above note 10, p. 76.

¹⁶⁵ *Ibid.*, p. 74

¹⁶⁶ *Ibid.*, citing E. Gillard, above note 53.

¹⁶⁷ *Ibid.*, p. 75.

¹⁶⁸ *Ibid.*, p. 76.

standards of impartiality and being in humanitarian nature as standards for exemption. This is consistent with IHL.

Although not binding, the drafting of the exemption in the European Union 2017 Directive is also worth considering. Compared to the ATA, this Directive is more lenient because it does not require prior State recognition for humanitarian organizations. The safeguard of the directive is that so long as international law recognizes the humanitarian activities of an organization, they are exempt.¹⁶⁹ Again, IHL only requires that the services provided are impartial and humanitarian in nature.

The foregoing is in contrast with Section 13 which requires prior state-recognition to be covered by the exemption. It adds another burden to humanitarian organizations which only have to satisfy less stringent standards under IHL. Furthermore, the only safeguard is the mere inclusion of the phrase “in conformity with International Humanitarian Law”, which appears to be mere lip service without the express provision of the process to be implemented. Arguably, what Section 13 sets is that aside from the ICRC and PRC, State recognition, intervention or even intrusion is the rule rather than the exception.

Aside from the points made above, the mental threshold for providing material support must also be reconsidered. At present, the material support provision adopts knowledge that the party receiving support is a terrorist organization as the threshold for liability. This bar is too low and may clash with the humanitarian principles of impartiality and independence. As pointed out by McKeever, humanitarian workers extend aid on the basis of need alone, regardless of their knowledge of the recipient’s designation as terrorists or not.¹⁷⁰ To expand the exemption and to limit the detrimental effects of the material support provision, a higher mental threshold must be adopted. This higher mental threshold is either knowledge of the intent of the recipient to use the support to further terrorist activities, or actual intent to support and further terrorism. The European Union Directive may again be used as reference. The Directive requires knowledge of the receiving party’s intent to use the support given to further terrorism.¹⁷¹ As an alternative, the HAPPA¹⁷² may also be emulated. The HAPPA exempts transactions of humanitarian organizations with foreign persons subject to sanctions provided that the transactions are performed “in good faith and without intent to further the aims or objectives of the foreign person and has used its best efforts to minimize any such

¹⁶⁹ EU Directive 2017/541 (2017), Recital 38.

¹⁷⁰ D. McKeever, above note 10, p. 66.

¹⁷¹ EU Directive 2017/541 (2017), para. 15.

¹⁷² U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015).

transactions.”¹⁷³ Similar to the EU Directive, the HAPPA adopts a higher mental threshold. Furthermore, HAPPA requires “robust due diligence” measures for transactions with designated organizations,¹⁷⁴ similar to McKeever’s recommendation. Due diligence measures may be a good balancing scheme to reconcile security concerns with the necessity to provide humanitarian assistance. Nonetheless, scholars also posit that cooperation between the State and humanitarian organizations is vital in crafting exemptions.¹⁷⁵

However, despite these possible adjustments to Sections 12 and 13, it is also significant to note that adopting a definition of terrorism that expressly excludes the whole range of humanitarian activities protected by IHL is a possible and viable route to take. Section 4 of the ATA which defines terrorism under the statute has been assailed to be unconstitutional on grounds that it “denies due process for lack of notice, deters free speech, and grants law enforcers unbridled discretion to define criminal conduct.”¹⁷⁶ An amended definition of Section 4 may soon be in order, and although tackling the definition of terrorism is another matter altogether, it is a fundamental consideration in defining material support offences and humanitarian exemptions. In defining terrorism, it is submitted that a definition that is compliant with both international law and constitution be adopted.

In sum, Congress must consider making the humanitarian exemption more comprehensive and more sensitive to the Philippines’ international obligations. As a starting point, Congress must define humanitarian assistance in the country’s counter-terrorism measures. Philippine laws already provide for a definition. For legal clarity, it would be wise to either adopt the same in counter-terrorism laws or to adopt a more comprehensive definition which covers the different species of humanitarian activities. Further, Congress may also consider redefining the concept of terrorism to exclude activities which are humanitarian and impartial in nature. Third, the obligations of the Philippines under IHL must be affirmed. This eases not only the tension among IHL, domestic legislation, and domestic counter-terrorism legislation, but it also clarifies grey areas. Fourth, Congress should consider adopting a higher mental threshold in punishing the provision of material support. Intent is more appropriate, or at least knowledge that the receiving party intends to use the support provided in furtherance of terrorism. Adopting mere knowledge that the receiving party is a designated terrorist organization as a threshold clashes with humanitarian principles as humanitarian workers are often already knowledgeable that designated terrorists receive their aid.

¹⁷³ U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015), § 5(b).

¹⁷⁴ U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015), § 5(b).

¹⁷⁵ Norwegian Refugee Council, above note 57; E. Gillard, above note 53.

¹⁷⁶ *Carpio v. Anti-Terrorism Council*, above note 21, para. 2(d).

V. Conclusion

The ATA leaves much to be desired especially for the humanitarian sector and its beneficiaries. The material support provision and its adjunct exemption are replete with gaps and loopholes. Humanitarian workers face the risk of criminal liability under Section 12 because of the nature of their work. Section 13, the supposed exemption, provides little protection as it requires either that the humanitarian worker is with the ICRC or the PRC, or is from a State-recognized humanitarian organisation. The required State recognition for humanitarian organisations puts the Philippines in a position to potentially violate its IHL obligations. Further, a State recognition requirement places an additional requisite than what IHL requires. To reiterate, IHL only requires impartiality and that the act is humanitarian in nature. Furthermore, while what constitutes State recognition remains to be an unresolved issue, legal scholars have already cited potential threats to the humanitarian sector because of added administrative regulations.

Although it is still hotly debated whether humanitarian exemptions are necessary or not, it is submitted that they are, and that they must allow the humanitarian sector to accomplish their job with minimal State intervention. The Article demonstrated that there are practices that may be emulated in crafting a humanitarian exemption. Among aspects to be considered are: first, a definition of terrorism which expressly excludes humanitarian activities; second, a higher mental threshold for the provision of material support; third, a definition of humanitarian assistance which covers both relief and protection activities; fourth, a reaffirmation of the Philippines IHL obligations; and fifth, the consideration of adopting due diligence measures.

Ultimately, the fight against terrorism is a valid and urgent undertaking. Counter-terrorism laws are necessary to equip States with legal means to combat terrorism. However, they must be sensitive to the operations and needs of humanitarian organisations and their beneficiaries. The tension between IHL and counter-terrorism has been well-documented and extensively discussed. The challenge faced by the Philippine legislature, albeit difficult, is not novel. Thus, Congress ought to take note of the nuances of counter-terrorism legislation *vis-à-vis* the State's equally important duty to uphold its international law obligations.