

# HUMANITARIAN EXEMPTIONS IN DOMESTIC COUNTERTERRORISM LEGISLATION



Recent years have seen an increase in international, regional and local regulatory measures in the field of counterterrorism. The International Committee of the Red Cross (ICRC) does not engage in questioning the legitimacy and necessity of states taking such measures. However, it observes that these measures have objectively had adverse consequences for humanitarian action and for the ability of impartial humanitarian organizations, such as the ICRC, to respond to the needs of people affected by armed conflict and other situations of violence.

Domestic counterterrorism legislation must not impede neutral, impartial and independent humanitarian action and must comply with international humanitarian law (IHL) rules, notably those governing humanitarian activities. In this regard, the ICRC proposes the inclusion, in such legislation, of well-framed and standing humanitarian exemptions whose objective is to exclude from the scope of counterterrorism legislation exclusively humanitarian activities carried out by impartial humanitarian organizations in accordance with IHL.

### ***Domestic counterterrorism measures***

Terrorism negates the basic principle of humanity and goes against the underlying principles and core objectives of IHL.

It is both legitimate and necessary for states and international organizations to take action in response to terrorism in order to ensure their security and, in the case of states, the security of those subject to their jurisdiction, as well as to restore and maintain international peace and security. Counterterrorism measures include the criminalization of terrorism and terrorism-related activities.

### ***Potential adverse impact of counterterrorism measures on humanitarian action***

Counterterrorism measures adopted by states are frequently based on the United Nations Security Council resolutions that have been adopted since 2001, as well as on international and regional counterterrorism instruments. While the exact content and scope of terrorism offences vary from one state to another, many states have made it a criminal offence to provide “support”, “services”, “financing” or “assistance” to entities or persons involved in terrorist acts.

*There is a risk that counterterrorism measures could criminalize the core activities of impartial humanitarian organizations.*

Often, the relevant provisions are broadly worded and can be interpreted to include any humanitarian activity directly or indirectly benefiting “individuals or entities associated with terrorism”. In practice, this broad scope leads to the risk that counterterrorism measures could criminalize the core activities of impartial humanitarian organizations and their personnel.<sup>1</sup>

The criminalization of impartial humanitarian action would run counter to the letter and spirit of the Geneva Conventions of 12 August 1949 and their Additional Protocols. Moreover, the use of broad language prohibiting “services” or “support” to terrorism could make it impossible for the ICRC or other impartial humanitarian organizations to fulfil their treaty-based mandate, notably in contexts where non-state armed groups party to a non-international armed conflict are designated as “terrorist organizations”.

## **INTERNATIONAL HUMANITARIAN LAW**

### ***IHL rules governing humanitarian activities***

Under IHL, the parties to an armed conflict bear the primary obligation to meet the basic needs of the people under their control. IHL also lays down the legal basis for humanitarian activities to be offered and provided by impartial humanitarian organizations when those basic needs remain unmet (Arts 3 and 9/9/9/10 common to the Geneva Conventions; Fourth Geneva Convention (GC IV), Art. 59; Additional Protocol I (AP I), Arts 69, 70, 71 and 81; Additional Protocol II (AP II), Art. 18; Customary IHL Study (CIHL Study), Rules 31, 32, 55 and 56). This so-called “right of initiative” is the legal entitlement given to such organizations to offer their humanitarian activities to parties to international and non-international armed conflicts, regardless of how a conflict may be characterized under counterterrorism legislation or sanctions regimes (Common Arts 3 and 9/9/9/10).

This right to offer services does not translate into an unrestricted right of access given to impartial humanitarian organizations. In order to carry out their humanitarian activities in situations of armed conflict, impartial humanitarian organizations must seek and obtain the consent of the parties concerned. Under IHL, consent must not be unlawfully withheld.

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<sup>1</sup> International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC, Geneva, 2011, 2015, 2019 and 2024: <https://www.icrc.org/en/report/2024-icrc-report-ihl-challenges>, accessed June 2025.

Once humanitarian activities are accepted, the state and non-state parties to an armed conflict are under an obligation to cooperate and to take positive action to facilitate humanitarian operations, subject to their right of control.

### ***IHL rules protecting the wounded and sick as well as those providing medical assistance***

Wounded and sick civilians and fighters placed *hors de combat* have the right to be respected and protected, to be treated humanely without any adverse distinction, and to receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition, as well as to be searched for, collected and evacuated. These rights are a foundational principle of IHL (First Geneva Convention (GC I), Arts 12 and 18; Second Geneva Convention (GC II), Arts 12 and 21; AP I, Arts 8–11; AP II, Arts 7 and 8; CIHL Study, Rules 109–111).

This obligation of means is first and foremost an obligation incumbent upon all parties to an armed conflict. However, “taking all possible measures” also encompasses permitting impartial humanitarian organizations such as the ICRC to assist with collecting and caring for the wounded and sick, even if they are designated persons under counterterrorism legislation and/or sanctions regimes.

The protections afforded under IHL to the wounded and sick would often be meaningless without access to humanitarian personnel and supplies.

### ***IHL rules protecting humanitarian personnel***

Complementary to the above-mentioned IHL rules, a fundamental tenet of this body of law is that humanitarian personnel and objects used to undertake humanitarian activities must be respected and protected at all times (AP I, Arts 17 and 71; CIHL Study, Rules 30–32). This rule is a necessary corollary of the rules providing for rapid and unimpeded access for humanitarian activities and freedom of movement for humanitarian personnel.

The safety and security of humanitarian personnel is an indispensable condition for the delivery of humanitarian relief to civilian populations in need. Such personnel should be protected against practices including harassment and intimidation aimed at disrupting their work, and more broadly should be able to operate free from undue interference, notably arrest – including under counterterrorism legislation – for carrying out their duties.

The prohibition on prosecuting humanitarian personnel for actions foreseen by IHL can also be inferred from the obligation to “respect and protect” such personnel. This requirement triggers obligations of a negative and positive nature.

## **AVOIDING THE ADVERSE IMPACT OF DOMESTIC COUNTERTERRORISM LEGISLATION ON HUMANITARIAN ACTION**

The ICRC proposes the inclusion of well-framed and standing humanitarian exemptions as the most effective way for states to reconcile their obligations under counterterrorism legal frameworks and IHL. Such exemptions would avoid the adverse impact of counterterrorism legislation on humanitarian action, as well as avert abuse, without otherwise endangering the effectiveness of counterterrorism measures.

*Measures adopted by states aimed at criminalizing and punishing acts of terrorism or related offences should be crafted so as to not impede humanitarian action and to align with IHL.*

In particular, legislation that establishes the criminal offences of providing “material support,” “services” and “assistance” to, or of “association” with, persons or entities involved in terrorism should exclude from the ambit of such offences activities that are exclusively humanitarian and impartial in character, and that are conducted by impartial humanitarian organizations in accordance with IHL.

It should also be recognized that humanitarian engagement with non-state armed groups party to a non-international armed conflict is a task foreseen and expected from impartial humanitarian organizations (and more particularly the ICRC) under common Article 3 of the 1949 Geneva Conventions.

The ICRC therefore proposes that a humanitarian exemption, based on the sample wording below, be included in domestic legislation criminalizing terrorism or related offences:

*Well-framed and standing humanitarian exemptions alleviate the risk of criminalization of humanitarian action while not endangering the effectiveness of counterterrorism measures.*

*The provision of exclusively humanitarian activities by impartial humanitarian organizations carried out in accordance with international humanitarian law is not considered as an offence/crime for the purposes of this law/act.*

The proposed wording excludes from the scope of counterterrorism legislation only those activities that, under IHL, are (i) exclusively humanitarian in nature, and (ii) carried out by impartial humanitarian organizations.

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#### ***What activities does the exemption protect?***

The notion of “**humanitarian activities**” is to be construed broadly and in line with applicable IHL. It fully encompasses, but is not limited to, narrower categories such as “humanitarian assistance”, “humanitarian relief” and “humanitarian aid”. It also includes all activities that “prevent and alleviate human suffering wherever it may be found” and whose purpose is “to protect life and health and to ensure respect for the human being”. The notion therefore also includes protection activities aimed at seeking to ensure that the authorities and other relevant actors fulfil their obligations to uphold the rights of individuals.

The word “**exclusively**” indicates that the objective pursued by the beneficiary of the exemption must be solely humanitarian in nature. If the presence and operations of the organization in question are motivated by other objectives, irrespective of their nature (political, financial, military, *a fortiori* criminal or otherwise), then such activities would not be covered by the proposed humanitarian exemption.

#### ***What actors does the exemption protect?***

For the purposes of the proposed humanitarian exemption, the above-mentioned activities must be carried out by an “impartial humanitarian organization”. To qualify as such, an organization must meet specific conditions: First, the aim pursued by the organization eligible for the humanitarian exemption must be “**humanitarian**”. In other words, the organization must follow exclusively humanitarian objectives and must act for the survival, well-being and dignity of all those affected by armed conflict.

Second, IHL requires a humanitarian organization wishing to operate in armed conflict to be “**impartial**”. Impartiality refers to the attitude to be adopted vis-à-vis the persons affected by the armed conflict when planning and implementing the proposed humanitarian activities. In this sense, impartiality is the requirement not to make any “discrimination as to nationality, race, religious beliefs, class or political opinions” or any other, similar criteria. Third, the beneficiary of the humanitarian exemption must be an impartial humanitarian “**organization**” as required by IHL. Thus, a loose association of individuals, while their activities may alleviate human suffering, would

not qualify on the basis of this provision; nor would a private person wishing to engage in charitable activities. A minimum structure is required for the “body” to be able to function as a humanitarian organization.

Finally, the exclusively humanitarian activities by impartial humanitarian organizations in armed conflict must be carried out accordance with IHL, notably requiring them to operate with the consent of the parties to the armed conflict concerned.

***What should be the temporal scope of the protection accorded by the exemption?***

To enable impartial humanitarian organizations to deliver their activities in the most effective way without being concerned with interference by counterterrorism legislation, the humanitarian exemption should be designed to apply for a long time.

Impartial humanitarian organizations need to operate in a stable and predictable legal environment. In this regard, to fulfil their function, humanitarian exemptions must be **standing**, i.e. not time-bound. This is a prerequisite to eradicate legal risks emanating from counterterrorism and sanctions legal frameworks. The durability of humanitarian exemptions guarantees legal security for impartial humanitarian organizations and their personnel.

## THE ICRC'S ROLE

The ICRC has been engaging with states and international organizations, at the international, regional and national levels, to raise awareness about the impact of counterterrorism measures and to promote effective mitigation measures, especially in the shape of humanitarian exemptions that exclude the humanitarian activities of impartial humanitarian organizations from the scope of counterterrorism legislation and sanctions regimes, in line with IHL and humanitarian principles.

## MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.