



INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

BUILDING A CULTURE OF COMPLIANCE FOR IHL TO PROTECT HUMANITY
IN TODAY'S AND FUTURE CONFLICTS

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VI. PROTECTING AND FACILITATING IMPARTIAL HUMANITARIAN WORK IN EVOLVING CONFLICTS

The UN estimates that in 2024, 300 million people need humanitarian assistance and protection, which is more than double the 130 million in 2019.²¹⁹ These staggering numbers, however, only tell half the story. They do not include humanitarian activities that address other needs. For instance, persons deprived of liberty were able to contact family members only through an impartial humanitarian organization that could work across front lines, and families were able to find relatives who had gone missing because of the efforts of humanitarian volunteers. Moreover, humanitarian organizations, such as the ICRC, play an important role in disseminating IHL to belligerents and reminding them of their obligations.

Humanitarian operations, however, face numerous challenges. All too often, access to populations is blocked, barriers set up, security guarantees denied, and the lives and safety of humanitarian personnel threatened. In a more subtle way, the complex web of sanctions and counter-terrorism measures is making the work of impartial humanitarian organizations difficult and undermines the IHL rules governing humanitarian access and activities.

Furthermore, all humanitarian organizations now use digital technologies to make their work for people affected by armed conflict more efficient and effective, and they face digital threats. When computer systems of humanitarian organizations are blocked, humanitarian data is stolen, or online campaigns are designed to question the impartial humanitarian nature of their work, it becomes difficult for these organizations to assist and protect people in need and to operate in safety.

In this chapter, the ICRC presents its legal views on maintaining space for humanitarian action in sanctions and counter-terrorism measures, and on the IHL rules that protect humanitarian organizations against digital threats.

1. MAINTAINING SPACE FOR HUMANITARIAN ACTION IN SANCTIONS AND COUNTER-TERRORISM MEASURES

Over the past two decades, states and international organizations have increasingly resorted to sanctions and counter-terrorism (CT) measures to attempt to change the behaviour of designated individuals and entities. Many of these measures aim at denying these individuals and entities the means to support or conduct any action considered to amount to terrorism or to a threat to international peace and security. In many cases, these measures take effect in contexts where impartial humanitarian organizations such as the ICRC operate.

The ICRC does not take a position on the legitimacy or necessity of sanctions and CT measures. However, these sanctions and CT measures – whether adopted at the UN, or at regional or domestic levels – have caused concern in the humanitarian community. This concern originates mainly in the complex legal, logistical and financial challenges posed by sanctions and CT measures, the cumulative effects of which have adversely affected the scope and quality of humanitarian activities conducted for people affected by armed conflict.

A) CONSIDERING IHL IN SANCTIONS AND COUNTER-TERRORISM MEASURES

In contexts where they apply, it is crucial that sanctions and/or CT measures include robust safeguards to ensure that they are in conformity with IHL and do not impede principled humanitarian action. Such safeguards can take the form of well-framed and standing humanitarian exemptions that exclude exclusively humanitarian activities carried out by impartial humanitarian organizations in accordance with IHL from the scope of sanctions and CT measures. In the ICRC's view, this is the only way to ensure that humanitarian activities foreseen, authorized and protected under IHL are not criminalized under sanctions and CT frameworks. Furthermore, it helps ensure that the measures themselves comply with IHL rules governing

²¹⁹ See United Nations Office for the Coordination of Humanitarian Affairs, *Global Humanitarian Overview 2019 and 2024*, available at www.unocha.org.

humanitarian access and activities, as required by various UN Security Council (UNSC) resolutions adopted since 2004.

There have been a number of significant legal developments in this area in recent years.

Between 2022 and 2023 there was a significant shift in the way states and international organizations made space for humanitarian action in the design of international and autonomous sanctions. Mounting evidence of the need for sanctions to include robust humanitarian safeguards, and advocacy in this regard, culminated in the adoption of UNSC Resolution 2664 in 2022.²²⁰ The resolution explicitly excludes from the scope of all current and future financial sanctions adopted by the UNSC “the provision, processing or payment of funds, other financial assets, or economic resources, or the provision of goods and services necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs”²²¹ by a variety of humanitarian actors. This resolution clearly marks a shift towards well-framed and standing humanitarian exemptions as the new standard in the design of such sanctions.

UNSC Resolution 2664 applies only to UN financial sanctions, but its adoption has set in motion significant changes in the approach of some states and international organizations. These changes are often replicated in the sanctions – distinct from UN sanctions – that are established by those states and international organizations on their own. This shift shows an increasing acceptance of humanitarian exemptions. It also reflects the need to ensure uniformity in the various sanctions frameworks and avoid contradictions between UN and other sanctions. An absence of uniformity would lead to contradictory results: in the same crisis, some humanitarian activities involving listed entities or persons would be authorized under UN financial sanctions but prohibited under certain autonomous sanctions. In this regard, states should maintain their efforts to create a clear and predictable legal framework that allows humanitarian organizations and their private-sector partners to work without also having to navigate contradictory sanctions applicable in the same context.

This change in sanctions regimes has several practical benefits for impartial humanitarian organizations. Notably, it allows and facilitates the involvement of the private sector (banks, suppliers, transporters) in humanitarian activities without being at risk of breaching sanctions and thereby helping to avoid over-compliance and de-risking policies. It should also ease the funding of humanitarian operations in contexts affected by sanctions, by reassuring donors that their humanitarian funding does not breach sanctions regimes. Finally, as required by IHL, it offers critical legal protection for humanitarian personnel in contexts where they have to engage with various listed individuals and entities on sanctions lists to carry out their humanitarian activities.

B) REMAINING CHALLENGES IN SANCTIONS FRAMEWORKS

Despite this progress, several challenges remain to be addressed in sanctions frameworks.

First, there are still autonomous sanctions regimes applicable to contexts where impartial humanitarian organizations operate that do not contain any humanitarian exemptions, or only temporary exemptions that are not adequate for protracted conflict situations. The inclusion of a standing and well-framed humanitarian exemption in these sanction regimes remains a necessity.

Second, making sure that the interpretation and implementation of humanitarian exemptions is consistent will be key to ensuring that they are helpful and effective. Humanitarian carve-outs will have little impact on de-risking and overcompliance policies without proper communication and guidance. The private sector, donors and other stakeholders must feel confident in the ability of states enforcing sanctions to understand and apply humanitarian exemptions. This requires states to draft clear guidelines concerning humanitarian exemptions and also promote these exemptions.

²²⁰ UNSC Resolution 2664 of December 2022 was inspired to a significant degree by UNSC Resolution 2615.

²²¹ *Ibid*, para. 1. This must be read in light of preambular paragraphs 3 and 6 of the Resolution, which reaffirm that sanctions must comply with IHL. In this regard, the ICRC takes the view that the notion of activities exempted under UNSC Resolution 2664 encompasses all humanitarian activities as understood under IHL, and therefore encompasses assistance and protection activities undertaken by impartial humanitarian organizations.

Third, financial sanctions are not the only sanctions that can impede principled humanitarian action. Other sanctions, such as export restrictions, can create logistical, financial, and legal obstacles to humanitarian activities. Advocacy for humanitarian exemptions to be included in these types of sectoral sanction might also be necessary, in order to ensure that progress made in the area of financial sanctions is not undermined by a lack of carve-outs in other restrictions.

C) IHL COMPLIANCE WHEN IMPLEMENTING COUNTER-TERRORISM MEASURES

UN resolutions concerning counter-terrorism measures have, since 2004, sometimes referred (mostly in pre-ambular or non-binding operative paragraphs) to the need for states to comply with international law, including IHL, when adopting or implementing CT measures. In 2019, UNSC Resolution 2462 – using mandatory language in a resolution adopted under Chapter VII of the UN Charter – imposed on UN member states, for the first time, a requirement that all CT measures, including those taken to counter the financing of terrorism, comply with IHL, thereby recognizing the primacy of IHL in the event of friction between IHL and CT frameworks. Therefore, the combined effects of operative paragraphs 5, 6 and 24 of UNSC Resolution 2462 make it possible to interpret the extensive CT obligations laid down in Resolution 2462 as excluding from their scope exclusively humanitarian activities carried out by impartial humanitarian organizations regulated by IHL.

While this resolution does not explicitly require states to adopt humanitarian exemptions in their domestic CT laws, it gives them the leeway to do so without falling afoul of their obligations under the UN's CT framework. Several states have adopted humanitarian exemptions in their domestic laws, but, unfortunately, a majority have not yet done so. Efforts must be made to improve implementation of UNSC Resolution 2462, with a view to ensuring that states “take into account the potential effect [of measures to counter the financing of terrorism] on exclusively humanitarian activities”. This is best done by adopting well-framed and standing humanitarian exemptions in their domestic CT laws.

States must avoid inconsistencies between CT measures and sanctions. In order not to render void the humanitarian exemptions recently included in sanctions regimes, it is crucial that states harmonize their approaches in sanctions and CT frameworks. Otherwise, there is a real risk that activities exempted under sanctions regimes would still be prohibited and criminalized under CT penal laws.

2. PROTECTING HUMANITARIAN ORGANIZATIONS AGAINST DIGITAL THREATS

Humanitarian organizations increasingly rely on digital technologies to fulfil their mandate, operate in the context of digitalizing armed conflicts, and face rapidly evolving digital threats. The threats include cyber operations that disrupt their digital infrastructure and communication systems or access or exfiltrate data, and information operations aimed at undermining their reputation. In recent years, the ICRC and several other humanitarian organizations have been targets of such operations. When these organizations' systems are disrupted, much-needed assistance and protection programmes are slowed down or come to a halt, with adverse consequences for vulnerable populations. If humanitarian data fall into the wrong hands, they may be misused to target or persecute people who are already at risk or in a situation of vulnerability. And if trust in humanitarian organizations is undermined, their access to people in need becomes even more difficult and their staff are exposed to additional risks. In a global context characterized by staggering needs and insufficient humanitarian capacity, digital threats risk exacerbating the suffering of people affected by armed conflict.

There has been a global consensus, for decades, that in times of armed conflict humanitarian operations must be allowed and facilitated by parties to armed conflict and third states, subject to their right of control, and that humanitarian relief operations and personnel must be respected and protected. Directing attacks against them is a war crime.²²² In the ICRC's view, these rules also protect humanitarian organizations against harmful cyber and information operations.

²²² See Rome Statute of the ICC, Art. 8(2)(b)(iii), 8(2)(b)(xxiv) and 8(2)(e)(iii).

A) CYBER OPERATIONS THAT BREACH AND DISRUPT THE IT SYSTEMS OF HUMANITARIAN ORGANIZATIONS

Cyber operations that can reasonably be expected to damage or destroy the operational assets of humanitarian organizations, or injure or kill their staff or the people they serve, are prohibited – just as any other attack against civilians is. In addition, cyber operations that unduly interfere with their operations are also prohibited. This is either because such operations would be regarded as an ‘attack’ against a civilian object, or because they would violate the obligations to allow and facilitate humanitarian activities and to respect and protect humanitarian operations. IHL also requires parties to armed conflict to protect humanitarian organizations and their staff against harm by private actors.²²³

Cyber operations that breach humanitarian data even without manipulating, encrypting, or deleting them raise distinct legal issues. While IHL does not generally prohibit warring parties from collecting information related to the armed conflict (including covertly, i.e. espionage), parties that contemplate accessing humanitarian data without authorization must take into account the specific protection of humanitarian operations. Spying on humanitarian organizations compromises the confidentiality of the information in their possession. In the case of the ICRC, confidentiality is one of its key working procedures, and one that is explicitly recognized in international law, for instance with regard to detention visits.²²⁴ Moreover, if states mandate an impartial humanitarian organization like the ICRC to perform services such as tracing missing people, these services must be facilitated and not undermined.²²⁵ Parties accessing humanitarian data should also remember that their conduct risks jeopardizing trust in the humanitarian organizations, particularly if humanitarian data is extracted with a view to targeting adversaries or civilians.

There are a number of possibilities for operationalizing the protection afforded by IHL to certain medical and humanitarian entities, including against cyber operations. The ICRC has proposed the idea of a new digital marker, another means of identification for the digital assets of specifically protected entities: a ‘digital emblem’. Obviating the need for new protection under IHL, a digital emblem would act as a digital analogue to the physical emblem, identifying assets that benefit from specific protection under IHL. The digital emblem would do what the physical emblem does in the real world during armed conflict: it would be used by medical facilities, including those of the armed forces, to signal their specific protection under IHL and identify – and signal the protection of – the Movement’s humanitarian operations. A global group of experts consulted by the ICRC concluded that the benefits of clearly signalling legal protection outweigh the risks associated with the use of a digital emblem.²²⁶

B) DISINFORMATION THAT UNDERMINES THE REPUTATION AND OPERATIONS OF HUMANITARIAN ORGANIZATIONS

The increasing number of information operations, online and offline, is also of particular concern, including from a legal perspective. Humanitarian organizations are not protected against, and should not be immune to, criticism or expressions of frustration; however, information operations that unduly interfere with their work, or expose their operations and personnel to risk, are prohibited. First, it is unlawful to incite people to commit violations of IHL, such as violence against civilians or humanitarian personnel, including through online messengers or platforms.²²⁷ More specifically, spreading disinformation aimed at obstructing or frustrating humanitarian operations unduly interferes with them; it certainly does not facilitate them. It also risks violating the obligation not to harm them (i.e. the obligation to respect humanitarian organizations), or – by creating false perceptions and stirring up violence against humanitarian actors – fails to comply with the obligation to protect such organizations against harm.

²²³ AP I, Art. 71; ICRC, Customary IHL Study, Rules 31 and 32.

²²⁴ GC III, Art. 126; GC IV, Art. 143. The confidential nature of information and documents in the possession of the ICRC is, for example, also recognized in Rule 73(4) of the Rules of Procedure and Evidence of the ICC.

²²⁵ AP I, Art. 81.

²²⁶ ICRC, *Digitalizing the Red Cross, Red Crescent and Red Crystal Emblems*, ICRC, Geneva, 2022: <https://www.icrc.org/en/document/icrc-digital-emblems-report>.

²²⁷ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, I.C.J. Reports 1986, p. 14, para. 220; ICRC, *Commentary on the Third Geneva Convention*, 2020, para. 191.

The continuing digitalization of societies and warfare is likely to increase the frequency, scope and impact of digital threats in armed conflicts – against civilians, but also against humanitarian organizations. Humanitarians, states and other actors must work together to ensure that the long-standing consensus on the protection of impartial humanitarian activities prevails, in law and in practice, in the digital age. For as long as people affected by armed conflict need impartial and independent humanitarian relief, those who provide it must be safeguarded, including against digital threats.