

# 1. An IHL/ICRC perspective on ‘humanitarian space’

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*The enemy, our real enemy, is not the neighbouring nation; it is hunger, cold, poverty, ignorance, routine, superstition, prejudice.*

Henry Dunant, L’Avenir Sanglant

Fears that ‘humanitarian space’ is shrinking, particularly in integrated UN peacekeeping missions, have led the humanitarian community to call repeatedly for its preservation. Yet most debates about humanitarian space make no mention of International Humanitarian Law (IHL). This article aims to fill that gap by offering an IHL perspective on the concept of humanitarian space. It argues that it is ‘populated’ by a variety of very diverse actors. Within this diverse space, the International Committee of the Red Cross (ICRC) has a mandate that refers to a specific sub-part, wherein humanitarian action, which is specifically neutral and independent, is needed.

### Defining humanitarian space

The term ‘espace humanitaire’ was coined by former Médecins Sans Frontières (MSF) president Rony Brauman, who described it in the mid-1990s as ‘a space of freedom in which we are free to evaluate needs, free to monitor the distribution and use of relief goods, and free to have a dialogue with the people’. The UN Office for the Coordination of Humanitarian Affairs (OCHA)’s Glossary of Humanitarian Terms has no specific entry for humanitarian space, but it does mention the term as a synonym for ‘humanitarian operating environment’: ‘a key element for humanitarian agencies and organisations when they deploy, consists of establishing, and maintaining a conducive humanitarian operating environment’. The Glossary goes on to state that:

adherence to the key operating principles of neutrality and impartiality in humanitarian operations represents the critical means, by which the prime objective of ensuring that suffering must be met wherever it is found, can be achieved. Consequently, maintaining a clear distinction between the role and function of humanitarian actors from that of the military is the determining factor in creating an operating environment in which humanitarian organisations can discharge their responsibilities both effectively and safely.

The authors of the OCHA/Department of Peacekeeping Operations (DPKO) report on integrated missions, published in 2005, also address the apparent need to ‘preserve’ humanitarian space, and focus on the distinction between civilian and military functions.

### IHL and humanitarian space

What does IHL have to say about humanitarian space? Under the 1949 Geneva Conventions and their Additional Protocols, the primary responsibility for the survival of the population lies with the authorities or, in the case of occupation, with the occupying power. If the responsible authorities do not provide the supplies the civilian population needs for survival,

they are obliged to permit the free passage of relief consignments. Relief action – ‘which is humanitarian and impartial in character and conducted without any adverse distinction’ – may be undertaken. Additional Protocol II, relating to non-international armed conflict, also explicitly stipulates that ‘if the civilian population is suffering excessive deprivation owing to a lack of supplies essential to its survival, relief actions which are of an exclusively humanitarian and impartial nature and conducted without any adverse distinction shall be undertaken’, subject to the consent of the warring parties. Article 70 of Additional Protocol I adds that offers of relief ‘shall not be regarded as interference in the armed conflict or as unfriendly acts’, and that the parties to the conflict ‘shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment, and personnel’.

To make plain the intention, Article 70 also states that this is the case ‘even if the assistance is destined for the civilian population of the adverse Party’. The right of people affected by the conflict to have ‘every facility for making application to ... any organisation that might assist them’ reaffirms this principle. Common Article 3 of the Geneva Conventions – sometimes called ‘elementary considerations of humanity’ – asserts that individuals taking no active part in hostilities (i.e., civilians) or those who are hors de combat (prisoners, the sick or wounded) are in all circumstances entitled to ‘humane treatment without any adverse distinction’. Access to relief and assistance necessary for the survival of civilian populations suffering undue hardship is surely included in the notion of humane treatment. The Article also specifies that ‘an impartial humanitarian body, such as the ICRC may offer its services’. It is generally recognised today that such offers cannot be arbitrarily declined. IHL also accords the parties the ‘right to prescribe technical arrangements’ for the delivery of relief. Most provisions specify that the assistance provided by relief organisations is subject to the parties’ consent. Thus, while IHL recognises the parties’ security requirements, it also seeks to ensure that relief reaches those who need it, and stipulates that the parties shall ‘in no way whatsoever divert relief consignments ... nor delay their forwarding’.

In the case of occupation, ‘the Occupying Power has the duty of ensuring the food and medical supplies of the population’. It may requisition foodstuffs and medical articles ‘only if the requirements of the civilian population have been taken into account’. If the occupying power is not in a position to provide sufficient supplies, it must allow relief to be provided by outside sources. Additional Protocol I adds that an occupying power must ‘ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of civilian populations of the occupied territory and objects necessary for religious worship’. If the supplies provided by the occupying power are inadequate, relief action must be authorised.

Customary international humanitarian law (i.e., practices generally accepted as law) leaves no doubt that parties to both international and non-international conflicts must allow and facilitate the rapid and unimpeded passage of humanitarian relief, which is impartial in character and conducted without any adverse distinction, subject to their right of control. They must also ensure the freedom of movement of authorised humanitarian relief personnel so that they can exercise their functions.

Taken together, these provisions provide a solid ground for humanitarian space that is impartial in character, in the sense that they intend to create, as per the OCHA Glossary, an ‘environment in which humanitarian organisations can discharge their responsibilities both effectively and safely’. What these provisions do not say is that providing assistance is exclusively the preserve of civilian actors. If the occupying power has a duty to provide for the survival of the population, it is difficult to exclude the military. The phrase ‘relief action

of an exclusively humanitarian and impartial nature', however, means that the military must not disguise itself as a civilian humanitarian actor in order to deceive the population and collect intelligence for future military action. To do so would pervert the intention of the law, and lead to uncertainty as to the respective roles of civilian humanitarian actors and the military. Generally, military personnel have combatant status and, as such, constitute legitimate military targets; civilian humanitarian actors do not. If the military engages in relief activities in a non-transparent manner, warring parties may no longer be able to make this distinction. In addition, 'impartial humanitarian action' means not expecting humanitarian actors to serve as force multipliers, or to work for the benefit of one party to the conflict. A distinction between military and humanitarian actors needs to be clearly maintained at all times. This does not, however, preclude military actors from providing relief.

### **The ICRC and humanitarian space**

IHL and other international norms provide for something that could be called 'impartial humanitarian space'. Most actors carrying out relief programmes within the parameters set by IHL (be they civilian or military, state or non-state) comply with, or at least try to comply with, the principles of impartiality (needs-based and non-discriminatory aid) and humanity (a concern for the humanity and dignity of those suffering from the effects of war). Yet the drafters of the Geneva Conventions, and the states that endorsed them, had an additional concern. They recognised the need for a neutral and independent organisation, which could, when needed, act as an intermediary between the parties, an organisation that would be accepted by all parties, and recognised as having a specific role apart from any political project or military goal. As it was not expected that all humanitarian actors would be neutral and able to move from one side of the conflict to the other (indeed, to have expected this would have been ill-advised), this function was, and still is, specifically expected of the ICRC.

Through the adoption of the Statutes of the Red Cross and Red Crescent Movement, the state parties to the Geneva Conventions formally confirmed their expectation that the ICRC will be neutral and independent. The exact wording of the principle relating to neutrality states that 'in order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature'. The ICRC therefore does not distinguish between 'good' and 'bad' protagonists; it is not 'for' one side and 'against' the other. It does not ascribe fault to a party for having started a conflict, nor does it support any kind of justification for a war. It takes the conflict as a fact, and expresses views only on the application of IHL. These views are addressed first and foremost to the relevant actors directly. Neutrality is a means to an end, and not an end in itself. It is a tool to keep channels open for better and more effective humanitarian action in the midst of an armed conflict. The Statutes also stipulate, in simple terms, that the ICRC shall be an 'independent humanitarian organisation'. Why is this important? No belligerent in their right mind would consent to the ICRC's presence if they could not trust the organisation, or if they felt that the ICRC was being used to as a Trojan horse to promote the enemy's wider political agenda, even if the perceived 'enemy' is a properly mandated UN peacekeeping mission.

From a legal point of view, these principles apply only to the Red Cross. Other actors within the humanitarian community are not under the same obligation to apply the principles of neutrality and independence as defined by the Red Cross. It would not be realistic to demand that UN humanitarian agencies, for example, should be independent from political decision-making processes, or that they could be perceived as neutral – i.e., not taking sides – in the

context of an integrated UN peace-enforcement mission. In such a situation access to all parties will prove difficult, if not impossible, for UN actors.

What this all means is that 'humanitarian space' may be open to a range of actors – both civilian and military. The ICRC, by virtue of its mandate and the will of the state parties to the Conventions, claims a specific 'sub-part' of this 'space'. The ICRC has repeatedly insisted that its neutrality and independence must be respected because, among other reasons, that was the intention of the parties to the Geneva Conventions. This mandate was meant to allow the ICRC to reach and protect those who often bear the brunt of armed conflict. This is why the ICRC cannot fully participate in integrated missions that combine political, military and humanitarian objectives. Space for neutral and independent humanitarian action must be preserved at all times, within a larger and more diverse humanitarian space.

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