

Joint submission of
Australian Red Cross, the International Committee of the Red Cross and the
International Federation of Red Cross and Red Crescent Societies
to the Australian Department of Foreign Affairs and Trade

Public consultation: Review of Australia's legal framework for autonomous sanctions

The International Red Cross and Red Crescent Movement

The International Red Cross and Red Crescent Movement (the Movement) is a worldwide humanitarian network that operates in accordance with internationally recognised [Statutes](#) and Regulations.¹ The Movement is guided in its mission by its [Fundamental Principles](#), including humanity, impartiality, neutrality and independence. It consists of distinct components: the International Committee of the Red Cross (ICRC); the International Federation of Red Cross and Red Crescent Societies (IFRC); and the 192 individual Red Cross or Red Crescent National Societies (including Australian Red Cross). The work of Australian Red Cross, the ICRC and the IFRC is based on the Geneva Conventions of 1949, their Additional Protocols, the Movement Statutes and the resolutions of the International Conferences of the Red Cross and Red Crescent.

Australian Red Cross has been a critical part of Australian life since 1914, mandated by the [Royal Charter of 1941](#) as an auxiliary to Australia's public authorities in the humanitarian field including during emergencies and armed conflict. Its mission is to alleviate vulnerability, including championing the importance of international humanitarian law (IHL) in Australia.

The ICRC's 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 endeavours to prevent suffering by promoting and strengthening IHL and universal humanitarian principles.

The IFRC is the global network of the 192 Red Cross and Red Crescent National Societies, which includes Australian Red Cross. The IFRC's mission is to bring relief to all disaster-affected people, including victims of armed conflicts and internal strife, and support its members in carrying out and strengthening their humanitarian work.

Executive summary

Australian Red Cross, the ICRC and the IFRC welcome the opportunity to provide input into the Review of Australia's Autonomous Sanctions Framework (Review). This submission and its recommendations are based on our significant experience in humanitarian action and on the legal frameworks governing our humanitarian activities, in particular IHL.

¹ Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in 1986 and amended by the 26th International Conference of the Red Cross and Red Crescent at Geneva in December 1995 and by the 29th International Conference of the Red Cross and Red Crescent at Geneva in June 2006 (Statutes of the Movement).

Noting the Terms of Reference, our submission addresses matters relevant to the Movement arising under Issues 1, 2, 3, 4 and 7 of the Issues Paper. Unless otherwise stated, the terms used in this submission are as defined in the Issues Paper.

Through a humanitarian lens, and with a focus on the protection of impartial humanitarian action, we recommend a well-framed humanitarian exemption across all of Australia's sanctions regimes and types of sanctions that is consistent with the formulation of United Nations Security Council Resolution (UNSCR) 2664 (2022) as well as with Australia's obligations under IHL.²

With this submission, we recommend a humanitarian exemption that:

- Sits in primary legislation;
- Can be consistent across Autonomous Sanctions Framework and COTUNA Framework;
- Applies across all sanctions measures without time limitations;
- Covers all impartial humanitarian organisations, including all components of the Movement;
- Safeguards against misuse by reference to principled humanitarian action;
- Is sufficiently broad to include the exclusively humanitarian activities of the Movement, notably working to protect and assist people affected by armed conflict, other situations of violence and protracted crises and to prevent violations of IHL;
- Is clearly communicated to interested persons, including the private sector.

Background

Humanitarian access is central to the effective protection of civilians. Through the imperative to address human suffering, the principles of neutrality, impartiality and independence remain relevant to gain and maintain access, acceptance and security.

In our view, sanctions regimes must not impede principled humanitarian action and must comply with IHL rules,³ notably those governing humanitarian activities:⁴

- Each party to an armed conflict bears the primary obligation to meet the basic needs of the population under its control.⁵
- Impartial humanitarian organisations have the right to offer their services to carry out humanitarian activities, especially when basic needs of the population are not being met.⁶

² UNSCR 2664 provides for a legally binding humanitarian carve-out for humanitarian organisations, including the ICRC, IFRC and National Societies (such as Australian Red Cross), from the "asset freeze" portion of all UN sanctions regimes. Prohibitions on providing any form of economic benefit, directly or indirectly, to listed individuals and entities (including many non-state armed groups in armed conflicts), now no longer apply to activities related to "humanitarian assistance and other activities that support basic human needs". See, [S/RES/2664 \(2022\)](#).

³ Art. 1 common to the four Geneva Conventions of 1949.

⁴ The nature of the relevant rules vary slightly depending on the nature of the conflict. These rules, along with several challenges and questions related to this area, are discussed in more detail in ICRC, "ICRC Q&A and lexicon on humanitarian access", *International Review of the Red Cross* (2014) Vol. 96, No. 893, pp.359-375, 2015, available at: <https://international-review.icrc.org/sites/default/files/irrc-893-q-a.pdf>; ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 2015, available at: <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>.

⁵ This is an express obligation in situations of occupation. See Art. 55, Fourth Geneva Convention and Art. 69, Additional Protocol I. It arguably also derives from the broader obligation of humane treatment of persons who are in the power of a party to the armed conflict. See Art. 3 common to the four 1949 Geneva Conventions and Art. 27, Fourth Geneva Convention. It can otherwise be inferred from the object and purposes of IHL.

⁶ See Art. 3 common to the four Geneva Conventions (NIAC) and Arts. 9/9/9/10 common to the 1949 Geneva Conventions (IAC), establishing the so-called 'right of humanitarian initiative'.

- Impartial humanitarian activities in armed conflicts are generally subject to the consent of the parties to the conflict concerned. Consent cannot be arbitrarily or unlawfully denied.⁷
- Once impartial humanitarian relief schemes have been agreed, the parties to the armed conflict, as well as all States that are not a party, are expected to allow and facilitate the rapid and unimpeded passage of humanitarian relief, subject to a right of control.⁸

Australian Red Cross, the ICRC and the IFRC have observed that sanctions measures have had unintended adverse consequences for humanitarian action.⁹ Humanitarian organisations trying to deliver assistance in sanctions-affected areas have had to navigate a patchwork of regimes from different States, undertake extensive due diligence processes, comply with donor/funding requirements and navigate a risk-averse private sector. An increasing and dangerous politicisation of neutral and impartial humanitarian action adds to this challenge. Given the proliferation and widening scope of sanctions, their impact on humanitarian action is increasing and threatens the effective continuation of principled humanitarian operations. Certain prohibitions established under sanctions regimes targeting non-state armed groups also impact humanitarian actors due to the indirect interaction with such entities. Impartiality is often compromised leaving affected populations with limited, or otherwise without, assistance and placing staff safety at risk. The listing of Ministries and Ministers of some states in sanctions regimes directly affect our capacity to deliver our humanitarian activities, notably in the fields of health and water and habitation.

Our collective objective is to prevent these unintended consequences of sanctions measures by ensuring that impartial humanitarian action and the humanitarian activities foreseen, authorised and protected under IHL are not criminalised, or otherwise prevented, disrupted or discouraged.

Recent UN Security Council Resolutions,¹⁰ supranational and national sanctions frameworks express more clearly the intention to preserve humanitarian activities from adverse consequences and to respect international law, including IHL. We encourage the Department to provide similar clarity within the Autonomous Sanctions Framework.

Standing and well-framed humanitarian exemptions are the most appropriate and efficient way to safeguard and protect humanitarian action and to ensure that sanctions do not impede humanitarian access so that crises affected populations are not unduly and negatively impacted. Such exemptions would also help the humanitarian sector address over-compliance and de-risking practices while fostering a culture of support for overall humanitarian action. These would not be “blanket” exemptions but would apply specifically to the exclusively humanitarian activities of impartial humanitarian organisations working at all times in conformity with humanitarian principles and IHL (as applicable in armed conflict).

⁷ The IHL rules governing consent vary in their scope and wording. See Common Arts. 9/9/9/10 of the GCs, Art. 70(1), Additional Protocol I (IAC); Art. 59, Fourth Geneva Convention (occupation); and Art. 18, Additional Protocol II (NIAC).

⁸ For IAC, see Art. 23, Fourth Geneva Convention, Arts. 70(2), 70(4) and 70(5) of Additional Protocol I and ICRC Customary IHL Study, Rule 55 (ICRC Customary IHL Study).

⁹ For example, difficulties importing or exporting goods, bank transfers being blocked or delayed, suppliers “de-risking”, leading to a halt or delay in humanitarian activities in the health or water and sanitation sector, donor agreements no longer being consistent with IHL and humanitarian principles and potential exposure for non-compliance and the ensuing liability. This last issue can give rise to problems in terms of humanitarian organisations’ duty of care to staff.

¹⁰ UN Security Council Resolutions [S/RES/2664 \(2022\)](#), [S/RES/2610 \(2021\)](#) and [S/RES/2610 \(2021\)](#).

Issue 1: Streamlining the legal framework

1A. How could the Autonomous Sanctions Framework be made more clear and easy to navigate?

In streamlining the Autonomous Sanctions Framework, we urge the Department to consider making it as consistent as possible with Australia's implementation of UNSC-mandated sanctions under the COTUNA Framework. Greater consistency between the two frameworks will make it easier for both Government and users to navigate and ensure compliance with both sanctions regimes, which is an objective of the Act.¹¹

Consistent and standardised humanitarian exemptions between the Autonomous Sanctions and COTUNA Frameworks will generally make such exemptions more predictable and simpler to apply. To this end, we recommend that the Autonomous Sanctions Framework include a humanitarian exemption that is at least as wide in its personal and material scope as the exemption provided under UNSCR 2664, albeit expanded from asset freezes to all sanctions measures.

Any humanitarian exemption that is introduced to the Autonomous Sanctions Framework would be best placed in the Act itself, as opposed to subordinate legislation or instruments. This would clearly indicate the Government's intention not to affect principled humanitarian action, minimise ambiguity and improve the effectiveness of any subsequent guidance. Similar amendments could also be made to the COTUNA Framework to ensure the humanitarian exemption provided for under UNSCR 2664 is explicitly incorporated into the framework.

Further, while not directly related to this Review, we note that similar issues regarding consistency exist with respect to Australia's counter-terrorism offences and related citizenship loss laws, which have varying policy approaches to humanitarian exemptions. Providing clear consistent humanitarian exemptions across both sanctions and counter-terrorism laws would promote greater clarity and cohesion between related laws and policies for humanitarian organisations and decision-makers alike.

We recommend streamlining the inclusion of a humanitarian exemption within the Autonomous Sanctions Framework by:

- i. mirroring the language of the humanitarian exemption provided to UNSC-mandated financial sanctions under UNSCR 2664 (2022); and
- ii. ensuring that any such exemption is incorporated into the Act rather than subordinate legislation.

¹¹ An objective of the Act is "to assist the administration of, and compliance with, autonomous sanctions measures by removing distinctions between the scope and extent of autonomous sanctions and Australia's UN sanction enforcement laws." See, [Explanatory Statement](#) to Select Legislative Instrument 2011 No. 247 of the *Autonomous Sanctions Act 2011* and *Autonomous Sanctions Regulations 2011*.

Issue 2: Scope of sanctions measures

2B. Have any terms in the Autonomous Sanctions Framework presented you with any challenges in understanding whether an activity you wish to undertake is sanctioned?

Whilst not directly related to our own activities, it is worth bearing in mind a particular lack of clarity with the existing language in the Act, as amended in 2021, allows for the imposition of sanctions for “serious violations of international humanitarian law” without defining this term.¹²

The term “serious violation of international humanitarian law” has a particular significance under international law, being a violation of IHL which attracts individual criminal responsibility and which States have an obligation to repress.

It is essential that the term is defined in the Autonomous Sanctions Framework consistently with international law by which Australia is bound.

Violations of IHL are serious, and are considered war crimes, if they endanger protected persons (such as civilians, prisoners of war, or the wounded and sick) or objects (such as civilian objects or infrastructure) or if they breach important values.

Serious violations of IHL are: grave breaches of the Geneva Conventions and Additional Protocol I;¹³ other serious violations codified as war crimes in the Statute of the International Criminal Court;¹⁴ and other serious violations in customary international humanitarian law.¹⁵

Derived from treaty and customary international law, the majority of serious violations of IHL are now codified in the Statute of the International Criminal Court¹⁶ and incorporated into Australian law through the *Criminal Code Act 1995* (Cth).¹⁷ Recognising the need for certainty and consistency across domestic legal instruments, serious violations of IHL could be defined in the Autonomous Sanctions Framework through a cross-reference to the *Criminal Code Act*, as amended from time to time.

We recommend that “serious violations of international humanitarian law” be defined in the Autonomous Sanctions Framework in conformity with international law either as:

- conduct constituting grave breaches of the Geneva Conventions and Additional Protocol I, other serious violations codified as war crimes in the Statute of the International Criminal Court, and other serious violations in customary international humanitarian law; or
- conduct defined in Subdivisions D-H in Division 268 of the Criminal Code.

¹² Section 3(f), *Autonomous Sanctions Act 2011*.

¹³ See Art. 50, First Geneva Convention; Art. 51, Second Geneva Convention; Art. 130, Third Geneva Convention; Art. 147, Fourth Geneva Convention, Arts. 11, and 85, Additional Protocol I.

¹⁴ See, Art.8 of the Rome Statute of the International Criminal Court (1998).

¹⁵ See, [ICRC Customary IHL Study](https://ihl-databases.icrc.org/en/customary-ihl/v1/rule156), Rule 156 and commentary, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule156>.

¹⁶ Rome Statute of the International Criminal Court (1998).

¹⁷ See, Chapter 8, Division 268, Subdivisions D-H, *Criminal Code Act 1995* (Cth).

Issue 3: Permit Powers

3B. Are there other permit-related matters you wish to raise?

In our experience, derogations, like permit processes, are inadequate and ineffective to preserve the humanitarian space from the negative effects of sanction regimes for several reasons:

- To ask authorities of third States for permission to work in a given context would risk undermining our acceptance as neutral, impartial and independent humanitarian actors and, consequently, our access to operate safely in those contexts.
- It is operationally untenable for the Movement to navigate derogations processes in multiple third jurisdictions. Derogations are complex, bureaucratic and time-consuming, with a significant negative impact on humanitarian organisations' operational responsiveness and continuity.¹⁸ To carve out humanitarian action from the scope of sanctions would offer a lighter administrative burden on both the Government and humanitarian sector.
- They raise serious concerns in terms of compatibility with IHL. They are difficult to reconcile with IHL rules governing humanitarian access and humanitarian activities and, in view of the risk of liability that non-compliance poses, with the rules protecting humanitarian personnel.
- It is not clear that a humanitarian organisation would have standing to seek a permit under the extant Autonomous Sanctions Framework. In practice, we are not aware of any humanitarian organisation applying for a permit.

Example A: Derogations in UN sanctions in the Democratic People's Republic of Korea (DPRK)

The Movement has considered obtaining various derogations across States imposing both UNSC and Autonomous sanctions in relation to the DPRK, which is facing protracted and persistent humanitarian needs. Issues with permit applications have led to planning operations challenges with the main issues arising due to:

- significant delays in receiving exemption certificates;
- discretionary and unsubstantiated hindrances from sanctioning authorities;
- the collapse of the banking channel;
- delays in customs clearance;
- a decrease in willingness of foreign suppliers;
- increased cost of humanitarian-related items and operations; and
- diminished funding for operations.

We recommend that the exclusively humanitarian activities of impartial humanitarian organisations be carved out of the scope of the Autonomous Sanctions Framework through a standing and well-framed humanitarian exemption rather than through a permit system.

¹⁸ For further detail, see Tristan Ferraro, "International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues", *International Review of the Red Cross* (2021), Vol. 103, No. 916-917, 2021, pp. 109–155 at pp. 145–47, available at: <https://international-review.icrc.org/sites/default/files/reviews-pdf/2022-02/international-humanitarian-law-principled-humanitarian-action-916.pdf>, <https://international-review.icrc.org/sites/default/files/reviews-pdf/2022-02/international-humanitarian-law-principled-humanitarian-action-916.pdf>.

Issue 4: Humanitarian exemption

Australian Red Cross, the ICRC and the IFRC have consistently advocated for a well-framed humanitarian exemption across all sanctions regimes.

The Autonomous Sanctions Framework should be consistent with the principles of humanitarian action and IHL in allowing impartial humanitarian organisations to carry out their exclusively humanitarian activities. The adoption of a standing exemption that applies across all thematic and country-based sanctions measures would ensure that humanitarian assistance is protected and facilitated. Accordingly, it would ensure that decisions affecting humanitarian activities can be taken impartially, i.e. exclusively on the basis of humanitarian need. To this end, we recommend that any humanitarian exemption to the Autonomous Sanctions Framework apply across all types of sanctions, including with respect to asset freezes, trade restrictions, travel bans, and arms embargoes as all of these measures impact the exclusively humanitarian activities of the Movement.

In the absence of a well-framed humanitarian exemption, we have experienced difficulties in providing humanitarian assistance in areas where it has been needed the most. The following examples illustrate these challenges.

Example B: Impact of Australian trade restrictions

The ICRC encountered challenges in securing the supply of goods from a company based in the United Kingdom. The company required assurances that the ICRC complies with sanctions laws in Australia, Canada and the United States as well as those in the United Kingdom. While the order was ultimately processed, it increased our administrative burden and caused delay.

Example C: Australia's Myanmar sanctions

The Regulation allows for the listing of entities that provide support to a regime controlled by the Myanmar military.¹⁹ A broad interpretation of “support” could potentially capture some of the ICRC’s activities in Myanmar (for example, supplying items to penitentiary authorities for exclusively humanitarian purposes). Such activities could also be regarded as making economic resources directly and indirectly available to listed persons and entities. While unintended, these types of provisions may unduly expose humanitarian organisations to the risk of being listed, increase their legal risk and compliance obligations and generally impede principled humanitarian action.

¹⁹ *Autonomous Sanctions Regulations 2011*, Reg 6, Item 6(i)(i) allows the listing of “an entity that ... is owned or controlled by, or provides support (including political support) to, a regime controlled by the Myanmar military.”

Example D: Donor Agreements

Australian Red Cross relies on donor support to fund its humanitarian work, often in countries impacted by sanctions. Understandably, donors, as part of their sanctions risk mitigation measures, regularly include stringent contractual clauses that are difficult and sometimes impossible to comply with—requiring a donee to refrain from using funds in any territory subject to sanctions.²⁰ At a minimum, these types of sanctions clauses require considerable negotiation and explanation from Australian Red Cross to outline the nature of our humanitarian operations and our compliance with sanctions laws. Often, the donor requires internal approval at the highest level. This diverts time and resources away from an unfolding humanitarian crisis. At worst, organisations are unwilling or unable to fund our work knowing that we operate in sanctions-affected environments. Longer-term, these sanction landscapes can lead to aid diversion and restrict the ability of the Movement to operate in countries where the humanitarian need is greatest – further compromising impartiality.

In addition to the implementation of UNSCR 2664 in the COTUNA Framework, its structure may serve as a model for autonomous sanctions. When transposing UNSCR 2664 in domestic sanctions regimes, it is important to ensure the scope of the humanitarian exemption contained in the Resolution is preserved and that the overall purpose of the Resolution is not undermined.

Efforts to remove barriers to principled humanitarian action have rightfully focused on the impact of financial sanctions on the capacity of humanitarian organisations to operate. However, a humanitarian exemption is needed across all sanctions measures. This would allow for a clearer structure and ensure that Australian laws would be compliant with Australia’s obligation to allow and facilitate humanitarian access.

4A. In what circumstance would you support the introduction of a humanitarian exemption for a set group [of] humanitarian actors?

Under IHL, any impartial humanitarian organisation is entitled to offer its services and to undertake humanitarian activities for the protection and relief of victims of armed conflict once they have been agreed upon by the belligerents concerned.²¹ In situations of other emergencies or protracted crises, the exclusively humanitarian activities of impartial humanitarian actors operating within the remit of principled humanitarian action must also be protected. Accordingly, a humanitarian exemption should be broad enough to cover all impartial humanitarian actors carrying out exclusively humanitarian activities.

²⁰ For example, our work in the context of Ukraine or Syria would be severely restricted if we were to agree to the following two examples of sanction clauses in Donor Agreements received in recent months:

“The Donee will not use or permit the use of the Donation in any country or territory that is the target of country or territory-wide sanctions laws or regulations” Or “The Donee will not engage in any financial transaction or other dealing with a prohibited party who is an individual or entity that is proscribed or designated on an official government or United Nations list because it is directly or indirectly involved in activity on behalf of a sanctioned country”

²¹ See, notably, common Article 9/9/9/10 to the Geneva Conventions.

If a humanitarian exemption to the Autonomous Sanctions Framework were to identify a set group of humanitarian actors, we recommend that it reflect the language of UNSCR 2664,²² rather than the formulation contemplated in the Issues Paper at paragraph 63(a).

In our view, the wording contained in the Issues Paper does not adequately capture the Movement. Specifically, only the ICRC enjoys diplomatic status equivalent to an international organisation under Australian law.²³ Presently, the IFRC is not extended the same treatment as the ICRC under Australian law and would therefore not be exempt insofar as Australian law applies to its activities. Moreover, Australian Red Cross in the long-term, which will transition from an Australian NGO Cooperation Program accreditation to the Department's Due Diligence Framework, may also not be exempt.

Given that Australian Red Cross, the ICRC and the IFRC regularly work with and support other components of the Movement, notably National Red Cross and Red Crescent Societies in countries affected by armed conflict, violence and other crises, the humanitarian activities of all components of the Movement must be exempt from autonomous sanctions.

The UNSCR 2664 formulation captures the vast majority of impartial humanitarian organisations, which the Department could make clear through guidance. The reference in UNSCR 2664 to, "humanitarian organisations having observer status with the UN General Assembly and members of those organisations"²⁴ is sufficiently broad to capture all components of the Movement, including National Societies such as Australian Red Cross.²⁵

Alternatively, if an express reference is to be made to the Movement, we suggest that the term "all members of the International Red Cross and Red Crescent Movement" is used.²⁶

If the Department were to take the above approach, we also recommend including a flexible provision that would permit the Department to specify, from time to time, other persons or entities that may be exempt from autonomous sanctions to account for any relevant humanitarian actors not otherwise captured. This would allow flexibility for the Department to exempt broader local actors and diaspora entities, including regional actors that are funded by the Department and other actors that are critical to the provision of localised impartial humanitarian activities.

4B. What safeguards would be necessary to ensure such an exemption is not misused, for example to facilitate proliferation of financing or sanctions evasion?

Framing a humanitarian exemption through the lens of principled humanitarian action is the most appropriate safeguard to prevent misuse.

The humanitarian exemption contained in UNSCR 2664 does not attempt to limit "humanitarian activities" to any specific measures, but instead, facilitates the provision of impartial humanitarian

²² UNSCR 2664, operative paragraph 1 of refers to "the United Nations, including its Programmes Funds and Other Entities and Bodies, as well as its Specialised Agencies and Related Organisations, international organisations, humanitarian organisations having observer status with the United Nations General Assembly and members of those humanitarian organisations, or bilaterally or multilaterally funded non-governmental organisations participating in the United Nations Humanitarian Response Plans, Refugee Response Plans, other United Nations appeals, or OCHA-coordinated humanitarian "clusters," or their employees, grantees, subsidiaries, or implementing partners while and to the extent that they are acting in those capacities, or by appropriate others as added."

²³ *International Organisations (Privileges and Immunities) Act 1963* (Cth), s 9D.

²⁴ See UNSCR 2664, operative paragraph 1.

²⁵ See International Federation of the Red Cross press release, "IFRC welcomes landmark UN Security Council resolution as a critical step towards scaling up humanitarian action in crisis-hit countries," available at: <https://www.ifrc.org/press-release/ifrc-welcomes-landmark-security-council-resolution-critical-step-towards-scaling-up-humanitarian-action-in-crisis-hit-countries>

²⁶ For example, New Zealand's Russia Sanctions Regulations 2022 specifically defines "the International Red Cross and Red Crescent Movement" as a humanitarian organisation exempt from sanctions (reg 18).

action and prevents misuse. The adoption of the Resolution is global recognition that an exemption limited to exclusively humanitarian activities is a sufficient safeguard against abuse.

This would ensure that only humanitarian organisations that operate in accordance with humanitarian principles and IHL (where applicable) are exempt from the implications of sanctions and would provide protection from potential abuse.

Should Australia choose to adopt the same wording of the humanitarian exemption in UNSCR 2664, it would have the added benefit of looking to UN interpretations and precedents to ensure the exemption is not used for illegitimate purposes. This would streamline the interpretation and enforcement of Australia's Autonomous and COTUNA Sanctions Frameworks.

Further, principled humanitarian action is generally defined by reference to the principles of independence, impartiality, neutrality and humanity, which are enshrined in international law²⁷ and guide the Movement²⁸ in its delivery of effective, unbiased assistance to those in need.²⁹ Endorsed in United Nations resolutions³⁰ and by other regional organisations,³¹ these principles are the foundation of humanitarian action – delivered without discrimination, without taking sides in conflict and while maintaining autonomy from political, economic, military or other objectives.

Humanitarian organisations, such as the Movement, have a strong presence with decades of operational experience and adherence to humanitarian principles. Through the adoption of a risk-based approach when delivering humanitarian activities, operational needs are balanced with measures to avoid or minimise any adverse effects resulting from intervention, including proliferation of financing or sanctions evasion. The Movement works in transparency with authorities, donors and other partners in every context we operate. We have strong risk-based processes and financial control mechanisms in place to ensure that activities are exclusively humanitarian and oriented towards supporting people affected by crises.

4C. If an exemption for “humanitarian assistance” were to be included in the legislation, what types of activities would it be important to capture?

In our view, any potential humanitarian exemption within the Autonomous Sanctions Framework must be sufficiently broad to facilitate exclusively humanitarian activities.

A pragmatic approach would be to mirror the formulation found in UNSCR 2664, which refers to “humanitarian assistance and other activities that support basic human needs.”³² The Resolution makes clear that this notion is to be interpreted in light of IHL.³³ Relevantly, it should

²⁷ For example, Art. 63, Fourth Geneva Convention, impartiality in Art. 70 of Additional Protocol I and neutrality implicit in Art. 71 (4) of Additional Protocol I.

²⁸ Preamble, Statutes of the Movement.

²⁹ The term “principled” is used to distinguish humanitarian action that is instructed by those values from action that is not, and accordingly distinguishes genuine and legitimate humanitarian organisations from other actors.

³⁰ Since 1991, various UN resolution resolutions from General Assembly and Security Council have officially endorsed the four humanitarian principles (humanity, neutrality, impartiality and independence) applicable to situations of armed conflict. The UN General Assembly in Resolution 58/114 additionally endorsed the principle of independence as an important guiding principle for the provision of humanitarian assistance ([A/RES/58/114](#)). UN Security Council Resolution 1894 (2009) emphasised the importance of all four humanitarian principles in the framework of humanitarian assistance, see [S/RES/1894 \(2009\)](#).

³¹ Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, 30 January 2008, [2008/C/25/01](#), paras 10-14; [Common African Position \(CAP\) on Human Effectiveness](#), May 2016, para. 30.

³² UNSCR 2664, operative paragraph 1.

³³ UNSCR 2664, preambular paragraphs 2-3.

be interpreted broadly so as to include all humanitarian activities carried out by impartial humanitarian organisations and foreseen by IHL.³⁴

“Humanitarian activities” include both assistance and protection activities – meaning all activities, services and the delivery of goods, carried out primarily in the fields of health, water, habitat, education and economic security, which seek to ensure that persons caught up in armed conflict and other emergencies or protracted crises can survive and live in dignity, as well as all activities aimed at obtaining full respect for the rights of individuals in accordance with the letter and spirit of the applicable bodies of law.³⁵ For the Movement, these humanitarian activities include, but are not limited to:

- Distribution and delivery of humanitarian aid including food and other essentials;
- Facilitating access to life-saving services and infrastructure, including access to clean water and temporary shelter;
- Provision of medical and health care, including medical assistance to the wounded and sick, distribution of medical supplies and support to health facilities such as hospitals, medical transport, physical rehabilitation centres and limb fitting services;
- First-aid and medical training;
- IHL training for military and non-state armed groups and general IHL dissemination;³⁶
- Monitoring and improving the condition and treatment of detainees; and
- Tracing services to reconnect separated families.

We advocate for the breadth of humanitarian activities to be captured in a non-exhaustive manner, as humanitarian needs may not be the same in every context and may evolve over time. This could be made clear in guidance or supplementary materials to the Autonomous Sanctions Framework.

³⁴As articulated under the *Geneva Conventions 1949* and their *Additional Protocols of 1977*, the *Statutes of the International Red Cross and Red Crescent Movement*, Resolutions from the International Conference of the Red Cross and Red Crescent and other activities outlined in international legal frameworks.

³⁵ For further detail, see ICRC Protection Policy; ICRC Updated Commentary to the Third Geneva Convention, Article 3.

³⁶ We appreciate the explicit acknowledgement made in the Issues Paper about the need for humanitarian actors to undertake activities such as IHL training (para. 58 at footnote 25). We note that the Movement has a mandate, endorsed by States, to disseminate IHL (Art. 3 (2), Art.4 and Art. 6 (4)(j), Statutes of the Movement). Accordingly, The ICRC and National Societies, like Australian Red Cross, regularly undertake IHL training and dissemination, including to States and non-State armed groups, to promote respect for IHL.

Example E: First aid training

The overall goal of the Movement's first-aid support program is to ensure that during armed conflict and other emergencies or protracted crises, wounded and sick people benefit from impartial medical assistance. The provision of first aid to those injured in armed conflict is contemplated in IHL.³⁷ An impartial humanitarian body, such as the ICRC, can offer services including medical aid and first aid training. Guided by the principle of impartiality, assistance is provided on the basis of medical need, without discrimination. These provisions should prevail over any sanctions measures so as not to expose humanitarian organisations to legal risk.

On an expansive view, the notion of "humanitarian assistance and other activities that support basic human needs" could also be interpreted as including early recovery activities. We would advise to make any humanitarian exemption sufficiently broad and flexible to capture contexts affected by protracted crises; so as not to trap populations and humanitarian organisations in situations where they are meeting only urgent humanitarian needs. Consistent with Australia's developmental strategy, we urge the Department to consider the extent to which longer term developmental or "humanitarian plus" activities are exempt from autonomous sanctions. We note, for example, that the Department's Regional Humanitarian Strategy for Afghanistan and Pakistan 2021-2024 contemplates "targeted, well-planned multi-year interventions," which would be significantly restricted without sufficiently broad and flexible exemptions.³⁸

Consistent with UNSCR 2664, the exemption should be broad enough to include activities for the benefit of vulnerable populations in the long-term. This would include activities that are essential to the wellbeing, safety and stability of people and communities – such as food security, shelter, education, energy, water, sanitation, health, nutrition and hygiene, as well as agriculture and livestock programs and cash for work projects. This expression encompasses the protection and prevention activities³⁹ undertaken by our Movement partners in areas affected by sanctions and, in our view, closely aligns with the approach taken under UNSCR 2664 to capture "activities that support basic human needs."⁴⁰

Further, the interpretation of any such humanitarian exemption must be sufficiently clear to reassure humanitarian organisations, donors, commercial service providers (such as financial institutions) and other private sector entities that the processing and payment of funds and the facilitation of other transactions to support such humanitarian activities are permitted. These activities may include:

- funding and fundraising activities to support activities of impartial humanitarian actors;
- funding activities that effect payment of salaries, taxes, fees, or import duties or the purchase or receipt of permits, licenses or public utility services; and
- other payments that are necessary for the facilitation of impartial humanitarian activities.

³⁷ Under IHL, parties to a conflict have an obligation to collect and care for the wounded and sick. See, in particular, common article 3 to the Geneva Conventions.

³⁸ Foreign Affairs, Defence and Trade References Committee Senate Report, *Australia's engagement in Afghanistan: final report*, 2022.

³⁹ For a complete definition of 'protection activities', see [ICRC Protection Policy](#).

⁴⁰ UNSCR 2664, operative paragraph 1.

Without this clarity, we have observed financial institutions blocking transactions by humanitarian actors relating to any situations or areas that are impacted by sanctions (see Examples F and G, below).

Finally, we note that the limitation contemplated under paragraph 63(b) of the Issues Paper referring to “a sanctioned country” may not capture all sanctionable circumstances and therefore recommend that this be expanded to read “in countries or areas impacted by sanctions.”

Australian Red Cross, the ICRC and the IFRC strongly recommend including a standing, well-framed humanitarian exemption in Australia’s Autonomous Sanctions Framework to ensure that exclusively humanitarian activities carried out by impartial humanitarian organisations are excluded from its scope.

We recommend that the exemption mirror the language of UNSCR 2664 in capturing the humanitarian activities of impartial humanitarian organisations.

Any list of humanitarian actors must cover all components of the International Red Cross and Red Crescent Movement.

We recommend that a reference to activities be framed by reference to “humanitarian assistance and other activities that support basic human needs.” We urge against fixing an exhaustive list of activities in the Act. Instead, the Department could provide interpretive guidance on the types of non-exhaustive activities covered under such an exemption, including:

- i. humanitarian activities, which includes assistance and protection activities;
- ii. early recovery activities;
- iii. activities which seek to benefit vulnerable populations in the long-term, including activities that are essential to the wellbeing, safety and stability of people and communities; and
- iv. incidental and associated transactions relating to the funding and financing of exempted activities.

We recommend that the humanitarian exemption apply to all types of sanctions, including asset freezes, trade restrictions, travel bans and arms embargoes.

We recommend that the exemption also apply to situations beyond “sanctioned countries” to “countries or areas impacted by sanctions.”

Issue 7: Regulatory Functions of the Australian Sanctions Office (ASO)

7D. Do you have any suggestions for reducing the costs associated with compliance with autonomous sanctions laws?

The risk-averse approach to autonomous sanctions adopted by donors, partners, and critical commercial service providers such as banks, suppliers and other private entities to humanitarian operations and transactions in areas impacted by sanctions can significantly delay the provision of humanitarian assistance. The “chilling effect” of de-risking measures has resulted in financial costs but also significant time, resourcing and efficiency costs to humanitarian organisations operating in areas affected by sanctions such as in the DPRK, Afghanistan and Syria (see Examples A, F and G). Most importantly, the chilling effect results in significant humanitarian costs in areas and communities where humanitarian assistance is most needed.

We have observed that de-risking issues exacerbated by risk-averse attitudes and processes within private sector entities continue, even where sanctions regimes have been updated to exempt humanitarian activities. For example, despite the humanitarian exemptions provided to all UN-mandated financial sanctions under UNSCR 2664 and, previously, to the UN Taliban sanctions regime under UNSCR 2165 (2021), banks and suppliers have nevertheless been cautious when conducting transactions necessary for humanitarian activities with respect to sanctioned-affected areas because of the perceived complexity and the need for further “legal clarity and incentives.”⁴¹

Our recent experiences dealing with private sector institutions and their advisers indicate that they continue to adopt risk-averse approaches to humanitarian transactions based on perceived risk and lack of precedent on engaging in exempted transactions. Accordingly, we suggest that these entities would benefit from sector-specific guidance and outreach on their permitted activities. This approach would complement the ASO’s ongoing dialogue with specific sectors, including the financial sector.⁴²

Example F: The “chilling effect” of sanctions in Afghanistan⁴³

Following the fall of Kabul in August 2021, international sanctions and the withdrawal of support decimated Afghanistan’s aid-dependent economy. Banks closed and salaries for healthcare and government workers largely stopped, pausing pay checks which each supported about 15 people. This non-payment, along with an inability to access bank savings, drove families into poverty. In 2022, 55% of the population (up to 24 million people) needed humanitarian assistance, up 30% from 2021.

Australian Red Cross launched an Afghanistan appeal to raise funds to support people affected by the crisis and subsequently attempted to transfer appeal funds to the ICRC. However, the payment was automatically blocked by a financial provider as the word “Afghanistan” appeared in the payment details. This was followed by a request for additional

⁴¹ Norwegian Refugee Council, *Life and Death: NGO Access to Financial Services in Afghanistan*, 2022, available at: <https://www.nrc.no/resources/reports/life-and-death-ngo-access-to-financial-services-in-afghanistan/>.

⁴² Statement from Mr Andrew Walter, 2 February 2022, Committee Hansard, Senate Foreign Affairs, Defence and Trade References Committee, Inquiry on Australia’s Engagement in Afghanistan, p. 35.

⁴³ While this example relates to UNSC mandated sanctions, these issues are also prevalent with respect to Australia’s autonomous sanctions.

information by Australian Red Cross on the use of such funds, including “Full details of any third-party individual or entity based in Afghanistan who are related to this transaction...”

The additional bank processes took two weeks, delaying the transfer of funding which ICRC was relying on for its essential health care work in country.

This demonstrates the “chilling effect” of sanctions regimes on financial institutions, which take a risk-averse approach to humanitarian organisations.

Since the adoption of a humanitarian exemption to UNSC sanctions impacting Afghanistan⁴⁴ the ICRC has been able to design and implement its Hospital Resilience Program (HRP),⁴⁵ which would otherwise have been in violation of UN financial sanctions against the indirect provision of economic resources to the Taliban. Furthermore, the humanitarian exemption has alleviated donor reluctance to fund this project.

Example G: Issues with financial transactions

Financial institutions are increasingly delaying and blocking humanitarian transactions related to sanctioned-affected countries like Syria and Afghanistan.

At best, transfers take weeks or months and require under-resourced organisations to divert time into explaining and negotiating transactions. At worst, transactions are refused, accounts are closed, volunteers are unpaid, and lifesaving programs are shut down.

Complexity and lack of clarity regarding humanitarian exemptions are driving this trend, increasing the perception that banks can dictate where humanitarian actors can operate, when in reality, most of these transactions may be legally permissible. This is where clarity and education are needed. States need to produce clear guidelines to financial institutions on exemptions – noting that associated financial transactions relating to exempted humanitarian activities must be facilitated.

For example, the European Commission issued a guidance note on Syria, giving practical answers to questions it had received from banks, donors, and aid organisations on how to comply with EU sanctions when providing humanitarian aid. We urge that this becomes common practice with Australian Sanctions.

We urge the Department, specifically the ASO, to ensure that financial institutions are aware of obligations under sanctions regimes and are updated on any changes that take effect with respect to humanitarian exemptions, such as UNSCR 2664. We encourage the Department to proactively reach

⁴⁴ See UNSCR 2615 (2021), which was given automatic effect in Australia through section 2B(5) of the COTUNA Framework.

⁴⁵ The objective of the HRP is to maintain the hospital sector available for the population by: paying the salaries of healthcare staff in secondary and tertiary hospitals and of certain technical staff in the Ministry of Public Health (MoPH); supporting the procurement of ‘Drugs & Disposables’; and paying the running costs of the respective hospitals. With the HRP, we support 33 hospitals, with capacity of 7,057 beds serving 26 million people, which are supported through the payment of salaries to 10,483 health workers, running cost and medical supplies. The initial 2022 financial budget of the project was CHF 6.4m, with a subsequent extension of CHF 44m. Its projected financial budget for 2023 is at CHF 72.3m, approximately 38% of the delegation’s total financial budget of CHF 192m.

out to financial institutions following humanitarian exemptions to ensure they do not prevent or delay transactions critical to humanitarian activities.

To alleviate the issues and the costs associated with risk-averse compliance processes to autonomous sanctions, we recommend that the ASO provide sectoral guidance and increase its outreach to the private sector (with emphasis on financial institutions and law firms as their key advisers) and to civil society organisations regarding any updates to the Autonomous Sanctions Framework, particularly as it relates to the implementation of a humanitarian exemption.

We are grateful to the ASO on its outreach efforts to date. We welcome the opportunity for bilateral, sectoral and cross-sectoral engagement regarding the Autonomous Sanctions Framework and humanitarian exemptions in future.

We recommend that the ASO provide sector specific guidance and further undertake sector-based and cross-sectoral outreach and consultation on any updates to the Autonomous Sanctions Framework, in particular humanitarian exemptions so as to pre-empt and reduce (human and financial) costs associated with compliance.

Conclusion

Australian Red Cross, the ICRC and the IFRC thank the Department for the opportunity to make a submission to the review of Australia's legal framework for autonomous sanctions and take the opportunity to convey their appreciation for the ongoing, constructive engagement with the Australian Government on matters of mutual interest related to the humanitarian consequences of armed conflict, other emergencies and protracted crises, and the protection and assistance of people affected by them.

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