



# SUBMISSION TO THE STANDING COMMITTEE ON AFGHANISTAN (AFGH)

February 17, 2022

## EXECUTIVE SUMMARY

The Canadian Red Cross remains deeply concerned about the ongoing humanitarian crisis in Afghanistan and the continued barriers to the provision of neutral, impartial, and independent humanitarian assistance and lifesaving aid to those most impacted. While the Canadian Red Cross recognizes states' authority and need to take measures to prevent and respond to terrorist activities and other fund diversion, it is also imperative that neutral, impartial, and independent humanitarian assistance not be impeded. Measures taken and the ongoing de-risking efforts by donors, partners or private sector actors, including financial services, will continue to adversely affect humanitarian actors' ability to provide life saving aid in Afghanistan as well as other humanitarian situations as they arise.

It is in this context, that the Canadian Red Cross offers the following potential solutions to address this critical issue:

1. Should the government wish to allow for express permissibility and lift the sanctions limitations to swiftly allow for the provision of humanitarian aid to Afghanistan, it could consider the issuance of a Ministerial statement and/or interpretative bulletin to clarify that, in accordance with the UN Security Council's Resolution 2615 (2021), Canada will no longer consider humanitarian activities or financial transactions in support of those activities in Afghanistan by Canadian non-governmental organizations to be a violation of Canadian law.
2. Efforts to clarify permissibility could be further supported by a revision of the *Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da'esh) and Al-Qaida* (SOR/99-444) under the *United Nations Act* (R.S.C., 1985, c. U-2) to include a new clause expressly stating that the provisions of the sanction regulation do not apply to the provision of humanitarian aid, which would bring the Regulation in line with UNSC Resolution 2615.
3. If agreed, to combat the chilling effect on non-governmental organizations of the counter terrorism regime, provide clarity to the humanitarian sector on permissible action and the application of Anti-Terrorism legislation.
4. If it is determined appropriate and required, to undertake a longer-term update of the anti-terrorism provisions in Canada's *Criminal Code* to expressly and explicitly recognize the carve outs provided for life-saving activities of neutral and impartial humanitarian organizations, including the provision of humanitarian goods and services.

**Our submission is that these efforts help to aid humanitarian actors to take action to address urgent needs in Afghanistan and set a solid foundation to allow for continued humanitarian action in response to future crises that arise.**

**We thank the Committee and the Government of Canada for their review of and interest in this important issue set, particularly as it relates to the pressing need for humanitarian assistance in Afghanistan.**

## **CONTEXT**

### Previous Interventions and Intent

The Canadian Red Cross has made past, similar submissions to the Canadian Parliament and the Government of Canada on barriers to International Humanitarian Assistance related to counter-terrorism measures, sanctions, and the need for coherent and best practice-oriented reading of international humanitarian law.

The Canadian Red Cross has also worked in collaboration with authorities on how to ensure assistance reaches those who need it most and to guard against diversion, abuse and misuse which is, we believe, the intent of the current regulatory regime. Our objective is to work collaboratively with authorities to effectively balance the need to guard against the misuse and diversion of funds alongside the critical need for the provision of neutral, impartial and independent humanitarian assistance to those impacted.

### Red Cross Work in Afghanistan

#### *Humanitarian Crisis in Afghanistan*

As has been well discussed by the Special Committee, Afghanistan is currently in the midst of a collapse of health services and widespread hunger. Acute food shortages fueled by serious drought, lack of cash, internal displacement and impacts from the COVID-19 pandemic have converged on the people of Afghanistan, with some 18 million Afghans in urgent need of humanitarian assistance. The drought and displacement across Afghanistan come as a fractured health system worsens existing health issues and socio-economic hardship rises dramatically across the country. The closure of more than 2,300 health facilities, which provide the basic package of health services, has been prevented after key UN agencies and donors agreed on a temporary approach which would maintain the service for several months.

#### *Canadian Red Cross Partnership with the Afghan Red Crescent Society*

The Canadian Red Cross' knowledge and understanding of the complex context and operating environment has been developed over more than a decade of working in Afghanistan in providing emergency response and health services. The Canadian Red Cross has a longstanding partnership with the Afghanistan Red Crescent Society (ARCS) and we seek to continue to work together to meet the immense humanitarian needs in the country with a focus on health services.

Under the 'Humanitarian Operation for People in Emergencies' (HOPE) projects in 2019 and 2020, the ARCS was funded by and working in partnership with the Canadian Red Cross. This operation provided essential services through 34 Mobile Health Teams (MHTs) to some of the most remote areas of the country. MHTs are recognized as one of the most effective and efficient approaches for delivery of health

care services in complex contexts. With support from the Canadian Red Cross, Global Affairs Canada, the Norwegian Red Cross and the Swedish Red Cross, these teams of doctors, nurses, pharmacists, midwives, vaccinators and drivers helped increased ARCS ability to provide consistent gender responsive health services, regardless of governing authority. In 2021, using a Canadian public donation, the Canadian Red Cross continued to support 13 MHTs under the HOPE project in 13 provinces across Afghanistan including some of the most rural, remote, and difficult to access parts of the country. The MHTs provide inclusive primary health care services, including child health, immunization, SRH services (including family planning and post-abortion care), antenatal, childbirth and postnatal care, mental health, trauma care, nutrition screening and referral, and SGBV support and referral (where possible).

With all humanitarian actors in Afghanistan facing the challenge of working in a rapidly shifting context, Red Cross has a vital role to play in providing expert technical support in health and emergency response, building on strong and effective relationships with ARCS and Red Cross Red Crescent Movement Partners in Afghanistan. **However, due to the lack of clarity on permissible activities under anti-terrorism legislation and due to current regulatory barriers to assistance, our support has been on hold at this crucial time.**

## **DISCUSSION**

**Without clarity on permissible action, humanitarian actors, including the Canadian Red Cross, are unclear when and how they may run afoul of Canadian sanctions regimes, counter-terrorism legislation and charities regulations even while seeking to provide life-saving humanitarian assistance.** This includes the provision of life-sustaining goods that are now difficult to find within Afghanistan, such as medical supplies, medicines, and non-food items. There is no clear exemption for sanctions, there is a lack of clear alignment to IHL, and the *Criminal Code* and charities regime are being referenced to the humanitarian sector as the primary reason why action is impermissible although express prohibitions are not clear on the face of these provisions.

### **A. Sanctions as an obstacle to humanitarian assistance and other barriers**

To safeguard the ability to provide humanitarian assistance, the Canadian Red Cross recommends that the Government of Canada clarify the application of and revise the sanctions regulations concerning Afghanistan to clarify that the regulatory prohibitions against humanitarian organizations having to interact with individuals and entities associated with the Taliban excludes and does not apply to the provision of humanitarian assistance in Afghanistan.

The current sanctions regulation, the *Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da'esh) and Al-Qaida* (SOR/99-444) under the *United Nations Act* (R.S.C., 1985, c. U-2), prohibits providing any financial or related services to or for the benefit of the Taliban and individuals and entities connected with the Taliban. This Regulation was written at a point when the Taliban were a non-state armed group, not as the effective government ruling Afghanistan, as is the case now. While organizations are permitted to request an exemption from the applicability of those sanctions, this exemption does not specifically concern humanitarian action, the application process can be lengthy and may not be successful. It also does not mitigate the risk under other legal requirements, such as Canadian charities law and the *Canadian Criminal Code*.

At this crucial moment when Afghanistan as the country is on the verge of collapse, with millions of lives at stake, we welcome the passing of UN' Security Council *Resolution 2615* (2021) which provides a

humanitarian carveout for sanctions against the Taliban and designated individuals and entities. The new Resolution clarifies “humanitarian assistance and other activities that support basic human needs in Afghanistan” are not considered a violation of the UN Security Council’s previous Resolutions on Taliban related sanctions and, furthermore that “the processing and payment of funds, other financial assets or economic resources, and the provision of goods and services necessary to ensure the timely delivery of such assistance or to support such activities are permitted”.

In the wake of the adoption of this resolution, other governments with similar legal structures to Canada have updated their regulations to reflect the Security Council’s resolution and created humanitarian carveouts to their sanctions governing frameworks. These actions by the United States, the United Kingdom, and Australia, among others, have enabled organizations to restart humanitarian aid to Afghanistan. We observe that clarification has not occurred yet in the context of Canada.

### Recommendations with regard to the Sanctions Regime

#### *Short-Term*

- 1. Specific to Afghanistan, where a sanctions regime currently exists that makes action impermissible, we ask that Canada urgently take the additional steps toward the domestic implementation of this Resolution, which would rescind some of the obstacles currently existing under Canadian law regarding the provision of humanitarian aid to Afghanistan.**

This could be accomplished by the lifting of the current sanction measures implementing the new Security Council Resolution through its translation and integration in Canadian law, through modification of sanction regulations or other appropriate clarifications. This is on the basis that resolutions adopted by the Security Council acting under Chapter VII of the *UN Charter* 1 UNTS XVI, are considered binding to Canada and to all member States of the UN, in accordance with Article 25 of the said Charter which declares that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. Other Member States such as Australia and the U.S. have already taken steps to modify their domestic sanction regimes to reflect the UN Security Council’s carve-out for humanitarian aid in Afghanistan.<sup>1</sup>

#### *Express Carve Outs in the Short and Long Term (for future contexts)*

- 2. Informed by our understanding of other jurisdictions and based on our knowledge of humanitarian carve outs already existing in other Canadian sanction regimes, we respectfully**

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<sup>1</sup> Although Member States are not required to report to the UNSC on domestic implementation of the Regulation until 31 March 2022, and thus no official record yet exists of how many Member States have already domestically codified the Resolution provisions, several countries have publicized the steps they have taken towards adoption. For example, the Australian government issued a statement on January 11, 2021 to state the Australian Department of Foreign Affairs and Trade would immediately implement Operative paragraph 1 of Resolution 2615 while their domestic sanction regulations is being updated. On December 22, 2021, the United States Department of Treasury’s Office of Foreign Assets Control issued three General Licenses the day after the UNSC’s Resolution was passed to facilitate the flow of financial resources for humanitarian assistance and other support for the Afghan people in Afghanistan. Finally, the United Kingdom recently revised their sanctions regulations to create an exception for humanitarian assistance and other activities to support basic human needs in Afghanistan.

**further suggest that sanction regulations be revised to include an express exclusion of humanitarian activities.**

Non-applicability clauses are a well-established and uncontroversial feature within other existing sanctions-related regulations in Canada, including those applying to Burma (Myanmar) and to Iran. Some of the existing provisions include descriptions of the type of humanitarian activities excluded, while others focus on which types of organizations are excluded from the application of the sanction regime.<sup>2</sup> In many of these other sanction regimes, actions by the Red Cross and Red Crescent Movement are expressly carved out as permissible.

In the context of sanctions applying to Afghanistan, this express exclusion could be accomplished by a revision to the sanction regulation applicable to the Taliban (*Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da'esh) and Al-Qaida*) to include a stand-alone provision on the non-applicability of the ban on dealing with the Taliban or persons or entities associated with the Taliban where those dealings are ancillary to the provision of humanitarian aid.

The following type of language could be considered to accomplish this:

*Section X – Non-Application*

*Section 2 does not apply to any activity, or the provision or acquisition of financial services in relation to an activity by any international organizations with diplomatic status, with any United Nations agencies, with any member of the International Red Cross and Red Crescent Movement, or with any registered Canadian non-governmental organization which directly or indirectly engages with the Taliban or a person or entity associated with the Taliban, if that activity or financial service has as its purpose (i) the safeguarding of human life, (ii) disaster relief, or (iii) the provision of food, medicine and medical supplies.*

For further clarity and express permissibly the government could consider also including an exception for the provision of aid in the domain of other crucial services, such as education and activities that support sustainable development assistance, like improvements in water and sanitation services.

**Given the complex situation in Afghanistan both of the above noted solutions implemented in tandem would signal clear permissibility and give express comfort for humanitarian actors. The specific carve outs in forward looking sanctions could be explored as a solution for further contexts.**

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<sup>2</sup> In terms of oversight and ensuring activities are provided for the purpose for which they were given, our submission is that activities of Canadian charities are already subject to close oversight by the Canada Revenue Agency, and other regulatory bodies, for example. We believe other existing regulatory frameworks can support accountability for use of funds for exclusively humanitarian purposes.

## **B. The Lack of Certainty and Chilling effect of Anti-Terrorism provisions in the *Criminal Code* and the Counter-Terrorism Regime**

The Canadian Red Cross is deeply concerned that fear of exposure to criminal liability is having a chilling effect on organizations who have the experience and resources to provide humanitarian assistance in Afghanistan. Anti-terrorism legislation, particularly provisions in the *Criminal Code* and mirroring provisions in several finance-related regulations, arguably pose organizational and individual risks of criminal charges for individuals with the expertise to provide life-saving support to those in critical need. Where the intent is not to prevent humanitarian assistance, we urge the government to take short-term steps to provide clarification and reassurance to humanitarian organizations providing aid and, in the longer term, if required to revise the vague and broad provisions in Title II.1 of the *Criminal Code* with an express carve out for humanitarian action. In particular, the concept of ‘indirectly’ contributing to acts of a terrorist group and lack of interpretive case law leaves humanitarian actors responsible for interpreting what is or is not permissible.

It is our view that anti-terrorism measures were originally developed to address infrastructures supporting terrorist activities, not to create barriers to legitimate humanitarian organizations providing assistance to those in need.<sup>3</sup>

With this core principle in mind, it is crucial that the revision to sanctions regulation described above is complemented with much-needed clarification on the non-applicability of anti-terrorism measures to humanitarian activities. In order to safeguard humanitarian service provision, and where ambiguity exists, a humanitarian carveout is needed within the *Criminal Code* and related finance legal frameworks to exclude actions taken by Canadian non-governmental organizations engaged in the delivery of life sustaining aid.

The Canadian Red Cross urges the government to consider a holistic revision of the *Criminal Code*’s Title II.1 to make it more tailored to the purpose of addressing and preventing the threat of terrorism. However, we especially note Section 83.03 as particularly problematic in the context of humanitarian aid due to its overly broad language and its lack of a *mens rea* element in these provisions, unlike other provisions that require someone “knowingly” or with “purpose” take a specific action to support terrorism. In addition, the CRC notes that the prohibitions in Section 83.18 (1) to prohibit “participating and contributing” to activities intended to enhance the ability of terrorist groups to facilitate or carry out harmful acts is extremely broad and includes provision of training, provision of skills for the benefit of, at the direction of or in association with a terrorist group. The vague wording of this section and lack of interpretive case law, that could have provided much-needed clarity, points to the need for a specific humanitarian carve out. The breadth of the provisions at issue and arguably, in some interpretations, the kind of activities that could fall within their scope is not well defined and so could arguably include humanitarian assistance.

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<sup>3</sup> First articulated and codified at the international level through the 1999 *International Convention for the Suppression of Terrorist Financing* (the Convention), the development of legal frameworks to prevent and punish financing and activities supporting terrorism were never intended to apply to humanitarian actions that provide life-sustaining assistance to the world’s most marginalized populations. Furthermore, foundational documents like the Convention and UNSCR 1624 (2005) were clear that anti-terrorism instruments must comply with core international law, including international humanitarian law. As a member of the Red Cross and Red Crescent Movement, the Red Cross highlights the need for all signatories to the Geneva Conventions to respect and support adherence to IHL principles, which include the unimpeded provision of humanitarian assistance in situations of conflict.

## Recommendation with regard to Anti-Terrorism Provisions

Where humanitarian action is intended to be supported, the Canadian Red Cross urges the government to take steps to clarify and provide much needed certainty to humanitarian organizations who are poised to provide aid in Afghanistan.

### *Short Term*

1. **Provide assurances to facilitate humanitarian aid.** Solutions and tactics have been discussed in various fora such as communication in pre-budget submissions, memoranda of understanding and other manner of layering on top of the existing regulation. The Canadian Red Cross respectfully defers to the government on the best articulation and form for any short-term interventions, but would suggest that, in substance, a successful solution would provide clarity and reassurance to humanitarian actors and may include content akin to the suggested language reflected in the following:

*The provisions of Title II.1 of the Criminal Code and finance laws related to terrorism are not intended to apply to and will not be enforced against Canadian non-governmental organizations providing humanitarian aid in Afghanistan nor against their personnel carrying out their duties to support and provide that assistance.*

### *Long Term and for Future Crisis*

2. **In the longer-term, alongside many of the other humanitarian actors, where it is considered that the *Criminal Code* prohibits life-saving humanitarian action, we urge the government to revise the anti-terrorism provisions in the *Criminal Code* and provisions under Canadian finance laws to make their provision more tailored and specific to the types of activities and context that constitute support of terrorist entities, as described above.**

These revisions could ensure that Canada's anti-terrorism provisions are focused on those measures that anti-terrorism experts have determined are needed to address the issue in a proportionate and balanced manner. To accomplish this, based on principles again, a successful change could consider an express exemption and/or carve out within the *Criminal Code*'s Title II.1 "Terrorism" to exclude the provision of neutral, impartial humanitarian action. For example, the language found in the 2017 EU directive on Combating Terrorism, which acknowledges that what is compliant with international law including IHL, is not considered to be advancing terrorism. As this issue is broader than IHL, considerations should also be made for allowing for charitable or humanitarian action.

Further, we are of the view that this could be supported by the inclusion and consideration of provisions contained in international law, including the delivery of neutral, impartial, and independent humanitarian assistance, in the interpretation of domestic legislation. This is in recognition of the ongoing, critical humanitarian needs in countries impacted by sanction regimes and counter-terrorism measures, particularly as it relates to the alarming humanitarian crisis in Afghanistan. It is also in recognition of and in line with a series of Security Council's resolutions adopted since 2001 recalling the requirement of all United Nations' Member States to ensure that any measures taken to counter terrorism comply with all their obligations under international

law, in particular international humanitarian law, and reiterating the need to consider potential effect that the measures taken may have on principled humanitarian activities that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.<sup>4</sup>

**We thank the Committee and the Government of Canada for their review of and interest in this important issue set, particularly as it relates to the pressing need for humanitarian assistance in Afghanistan.**

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<sup>4</sup> See: United Nations, Security Council. Doc. Off. S/2020/731 (21 July 2020), *Annex: Framework document for Counter-Terrorism Committee visits to Member States aimed at monitoring, promoting and facilitating the implementation of Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2396 (2017), 2462 (2019) and 2482 (2019) and other relevant Council resolutions*, online : <<https://undocs.org/en/S/2020/731>>, at pp. 5, 10 and 11.