

## **Submission to the Special Committee on Afghanistan March 2022**

### **Introduction**

During the worst of the fighting and since 15 August 2021, MSF has continued to deliver medical services free of charge in five provinces in Afghanistan. In 2021, MSF ran its activities with 2,350 Afghan and 75 international staff and an allocated budget of \$46.7 million. We rely solely on private donations and do not accept funding from governments for our work in Afghanistan.

MSF teams in Helmand and Herat have been treating high numbers of patients for months, and hospital departments are frequently working above their capacity. This is likely due to a combination of factors, including: people's widespread health needs; the improved security situation, which allows patients to travel to seek healthcare; and the weakness of the Afghan health system, which has long been reliant on international aid and was badly impacted by a drastic reduction of funding in 2021.

The freezing of the assets of the Afghan Central Bank – a financial measure taken against the new government – and the withdrawal of development and other funding to Afghanistan has contributed to an ongoing banking and liquidity crisis in the country that is making it challenging for MSF and other actors to maintain, and even more so to expand, medical and humanitarian operations in the country. The Afghan health system has been under-funded, under-staffed and dysfunctional for years. Since the change in government, many international donors such as the World Bank, USAID and the EU have suspended their funding for a range of activities in Afghanistan. Given that the health service was dependent on foreign funding, this exacerbated the systemic problems in the Afghan health system, leading to reduced options for people in need of healthcare as some facilities are closed or lack medicines. Although, funding has been restored for some facilities for a short period, there is no indication about what will happen next, and it still leaves the health system with far fewer funds than before and will not improve a health system that was already failing to meet people's needs. The socio-economic crisis is making food unaffordable for many people in Afghanistan.

The ripple effect of pre-existing sanctions and the recent financial measures against Afghanistan's new *de facto* government is being deeply felt nationwide. The country faces near economic and institutional collapse, including an inability to provide most basic services and pay civil servant salaries. The banking sector is paralyzed, which bars people from accessing their savings and makes it harder for organizations providing healthcare, like MSF, to function. Financial transactions and cash flows to and across Afghanistan must be urgently re-established. People's livelihoods, but also the capacity of the healthcare system, and of health actors like MSF, to cover the running and salary costs of hospitals and clinics, hinge on this. The Afghan currency has devalued significantly, market prices are increasing, and many people are unable to afford necessities such as food.

It is difficult to provide a full picture of the situation countrywide, but MSF teams are seeing large numbers of malnourished children in its feeding centers in Herat and Helmand provinces. In recent months, both projects have consistently had greater numbers of admissions than beds available.

Many of the factors that cause malnutrition remain. The economic crisis means that many people struggle to afford sufficient food, which was made scarce by last year's drought, as well as the conflict and subsequent displacement, with the result that people had fewer reserves to last them over the winter. At the same time, the rise in numbers of malnourished children coming to our facilities may be related to easier access due to the improved security situation.

### **Recommendations Summary**

Canada's own domestic legislation – specifically Section 83 of the *Criminal Code* and the *Anti-Terrorism Act, 2001* – makes no specific exemptions for humanitarian organizations, and has been identified as a barrier to scaling-up Canadian humanitarian responses and funding in Afghanistan. Canadian domestic legislation presents larger risks to impartial humanitarian organizations beyond Afghanistan that Canadian legislators should fix. This submission to the Special Committee therefore focuses on this aspect of the Afghanistan crisis and the implications of Canadian counterterrorism and sanctions legislation on humanitarian assistance more broadly, specifically recommending that:

1. Canada should ensure that its counterterrorism and sanctions measures do not adversely affect humanitarian assistance, including clear reference and written guidance to all concerned parties (including financial institutions, law enforcement, and others) that counterterrorism and sanctions measures are not intended to have adverse effects on the civilian population, and that they comply with protections afforded to impartial humanitarian organizations and their personnel, and civilians, under international humanitarian law (IHL). *(Relevant international instruments and language are provided below to ensure Canadian laws are updated to reflect current international consensus and language to which Canada has already agreed.)*
2. Canada should introduce permanent and well-framed humanitarian exemptions into the *Criminal Code* provisions that concern counterterrorism, specifically Section 83, as well as the *United Nations Act* and the *Special Economic Measures Act*, to comply with IHL, clearly applicable to all impartial humanitarian organizations – including MSF – and eliminate the Canadian legal and administrative barriers and risks that impartial humanitarian organizations face in operating in these environments.
3. In future legislation, notably counterterrorism and sanctions-related legislation, Canada must include comprehensive humanitarian exemptions that create a carve-out or exemption from the outset for impartial humanitarian organizations, rather than case-by-case authorization procedures which lead to unnecessary and unacceptable delays and administrative confusion (e.g. from financial institutions), compromising the timely delivery of urgent humanitarian assistance to people in crisis – for example, current sanctions laws include the possibility of humanitarian organizations being issued a permit upon request, but this is problematic as the application and issuance of such a permit can cause delays as it is not automatic.
4. Any revisions to Canadian counterterrorism and sanctions-related legislation should, as much as possible, retain the language used in the recent United Nations Security Council (UNSC) resolutions.

## Canadian Counterterrorism Legislation

It has been 50 years since Médecins Sans Frontières/Doctors Without Borders (MSF) launched its medical humanitarian work and 20 years since the start of the ‘Global War on Terror’. In those 20 years, counterterrorism has come to define military operations far beyond those launched by the United States (US) in response to the attacks of September 11, 2001. The US’s ‘war on terror’ paved the way for other states to launch their own battles against domestic and transnational enemies, without the same constraints as in a conventional armed conflict between states. While this may not have fundamentally changed the nature of warfare, it has changed the way it is justified. Today, the conflicts in Ethiopia, Yemen, Syria, Iraq, Nigeria, Mozambique, Mali and countless other places are defined as ‘battles against terrorism’. The trend seems set to continue, as States find comfort in the expansive powers offered by fighting an enemy designated as ‘terrorist’.

Canada’s *Criminal Code* prohibits activities such as the financing of terrorism, dealing with terrorist property, and providing “material support” for terrorist groups and/or terrorist activity. However, while at face value several of these provisions may be interpreted as extending to criminalize the activities of impartial humanitarian actors, many contain an explicit reference to the intention or purpose behind the act that must be proven for an individual to be found guilty – impartial humanitarian organizations engaged in humanitarian assistance consistent with IHL clearly are not engaged in such activities, with this intention or purpose. Testimony from other impartial humanitarian organizations<sup>1</sup> indicates that, at least as it pertains to the use of Canadian government funds in Afghanistan, the Canadian government’s interpretation of the relevant counterterrorism provisions of the *Criminal Code* appears to be shaping the advice given to impartial humanitarian organizations, consequently leading them to reduce their humanitarian activities.

MSF encourages this Special Committee to undertake a specific review of Section 83 of the *Criminal Code*, examining the provisions that could expose humanitarian workers and humanitarian organizations to potential criminal liability, or that could, without a specific humanitarian exemption, result in the face-value interpretation of these provisions as suggesting to governments (including government funders, police, border officials, and others) and other entities (e.g. banks) that such a risk exists. We further note that such a face-value interpretation of the law does not account for the explicit references to the intention or purpose behind the criminalized acts, which must be proven for an individual to be found guilty – none of which captures humanitarian assistance – and which are contained in, for example, Sections 83.02, 83.03(a), 83.04(a), 83.04(b), 83.18, 83.181, 83.21, 83.23(1), and 83.23(2).

Beyond these domestic laws, the provision of impartial humanitarian assistance<sup>2</sup> is a matter of

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<sup>1</sup>Special Committee on Afghanistan, 44<sup>th</sup> Parl, 1st session, No 3 (07 February 2022) at

<https://www.ourcommons.ca/DocumentViewer/en/44-1/AFGH/meeting-3/evidence#Int-11501378>

<sup>2</sup> The provision of impartial humanitarian assistance is a concept that is well defined in international law, notably in the commentaries of the Geneva Conventions. See for example, the [2020 commentaries to article 9 of the Geneva Convention III at para. 1323](#): “In the context of an armed conflict, ‘humanitarian activities’ are those that seek to preserve the lives, security, dignity, and mental and physical well-being of persons affected by the conflict, or to restore that well-being if it has been infringed upon. These activities must be concerned with human beings as such. Thus, as also informed by the requirement of ‘impartiality’ (see paras 1343–1345), humanitarian activities and the way in which they are conducted must not be affected by any political or military consideration, or by any consideration related to the person’s past behaviour, including behaviour which is potentially punishable on the basis of criminal or disciplinary norms. Humanitarian activities seek to preserve human life, security, dignity and physical and mental well-being with no other motive than to accomplish this objective. Lastly, those offering to undertake humanitarian activities focus solely on the

customary international law – a set of rules that come from a general practice accepted as law and which exist independent of treaty law, and which become a part of Canada’s common law unless the Canadian government specifically derogates from it. Canada has not done this. We further note that the provision of impartial humanitarian assistance is already well-defined in international law, notably in the commentaries of the Geneva Conventions.

MSF is an international medical and humanitarian organization that has provided exclusively independent, impartial and neutral humanitarian assistance since 1971 in a manner consistent with the principles and rules of IHL and medical ethics. MSF works to save lives, alleviate suffering, and restore human dignity – actions that clearly fall outside of the scope of the legislative intent of the relevant Canadian *Criminal Code* provisions, yet are not explicitly exempted from them either. Herein lies the problem that Canadian legislators must urgently fix to ensure there is no ambiguity in the interpretation of the *Criminal Code*, and to ensure that Canada’s laws reflect recent international developments in the protection of humanitarian assistance. The content of the Criminal Code must evolve to better align with this international consensus and include a humanitarian exemption that is consistent with recent UN language.

The latest United Nations resolutions (see [Resolution 2462 \(March 2019\)](#), para. 24<sup>3</sup> and [Resolution 2482 \(July 2019\)](#), para. 16,<sup>4</sup> [Resolution 2593 \(August 2021\)](#), para. 3,<sup>5</sup> [Resolution 2582 \(June 2021\)](#), para. 4,<sup>6</sup> [Resolution 2590 \(August 2021\)](#), preamble<sup>7</sup> and [Resolution 2615 \(December 2021\)](#), para. 1<sup>8</sup>) as well as the parliamentary work of certain countries have made it possible to refine the drafting of a humanitarian exemption to Canada’s counterterrorism legislation. Security Council resolutions provide exemptions for humanitarian activities and direct States to ensure that their counterterrorism

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*needs of the persons affected by an armed conflict, irrespective of the rights which these persons may additionally have on the basis of applicable human rights law.”*

<sup>3</sup> Para. 24. ***Urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law;***

<sup>4</sup> Para. 16. ***Urges Member States to ensure that all measures taken to counter terrorism comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, and urges states to take into account the potential effects of counterterrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law;***

<sup>5</sup> Para. 3. ***Calls for strengthened efforts to provide humanitarian assistance to Afghanistan, calls on all parties to allow full, safe, and unhindered access for the United Nations, its specialized agencies and implementing partners, and all humanitarian actors engaged in humanitarian relief activity, including with respect to internally displaced persons, to ensure that humanitarian assistance reaches all those in need, calls on all donors and international humanitarian actors to provide humanitarian assistance to Afghanistan and major Afghan refugee-hosting countries, and underlines that all parties must respect their obligations under international humanitarian law in all circumstances, including those related to the protection of civilians.***

<sup>6</sup> Para. 4. ***Demands that States ensure that all measures taken by them to implement this resolution comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, as applicable;***

<sup>7</sup> ***Stressing that the measures imposed by this resolution are not intended to have adverse humanitarian consequences for the civilian population of Mali.***

<sup>8</sup> ***Decides that humanitarian assistance and other activities that support basic human needs in Afghanistan are not a violation of ... and that the processing and payment of funds, other financial assets ..., and the provision of goods and services necessary to ensure the timely delivery of such assistance or to support such activities are permitted, strongly encourages providers relying on this paragraph to use reasonable efforts to minimize the accrual of any benefits, whether as a result of direct provision or diversion, to individuals or entities designated on the 1988 Sanctions List, and further decides to review the implementation of this provision after a period of one year.***

measures do not adversely affect humanitarian action.

### **Humanitarian Exemptions to Canadian Counterterrorism and sanctions Legislation**

The interest of including a humanitarian exemption is to remove the ambiguity on the protected status of humanitarian activities carried out in a context of armed conflict (international or non-international) as well as to remove the risks (for example, of the freezing of financial assets, of banks refusing to do business with humanitarian organizations, or the detention or arrest of humanitarian workers returning from counterterrorism-relevant contexts) that impartial humanitarian organizations and workers could face, as a result of government or federally-regulated entities (e.g. banks) interpreting the current provisions of the *Criminal Code* and sanctions legislation.<sup>9</sup>

The need for such an exemption is not unique to Afghanistan, and in fact the potential for charities to be inadvertently targeted by the *Anti-Terrorism Act, 2001*, was specifically discussed during the Parliamentary debates around it, where Members of Parliament specifically discussed whether the law would create “charity chill” by inadvertently criminalizing the activities of charities, as well as the need for humanitarian exemptions and the challenge of the current law to identify which acts are criminal and which are not – including humanitarian assistance.<sup>10</sup> Although this was discussed, the government maintained that no exemption was necessary. For example, Hon. Jim Peterson stated at Committee: “In the case where a charity is supplying food to refugees in Afghanistan, I have no doubt the CCRA would tell you that is not financing a terrorist activity.”<sup>11</sup> Despite these assertions and while other global risks of Canadian legislation remain for impartial humanitarian organizations, the current reality of Canadian humanitarian organizations being unable to operate in Afghanistan suggests that such a humanitarian exemption is in fact necessary to provide adequate protection for humanitarian assistance.

It is MSF’s recommendation that a humanitarian exemption is needed to Canadian counterterrorism legislation, and that such an exemption should address the full set of relevant provisions in the *Criminal Code* Section 83 and any future additions to the *Criminal Code* that may be made. Specifically, we believe that legal risks remain for humanitarian organizations in Sections 83.03(1)(b), 83.08, and 83.19, though proposed humanitarian exemptions should be sufficiently broad to clarify that all activities of a humanitarian nature – such as those medical activities provided by MSF to save lives, alleviate suffering, and restore human dignity – are not considered as criminal acts.

Some countries have inserted this type of humanitarian exemption into their legislation, and it should be emphasized that this does not prevent countries from prosecuting individuals who are alleged perpetrators of terrorist acts that fall outside of humanitarian activities, since these exemptions only apply to humanitarian activities undertaken in armed conflict, in accordance with IHL. Examples of relevant exemptions include:

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<sup>9</sup> Notably the sanctions imposed under the *United Nations Act*, the *Special Economic Measures Act* and their ensuing regulations which do not contain a humanitarian exemption for all impartial humanitarian organisations.

<sup>10</sup> *Standing Committee on Justice and Human Rights*, 37th Parl, 1st session, No 35 (25 October 2001)

<sup>11</sup> *ibid*

## Australia

### Division 102.8, [Criminal Code Act 1995](#)

#### Associating with terrorist organisation (adopted in 2014)

[...] (4) This section does not apply if: [...]

(c) the association is only for the purpose of providing aid of a humanitarian nature; or [...]

### Section 119.2, [Criminal Code Act 1995](#) (adopted in 2014)

#### Entering, or remaining in, declared areas

[...] *Exception—entering or remaining solely for legitimate purposes*

(3) Subsection (1) does not apply if the person enters, or remains in, the area solely for one or more of the following purposes:

(a) providing aid of a humanitarian nature; [...]

## United Kingdom

### Section 58B, [Counter-Terrorism and Border Security Act 2019](#) (adopted in 2019)

#### Entering or remaining in a designated area

(4) A person does not commit an offence under this section of entering, or remaining in, a designated area if—

- a) the person enters, or remains in, a designated area involuntarily, or
- b) the person enters, or remains in, a designated area for or in connection with one or more of the purposes mentioned in subsection (5).

(5) The purposes are—

- a) providing aid of a humanitarian nature; [...]

## United Kingdom

### [The Afghanistan \(Sanctions\) \(EU Exit\) \(Amendment\) Regulations 2022](#) (adopted in 2022)

#### Finance: exception for humanitarian assistance and other activities

**25A.**—(1) The prohibitions in regulations 8 to 12 (asset-freeze etc.) are not contravened by a person (“P”) carrying out a relevant activity which is necessary—

(a) to ensure the timely delivery of humanitarian assistance in Afghanistan, or

(b) to carry out other activities that support basic human needs in Afghanistan,

provided that P believes that carrying out the relevant activity is so necessary and there is no reasonable cause for P to suspect otherwise.

(2) For the purposes of paragraph (1), “relevant activity” means any activity which would, in the absence of this regulation, contravene the prohibitions in regulations 8 to 12.”

## Switzerland

### Article 260 <sup>quinquies 280</sup>, [Penal Code](#) (adopted in 2020)

#### Financing terrorism

[...] 4 Paragraph 1 does not apply if the financing is intended to support acts that do not violate the rules of international law on the conduct of armed conflicts.

## Chad

### Article 1, [Loi N° 003/PR/2020 Portant Répression des Actes de Terrorisme en République du Tchad](#) (adopted in 2020)

[...] 3. Aucune disposition de la présente loi ne peut être interprétée comme dérogeant au droit international humanitaire et au droit international des droits de l'homme.

4. Les activités à caractère exclusivement humanitaire et impartial menées par les organisations humanitaires neutres et impartiales sont exclues du champ d'application de la présente loi.[...]

## Ethiopia

### Article 9, [Proclamation No. 1176/2020 Prevention and Suppression of Terrorism Crimes](#) (adopted in 2020)

#### Rendering support

5/ Notwithstanding to Sub Article 1 to 4 of this Article a humanitarian aid given by Organizations engaged in humanitarian activities or a support made by a person who has legal duty to support other is not punishable for the support made only to undertake function and duty.

Drawing inspiration from these clauses, MSF was able to draft five examples of humanitarian exemptions that could be incorporated into the Criminal code and other counterterrorism, sanctions related legislation:

**Example 1:** Humanitarian assistance and other activities that support basic human needs carried out by impartial humanitarian organizations are excluded from the scope of this [provision/law/section].

**Example 2:** Excluded from the scope of [terrorist offenses] are the activities of impartial humanitarian organizations carried out in accordance with the applicable rules of international humanitarian law and defined in Articles 3(2) and 9 common to the Geneva Conventions I to III and Articles 3(2) and 10 of the Geneva Convention IV of August 12, 1949.

**Example 3:** For greater clarity, [terrorist offenses] do not include acts or omissions by impartial humanitarian organizations committed during an armed conflict that are not inconsistent with customary or treaty international law applicable to the conflict.

**Example 4:** This [provision/law/section] should not be implemented in a manner that criminalizes, impedes, limits, or otherwise restricts, the exclusively humanitarian activities of impartial humanitarian actors, conducted in accordance with international humanitarian law.

**Example 5:** These provisions are not intended to have adverse effect on the civilian population nor be in contradiction to the spirit of international humanitarian law.

The wording of the humanitarian exemptions proposed by MSF is consistent with the jurisprudential interpretation of the Supreme Court of Canada regarding the terrorist offences of the Criminal Code in Canada. For example, see the Supreme Court of Canada case, in *R. v. Khawaja*, 2012 (see paras 44 and 45).

[44] The Terrorism section of the *Criminal Code*, like any statutory provision, must be interpreted with regard to its legislative purpose. **That purpose is “to provide means by which terrorism may be prosecuted and prevented”** (*Application under s. 83.28 of the Criminal Code (Re)*, at para. 39) — not to punish individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to a terrorist activity.

[45] This purpose commands a high *mens rea* threshold. To be convicted, an individual must not only participate in or contribute to a terrorist activity “*knowingly*”, his or her actions must also be

undertaken “for the purpose” of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The use of the words “for the purpose of” in s. 83.18 may be interpreted as requiring a “higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity”: K. Roach, “Terrorism Offences and the Charter: A Comment on R. v. Khawaja” (2007), 11 *Can. Crim. L.R.* 271, at p. 285.

Finally, MSF’s proposed language is coherent with the diplomatic action Canada is undertaking as a member of the Good Humanitarian Donorship Group. This Group’s current initiatives include a reaffirmation of IHL, humanitarian exemptions and risk sharing (as opposed to risk transferal to the humanitarian actor, i.e. MSF).

### **Conclusion**

We thank the Special Committee for their ongoing work on this topic, and want to re-iterate our conclusion that although sanctions and counterterrorism legislation are being discussed by this Special Committee in relation to the provision of humanitarian assistance provided to the people of Afghanistan, any proposed exemptions or amendments must address the root cause of these problems in the *Criminal Code* as well as in other relevant counterterrorism and sanctions regulations and be broadly applicable to humanitarian assistance provided everywhere and not focus only on Afghanistan.

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