



UNITED NATIONS
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Centre for Policy Research

UN Sanctions and Humanitarian Action
Policy Memo 3/4

Humanitarian Exemptions in UN Sanctions Regimes

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March 2022



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Foreign Affairs FDFA

This series of policy briefs was commissioned by the Swiss Federal Department of Foreign Affairs as part of the larger Swiss-supported project: Developing Guidance for Improved Implementation: UN Conflict-Related Sanctions and Humanitarian Action. All opinions expressed in the report are those of the authors alone.

The UN Sanctions and Humanitarian Action (UNSHA) project team would like to thank the Swiss Federal Department of Foreign Affairs for supporting and financing this research. The team would also like to acknowledge and thank the members of the UNSHA Advisory Board for their support, guidance, and advice provided throughout the project.

ISBN: 978-92-808-6559-2 © United Nations University, 2022.

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Citation: Sophie Huvé and Dr Rebecca Brubaker, "Humanitarian Exemptions in UN Sanctions Regimes," *UN Sanctions and Humanitarian Action Policy Brief 3* (2022).

Overview

The purpose of this thematic brief is to:

- Define humanitarian exemptions as they exist under United Nations (UN) sanctions.
- Clarify some areas of confusion surrounding the notion of “humanitarian exemption”.
- Provide impartial humanitarian actors with a descriptive analysis of the existing UN exemptions and discuss some of the advantages and limitations of the current models.

Terminological confusion: What exactly is a humanitarian exemption? What is the difference between “exemption”, “exception”, “derogation”, or “carve-out”? There is considerable confusion around these terms, both procedurally and substantially. The Security Council, the European Union, States and even the academic sector all employ the terms differently. Indeed, inconsistencies were even noted between the terms employed in the English and French text of some Security Council sanctions resolutions.¹ This inconsistency is problematic as it impedes effective advocacy, leads to confusion among humanitarian actors, and frustrates sanctions communities, who receive many different briefings and recommendations from humanitarians. Clarity on terms and substance is essential for sanctions and impartial humanitarian actors to enter a productive and international humanitarian law (IHL)-compliant dialogue on humanitarian safeguards in sanctions regimes.²

Interest of humanitarian and sanctions communities: The humanitarian community’s interest in exemptions is three-fold: to understand the extent of their obligations under the sanctions regimes; to facilitate international procurement, import, and transit; and to avoid instances of non-compliance. The interests of the sanctions community are similarly focused on avoidance of non-compliance and preventing the unintended disruption of the activities of impartial humanitarian organizations³ that are permitted under IHL. These two communities differ, however, in terms of how tightly they draw the net around appropriate actors and activities, as well as in the procedures and authorities they think are best placed for achieving these two – at times perceived as competing – goals.

“Exemption” as defined by the UN: According to Security Council practice, an “exemption” is a deviation from the rule imposed by the UN sanctions regime to limit the scope of a sanctions measure by specifying to which activities or actors the prohibitions *shall not apply*, or which activities or actors shall be *exempted* from the sanctions measure. As such, the term designates a generic category encompassing “standing” humanitarian exemptions and also exemptions requiring either prior approval or notification.⁴ In this context, an “exemption request” (also known as exception/*ad hoc* derogation) refers to the possible exclusion of activities, goods, or actors from the sanctions measure for a precise duration and/or for a particular humanitarian purpose following an approval from the competent authority.

Substantive and procedural aspects

“Exemptions” have a substantive aspect (the types of acts, transactions, or activities permitted, and their beneficiaries) and a procedural aspect (the process for obtaining or activating the exemption).

Substantive aspect of exemptions: The substantial purpose of an “exemption” is to permit an activity that otherwise would have been covered and prohibited by a sanctions measure. Thus, exemptions can be enumerated for any type of sanctions measures (e.g. assets freeze, travel ban, arms embargoes) and can cover specific activities, items, actors, areas, timeframes or even conditions and circumstances. For example, exemptions can cover Member States, private sector actors, peacekeeping missions, authorized foreign troops, sanctioned actors, and, of course, impartial humanitarian actors.

The term “humanitarian exemption” is used to describe two very different concepts. First, the exemptions based on prior approval for the benefit of sanctioned individuals, and second, the exemptions granted to impartial humanitarian

actors. Both categories rely on humanitarian grounds and are often indistinctly referred to as humanitarian exemptions, though should be thought of as different categories.

1. Exemptions for sanctioned actors: The most common motives for this type of exemptions based on prior approval, appearing in 12 of the 14 UN sanctions regimes, are related to exemptions for listed individuals and entities, i.e. sanctioned actors. These exemptions allow States to temporarily and exceptionally lift sanctions restrictions after a request by a Member State is approved by the relevant Sanctions Committee, for the benefit of designated individuals and entities (and not for civilian populations in need). Yet, because they are based on humanitarian considerations vis-a-vis targeted individuals and entities (e.g., foodstuff and medical treatment), these exemptions are often referred to in the sanctions community as “humanitarian exemptions.” This is not a term of art and does not have a distinct legal meaning. Indeed, they are distinct from exemptions under IHL adopted for humanitarian actors carrying out humanitarian activities.
2. Exemptions for impartial humanitarian actors: These are designed to carve out a space in sanctions regimes for impartial humanitarian actors and/or impartial humanitarian activities (as already foreseen and regulated by IHL). They either specify that a particular sanctions measure does not apply to impartial humanitarian actors / impartial humanitarian activities (e.g. in Somalia, as described below) or that humanitarian actors can request the relevant Sanctions Committee to officially exempt their activities in order to facilitate their work in a context under sanctions (e.g. the Democratic People’s Republic of Korea (DPRK), Yemen, as described below).

Procedural aspect of exemptions: Not all exemptions follow the same procedure. There are three main types that can be distinguished based on Security Council practice:

1. The first type of exemptions are **standing exemptions**, i.e. exemptions that do not require that a request or notification be submitted to a Sanctions Committee. Instead, a standing exemption is sufficient on its own to guarantee that the sanctions measures shall not apply to the beneficiaries of the exemption, without prior approval or prior notification.
2. Some exemptions require the applicant to submit an **exemption request** to the relevant Sanctions Committees. These types of exemptions (exceptions/*ad hoc* derogations) are case-by-case specific and are usually granted for a defined/specific term/duration, i.e., prior approval is needed and this approval can be granted or denied. The application for the exception must be renewed or a new one submitted for each activity.
3. Finally, some exemptions simply require an applicant to submit an **exemption notification** to the relevant Sanctions Committee in advance. However, there is no need for further approval by the relevant Sanctions Committee once the notification is received.

The submissions for both **notifications** and **requests** must contain specific information, detailed in the relevant Sanctions Committee’s guidelines. In most cases, requests or notifications cannot be directly submitted to the Sanctions Committees by impartial humanitarian organizations but through Member States or international, regional or subregional organizations.

A closer look at three UN exemption models

Model 1: Standing humanitarian exemptions

In most cases, sanctions regimes do not possess standing exemptions for humanitarian actors or activities. There are,

however, three prominent special cases of exemptions: the standing exemption on flight bans in the 1988 regime, which does not exist anymore; the standing exemption on assets freezes in the Somali regime; and the recently adopted exemption on assets freezes in the 1988 regime (see Annex 1). These provisions were designed to exempt specific impartial humanitarian organizations from explicit sanctions measures to ensure the delivery of humanitarian assistance. The assumption in these resolutions appears to be that other members of the humanitarian sector remain subject to the prohibitions until decided otherwise by the Sanctions Committee.⁵

The fact that standing exemptions are not attached to a system of case-by-case application is extremely important. For example, as of February 2021, Somalia represented a USD 1 billion humanitarian operation, with 363 operational partners and 5.9 million people in need.⁶ It would not be possible to operate in such a context and have satisfactory results if impartial humanitarian organizations were required to ask for permission each time they wished to initiate a new activity. The standing exemption model can also be helpful for reassuring States, donors, and other private actors, such as banks or procurement actors, that they are not in violation of a sanctions regime when they assist or contract with an impartial humanitarian organization operating in the specific context under sanctions. Finally, standing exemptions are reaffirming IHL rules and ensuring its respect by mitigating any potential adverse effects by clearly stating that sanctions “do not apply to” a specific set of designated impartial humanitarian organizations or those carrying humanitarian aid (depending on the sanctions regime) and that “measures are not intended to have adverse humanitarian consequences”.

However, standing exemptions, as they currently stand and from the perspective of the humanitarian community, are not necessarily a perfect solution. Even as the current gold standard among UN exemptions, leading voices in the humanitarian community argue that they fall short in an important way. As designed currently, they are limited to specific humanitarian actors only. For example, in Somalia, the Security Council resolutions refer to a narrow category of impartial humanitarian actors: the UN, its specialized agencies or programmes, humanitarian organizations having observer status with the General Assembly that provide humanitarian assistance (i.e. International Committee of the Red Cross), or their implementing partners. In practice, the Somalia exemption is interpreted to cover a wide range of organizations but is not exhaustive. In the 1988 regime, the Sanctions Committee maintained a so called “whitelist” of pre-approved humanitarian organizations. These “whitelist” exemptions can also endanger the neutrality and independence of humanitarian actors approved on the list, and the impartiality of those not “making it”.

By contrast, the newest exemption adopted in Afghanistan departs from the Somalia model. In resolution 2615 (2022), the Security Council decides that humanitarian assistance and other activities that support basic human needs in Afghanistan are not a violation of the Taliban sanctions regime asset freeze. In other words, this resolution allows *all providers of humanitarian assistance*, along with other activities that support basic human needs, to continue their humanitarian operations in Afghanistan while not being at risk of violating UN sanctions. This new model does not distinguish between specific sets of providers of humanitarian assistance, neither within the community of impartial humanitarian organizations, nor with other development organizations which are also involved in such assistance. As a result, the personal scope of this exemption is broader than in Somalia.

Model 2: Case-by-case exemptions or exemptions “upon request”

This second type of exemption requires that applicants submit a request to the relevant Sanctions Committee requesting permission to make use of an existing exemption provision. Each sanctions regime specifies the timeline and the criteria for the application. In some cases, applicants can submit requests directly to the Sanctions Committee, but in most cases applicants must apply to the Sanctions Committee via a willing Member State. Often a Sanctions Committee need not give reasons if it chooses to deny a request, although denials are rare.⁷

The latest exemptions upon request specifically tailored for impartial humanitarian actors have been introduced in two sanctions regimes – Yemen and DPRK since 2017 (see Annex 2). These are case-by-case exemptions granted by a

Sanctions Committee. Once granted, these exemptions explicitly guarantee that the humanitarian actors are exempted from the relevant sanctions measures to facilitate their work.

This model of exemption has some advantages. For example, they can facilitate the operations of impartial humanitarian actors in sanctions regimes where the sanctions measures are extensive, detailed, and complex. Nevertheless, most impartial humanitarian actors point to this model's inherent disadvantages. For example, the DPRK comprehensive exemption mechanism is complex, time consuming and must be repeated over and over. Humanitarian actors report that it is also unpredictable as there are no guarantees that a request will be granted. Thus, while the process has allowed for humanitarian access in DPRK, it is long, tedious, and may result in serious obstacles for an effective and rapid humanitarian response, and thus may not be adapted to emergency contexts.

CONCEPTUAL ISSUES BETWEEN STANDING AND UPON REQUEST EXEMPTIONS AND IHL

Through exemptions, it is the Security Council that authorizes impartial humanitarian actors to operate in armed conflict settings under a UN sanctions regime. Yet, IHL already allows, delineates, and protects the humanitarian activities of impartial humanitarian actors by imposing specific obligations on parties to the armed conflict and third States. IHL experts have advocated that, under IHL, all UN sanctions regimes should already include implicit exemptions for humanitarian action. Thus, including explicit standing exemptions, as in the case of Somalia, or exemptions upon requests, could be interpreted as indicating that, in the absence of similar exemptions, humanitarian activities could fall within the scope of sanctions measures in other UN sanctions regimes. Thus, elaborating additional exemption procedures for impartial humanitarian actors that “allow” them to operate in armed conflict contexts – let alone, setting out specific procedures to apply to when, how, and with whom they can operate – contradicts the pre-existing rights of humanitarian organizations, the obligations of parties to the armed conflict, and third States under IHL.⁸

In addition, requiring that impartial humanitarian actors seek authorizations to operate from a political body such as the Sanctions Committees, or political authorities (e.g. host Member States), can endanger the principles of impartiality, neutrality, and independence enshrined in IHL. These operational principles aim to ensure that humanitarian activities are not implemented in a politicized or instrumentalized manner (see Policy Brief 1 and 2). They work as fundamental guarantees to enable impartial humanitarian organizations' access to all those in need and to protect them against accusations of political interference, which could quickly threaten their safety and their access to vulnerable populations.

Model 3: Exemptions for notification to or information of the Sanctions Committees

A third model is the exemption simply requires that applicants send a prior notification to the relevant Sanctions Committee of their intention to make use of an existing exemption. Provided that the notification is received within a designated timeframe, the actor is then free to proceed with what could otherwise be interpreted as a proscribed action. This exemption model is mostly used for arms embargoes.

There is, however, one main limitation to this model: notifications must be transmitted through a Member State. For example, impartial humanitarian actors must pass through a Member State to notify the Democratic Republic of the Congo (DRC) Sanctions Committee when they import demining equipment or armored vehicles into the country (as described in Annex 3). The primary problem with the notification model, as the humanitarian sector perceives it, is timing. Indeed, notification must come in advance of supplying the material. Depending on the Member State, the notification process may take longer than what the impartial humanitarian organization would allow or expect for its

operations. There have been cases in which supplies arrived after notification and that caused friction within the relevant Sanctions Committees. Thus, impartial humanitarian actors need to make sure that Member States send the notification ahead of time. In practice, only a handful of impartial humanitarian organizations have a direct link with Sanctions Committees and can unofficially bypass the requirement to go through a Member State.

Nonetheless, the main advantages to this process are quite clear. First, this exemption model is available to all impartial humanitarian actors. Second, there is no need to wait for an approval once the notification is received and this removes uncertainty from the process. Third, and contrary to the two other models, this exemption is purely declaratory, i.e., does not conceptually contradict the pre-existing rights and obligations of impartial humanitarian organizations under IHL.

Remaining questions

This brief aimed to cover basic notions related to the concept of exemptions. Many questions remain:

- Can the IHL community and the Security Council come to agreed terminology to govern the intersection of sanctions and humanitarian space?
- What bodies should decide on the scope of impartial humanitarian activities in settings involving sanctions regimes?
- How can exemptions be designed to permit humanitarian operations without undue delays while still upholding the fundamental purpose of sanctions?

ANNEX 1: EXAMPLES OF STANDING EXEMPTIONS

Model	The 1988 regime and the standing exemption on flight ban	The Somalia regime and the standing exemption on asset freezes
Resolution and language	<p>In resolution 1333 (2000), the Security Council granted a humanitarian exemption to the aviation ban for specific humanitarian actors: “the Committee shall maintain a list of approved organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, including the United Nations and its agencies, governmental relief agencies providing humanitarian assistance, the International Committee of the Red Cross and non-governmental organizations as appropriate, that the prohibition imposed by paragraph 11 above shall not apply to humanitarian flights operated by, or on behalf of, organizations and governmental relief agencies on the list approved by the Committee.”</p> <p>The Committee was required to keep the list under regular review, adding new organizations, and governmental relief agencies as appropriate and removing them from the list if they were “operating, or are likely to operate, flights for other than humanitarian purposes.”</p> <p><i>This exemption is no longer in use.</i></p>	<p>Adopted in resolution 1916 (2010), the Security Council granted a humanitarian exemption to the assets freeze measure to ensure “timely delivery of urgently needed humanitarian assistance in Somalia.” This exemption is limited to specific institutions, i.e. the “United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners.”</p> <p>A humanitarian affairs coordinator is mandated to report to the Sanctions Committee about the implementation and impact of the exemption (i.e. impediments to humanitarian aid delivery, and mitigation measures in place to address politicization, and misuse and misappropriation).</p>

ANNEX 2: EXAMPLES OF EXEMPTION FOR NOTIFICATION

Model	The DRC arms embargo exemption for the Committee’s information
Resolution and language	<p>Pursuant to paragraph 3(c) of resolution 2293 (2016), the Council decided that other supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance and training, as notified in advance to the Committee in accordance with paragraph 5 of resolution 1807 (2008), were exempt from the arms embargo.</p>
Applicable to which measure	<p>This exemption applies only to the arms embargo.</p>
Which humanitarian actor?	<p>It is not limited to specific actors and is intended for all actors using non-lethal military equipment “for humanitarian or protective use.” The exemption can thus benefit humanitarian actors, diplomatic missions, UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) or the DRC Government.</p>

Which activity?	The import of supplies of non-lethal military equipment intended solely for humanitarian or protective use. For example, this would cover demining equipment as well as protection supplies like armored vehicles.
What is granted?	Acknowledgment of notification is sent back to the Member State who notified the Committee. Delays can vary.
Approval	No approval needed but prior notification process is required. Notifications are required to include specific information.
Routing path to Committee	The routing path to the Committee is through Member States, i.e. humanitarian organizations may not directly reach out to the Committee.

ANNEX 3: EXAMPLE OF CASE-BY-CASE EXEMPTION “TO FACILITATE THE WORK” OF HUMANITARIAN ACTORS

Models	DPRK regime and the comprehensive humanitarian exemption mechanism	Yemen regime and the exemption to the arms embargo
Resolution and language	Resolution 2391 (2019): “The Committee may, on a case-by-case basis, exempt any activity from the measures imposed by these resolutions if the committee determines that such an exemption is necessary to facilitate the work of such organizations in the DPRK or for any other purpose consistent with the objectives of these resolutions.”	Resolution 2511 (2020): “The Committee may, on a case-by-case basis, exempt any activity from the sanctions measures if the Committee determines that such an exemption is necessary to facilitate the work of the UN and other humanitarian organizations in Yemen or for any other purpose consistent with the objectives of these resolution.”
Context	<p>The DPRK regime is one with the highest number of measures (26), articulated around 10 resolutions shaping the regime. Because the sanctions measures grew fast and more complex, the humanitarian actors were facing increasing difficulties to bring in humanitarian aid to DPRK. The idea of avoiding adverse consequences for population, which was already there, has evolved towards a legal mandate for establishment of such a mechanism. There was a strong political call for the mechanism and the need to avoid adverse consequences.</p> <p>Direct dialogue between humanitarian actors and the DPRK Sanctions Committee are in progress behind the scenes. The Sanctions Committee was also reached out to directly by specific humanitarian actors and through the Resident Coordinator’s Office in DPRK on these issues.</p>	The exemption was introduced because of the findings of the Panel of Experts regarding specific goods like demining equipment, which were needed by humanitarian actors and yet were prevented to enter Yemen because of how the arms embargo was implemented by some States. The goal was to facilitate the activities of humanitarian actors when facing concrete blockades or difficulties, by allowing them to request an official exemption to the Sanctions Committee, making it explicit that said activity was permitted.

Applicable to which measure?	The DPRK exemption is a comprehensive humanitarian exemption mechanism. In other words, it applies to all sanctions measures existing in the DPRK regime.	From paragraph 3 of resolution 2511 (2020), the exemption could work for all sanctions measures – it does not mention the arms embargo but “any activity” from the “sanctions measures” (plural). However, the website of the Security Council on Yemen sanctions labels it as an “exemption to the targeted arms embargo,” likely because of the need to import de-mining equipment.
Which humanitarian actor?	It is not limited to specific actors and covers all international and non-governmental organizations carrying out assistance and relief activities for the benefit of the civilian population in the DPRK.	It is not limited to specific actors and covers the UN and other humanitarian organizations in Yemen.
Which activity?	“Any activity”	“Any activity”
What is granted?	9 months approval for specific projects and recommendation to consolidate all planned shipments into three shipments or less every nine months, per project, to the best extent practicable.	Not specified on the Security Council website or in the Committee Guidelines. Only used one for a UN agency importing de-mining equipment.
Approval	Prior approval and case-by-case decision. Requests must include specific information, detailed in Implementation Assistance Notice 7.	Prior approval and case-by-case decision. Requests must include specific information, specified on the Security Council website.
Routing path to Committee	Primary route is through Member State, second route through DPRK Resident Coordinator Office and third route is directly to the Committee. In practice, International Committee of the Red Cross and Médecins Sans Frontières petition directly. Implementation Assistance Notice 7 offers specific guidance on the uniform process to apply for exemptions, as well as substantive and procedural advice for Member States and actors involved in the delivery of humanitarian assistance to address exemptions	On the Security Council website, it is not specified whether the humanitarian actors must go through a State or not. It is simply written to address the request to the Committee Chair and the Committee Secretary.

References

¹ The term “exemption” in the English text becomes “derogation” in the French version. See, for example, “Resolution 1803, adopted by the Security Council at its 5848th meeting,” United Nations, 3 March 2008, S/RES/1803: para 6.

² Moreover, it should be pointed that these inconsistencies are also found outside of the UN sanctions regime where similar detrimental effects on the humanitarian space are experienced. While the aim of this Policy Brief concerns the UN sanction regime, findings made are applicable for the overall usage of the terms in UN resolutions (such as the UNGA resolutions on counter-terrorism), the EU directives and in national legislation (when it comes to the integration of international obligations within a region or a country’s law).

³ Under IHL, State needs to ensure that they respect their obligations and to avoid any unintended disruption of the activities of impartial humanitarian organisations. In that regard, States should take concrete measures to mitigate the potential effects of sanctions and so not to impede humanitarian action.

⁴ Exemptions requests are more properly referred to as exceptions or *ad hoc* derogations.

⁵ There is another type of standing exemption for humanitarian actors specified for arms embargo measures, used across many UN regimes, and limited to “non-lethal military equipment intended solely for humanitarian and protective use” or to “supplies of protective clothing temporarily exported by humanitarian workers for their personal use only.”

⁶ “Lives on the line as UN and partners launch 2022 humanitarian plan for Somalia,” UN News, 20 December 2021.

⁷ See, Rebecca Brubaker, “Paving Pathways to Peace Talks with Sanctions Exemptions?,” *Sanctions and Mediation Policy Memo Series* 1 (2020).

⁸ The scope of humanitarian activities was initially determined by States when drafting the 1949 Geneva Conventions and the 1977 additional protocols. Criteria to determine the scope of humanitarian activities are now embedded in conventional and customary IHL. These criteria can be complex to navigate, and there are some debates, even among IHL scholars, on their exact scope. In its role of “guardian of IHL”, the ICRC offers interpretative guidance in its Commentaries to the Geneva Conventions.



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