Save the Children

Inquiry into whether Australia should enact legislation comparable to the United States Magnitsky Act 2012

SUBMISSION TO JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

21 February 2020

ACKNOWLEDGEMENTS

Save the Children Australia acknowledges Aboriginal and Torres Strait Islander peoples as the traditional owners and custodians of the land on which we work. We pay our respect to their Elders past, present and emerging.

Save the Children Australia acknowledges the input in this submission from our office in the Solomon Islands, the Centre for Humanitarian Leadership at Deakin University, Save the Children United States and Save the Children United Kingdom.

This submission was prepared by Simon Henderson, Head of Policy, and Beatrice Fiatte, Humanitarian Policy Advisor. For further information, please contact [redacted]

Contents

Executive Summary

Save the Children is pleased to participate in the Inquiry into whether Australia should enact legislation comparable to the United States Magnitsky Act 2012 (**the Inquiry**) by the Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Sub-committee (**the Committee**). We welcome the engagement by the Committee in reviewing Australia's approach towards gross human rights abuses committed overseas, including the framework for autonomous sanctions under Australian law through the *Autonomous Sanctions Act 2011* (Cth) (**the *Autonomous Sanctions Act***) and the *Autonomous Sanctions Regulations 2011* (Cth) (**the *Autonomous Sanctions Regulations***).

Australia regularly faces challenges in how to respond to gross human rights abuses, serious violations of international humanitarian law and acts of significant corruption overseas. Whether that is the treatment of the people of the Democratic People's Republic of Korea (**DPRK**), the Rohingya in Myanmar, widespread corruption in Cambodia or the Yemen civil war. For policy makers, it can be difficult to determine what measures drive accountability, what is proportionate, what would have a deterrent effect and the impacts on our relations with other states. Importantly, how Australia responds to gross human rights abuses says a lot about how we view ourselves as a nation and present ourselves to the world. Senator the Hon Marise Payne, Minister for Foreign Affairs, said in a speech to the United States Studies Centre last year that:

> *"The best way for Australia to lead, therefore, is to be an example to others. That means trading freely and fairly, pulling our weight to maintain a stable and prosperous region, not standing idly by when other countries are coerced, and speaking honestly and consistently about human rights."*[1]

Save the Children considers that much can be done to improve Australia's current response to combatting gross human rights abuses overseas, including child rights abuses. This is important to ensure that those committing, overseeing and ordering violations against children are brought to justice and held accountable for their actions. Save the Children is of the view that Australia's existing sanctions framework currently lacks measures to drive accountability. To that end, Save the Children recommends the following measures are undertaken:

- the development of a standalone International Human Rights (Magnitsky Sanctions) Act targeting persons and entities responsible for gross human rights abuses to overcome gaps in Australia's current framework for autonomous sanctions;
- key components of a standalone International Human Rights (Magnitsky Sanctions) Act should include:
    - "gross violations of international human rights law", "serious violations of international humanitarian law" and "acts of significant corruption" included as independent sanctionable activities;
    - specific protections for children;
    - mandated civil society consultation on the development of sanctions;
    - protections for civil society organisations undertaking humanitarian work;
    - the inclusion of state and non-state actors;

[1] Senator the Hon Marise Payne, Minister for Foreign Affairs, Speech, 'Ensuring security, enabling prosperity' - United States Studies Centre, 29 October 2019. Available at: https://www.foreignminister.gov.au/minister/marise-payne/speech/ensuring-security-enabling-prosperity-united-states-studies-centre.

  - reviewable sanctions measures, which protect procedural fairness of the listed person or entity, and incorporate specialist analysis of impacts on children; and
  - regular reporting requirements to the Australian Parliament to enable the best possible oversight.
- the standalone International Human Rights (Magnitsky Sanctions) Act should include specific reference to six grave violations of children's rights in situations of armed conflict as criteria for attracting sanctions in considering "serious violations of international humanitarian law";
- the Australian government should ensure its global response to human rights abuses includes a strong mix of public and private, multilateral and bilateral measures, while being able to pursue an autonomous agenda in promoting human rights, without relying on other countries' geopolitical interests;
- the Australian government should develop a standalone strategic framework and action plan on human rights and democracy, which outlines how it will protect and promote human rights abuses abroad. The strategy should set out the Australian government's overarching approach towards the protection and promotion of human rights and provide guidance to overseas missions on developing and implementing advocacy strategies. The strategy should include a particular focus on accountability for child rights abuses;
- Department of Foreign Affairs and Trade (DFAT) should build firmer partnerships and institutional arrangements between Australian civil society organisations and Pacific civil society organisations through capacity-building, mentoring and professional exchange, and supporting and fostering relationships between local civil society organisations and local governments; and
- DFAT should increase funding of the Australian NGO Cooperation Program and Direct Aid Program to enhance the capacity of civil society organisations to access long-term, flexible assistance to support the delivery of human rights capacity building, with a particular focus on the Pacific.

Introduction

As a leading independent international organisation for children and child rights, Save the Children has deep expertise in programming, policy and advocacy promoting and protecting children's rights, in Australia, in the Indo-Pacific and through our members positioned across the globe. We believe that children are the most important bearers of human rights, both as who they are today and for who they will become tomorrow.

Children are often the most vulnerable when it comes to gross violations of international human rights law and serious violations of international humanitarian law. This is especially the case in conflict environments, in situations of mass displacement or in authoritarian states where fundamental rights are constantly under threat. In situations of armed conflict, such as in Yemen, there may be deliberate campaigns of violence against civilians, including the targeting of schools, the abduction and enslavement of girls, and deliberate starvation.[2] In this environment, Save the Children has recently developed a Charter to Stop the War on Children,

[2] Save the Children, 'Stop the War on Children: Protecting Children in 21st Century Conflict', 2019. Available at: https://www.savethechildren.org.au/getmedia/42b8c232-dfc8-40d9-965c-e51c94340c73/SWOC-Report_Revised.pdf.aspx.

which includes a goal to ensure that those committing, overseeing and ordering violations against children in conflict are brought to justice and held accountable for their actions.[3]

Unfortunately, at present, perpetrators of violations of child rights often have little reason to fear being held to account for their actions. Even when perpetrators of violations of international laws have their crimes made public and receive international condemnation for them, most do not face any real political, economic or legal consequences for their behaviour.[4] International legal measures may be taken by the International Criminal Court, the International Court of Justice or the United Nations Security Council. However, such mechanisms may not have the expertise, scope or capacity to investigate and prosecute crimes specifically relating to children. Furthermore, outcomes can often take many years. Let alone, such approaches can be undermined through a state's failure to ratify a treaty or fear of repercussions to a bilateral relationship. As such, it is important for all states to have a suite of measures at their disposal to hold human rights abusers accountable.

This need is increasingly important in an inter-connected world, where people and financial capital easily flow. Australia operates as a hub for the Indo-Pacific, in terms of people, finance, services and goods. For example, Australia has the largest economy in the Pacific, is a member of the G20 and has a top 10 traded currency. Potential sanctions targets may travel to Australia for tourism, shopping or purchase property here. Alongside a stable political and economic environment, Australia is an attractive destination for human rights violators and corrupt officials to store their wealth.[5]

In this context, Save the Children considers that Magnitsky-style legislation for Australia presents a significant opportunity to promote accountability for human rights abusers as well as deterring significant acts of corruption. The United States, United Kingdom, Canada, Gibraltar, Estonia, Latvia, Kosovo and Lithuania have all taken Magnitsky-style legislative measures.[6] As with all sanctions, Magnitsky measures have a cumulative effect if acted upon in concert with likeminded governments, increasing the ability to hold perpetrators of human rights violations to account, deter abuses before they occur, and encourage governments to change corrupt practices.

Save the Children will use this submission to outline the gaps in Australia's existing sanctions regime under the *Autonomous Sanctions Act*, the *Autonomous Sanctions Regulations* and the *Charter of the United Nations Act 1945* (Cth) (**the *Charter of the United Nations Act***). At the same time, the submission will demonstrate how sanctions intersect with other tools to promote human rights overseas and the challenges in applying such measures. To further illustrate the need for sanctions reform and the value of Magnitsky-style legislation for Australia, Save the Children will draw upon two case studies where gross child rights abuses are being committed. Firstly, the DPRK, where United Nations Security Council (**UNSC**) sanctions and autonomous sanctions are being applied. Secondly, Myanmar, where only autonomous sanctions are being applied.

Impact of child rights' abuses in armed conflict

Gross child rights' abuses have great consequences on children, affecting their physical and cognitive development, in some cases with medium or long-term impact on their mental health and psychosocial well-being. Children are exposed to child rights' abuses to a higher degree in

[3] Ibid, p10.
[4] Ibid.
[5] Sydney Morning Herald, 'Steering corrupt cash into Australia from PNG: a how-to guide', 24 June 2015. Available at: https://www.smh.com.au/national/steering-corrupt-cash-into-australia-from-png-a-howto-guide-20150623-ghv1sx.html.
[6] For further comparative analysis, see Safeguard Defenders, 'Fighting Impunity: A guide on how civil society can use Magnitsky Acts to sanction human rights violators', 2020. Available at: https://safeguarddefenders.com/en/publications.

fragile contexts, particularly in contexts of open or protracted conflicts. Children suffer in conflict in different ways from adults, partly because they are physically weaker and also because they have so much at stake, their physical, mental and psychosocial development are heavily dependent on the conditions they experience as children.[7]

There are 415 million children worldwide living in a conflict zone including 149 million children living in high-intensity conflict zones where more than 1,000 battle-related deaths occur in a year. Conflict is becoming increasingly dangerous for children. Since 2010, there has been a 34% rise in the total number of children living in conflict zones.[8] The Office of the Special Representative to the United Nations Secretary general on Children in Armed conflict distinguishes grave violations against children in conflict settings as;

- killing and maiming of children;
- recruitment or use of children as soldiers;
- sexual violence against children;
- abduction of children;
- attacks against schools or hospitals; and
- denial of humanitarian access for children.[9]

Since 2010, there has been a rise of 170% in verified grave violations committed against children.[10] Children's exposure to these violations is driven by interrelated deficiencies which include a lack of compliance with international laws, especially international humanitarian law violations, and a failure to hold the perpetrators of violations to account. By having an effective multi layered approach to the defence of human rights abroad, Australia has a key role to play in addressing these discrepancies.

Australia's framework for sanctions

Sanctions are widely used as a tool by states to influence and enforce international norms and laws, and to maintain or restore international peace and security. Sanctions can encompass a range of measures including restraints on travel, legal action aimed at restricting or prohibiting trade or the seizure or freezing of property of individuals and entities.[11]

Australia currently operates two sanctions regimes. Firstly, sanctions imposed by the UNSC, which are given effect under the *Charter of the United Nations Act 1945*. The *Charter of the United Nations Act* enables Australia to apply sanctions to give effect to certain decisions of the UNSC. This enables listing of certain countries, individuals or entities. For example, on 23 July 2019, Senator the Hon Marise Payne, Minister for Foreign Affairs, listed Soheyb Laraibi, an Australian national who had his passport revoked, for counter-terrorism targeted financial sanctions under section 15(1) of the *Charter of the United Nations Act*. This was pursuant to Australia's obligations under UNSC resolution 1373.

Secondly, Australia also imposes autonomous sanctions on certain countries, individuals or entities under the *Autonomous Sanctions Act* and through the *Autonomous Sanctions*

---

[7] Save the Children, 'Stop the War on Children: Protecting Children in 21st Century Conflict', 2019. Available at: https://www.savethechildren.org.au/getmedia/42b8c232-dfc8-40d9-965c-e51c94340c73/SWOC-Report_Revised.pdf.aspx.
[8] PRIO - Children and Armed Conflict: What Existing Data Can Tell Us. Available at: https://www.prio.org/Publications/Publication/?x=10867
[9] UN children in Armed Conflict, The Six Grave violations, Legal Foundation, October 2009. Available at: https://childrenandarmedconflict.un.org/publications/WorkingPaper-1_SixGraveViolationsLegalFoundation.pdf
[10] Ibid n7.
[11] Parliament of Australia, Autonomous Sanctions Bill 2010, Bills Digest no. 111 2010-11. Available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1011a/11bd111.

Regulations. The *Autonomous Sanctions Act* defines an "autonomous sanction" as a tool to influence a foreign government's policy, a member of a foreign entity or another person or entity outside Australia or prohibit conduct of the engagement of the above person or entity in actions outside Australia that are contrary to Australian Government policy. For example, on 18 March 2019 Minister Payne imposed financial sanctions and travel bans on seven Russian individuals for their role in the interception and seizure of Ukrainian naval vessels that were attempting to pass through the Kerch Strait.[12]

Autonomous sanctions may be used to supplement and/or reinforce sanctions imposed by the UNSC. However, there may also be circumstances not covered by UNSC sanctions because either the specific situation does not fall within the UN Charter or because UNSC states are unable to reach agreement. This has been an increasingly common occurrence in the last decade, where many armed conflicts, such as the Syrian civil war, have led to sharply opposing views from UNSC members, especially the United States and Russia. It is this context that has led Australia to look at autonomous sanctions to complement UNSC sanctions.

What is the purpose and objective of Australia's autonomous sanctions regime?
The Autonomous Sanctions Bill 2010 was introduced into Parliament on 26 May 2010. The then Minister for Foreign Affairs, the Hon Stephen Smith MP, said during his second reading speech that:

> *"The purpose of the Autonomous Sanctions Bill 2010 is to strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia can implement, beyond those achievable under existing instruments, thus ensuring Australia's autonomous sanctions can match the scope and extent of measures implemented by like-minded states.*
>
> *The bill will also assist the administration of, and compliance with, sanctions measures by removing the distinctions between the scope and extent of autonomous sanctions and Security Council sanction enforcement laws."*[13]

Autonomous sanctions are intended to achieve the following three objectives, according to the Explanatory Memorandum to the Autonomous Sanctions Bill 2010:

> *(a) to limit the adverse consequences of the situation of international concern (for example, by denying access to military or paramilitary goods, or to goods, technologies or funding that are enabling the pursuit of programs of proliferation concern);*
>
> *(b) to seek to influence those responsible for giving rise to the situation of international concern to modify their behaviour to remove the concern (by motivating them to adopt different policies); and*
>
> *(c) to penalise those responsible (for example, by denying access to international travel or to the international financial system).*

---

[12] Senator the Hon Marise Payne, Minister for Foreign Affairs, Media Release, 'Financial sanctions and travel bans in response to Russia's continued aggression against Ukraine', 18 March 2019. Available at: https://www.foreignminister.gov.au/minister/marise-payne/media-release/financial-sanctions-and-travel-bans-response-russias-continued-aggression-against-ukraine.

[13] Mr Stephen Smith, Minister for Foreign Affairs, Second Reading Speech, Autonomous Sanctions Bill 2010, 26 May 2010. Available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2010-05-26%2F0023%22.

The Autonomous Sanctions Bill 2010 lapsed on 19 July 2010 when Parliament was prorogued for the 2010 federal election. The Autonomous Sanctions Bill was re-introduced on 30 September 2010 unchanged and was subsequently referred to the Committee on Foreign Affairs, Defence and Trade for inquiry and report. A report was handed down by the Committee on Foreign Affairs, Defence and Trade on 3 March 2011, with 12 recommendations made before it was suggested that the Senate pass the Autonomous Sanctions Bill.[14] Those recommendations covered concerns such as the application of strict liability for certain offences, the lack of information contained in the Explanatory Memorandum and derogating from the privilege against self-incrimination. While a replacement Explanatory Memorandum was subsequently issued, no further amendments to the Autonomous Sanctions Bill were made and it passed on 10 May 2011.

How does the autonomous sanctions regime work in Australia?
The Act does not in of itself include sanctions on any persons or entities. Instead, it provides for sanctions to be applied by regulations. This is done through the Regulations. Subsection 10(1), which authorises the Governor-General to make regulations with respect to:

- the proscription of persons or entities
- restrictions or prevention of use, dealings and availability of assets
- restrictions or prevention of supply, sale or transfer of goods or services
- indemnities for acting in compliance with regulations
- the provision of compensation for owners of assets that are affected by regulations relating to a restriction or prevention described above.

Before the Governor-General makes such regulations, the Minister must be satisfied under subsection 10(2) that the proposed regulations will:

- facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia or
- otherwise deal with matters, things or relationships outside Australia.

What are the deficiencies in the autonomous sanctions regime?

1. ***Failure to target human rights abuses, violations of international humanitarian law and acts of significant corruption***

Three of the most notable omissions from the *Autonomous Sanctions Act* and the *Autonomous Sanctions Regulations* are the failure to reference either international human rights law, international humanitarian law or corruption. "Human rights" is only mentioned once, in the Explanatory Memorandum to the Autonomous Sanctions Bill 2010. Meanwhile "corruption" and "humanitarian law" violations are not referred to at all.

Firstly, while specific countries listed under *Autonomous Sanctions Regulations* may have a reference to "human rights" (for example, in the case of Syria under Item 7, Regulation 6, or in the case of Zimbabwe under Item 8, Regulation 6), there is no requirement for sanctions to be linked to human rights abuses. Even in such cases, the level of detail provided is limited. For example, with respect to Zimbabwe the sanctioned activity listed under the *Autonomous Sanctions Regulations* is phrased broadly, lacking information on what human rights abuses are being targeted:

[14] Foreign Affairs, Defence and Trade Legislation Committee, 'Autonomous Sanctions Bill 2010 [Provisions]', 3 March 2011. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed_inquiries/2010-13/autonomoussanctions43/report/index.

> *"A person or entity that the Minister is satisfied is engaged in, or has engaged in, activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe."*

The Department of Foreign Affairs and Trade (DFAT), which administers the sanctions regimes, has a fact sheet on the Zimbabwe sanctions, as with all other states for which autonomous sanctions apply. In describing why sanctions were imposed it simply states:

> *"Australia imposed autonomous sanctions in relation to Zimbabwe in 2002, reflecting concerns about political violence and human rights violations. The sanctions were adjusted in 2012 and 2013 in response to some progress."*

It is hard to reassure the public that DFAT is serious about tackling human rights abuses through autonomous sanctions if the information outlining why sanctions were imposed does not even list those human rights violations or the relevant international human rights law treaties which have been breached. Furthermore, the purpose of the *Autonomous Sanctions Act,* contained in Section 3, makes no mention of any potential efforts to target human rights abuses.

This contrasts with Magnitsky style sanctions in other jurisdictions, such as Canada. For example, Section 4(2)(a) of the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* S.C. 2017, c. 21 (Canada) lists the circumstances in which sanctions may be applied. This includes where:

> *"(a) a foreign national is responsible for, or complicit in, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state who seek;*
>
> *(i) to expose illegal activity carried out by foreign public officials, or*
>
> *(ii) to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and the right to a fair trial and democratic elections"*

Secondly, the omission of serious violations of international humanitarian law is of great concern, especially in light of the significant impact of armed conflict on children. 149 million children, 30 times the child population of Australia, were living in high intensity conflict zones in 2018.[15] In 2019, there were more than 1,800 attacks or military use of schools and hospitals, representing an increase of more than 30 percent in just two years. Under international humanitarian law, both schools and hospitals are protected civilian objects, and therefore benefit from the humanitarian principles of distinction and proportionality. The United Nations Secretary-General's report on children and armed conflict found an overall increase in attacks in Afghanistan, Colombia, Central African Republic, Yemen, Somalia, Sudan, Mali, occupied Palestinian territory and Libya.[16] Enacting Magnitsky style legislation, would enhance the capacity of the Australian government to target serious violations of international humanitarian law, while complimenting existing support provided towards promoting

[15] Save the Children, 'Stop the War on Children: Gender Matters', 2020. Available at: https://resourcecentre.savethechildren.net/library/stop-war-children-2020-gender-matters.
[16] Office of the Special Representative of the Secretary-General for Children and Armed Conflict, '2019 Secretary-General Annual Report on Children and Armed Conflict', July 2019. Available at: https://childrenandarmedconflict.un.org/document/2018-secretary-general-annual-report-on-children-and-armed-conflict/.

adherence to international humanitarian law, such as funding for the International Committee of the Red Cross.[17]

Thirdly, the omission of references to corruption is of particular concern given the prevalence of significant acts of corruption near Australia, especially South East Asia and the Pacific. Save the Children's office in Solomon Islands has identified corruption challenges as a major obstacle in the Pacific. While Solomon Islands faces significant poverty, it is not a situation where the government is actively persecuting children. Children are not being denied adequate health care because the government is limiting access to medicines or closing clinics to certain ethnic groups. However, the potential for money to be misused could lead to child rights abuses in situations where resources are not made available for those most at need. Many of the abuses of child rights in Solomon Islands and across the Pacific are 'slow burn' issues, such as death due to preventable diseases or child sexual abuse, rather than humanitarian crises. Australia is attempting to tackle these issues through its development program, promoting prosperity, reducing poverty and enhancing stability. Given the economic situation in the Pacific, broad economic sanctions would not be a desirable tool. As such, having Magnitsky style legislation to target specific acts of corruption would complement Australia's attempts to improve good governance in the Pacific through the aid program.

2. Lack of information about criteria and evidence used to apply autonomous sanctions

As noted above, in all cases where autonomous sanctions are applied, DFAT prepares fact sheets which are publicly available. Each fact sheet follows the same format and is usually no more than two pages long, listing:

- Why are sanctions imposed?
- What is prohibited by the sanctions regime?
- Relevant legislation
- Who must comply with sanctions?
- Where can I get more information?

While they may be helpful for some interested stakeholders, these fact sheets lack detail on the criteria and evidence used to apply sanctions. Explanations as to why sanctions have been imposed are generally no more than a few sentences and there is no information to indicate how the assessment has been undertaken, such as consideration of violation of certain international human rights law treaties.

The *Autonomous Sanctions Act* and the *Autonomous Sanctions Regulations* provide limited assistance for the decision-maker, the Minister for Foreign Affairs. For example, Regulation 6 of the *Autonomous Sanctions Regulations* lists the designations of countries, persons or entities that might be sanctioned, but no detail is provided on as to the reason for designation. To ensure transparency and accountability there should be clear criteria and methodology for sanctions listing and de-listing. Wherever possible, designations under the sanctions regime should be made based on publicly available, non-classified information. New Magnitsky style legislation could outline those criteria and evidentiary requirements in more detail.

[17] In 2018-19 Australia provided $27.5 million in core funding to the International Committee of the Red Cross, including to promote and strengthen adherence to international humanitarian law. Department of Foreign Affairs and Trade, 'Humanitarian policy and partnerships', https://dfat.gov.au/aid/topics/investment-priorities/building-resilience/humanitarian-policy-and-partnerships/Pages/aus-partnership-international-committee-red-cross.aspx.

3. Infrequent use of autonomous sanctions

Since the *Autonomous Sanctions Act* was brought into force, it has been used on relatively few occasions. Sanctions have been applied to the following states:

- Democratic People's Republic of Korea (North Korea)
- Iran
- Libya
- The Former Federal Republic of Yugoslavia
- Myanmar
- Russia/Ukraine
- Syria
- Zimbabwe

There will also have been cases where autonomous sanctions are not necessary given that UNSC sanctions have already been imposed, such as in the case of the Democratic Republic of Congo or the Central African Republic.[18] However, the list of autonomous sanctions and UNSC sanctions is notable by its omissions in comparison to other like-minded states, such as the United States, in response to corrupt practices or gross human rights abuses. For example, Australia has not imposed sanctions on any Cambodian individuals or entities, despite Cambodia having the highest levels of corruption in South East Asia and a listing of 162 on the Transparency International Corruptions Perception Index.[19] Additionally, Australia has not imposed sanctions on Saudi Arabian individuals in respect of the killing of Jamal Khashoggi, a particularly egregious case of state backed murder, which Australia has condemned at the Human Rights Council.[20]

There may be several reasons why Australia has chosen not to apply sanctions in either of the above cases, including; the criteria in the *Autonomous Sanctions Act*, a lack of resources in DFAT to make the designation or a view that doing so would harm Australia's national interests or lack of evidence. However, there does appear to be at least several prominent cases where Magnitsky style legislation would enhance the capacity to increase accountability for corruption and human rights abuses overseas.

4. Lack of civil society engagement

There is a lack of specific provision for civil society engagement in the administration of sanctions under the *Autonomous Sanctions Act* and the *Autonomous Sanctions Regulations*, neither of which reference the need to consult with civil society. This is even though civil society organisations often have access to valuable information and possess on-ground capacity in documenting human rights abuses and corrupt practices. Further, they may have greater capacity to assess and monitor violations against certain groups, for instance children. This applies to international non-government organisations as well as civil society

---

[18] Further information provided at: https://dfat.gov.au/international-relations/security/sanctions/Pages/about-sanctions.aspx.
[19] U.S. Department of State, Media Note, 'Global Magnitsky Program Designations for Corruption and Serious Human Rights Abuse', 10 December 2019. Available at: https://www.state.gov/global-magnitsky-program-designations-for-corruption-and-serious-human-rights-abuse/. Transparency International, 'Corruption Perceptions Index 2019', 23 January 2020. Available at: https://www.transparency.org/cpi2019.
[20] U.S. Department of State, Media Note, 'Global Magnitsky Sanctions on Individuals Involved in the Killing of Jamal Khashoggi', 15 November 2018. Available at: https://www.state.gov/global-magnitsky-sanctions-on-individuals-involved-in-the-killing-of-jamal-khashoggi/. Department of Foreign Affairs and Trade, 'HRC42 joint statement on Saudi Arabia', Item 8, 23 September 2019. Available at: https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/statements/Documents/42nd-hrc-joint-statement-human-rights-saudi-arabia.pdf.

organisations based in Australia with diaspora connections in-country or civil society organisations in-country.

The lack of specific provision for civil society organisations in the autonomous sanctions regime does not mean that civil society input cannot or will not be included. For example, DFAT may use information obtained from overseas posts to assist decision making, which would often be informed by meetings with civil society organisations. However, it is Save the Children's experience that decisions on whether to apply autonomous sanctions involves limited external input. This could lead to missed opportunities, such as the delays in applying autonomous sanctions on Myanmar as cited in the case study later in this submission. Another component of DFAT's information gathering process is intelligence provided by five-eyes partners.[21] Such information may play a greater role where there are gaps in Australia's diplomatic network, insufficient Australian intelligence capabilities or a lack of open source material. Again, this provides an opportunity for civil society organisations to work closely with the Australian government to fill information gaps.

While the lack of specific requirements for civil society input does not preclude it from being provided, Save the Children notes that one of the advantages of Magnitsky style sanctions is the legislated role for civil society contributions. For example, Section 1263(c) of the *Global Magnitsky Act 2016* (United States) provides that:

> *"[i]n determining whether to impose sanctions…the President shall consider…credible information obtained by other countries and nongovernmental organizations that monitor violations of human rights."*

Additionally, Save the Children understands that the US State Department organises annual meetings with civil society organisations to discuss application of the Global Magnitsky Act, share information and identify possible sanctions targets. These meetings provide a valuable forum to have candid and confidential discussions, complementing information that the US State Department receives through other mechanisms.

5. Insufficient procedural safeguards

The *Autonomous Sanctions Act* lacks information regarding merits review and other procedural safeguards for the persons or entities subject to sanctions. Decisions on whether to apply autonomous sanctions are decided by the Minister for Foreign Affairs who then issues a legislative instrument each time a person or entity is included in the designation list.

While Save the Children acknowledges the need to have a timely and flexible regulation-making power, it should not come at the expense of procedural safeguards. The Explanatory Memorandum and the *Autonomous Sanctions Act* are silent on the issue of judicial review. This issue was noted when the Autonomous Sanctions Bill was first being debated and highlighted in the Bills Digest:

> *"…the Queensland Law Society reflected with concern on the implications of a 2010 decision of the Federal Court[34], which seemed to signal decisions to proscribe certain persons or entities were going to be non-reviewable as they were non-justiciable political decisions.[35] Hence, it is possible for example, that a young adult who is estranged from their dictator father living overseas and who is on a sanctions list, may be captured by*

[21] Five-eyes partnership refers to an intelligence sharing and cooperation arrangement between Australia, United States, United Kingdom, Canada and New Zealand.

> *that listing on account of their blood relationship, without any examination of the facts to support such an assumption of actual association."*[22]

The means by which a sanctioned person or entity can challenge their listing, through administrative or judicial remedy, should be clearly written into the applicable law or regulations governing a sanctions regime. When looking at procedural safeguards present in Magnitsky style legislation there is some variation and Save the Children does not make any comments on a preferred model. However, Save the Children is of the view that further consideration should be given to such matters, especially in the development of any new legislation. Sanctions may have implications for children, either those who may have been associated with potential crimes (as victim or perpetrator), or may be indirectly affected, either through family ties or reverberating impacts.

6. Lack of parliamentary oversight

The *Autonomous Sanctions Act* lacks mechanisms for parliamentary oversight. There is no reporting or review process. This is especially important given that listings are made by legislative instrument. Magnitsky style legislation in other jurisdictions generally provides roles for parliamentary committees. For example, section 16(3) of the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* S.C. 2017, c. 21 (Canada) states:

> *"Committees of the Senate and the House of Commons that are designated or established by each House for that purpose may conduct a review concerning the foreign nationals who are the subject of an order or regulation made under this Act and submit a report to the appropriate House together with their recommendations as to whether those foreign nationals should remain, or no longer be, the subject of that order or regulation."*

Tools used to promote human rights internationally

The Australian government has a variety of tools at its disposal to promote human rights internationally, including children's rights. This section provides an overview of some of those tools and how they are utilised or not. It also considers their advantages and disadvantages, while the complimentary role for Magnitsky style legislation in Australia.

Multilateral human rights advocacy

United Nations Security Council

Australia possesses a range of tools to promote and defend the respect of human rights overseas, notably through multilateral engagement. One of the most prominent of these is influencing the UNSC's decisions. Australia had a substantial opportunity to exert influence when it chaired three sanctions committees in 2013-2014, namely the 1737 (Iran) Committee, the 1988 (Taliban) Committee and the 1267/1989 (Al-Qaida) Committee.[23]

However, it is clear that non-permanent members of the UNSC such as Australia must navigate a series of obstacles in order to drive, shape or refine UNSC decision-making. The biggest obstacle is the veto power of the five permanent members, which empowers them to exert considerable control over UNSC decisions. Another obstacle is that few non-permanent members possess meaningful institutional knowledge of the UNSC's diplomatic and decision-

[22] Parliament of Australia, Autonomous Sanctions Bill 2010, Bills Digest no.111 2010-11. Available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1011a/11bd111#_ftn34.
[23] Australian journal of International Affairs, Leveraging diplomatic power and influence on the UN Security Council: the case of Australia, Sept 2016. Available at: http://bellschool.anu.edu.au/sites/default/files/publications/attachments/2016-12/leveraging_diplomatic_power_and_influence_on_the_un_security_council_the_case_of_australia.pdf

making processes prior to assuming their seats.[24] Opportunities to sit on the UNSC as non-permanent members are limited. The last time Australia was elected as a non-permanent member was seven years ago which is insufficient to have a long-term strategy to promote human rights through the UNSC.

Perhaps one of the most striking examples of the UNSC's limited capacity to resolve conflicts and hold human rights perpetrators to account is Syria. The UN Fact Finding mission from the Organisation for the Prohibition of Chemical Weapons (PCW) had confirmed sixteen cases of chemical attacks by the Syrian regime at June 2018[25] – out of 212 likely attacks documented by the Syrian Archives – showing the extent and the severity of human rights abuses by the Syrian government. Chemical attacks have a greater effect on children than on adults, with higher risk of immediate death or permanent neurological damage.[26]

While the UNSC has attempted to unanimously condemn the use of chemical weapons in Syria and to strategise ways to hold the Assad regime accountable for its ongoing human rights abuses, actions have been ineffective and have resulted in gridlock. Russia has vetoed ten resolutions pertaining to Syria in furtherance of its support for the Assad regime.[27] Both China and Russia have also vetoed resolutions "which would have sanctioned entities involved in the production of chemical weapons" used in Syria.[28] Those vetoes by China and Russia have prohibited the international community from holding the regime accountable for human rights violations, including by systematically rejecting any UNSC originated resolutions that would refer to "belligerents in the Syrian Civil War, including the individuals in the Bashar al-Assad regime, to the International Criminal Court (ICC)".[29]

Syria is one of the ten worst countries to grow up as a child.[30] Evidently Australia, as a promoter of human rights abroad, cannot solely rely on the UNSC's actions to protect these children and hold human rights violators to account. Beyond Syria, the growing tensions between some of the five permanent members of the UNSC, trade conflicts between the US and China, and a proxy war in the Middle East between Russia and the US, highlights the necessity for other tools to address human rights abuses.

United Nations Human Rights Council

Australia's multilateral human rights advocacy is also undertaken through the UN Human Rights Council (HRC). As an elected member of the council from 2018 to 2020, Australia has an opportunity to promote human rights overseas. The HRC seeks to promote and protect human rights, notably through the Universal Periodic Review (UPR), as well as addressing alleged rights violations and makes recommendations using "soft law" techniques. As we will further examine in the case study on Myanmar, these tools include independent experts and investigative mechanisms, different working groups that publicly report on human rights

---

[24] Ibid.
[25] OPCW, Fact-Finding Mission in Syria (FFM) regarding the alleged use of toxic chemicals as a weapon in Douma, the Syrian Arab Republic, April 2018. Available at: https://www.opcw.org/sites/default/files/documents/2019/03/s-1731-2019%28e%29.pdf
[26] Brooks, J., Erickson, T.B., Kayden, S. et al. Responding to chemical weapons violations in Syria: legal, health, and humanitarian recommendations. Confl Health 12, 12 (2018). https://doi.org/10.1186/s13031-018-0143-3
[27] The Guardian, Julian Borger., "Vetoed! What's Wrong with the UN Security Council – and How It Could Do Better," May 2018. Available at: https://www.theguardian.com/world/ng-interactive/2015/sep/23/un-security-council-failing-70-years
[28] Nina Kalantar, The Limitations and Capabilities of the United Nations in Modern Conflict, July 2019. Available at: https://www.e-ir.info/2019/07/10/the-limitations-and-capabilities-of-the-united-nations-in-modern-conflict/
[29] Council on Foreign Relations, Syria's Civil War: The Descent Into Horror, Oct 2019. Available at: https://www.cfr.org/article/syrias-civil-war
[30] Save the Children, 'Stop the War on Children: Protecting Children in 21st Century Conflict', 2019. Available at: https://www.savethechildren.org.au/getmedia/42b8c232-dfc8-40d9-965c-e51c94340c73/SWOC-Report_Revised.pdf.aspx.

situations in specific countries. Among the experts sitting in the HRC are two Australian nationals.[31] However, as is the case with the UNSC, there are limitations to the HRC's influence.

The US' decision to withdraw from the HRC in 2018 demonstrates the fragility of this institution. However, it also highlights the need for countries like Australia to have an efficient and complete sanctions regime to ensure major powers do not compromise efforts to increase accountability for human rights abuses. In many respects, Australia has been a powerful voice at the HRC. For example, Australia issued strong and important statements on the draft resolution L.36 on the right to development, which sought to undermine international human rights architecture.[32] However, at the same time, Australia's strategy before the HRC has been criticised by some civil society organisations for its "quiet diplomacy" approach, especially in the lack of integration between public and private advocacy.[33] Finally, while membership at the HRC is likely to happen more regularly than the UNSC, appointments are still subject to a lengthy and often resource intensive lobbying process to obtain a position.

Regional organisations – ASEAN and PIF

Australia's influence on human rights promotion through regional bodies is also limited. This is partially a measure of design, but also a product of engagement and domestic policy. Two examples help to illustrate this, the Association of South East Asian Nations (ASEAN) and the Pacific Islands Forum (PIF).

Australia engages on human rights in the Asia-Pacific through its close ties with ASEAN. Australia has been a dialogue partner of ASEAN since 1974 and has a resident ambassador accredited to the Secretariat in Jakarta. Australia and ASEAN cooperate under a Strategic Partnership,[34] which includes working on human rights and good governance. The ASEAN's main body of human rights cooperation, ASEAN Intergovernmental Commission of Human Rights (AICHR), is meant to increase governments' cooperation in the respect of human rights. However, it has been widely criticised in its capacity to defend human rights in the region. This can partly be explained by the design of the AICHR whereby each state nominates representatives to the Commission. Representatives can thus be more inclined to defend their respective governments rather than acting as an independent panel of experts.

Australia's role within PIF is another example of the limitations of regional engagement on human rights. In recent years, it has been argued that Australia has lost ground and credibility in PIF due to its failure to adequately address climate change and labour mobility as key development issues for small states in the region.[35] It is the view of Save the Children's Solomon Islands office that this has affected Australia's ability to promote broader a human rights agenda across the Pacific.

---

[31] Lowy Institute, Human Rights Council: reform rather than reject, June 2018. Available at: https://www.lowyinstitute.org/the-interpreter/human-rights-council-reform-rather-reject

[32] Australia, 'Human Rights Council – 42nd Session: Explanation of Vote, HRC42 Resolution on the Right to Development', 27 September 2019. Available at: https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/statements/Documents/42nd-hrc-joint-statement-right-to-development.pdf.

[33] Human Rights Watch, Australia: Protect Human Rights in Foreign Policy, June 2019. Available at: https://www.hrw.org/news/2019/06/24/australia-protect-human-rights-foreign-policy

[34] Australia- ASEAN Strategic Partnership 2015-2019, 2014. Available at: https://asean.org/wp-content/uploads/images/2015/November/ASEAN-Australia/ASEAN-Australia%20Strategic%20Partnership%20POA%202015-2019-Final.pdf

[35] The Guardian, 'Revealed; 'fierce' Pacific forum meeting almost collapsed over climate crisis', 16 August 2019. Available at: https://www.theguardian.com/environment/2019/aug/16/revealed-fierce-pacific-forum-meeting-almost-collapsed-over-climate-crisis.

Australia should promote human rights as a regional power, especially given the lack of regional human rights instruments in the form of courts or treaties.[36] Adopting legislation similar to the Magnitsky Act would help fill that gap by giving Australia a valuable accountability tool to address human rights abuses in the region, without having to rely as heavily on multilateral regional engagement.

Bilateral human rights advocacy

Aid and human rights

Aid policy is another key means by which Australia promotes human rights to support global development, stability, security and peace. Contributing to the promotion of human rights through aid policy can include measures such as funding to build civil society capacity, a valuable feature of the Australian aid program.[37] Such a commitment was part of Australia's pledge to obtain a seat on the HRC:

> *"We are committed to achieving sustainable development outcomes by building long-term partnerships with other donors, regional and multilateral organisations and partner governments."*[38]

As a member of the HRC, Australia has committed to strengthen national human rights institutions and civil society, especially in the Indo-Pacific region. While civil society capacity building is a feature of the Australian aid program, it lacks funding and support. Last year at the Australian Council for International Development's (**ACFID**)'s national conference a joint resolution, co-sponsored by Save the Children and Oxfam, called upon the Australian government to invest more in programs to promote civil, political, economic, social and cultural rights in the Indo-Pacific.[39] Doing so would provide Australia with the opportunity to build more viable states less vulnerable to their geographic, climatic, economic and political contexts. ACFID supports firmer partnerships and institutional arrangements between Australian civil society organisations and local Pacific civil society organisations through capacity-building, mentoring and professional exchange.

The Australian Human Rights Commission (**AHRC**) through DFAT, engages in human rights technical cooperation activities with other countries. In recent years this has included China, Laos and Vietnam. These programs are underpinned by the view that by working together, and by exchanging views and approaches, human rights protection, promotion and administration will develop and prosper.[40] For example, in the case of Laos, one of the projects for the 2017-21 Lao PDR-Australia Human Rights Technical Cooperation Program has been on strengthening Laos' response to the UPR process. This included training workshops, civil society consultations and the development of technical support resources.[41] While these programs can be valuable, they depend upon the cooperation of the other state to ensure their

---

[36] Philip Lynch, Australia's human rights and foreign policy, 2009. Available at: https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/

[37] For example, DFAT allocated $12 million between 2010-2020 in a Civil Society Support program in Samoa which supports civil society to engage in national policy and planning processes. Available at: https://dfat.gov.au/geo/samoa/development-assistance/Pages/strengthening-governance.aspx.

[38] DFAT, Australia on the United Nations Human Rights Council 2018-2020. More information at: https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/pillars-and-priorities/Pages/promoting-strong-national-human-rights-institutions-and-capacity-building.aspx

[39] Probono Australia News, NGOs urge Australia to call out human rights violations, October 2019. Available at: https://probonoaustralia.com.au/news/2019/10/ngos-urge-australia-to-call-out-human-rights-violations/

[40] Australian Human Rights Commission, 'Annual Report and Non-Financial Statement: 2018-2019', 21 October 2019. Available at: https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019.

[41] Ibid.

success. For example, it is noted that the Australia-China technical cooperation program was suspended in August 2019, as reported in ABC News and other media outlets, after operating for over 20 years.[42] While the reasons for suspension have not been made public, it comes at a time when the PRC's engagement with other states on human rights, including Australia, has become increasingly challenging.

Human rights dialogues

Australia currently holds bilateral human rights dialogues with Vietnam, Laos and Iran. These dialogues provide an opportunity for Australia to raise human rights concerns in other countries. The goal is to help make practical improvements where there are consistent and widespread human rights violations. When combined with strong civil society engagement, they can be a valuable tool. For example, during the 12th Australia-Vietnam Human Rights Dialogue, civil society organisations were able to meet directly with senior officials from the Vietnam government at the Australian Human Rights Commission to raise their concerns.

However, the success of dialogues depends on the willingness of the other party to engage in constructive discussion across all topics. For example, the Australia-China Human Rights Dialogue ceased due to PRC views on what topics could be placed on the agenda. In 2007, PRC representatives informed Australian diplomats that they would not discuss the "current evolving situation" in Tibet on grounds that it is an "internal matter" and not a "human rights problem".[43] According to Australian diplomats, the PRC often refused to discuss human rights issues, including developments in Xinjiang.[44] The Dialogue was last held in February 2014 and has not been held since.

Further hampering the potential success of the dialogue process has been the failure to implement substantive reforms to improve transparency and accountability. For example, in 2005 the Joint Standing Committee on Foreign Affairs, Defence and Trade held an Inquiry into Australia's Human Rights Dialogue Process, which recommended:

> *"…the Minister for Foreign Affairs table an annual statement in Parliament on the status and proceedings of each of Australia's bilateral human rights dialogues with China."*[45]

Other recommendations on improving monitoring and evaluation of outcomes have not been fully implemented. In 2011-2012, the Joint Standing Committee on Foreign Affairs, Defence and Trade held a follow-up Inquiry into Australia's Human Rights Dialogues with China and Vietnam. One of the recommendations was:

> *"The Committee recommends that the Department of Foreign Affairs and Trade convene a panel of experts to produce a report that outlines a clear set of principles, aims and benchmarks for each of Australia's human rights dialogues. The panel should conduct an overall review of the effectiveness of the dialogues every three years."*[46]

---

[42] ABC News, 'Foreign Minister Marise Payne takes aim at China's treatment of Uyghurs amid row over Liberal MPs' travel ban', 18 November 2019. Available at: https://www.abc.net.au/news/2019-11-18/australia-china-human-rights-muslim-minorities-marise-payne/11712892.

[43] Sydney Morning Herald, 'China laughs off human rights concerns', 27 April 2011. Available at: https://www.smh.com.au/world/china-laughs-off-human-rights-concerns-20110426-1dv4k.html.

[44] Ibid.

[45] Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Australia's Human Rights Dialogue Process', 12 September 2015. Available at: https://www.aph.gov.au/parliamentary_business/committees/House_of_Representatives_Committees?url=/jfadt/hrdialogue/report.htm.

[46] Joint Standing Committee on Foreign Affairs, Defence and Trade, 'More than just talk: Australia's Human Rights Dialogues with China and Vietnam', June 2012. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfadt/HRdialoguechinavietnam/report/index.

Human rights provisions in trade agreements

One way in which human rights can be incorporated into bilateral agreements is through an 'essential elements' human rights clause that enables one party to take appropriate measures in case of serious breaches by the other party. The clause, which could cover democratic principles and often the rule of law, enshrines the parties' commitments to human rights, creating paths to dialogue and cooperation on human rights issues.[47]

Such clauses have been incorporated into the European Union's (**EU**) Free Trade Agreements (**FTA**) for decades and are also used by like-minded partners, including the United States and Canada. DFAT is currently undertaking negotiations with the EU on the development of an FTA, which commenced on 18 June 2018. The EU makes human rights an important feature of its trade policy and it is likely that a human rights clause will be incorporated into the Australia-EU FTA under discussion, given that the European Parliament has supported the inclusion of a human rights clause in all new trade agreements.[48] Additionally, it is noted that in a post-Brexit United Kingdom, international agreements, including with Australia, may include human rights clauses following recommendations from the United Kingdom Joint Committee on Human Rights.[49]

The issue of including human rights clauses in Australia's FTAs has been given additional attention recently through the Joint Committee Inquiry into Australia-Hong Kong Free Trade Agreement by the Joint Standing Committee on Treaties (**JSCOT**). The JSOCT Inquiry conducted during August to September 2019 received multiple submissions recommending a human rights clause in the Australia-Hong Kong FTA. This included civil society organisations such as Hong Kong Watch,[50] Australia-Hong Kong Link,[51] Canberra Hong Kong Concern Group[52] and Demosisto,[53] as well as individuals.[54] While such concerns were not mentioned in the JSCOT report tabled on 9 October 2019, they are an avenue of human rights accountability that has yet to be adequately explored by Australia.

Business and human rights

The impact and influence of corporate activity on human rights is significant, widespread and increasing. Corporations have the capacity to foster economic well-being, development technological improvement and wealth, but they also have the capacity to impact harmfully on the human rights and lives of individuals.[55] The Australian Government encourages businesses to apply the United Nations Guiding Principles on Business and Human Rights (**Guiding**

---

[47] Simon Henderson, 'Submission to Joint Standing Committee on Treaties: Australia-Hong Kong FTA Inquiry', Submission 27, 6 September 2019. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/A-HKFTA/Submissions.

[48] For example, see its recommendation with respect to the EU-Chile Association Agreement: http://www.europarl.europa.eu/doceo/document/TA-8-2017-0354_EN.html?redirect.

[49] United Kingdom Joint Committee on Human Rights, 'Human Rights Protections in International Agreements', Final Report, 12 March 2019. Available at: https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1833/1833.pdf.

[50] Hong Kong Watch, Submission to the Joint Standing Committee on Treaties on Inquiry into the Australia-Hong Kong Free Trade Agreement, Submission 16, 23 August 2019. Available at: https://www.aph.gov.au/DocumentStore.ashx?id=f9aff9b7-025e-494a-a2e5-6393bafaedf3&subId=668999.

[51] Australia-Hong Kong Link, Submission with regards to the impending inquiry of the Australia-Hong Kong Free Trade Agreement, Submission 17, 23 August 2019. Available at: https://www.aph.gov.au/DocumentStore.ashx?id=ae1fb26d-7f00-40bc-a30e-be74a273a208&subId=669022.

[52] Canberra Hong Kong Concern Group, Submission to the Joint Standing Committee on Treaties Inquiry into the Australia-Hong Kong Free Trade Agreement, Submission 4, 23 August 2019. Available at: https://www.aph.gov.au/DocumentStore.ashx?id=252a3d2e-72f9-4f0b-9121-00e70a4c5e57&subId=668938.

[53] Demosisto, 'Submission to the Joint Standing Committee on Treaties on Inquiry into the Australia-Hong Kong Free Trade Agreement, Submission 26, 6 September 2019. Available at: https://www.aph.gov.au/DocumentStore.ashx?id=2d3f66b2-e2ac-4780-9d08-b67ae1d8bd43&subId=669244.

[54] Ibid, n39.

[55] Philip Lynch, Australia's human rights and foreign policy, 2009. Available at: https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/

Principles).[56] The Guiding Principles set international standards guiding government and business practice on human rights and encourage voluntary commitments from business.[57] However, the Australian government has to date failed to heed the recommendations of Australian civil society organisations[58] and foreign governments through the UPR[59] to establish a National Action Plan on Business and Human Rights. Australia recently passed the *Modern Slavery Act 2018* (Cth) under which businesses and other organisations with a consolidated revenue of over A$100 million are required to report annually on the risks of modern slavery in their operations and supply chains, the action they have taken to assess and address those risks, and the effectiveness of their response.[60] This has the potential to reduce the prevalence of child rights abuses domestically and business activities abroad, particularly child labour.

Conclusion

Australia has a variety of tools in several international and regional forums to promote and defend human rights. However, as noted above they each have their limitations, due to their design, the geopolitical context or resource limitations. Human rights advocacy, multilaterally and bilaterally, is an essential tool of Australia's foreign policy, but for such engagement to be strategic and effective, it must be coupled with other flexible and targeted measures, which Magnitsky style legislation could offer. To support this process, the Australian government should develop a standalone guiding strategy document on how it responds to human rights abuses abroad, with a focus on accountability for child rights abuses. This strategy could draw upon existing foreign policy strategy documents, including the format of the Australia's Strategy for the Abolition of the Death Penalty[61] and priorities identified in the Foreign Policy White Paper.[62] Additional guidance can also be drawn from the European Union Action Plan on Human Rights and Democracy 2015-2019.[63]

Recommendation 1: The Australian government should ensure its global response to human rights abuses includes a strong mix of public and private, multilateral and bilateral measures, while being able to pursue an autonomous agenda in promoting human rights, without being constrained by on other countries' geopolitical interests.

Recommendation 2: The Australian government should develop a standalone strategic framework and action plan on human rights and democracy, which outlines how it will protect and promote human rights abuses abroad. The strategy should set out the Australian government's overarching approach towards the protection and promotion of human rights

[56] UN Guiding Principles on Business and Human Rights, 2011. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf
[57] https://dfat.gov.au/international-relations/themes/human-rights/business/Pages/default.aspx
[58] Australian NGO Coalition, 'Australia's 2nd Universal Periodic Review', March 2015. Available at: http://www.naclc.org.au/cb_pages/files/Submissions/Final%20Joint%20NGO%20Sub%20Aus%20UPR%202015.pdf.
[59] Human Rights Council, 'Report of the Working Group on the Universal Periodic Review', A/HRC/31/14, 13 January 2016. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/004/89/PDF/G1600489.pdf?OpenElement.
[60] The Conversation, Paul Redmond, At last, Australia has a Modern Slavery Act. Here's what you'll need to know. Available at: https://theconversation.com/at-last-australia-has-a-modern-slavery-act-heres-what-youll-need-to-know-107885
[61] Department of Foreign Affairs and Trade, 'Australia's Strategy for Abolition of the Death Penalty', June 2018. Available at: https://dfat.gov.au/international-relations/themes/human-rights/Documents/australias-strategy-for-abolition-of-the-death-penalty.pdf.
[62] Department of Foreign Affairs and Trade, 'Foreign Policy White Paper', 2017. Available at: https://www.fpwhitepaper.gov.au/.
[63] Council of the European Union, 'EU Action Plan on Human Rights and Democracy', 2015. Available at: https://www.consilium.europa.eu/media/30003/web_en__actionplanhumanrights.pdf.

and provide guidance to overseas missions on developing and implementing advocacy strategies. The strategy should include a focus on accountability for child rights abuses.

Recommendation 3: The Department of Foreign Affairs and Trade should build firmer partnerships and institutional arrangements between Australian civil society organisations and Pacific civil society organisations through capacity-building, mentoring and professional exchange, and supporting and fostering relationships between local civil society organisations and local governments.

Recommendation 4: The Department of Foreign Affairs and Trade should increase funding of the Australian NGO Cooperation Program and Direct Aid Program to enhance the capacity of civil society organisations to access long-term, flexible assistance to support the delivery of human rights capacity building, with a particular focus on the Pacific.

Case study: Use of United Nations Security Council sanctions and autonomous sanctions in North Korea

Overview of the human rights situation in North Korea and impact on children

DPRK is one of the most repressive states in the world. The government restricts all civil and political liberties, including freedom of expression, assembly, association, and religion. It also prohibits all organized political opposition, independent media, civil society, and trade unions.[64] The HRC's latest report on the situation of human rights in DPRK[65] details evidence of gross violations of rights to life, liberty and security of the person, right to a fair trial, right to freedom of movement, rights to freedom of expression, access to information, freedom of association, and right to an adequate standard of living. Children are affected by all these violations but also subject to specific child rights violations such as forced labour, government discrimination in access to education, abuses against children who have mothers in other countries and corporal punishment in schools.[66]

Australia's response to human rights in North Korea

Australia has spoken on human rights abuses in the DPRK in multilateral forums. As a member of the Human Rights Council from 2018-2020, Australia has released two statements (March 2018 and March 2019) on human rights in the DPRK. The most recent statement includes that "respect for human rights is essential to achieve lasting peace and stability on the Korean Peninsula". The statements both urge the DPRK to make steps towards greater accountability.[67] Additionally, an Australian played a notable role in the 2014 Report of the

[64] Human Rights Watch, World Report 2018 North Korea available at: https://www.hrw.org/world-report/2019/country-chapters/north-korea
[65] Office of the High Commissioner for Human Rights OCHR, Situation of human rights in the Democratic People's Republic of Korea, August 2019. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/A_74_268_E.pdf
[66] Human Rights Watch, North Korea Briefing Paper, June 2018. Available at: https://www.hrw.org/news/2018/06/05/human-rights-north-korea
[67] Australia statement, 'Interactive Dialogue with Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea', Human Rights Council, 37th Regular Session, 12 March 2018, 12 March. Available at:

Commission of Inquiry on Human Rights in the DPRK, with the chairperson being The Hon Michael Kirby AC CMG, former Justice of the High Court of Australia.

Australia's use of United Nations Security Council and autonomous sanctions

Australia has imposed autonomous sanctions against the DPRK and implemented UNSC sanctions in response the DPRK's nuclear programme since 2006. UNSC sanctions are broader and reinforced by autonomous sanctions, as demonstrated in Figure 1. This suggests that Australian sanctions are largely meant as reinforcements and to demonstrate Australia's opposition to the DPRK nuclear programme.

What is prohibited by the DPRK sanctions regime?

The DPRK sanctions regime imposes the following sanctions measures:

Measure	UNSC	Autonomous
restrictions on the export or supply of certain goods	✓	
restrictions on the import or purchase of certain goods	✓	
restrictions on the export or provision of certain services	✓	✓
restrictions on the import or purchase of certain services	✓	
restrictions on commercial and other activities	✓	✓
restrictions regarding vessels	✓	
restrictions on providing assets to designated persons or entities	✓	✓
restrictions on dealing with the assets of designated persons or entities	✓	✓
travel bans on designated persons	✓	✓
power with respect to vessels	✓	✓

Figure 1, Source: Department of Foreign Affairs and Trade (DFAT)[68]

Australian sanctions are in response to the DPRK's nuclear programme, not human rights abuses. Australia would like to see the DPRK take concrete, verifiable, and irreversible steps towards denuclearisation, though neither Australian autonomous sanctions nor UNSC sanctions have been successful at solving the nuclear issue. Australia also contributes to UNSC sanctions through maritime surveillance activities, which the Department of Defence cites as "…a demonstration to [Australia's] enduring commitment to regional security and stability on the Korean Peninsula."[69]

---

https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/statements/Documents/statement-on-human-rights-in-dprk-12-march-2018.pdf; Australia statement, 'Interactive Dialogue with Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea', Human Rights Council, 40th Regular Session, 11 March 2019. Available at: https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/statements/Documents/40th-hrc-national-statement-id-human-rights-dprk.pdf

[68] Department of Foreign Affairs and Trade, 'Snapshot – Democratic People's Republic of Korea Sanctions Regime'. Available at: https://dfat.gov.au/international-relations/security/sanctions/Documents/sanctions-snapshot-democratic-peoples-republic-korea-unsc-and-autonomous.pdf

[69] Department of Defence, 'Australia conducts deployments to enforce sanctions on North Korea', 1 September 2019. Available at: https://www.minister.defence.gov.au/minister/lreynolds/media-releases/australia-conducts-deployments-enforce-sanctions-north-korea

Humanitarian context of sanctions against North Korea

Australian sanctions legislation currently includes provisions for humanitarian exemptions, as does UNSC sanctions. Regulation 19 of the *Autonomous Sanctions Regulations 2011* states that the Minister may waive the operation of a declaration under paragraph 6(1)(b) or (2)(b) only:

(a) on the grounds that it would be in the national interest; or
(b) on humanitarian grounds.

However, in practice exemptions can be drawn-out and still cause problems. One Australian citizen seeking an Australian exemption encountered a problem when the application flagged the name as one of her North Korean contacts as being a sanctioned individual. The name was in fact similar, but slightly different. The Australian was able to prove that the contact and the sanctioned individual were not the same person by obtaining a copy of their contact's passport, but DPRK organisations are not always willing to give out such information.[70] Korean naming conventions mean many Koreans may have similar or even the same names. Additionally, the nature of the state means humanitarian organisations must work with government bodies to implement their work, such as the Ministry of Public Health. The scope of who works for the government is wide in the DPRK, and in other authoritarian states.

Australia must ensure that humanitarian civil society organisations have avenues to share their experiences with delivering humanitarian aid. Sanctions intended to punish individuals in the North Korean government for human rights abuses should be adequately targeted to avoid inadvertent impacts on aid recipients. Human rights abuses on the Korean peninsula and humanitarian need are an unfortunate co-existence. Australian denouncement of human rights abusers through sanctions should not erode humanitarian ability to work inside the DPRK.

How could Magnitsky sanctions apply to the situation in North Korea?

The case of DPRK distinguishes itself from others as there is a security argument to be made in favour of imposing Magnitsky style sanctions to individuals in the country. As Australia recently stated in the Human Rights Council, "respect for human rights is essential to achieve lasting peace and stability on the Korean Peninsula".[71] Adopting sanctions that are imposed in response to human rights abuses could contribute to achieving peace and stability in the region, which is a key strategic interest for Australia. Moreover, adopting Magnitsky sanctions would complement existing measures; UNSC and autonomous sanctions imposed to deter from nuclear proliferation as well as targeted individual sanctions against human rights abuses. From a child rights point of view, Australia can play a role in fighting against child rights abuses in DPRK, particularly against forced labour which is often imposed by the government.

Collective application of sanctions through Magnitsky style measures, alongside the United States and other like-mindeds, would further limit the capacity for DPRK entities and organs of the state to access financial markets.[72] The need for close coordination on DPRK sanctions is particularly important given the various means by which the state has tried to evade their operation. UN experts have advised the UNSC that North Korea has generated an estimated $2

---

[70] Anonymous interview conducted by Dr. Nazanin Zadeh-Cummings, Deakin University (2019).
[71] Human Rights Council – 37th Regular Session (2018, 12 March). Interactive Dialogue with Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea – Australian Statement. Retrieved from: https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/statements/Documents/statement-on-human-rights-in-dprk-12-march-2018.pdf; Human Rights Council – 40th Session (2019, 11 March). Interactive Dialogue with Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea – Australian Statement. Retrieved from: https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/statements/Documents/40th-hrc-national-statement-id-human-rights-dprk.pdf
[72] See for example, U.S. Department of Treasury, 'North Korea Designations; Global Magnitsky Designation', 13 September 2019. Available at: https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190913.aspx.

billion for its weapons of mass destruction programs using "widespread and increasingly sophisticated" cyberattacks to steal from banks and cryptocurrency exchanges.[73] This will require innovative measures to ensure that targeted sanctions can capture a wider variety of activities and may also include greater attention towards individuals, entities or representatives of the state in third countries which facilitate illicit capital flows. This further highlights the need of greater clarity in the application of existing autonomous sanctions measures, which should be addressed in new Magnitsky style legislation.

Recommendation 5: The Australian government should ensure that in the development of any Magnitsky style legislation that sufficient protection and waivers are provided for aid organisations to ensure to ensure the continued delivery of humanitarian assistance by civil society organisations, including, but not limited to; health, water and sanitation, disaster risk reduction and response, nutrition, food security and protection activities.

Case study: Autonomous sanctions in Myanmar

Overview of the human rights situation in Myanmar and impact on children

The situation of human rights in Myanmar, especially in Rakhine state, has been under increased international scrutiny since the mass exodus of an estimated 745,000[74] Rohingyas to Bangladesh, following targeted violence by the Myanmar military in August 2017. There is little sign of improvement for the Rohingyas in displacement camps in Rakhine State, and they are still denied basic human rights such as freedom of movement, the right to an education, and political rights. More than 128,000 Muslims, about 125,000 Rohingya and 3,000 Kaman, remain in detention camps in central Rakhine State, where they have been confined since 2012, arbitrarily deprived of their liberty.[75] There are ongoing clashes between several armed groups including the Arakan army and the Myanmar military in the region. Conditions for safe and voluntary returns of Rohingyas back to Myanmar are far from being met, and Rohingyas living in refugee camps in Bangladesh will probably stay there for years.

Refugees who arrived in Bangladesh from 2017 reported continuing abuses by Myanmar security forces, including killings, arson, enforced disappearances, extortion, severe restrictions on movement, and lack of food and health care. They also reported sexual violence and abductions of women and girls in villages and at checkpoints along the route to Bangladesh.[76] Returnees to Myanmar faced arrest and torture by authorities.[77] Senior UN officials have accused Myanmar of crimes against humanity, ethnic cleansing and potential

[73] Reuters, 'North Korea took $2 billion in cyberattacks to fund weapons program: U.N. report', 6 August 2019. Available at: https://www.reuters.com/article/us-northkorea-cyber-un/north-korea-took-2-billion-in-cyberattacks-to-fund-weapons-program-u-n-report-idUSKCN1UV1ZX.
[74] Joint Response Plan, January – December 2019. Available at: http://reporting.unhcr.org/sites/default/files/2019%20JRP%20for%20Rohingya%20Humanitarian%20Crisis%20%28February%202019%29.comp .pdf
[75] Human Rights Watch, Myanmar World report- events of 2018. Available at: https://www.hrw.org/world-report/2019/country-chapters/burma#619ec4
[76]United Nations Human Rights Office of the High Commissioner (OHCHR) , Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, August 2019. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/sexualviolence/A_HRC_CRP_4.pdf
[77] Human Rights Watch, Myanmar World report- events of 2018. Available at: https://www.hrw.org/world-report/2019/country-chapters/burma#619ec4

genocide.[78] Beyond the implications of a protracted refugee crisis, the prospects of any alleged perpetrators of human rights abuses being held to account are limited at present.

The treatment of Rohingya children by the Myanmar authorities breaches core provisions of the Convention on the Rights of the Child, one of the few international treaties to which Myanmar is signatory. Specifically, the outbreak of violence against the Rohingya community in August 2017 led to a comprehensive failure to protect children from violence, abuse, neglect, sexual and other exploitation, inhumane treatment and detention.[79] By denying many of the remaining Rohingya children living in camps in northern Rakhine State access to a formal education, Myanmar is also violating the rights of those children to education.

Efforts have been made by the international community to investigate alleged crimes perpetrated against the Rohingya community. The HRC established a Fact-Finding Mission (FFM) in March 2017 to investigate alleged human rights violations. The FFM published a report in June 2018, paving the way for the creation of and has now handed over the evidence gathered to the creation of the Independent Mechanism for Myanmar., focused on evidence gathering for future criminal prosecutions. The ICC in November 2019 authorised an investigation into the crime against humanity of mass deportation and related crimes by Myanmar officials against the Rohingya. That body, as well as the ICC, is continuing to gather evidence that could be used in legal cases, but the UN has not been granted access to the country to carry out investigations on the ground. The Gambia also filed a case against Myanmar in front of the International Court of Justice for breach of the UN Convention on Genocide.[80] The ICJ has ordered voted unanimously to order Myanmar to take "all measures within its power" to prevent genocide, to which they said the Rohingya remained at serious risk. In response, the Myanmar Government said that the ruling presented a 'distorted picture of the situation'.[81] Myanmar authorities continue to deny all the above-mentioned bodies access to the country.

Australia's response to human rights abuses in Myanmar

Australia has addressed the human rights situation in Myanmar both multilaterally and bi-laterally. The approach of the Australian government is to maintain a constructive dialogue with the civil and military authorities in Myanmar and support them in adopting the necessary measures to address the human rights situation in the country. This method has in some cases led Australia to be less outspoken on the alleged ongoing human rights violations than some of its counterparts. For example, Australia has not publicly called for the referral by the UN Security Council to the International Criminal Court to investigate into alleged genocide, as opposed to the European Union.[82] Australia's bilateral engagement to address the human rights situation in Myanmar has otherwise consisted of dialogues and official visits to the country, development and humanitarian aid as well as autonomous sanctions.

---

[78] Dr Cameron Hill, Australia's response to the Rohingya human rights and migrant crisis—a quick guide, June 2018. Available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/Rohingya

[79] Save the Children Norway, Joint Legal opinion on the government of Myanmar's compliance with the convention on the rights of the child in the context of the treatment of Rohingya children following the events of 25 August 2017, June 2018- Available at: https://resourcecentre.savethechildren.net/node/13627/pdf/joint_legal_opinion_-_myanmar.pdf

[80] The Guardian, Owen Bowcott, 'Gambia files Rohingya genocide case against Myanmar at UN Court, 11 November 2019. Available at: https://www.theguardian.com/world/2019/nov/11/gambia-rohingya-genocide-myanmar-un-court

[81] BBC World, Myanmar Rohingya: government rejects ICJ ruling, January 2020. Available at: https://www.bbc.com/news/world-asia-51229796

[82] Federation Internationale des ligues des Droits de l'Homme (FIDH), Myanmar: European Parliament calls for ICC investigation of the full scope of human rights violations, Oct 2018, Available at: https://www.fidh.org/en/international-advocacy/european-union/myanmar-european-parliament-calls-for-icc-investigation-of-the-full

Australia's engagement at the Human Rights Council

As a member of the HRC since 2018, Australia has been involved in several actions to seek justice for the human rights abuses in Myanmar, particularly those perpetrated against the Rohingya community. In March 2017, the Australian Government co-sponsored an EU-led resolution in the UN Human Rights Council to establish an international fact-finding mission to investigate allegations of systematic human rights abuses in northern Rakhine State. Australia voted to adopt three other resolutions by the HRC on the situation of human rights in Myanmar, in March 2018[83] in September 2018[84] and in September 2019.[85] The latest resolution drafted by the EU and Organisation of Islamic Cooperation (OIC), established a mechanism to collect, preserve, and analyse evidence of grave crimes committed in Myanmar, and prepare case files for prosecution. The UN General Assembly has also passed a resolution affirming the establishment of this mechanism and calling for its prompt initiation.

Australia has regularly called for the full implementation of the Rakhine state Advisory Committee (RAC) recommendations,[86] to address the situation of Rohingyas and other minorities in Rakhine and create the necessary conditions for refugees to return. Another consistent call from the Australian Ministry of Defence Foreign Affairs and Trade has been for the government of Myanmar to give full access to humanitarian agencies, including in its statement at the 42nd HRC session.[87]

However, the case of Myanmar illustrates the limits of multilateral actions to seek accountability for human rights abuses. As members of the UNSC, China and Russia have shielded Myanmar from accountability and scrutiny, weakening UN measures by refusing notably to refer to the ICC to investigate into alleged war crimes, human rights abuses and attempts of genocide, and attempting to limit high level discussions.[88] Save the Children has strongly supported calls for the investigation and prosecution crimes in Myanmar. George Graham, Director of Children and Armed Conflict at Save the Children, has said:

> *"The scale and intensity of violence committed against the Rohingya by Myanmar security forces demands an independent and impartial hearing in a court of law. Rohingya boys and girls were killed, raped and witnessed horrific human rights violations. Approximately half a million children have been displaced into neighbouring Bangladesh - where nearly one in five are experiencing mental distress. They are entitled to their day in court."*[89]

---

[83] Human Rights Council resolution 37/32, Situation of human rights in Myanmar, March 2018. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/37/32

[84] Human Rights Council Resolution 39/2, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, September 2018. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/39/2

[85] Human Rights Council Resolution 42/3, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, September 2019. Available at: https://undocs.org/A/HRC/RES/42/3

[86] Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine, August 2017. Available at: http://www.rakhinecommission.org/the-final-report/

[87] Human Rights Council 42nd session - Interactive Dialogue with Special Rapporteur on Myanmar (oral update), September 2019. Available at: https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/statements/Documents/42nd-hrc-national-statement-id-special-rapporteur-myanmar.pdf

[88] Gert Rosenthal, 'A Brief and Independent Inquiry into the Involvement of the United Nations in Myanmar from 2010 to 2018, 29 May 2019. Available at: https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/Myanmar%20Report%20-%20May%202019.pdf. See also, as reported in Al Jazeera, 'Why the UN failed to save the Rohingya', 28 June 2019. Available at: https://www.aljazeera.com/news/2019/06/united-nations-failed-save-rohingya-190628024749391.html. Civil society organisations have consistently raised concerns with the lack of acc

[89] Al Jazeera, 'ICC approves probe into Myanmar's alleged crimes against Rohingya', 15 November 2019. Available at: https://www.aljazeera.com/news/2019/11/icc-approves-probe-myanmar-alleged-crimes-rohingya-191114162419921.html.

Australia's aid to Myanmar

Australia also intends to promote human rights in Myanmar through its aid policy in the country:

> *"Australia's efforts to promote peace and stability in Myanmar encompass development assistance for peace and democratic governance, humanitarian assistance, and diplomatic engagement on human rights, humanitarian access, peacebuilding and democratic reform."*[90]

This encompasses development assistance for democratic governance as well as humanitarian assistance. Australia invested $29.2 million from 2016 to 2019 in the Myanmar Australia Peace Support Program to assist the implementation of the Nationwide Ceasefire Agreement between the government and a number of ethnic groups in the country. However, the Ceasefire Agreement does not include representatives of the Rohingya community. Additional support is provided for programs aimed at improving governance with an investment of $30.1 million from 2014 to 2022. Finally, Australia supports women's political participation in Myanmar through a Gender Equality Program.[91]

Australia's dialogue with Myanmar authorities

In October 2017, a spokesperson at DFAT declared that 'we consider it important we maintain appropriate lines of communication with Myanmar on a very challenging set of security, human rights and humanitarian issues and concerns in Rakhine state'.[92] At the time, the then Foreign Minister also stated that she had refrained from publicly condemning Myanmar's government "…because I can see that Aung San Suu Kyi can't be blamed for what's happening. She has to be part of the solution; otherwise we will be going back decades in terms of Myanmar's growth and prosperity".[93]

The communication between Australia and the government of Myanmar is ensured through visits by the Foreign Minister and through diplomatic engagement via the Australian embassy in Yangon. Following a visit to Myanmar in 2018, Foreign Minister Payne declared that Australia was working with Myanmar to "encourage efforts towards peace and reconciliation".[94] There was no public reference to the allegations of genocide or need for accountability at the time.

Australia also engages with the Myanmar military by providing training on humanitarian and non-combat areas such as disaster relief, peacekeeping, aviation safety and English-language training its cooperation in defence matters. In April 2018, Australia's Ambassador to Myanmar met with the commander-in-chief of Myanmar's military, Senior General Min Aung Hlaing. According to a post on General Min Aung Hlaing's official Facebook page, the two discussed defence cooperation, as well as the situation in Rakhine State. The post mentions 'concerted efforts of the government and the Tatmadaw in restoring eternal peace and participation of Australia in the peace processes, progress of undertakings in Buthidaung-Maungtaw region of

---

[90] Department of Foreign Affairs and Trade, Promoting Peace and stability in Myanmar. Available at: https://dfat.gov.au/geo/myanmar/development-assistance/Pages/peacebuilding-assistance-myanmar.aspx
[91] Ibid.
[92] Sidney Morning Herald, Australia softens Rohingya UN resolution to accusations of 'whitewashing' Available at: https://www.smh.com.au/world/australia-insists-on-rewording-rohingya-un-resolution-to-accusations-of-whitewashing-20170928-gyqbis.html
[93] Dr Cameron Hill, Australia's response to the Rohingya human rights and migrant crisis—a quick guide, June 2018. Available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/Rohingya
[94] Lowy Institute, The chance for Australia to urge ASEAN to act on the Rohingya crisis, April 2019. Available at: https://www.lowyinstitute.org/the-interpreter/chance-australia-urge-asean-act-rohingya-crisis

Rakhine State, and a helping hand given by Australia to development tasks of Myanmar.[95] Additionally, Australia's Ambassador to Myanmar met again with the Senior General in January 2019, exchanging gifts and posing for photos. He has expressed an interest to train his officers in Australia.[96] The ongoing cooperation of Australia with Myanmar is part of the government's strategy to provoke 'positive change in Myanmar' and to 'promote professionalism and adherence to international laws'.[97]

Save the Children notes that Senior General Min Aung Hlaing has been identified by the Fact-Finding Mission as one of the chief architects of the genocide. As a result, he has faced targeted sanctions by the European Union and by the United States. He was not however part of the militaries targeted by Australian autonomous sanctions in October 2018, nor has he been included since, which speaks to Save the Children's concerns with the arbitrary nature of the current sanctions regime.

Autonomous sanctions on Myanmar

While Australia uses soft diplomacy through bilateral dialogues and development aid to promote human rights in Myanmar, the government also relies on punitive methods to hold perpetrators of violations to account. This is mainly through the autonomous sanction regime. The Australian Government first imposed the autonomous sanctions in 1991 in response to the Myanmar Government's failure to recognise the victory of the National League for Democracy in the elections in Myanmar in 1990, imposing an arms embargo and travel bans. Targeted financial sanctions were imposed in 2007 in response to the military regime's repression of the 'Saffron Revolution'. In response to democratic reforms initiated by the government of President Thein Sein, the Australian Government lifted the financial sanctions and travel bans in July 2012.

In October 2018, the Minister for Foreign Affairs imposed new targeted financial sanctions and travel bans on five members of the Myanmar military (**Tatmadaw**)[98], in response to the release of the full report of the UN Fact-Finding Mission on Myanmar,[99] which documented human rights abuses committed primarily by Myanmar's military against ethnic minorities. The sanctions were applied after substantial advocacy from civil society organisations[100] and included the following prohibitions:

- restrictions on supplying arms or related matériel;
- restrictions on the provision of certain services – related to arms manufacture or maintenance;
- restrictions on providing or dealing with assets to designated persons or entities - an 'asset' includes an asset or property of any kind, whether tangible or intangible, movable or immovable; and

[95] Dr Cameron Hill, Australia's response to the Rohingya human rights and migrant crisis—a quick guide, June 2018. Available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/Rohingya

[96] The Guardian, 'Australian ambassador meets with Myanmar military chief accused of Rohingya genocide', 21 February 2020. Available at: https://www.theguardian.com/world/2020/feb/21/australian-ambassador-meets-with-myanmar-military-chief-accused-of-rohingya-genocide.

[97] SBS News, Bishop: Australia to retain military links with Myanmar despite Rohingya crisis, June 2018. Available at: https://www.sbs.com.au/news/bishop-australia-to-retain-military-links-with-myanmar-despite-rohingya-crisis

[98] Explanatory Statement Issued by the Authority of the Minister for Foreign Affairs, Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018. Available at: https://www.legislation.gov.au/Details/F2018L01409/Explanatory%20Statement/Text

[99] UN FFM, Massive violations by military in Rakhine, Kachin and Shan States, Sept 2018. Available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E

[100] Human Rights Watch, 'Australia: Seek Justice for Myanmar Atrocities', 11 September 2018. Available at: https://www.hrw.org/news/2018/09/11/australia-seek-justice-myanmar-atrocities.

- travel bans on designated persons.[101]

Australia continues to maintain an arms embargo and restrictions on the export or provision of services to Myanmar, due to ongoing concerns about armed conflict, weapons proliferation and human rights.[102] While both maintaining a dialogue with the government and military of Myanmar and imposing targeted sanctions on individuals, Australia has also been active multilaterally, notably through its mandate at the HRC.

How could Magnitsky sanctions apply to Myanmar?

Acknowledging that Australia's approach to the human rights abuses in Myanmar has been based on balancing multilateral public engagement with bilateral private advocacy, improving the autonomous sanctions regime by passing legislation similar to the Magnitsky Act would perfectly align with that approach. Imposing autonomous sanctions to individuals or entities takes part in the broader scheme of pressuring Myanmar to take action to address the human rights situation in the country. Even though there are doubts around the meaningfulness of the steps taken by the government to address these serious concerns,[103] it seems clear that the international pressure pushes the government to show willingness to take those steps. Australia's adoption of autonomous sanctions against five members of the Tatmadaw has contributed to that international pressure. However, the choice of the individuals targeted, although cited in the FFM report, can seem somewhat arbitrary as the FFM report refers to more than five individuals allegedly responsible for human rights abuses. Adopting Magnitsky style sanctions with clear process around assessment of different cases as recommended in this submission would allow a more systematic procedure.

Individual targeted sanctions serve several purposes. Firstly, they can act as a symbolic way to let the militaries targeted know that are being watched by another country. Passing Magnitsky Act laws would allow Australia to impose sanctions on individuals who are at a lower level in the command chain, as there would not need to be high profile to be targeted as it can be under the current sanctions regime. These individuals are the most likely to be influenced by the pressure created by such sanctions. Secondly, Magnitsky type sanctions would help show the Rohingya and other communities whose fundamental rights have been violated that the international community is actively supporting them on their path to justice. The US took an important first step in that direction by imposing sanctions under the *Global Magnitsky Act* on four high command military figures for their human rights abuses in Rakhine State. The list included the Chief and the Deputy chief of army.[104] Thirdly, as a regional power, Australia has a key role to play alongside like-minded countries, keeping the plight of the Rohingya community on the international agenda.

Putting additional pressure on the government of Myanmar through targeted sanctions could push them to implement the recommendations made by the Rakhine Advisory Committee, aimed at creating the right conditions for Rohingya refugees to return and for the Rohingya community still living in Rakhine to live peacefully and with their rights respected. International pressure could contribute to ensuring the Myanmar government takes the necessary measures to address the situation of the Rohingya community both in Myanmar and Bangladesh. This would specifically benefit Rohingya children who have been deprived of a

[101] Department of Foreign Affairs and Trade, Snapshot Myanmar sanctions regime. Available at: https://dfat.gov.au/international-relations/security/sanctions/Documents/sanctions-snapshot-myanmar-autonomous.pdf
[102] Ibid.
[103] Doubts have been raised around the independence of the Independent Commission of Inquiry set up by the government to investigate into the alleged crimes committed by the military against ethnic minorities.
[104] Servet Günerigök, Americas, Asia Pacific, US adds Myanmar army chief to Magnitsky sanction list Dec 2019. Available at https://www.aa.com.tr/en/americas/us-adds-myanmar-army-chief-to-magnitsky-sanction-list/1669789#

formal education since 2017. Adopting targeted sanctions would also increase accountability for the crimes committed on children during the violence outbreak in 2017. A UN HRC report on child rights violations on the Rohingya community in Myanmar found evidence of "indiscriminate and extrajudicial killing of Rohingya children, and the torture, ill-treatment and gender-based violence"[105] during violence committed in August 2017. Australia can contribute to ensuring these crimes do not go unpunished by strengthening its sanctions regime.

Furthermore, even though the current Australian autonomous sanctions regime might allow the imposition of sanctions on companies or corporations, it has never been the case so far. In the case of Myanmar, targeting economic entities held by high level militaries would be another path towards pressuring authorities to address the human rights situation. In one of its latest reports in August 2019, the UN Fact Finding mission has recommended the imposition of economic sanctions on companies that have ties with the Myanmar military.[106] Marzuki Darusman, chair of the mission declared that:

> *"…the implementation of the recommendations in this report will erode the economic base of the military, undercut its obstruction of the reform process, impair its ability to carry out military operations without oversight and thus reduce violations of human rights and international humanitarian law, and serve as a form of accountability in the short-term"*[107]

The report establishes the degree to which Myanmar's military has used its own businesses, foreign companies and arms deals to support brutal operations against ethnic groups that constitute serious crimes under international law, bypassing civilian oversight and evading accountability. Considering that Australia already imposes an arms embargo against Myanmar, adopting Magnitsky type sanctions that would simplify the procedure to impose restrictions on economic entities would considerably reinforce the efficiency of both the arms embargo and the individual sanctions.

Experience of other jurisdictions with Magnitsky Acts

Save the Children's experiences in jurisdictions with Magnitsky Acts

Save the Children has 25,000 dedicated staff across 120 countries, which respond to major emergencies, deliver innovative development programmes, and ensure children's voices are heard through our campaigning to build a better future for and with children. Our staff work in jurisdictions where Magnitsky Acts apply. This includes Save the Children members in the United States, Canada, the United Kingdom, Lithuania, as well as a Europe office, which covers developments in the European Union. We have contacted our counterparts in other jurisdictions to obtain information on the application of Magnitsky Acts and the application with respect to children's rights.

Save the Children United States has been supportive of the 'Magnitsky style sanctions regime' and particularly the *Global Magnitsky Act* which introduced the ability for the US to leverage sanctions on human rights abusers outside of country-specific sanctions regime. This has been considered by our US based staff as a valuable additional tool for accountability, including accountability for child rights abuses. Crimes against children have been specifically

---

[105] Office of the High Commissioner for Human Rights , Situation of human rights of Rohingya in Rakhine State, Myanmar, HRC/40/37, March 2019. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf

[106] Office of the High Commissioner for Human Rights OCHR, the economic interests of the Myanmar military - A/HRC/42/CRP.3 August 2019. Available at: https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx

[107] Ibid.

mentioned in the Global Magnitsky-related designations of Francisco Javier Diaz Madriz in Nicaragua and of the Burmese 99th LID, Than Oo, and Maung Maung Soe. Since the US does not have a country-specific sanctions regime for Myanmar, those sanctions would not have existed without the *Global Magnitsky Act*. Save the Children United States thus considers that Magnitsky sanctions are an efficient tool to fight impunity of child rights abuses. They have noted that one of the gaps in the *Global Magnitsky Act* from a child rights perspective is that at present it does not reference the six grave violations of children and armed conflict. This would provide the US with greater capacity to target serious violations of international humanitarian law in armed conflicts, such as those taking place in Syria and Yemen.

Developments in the European Union

In December 2019, the European Union member states announced through a council resolution they will start working together on adopting a global sanctions regime to address gross human rights violations.[108] This announcement follows an EU parliamentary resolution calling for an EU-wide 'Magnitsky Act' to:

> *"…swiftly establish an autonomous, flexible and reactive EU-wide sanctions regime that would allow for the targeting of any individual, state and non-state actors, and other entities responsible for or involved in grave human rights violations."*[109]

At the moment, the EU can already invoke sanctions against:

- governments of non-EU countries because of their policies;
- entities (companies) providing the means to conduct the targeted policies;
- groups or organisations such as terrorist groups; and
- individuals supporting or involved in terrorist activities.[110]

Sanctions on individuals include travels bans, visa restrictions and asset freezes. The EU can also impose sector-wide sanctions. Despite these tools, European countries are looking at adjusting the regime with flexible but strict global targeted sanctions. Although the name Magnitsky has been the object of some controversy between a few member states, the intention of the sanctions remains the same and are also meant to align with democratic partner countries like the US and the UK, and within the EU, such as Estonia and Latvia. Some countries have shown a true determination in seeing this proposal through. In a recent October proposal, the eight members of the Nordic Council, which includes Denmark, Finland, Iceland, Sweden, Norway, the Faroe Islands, Greenland, and Åland, are preparing to follow suit "in the event that Magnitsky legislation is not implemented in the EU".[111] The introduction of an EU Magnitsky type act would allow for sanctions against human rights violators and those involved in corruption, obviating the need for a new sanctions regime. It would reduce the complexity of the current system and enable the EU to introduce sanctions in the absence of UN Security Council resolutions or a countrywide sanction regime.[112]

Developments in the EU are even more important given that Australia is currently negotiating an FTA with the EU. The FTA, according to DFAT, "signals our shared commitment to open markets, free trade and the rules-based global trading system" and will seek boost trade in

---

[108] Euractiv, 'EU ministers break ground on European 'Magnitsky Act', 10 December 2019. Available at: https://www.euractiv.com/section/justice-home-affairs/news/eu-ministers-break-ground-on-european-magnitsky-act/
[109] European Parliament, Motion for a resolution on a European human rights violations sanctions regime 2019/2580(RSP) B8, March 2019. Available at : http://www.europarl.europa.eu/doceo/document/B-8-2019-0180_EN.html?redirect
[110] European Council, How and when the EU adopts restrictive measures, available at: https://www.consilium.europa.eu/en/policies/sanctions/
[111] Ibid.
[112] PluriCourts Blog, Instituting a Global Sanctions Regime, June 2019. Available at: https://www.jus.uio.no/pluricourts/english/blog/emma-carrol/instituting-a-global-sanctions-regime.html

goods, services and investment.[113] In doing so, it will be valuable to consider how complementarity in sanctions measures, most likely applicable to the restriction of goods to third parties, with respective Magnitsky style laws could be achieved. This will assist in improving the deterrence effect of sanctions measures.

Developing a new sanctions regime for Australia

Save the Children is of the view that Australia needs a new, more responsive and targeted sanctions regime in the form of Magnitsky style legislation aimed at gross violations of human rights and serious violations of international humanitarian law, including child rights violations, and significant acts of corruption, that mandates civil society engagement in the process. Existing legislation and regulations through the *Autonomous Sanctions Act*, *Autonomous Sanctions Regulations* and the *Charter of the United Nations Act* are insufficient. Magnitsky style legislation would provide a valuable tool to complement current multilateral and bilateral measures, support the actions of our like-minded partners and ensure that Australia does not become a haven for rights abusers.

Save the Children notes that Australia's 2017 Foreign Policy White Paper states:

> *"Australia's national interests are best advanced by an evolution of the international system that is anchored in international law, support for the rights and freedoms in United Nations declarations, and the principles of good governance, transparency and accountability"*[114]

This assessment fits the spirit of Magnitsky style legislation. To ensure that Australia can effectively advocate for an international system that supports rights and freedoms, we need a variety of tools that can drive accountability. Not one measure will achieve that, whether it is using the UNSC, HRC or holding a human rights dialogue. But Save the Children is of the view that Magnitsky style legislative measures will go a substantial way to filling our accountability gaps, while enhancing protection of children's rights.

Save the Children recommends the following measures in the development of a new sanctions regime for Australia:

Recommendation 6: The development of a standalone International Human Rights (Magnitsky Sanctions) Act targeting persons and entities responsible for gross violations of international human rights law, serious violations of international humanitarian law and acts of significant corruption.

Recommendation 7: The standalone International Human Rights (Magnitsky Sanctions) Act should include the following features:

- "gross violations of human rights", "serious violations of international humanitarian law" and "acts of significant corruption" included as independent sanctionable activities;
- specific protections for children;

[113] Department of Foreign Affairs and Trade, 'Australia-European Union Free Trade Agreement: Summary of negotiating aims and approach', November 2018. Available at: https://dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/summary-of-negotiating-aims-and-approach.aspx.
[114] Department of Foreign Affairs and Trade, 'Foreign Policy White Paper', 2017. Available at: https://www.fpwhitepaper.gov.au/

- mandated role for civil society organisations to be involved in making applications for sanctions measures;
- protections for civil society organisations undertaking humanitarian work against the imposition of sanctions, including clear exemptions;
- the inclusion of state and non-state actors;
- reviewable sanctions measures, which protect procedural fairness of the listed person or entity, and incorporate specialist analysis of impacts on children; and
- regular reporting requirements to the Australian Parliament to increase oversight.

Recommendation 8: The standalone International Human Rights (Magnitsky Sanctions) Act should include specific reference to six grave violations of children's rights in situations of armed conflict as criteria for attracting sanctions in considering "serious violations of international humanitarian law". This includes:

- killing and maiming of children;
- recruitment or use of children as soldiers;
- sexual violence against children;
- abduction of children;
- attacks against schools or hospitals; and
- denial of humanitarian access for children.