Warda Shazadi Meighen
Tel: +1-416-363-1696 x104
wshazadimeighen@landingslaw.com

Attention: Ms. Miriam Burke
Clerk of the committee / greffière du Comité
Special Committee on Afghanistan / Comité spécial sur l'Afghanistan
Committees Directorate / Direction des comités
House of Commons / Chambre des communes
131 Queen Street, Room 6-37 / 131, rue Queen
Ottawa, Ontario K1A 0A6
AFGH@parl.gc.ca
Tel/Tél. : 613-943-5132
Cell: 613-290-3559

VIA EMAIL

Dear Ms. Burke:

Re: Special Committee on Afghanistan – Terrorism / Criminal Code – S. 83.03 (b) of the *Criminal Code*

Please find enclosed a memorandum prepared by four leading thinkers on s. 83.03(b) of the *Criminal Code*[1] as it relates to the situation in Afghanistan and which was shared by the authors with the Honourable David Lametti's office on May 4, 2022. My testimony on May 16, 2022 to Special Committee on Afghanistan will reference this memorandum.

I also note that a proceeding under the above-referenced *Criminal Code* provision may only be commenced with the consent of the Attorney General, pursuant to section 83.24 of the *Criminal Code.*

Sincerely,

Warda Shazadi Meighen
Partner, Landings LLP

[1] *Criminal Code* (RSC , 1985, c. C-46)

UNIVERSITY OF TORONTO

HĀKI CHAMBERS

4 May 2022

The Hon. David Lametti
Attorney General and Minister of Justice
Government of Canada

Dear Minister Lametti:

Re: Section 83.08(b) of the *Criminal Code* and extrication of individuals from Afghanistan

We are writing to offer our opinion on whether the payment of regular taxes or fees to governing authorities in Afghanistan, by employees of humanitarian actors and/or by organizations that are funded by Canada to extract individuals from Afghanistan, would violate section 83.03(b) of the *Criminal Code*. Section 83.03(b) provides:

> Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services … knowing that, in whole or part, they will be used by or will benefit a terrorist group.

The Governor-in-Council has listed the Taliban as a "terrorist group" under section 83.05(1). It is our understanding that the concern has been raised that the simple payment of regular taxes or fees to Afghan authorities – a routine, compelled and inescapable activity for individuals living under a governing authority – would constitute the provision of "property" or "financial services" to the Taliban with the knowledge that they would benefit the Taliban, in violation of section 83.03(b).

In our opinion, this conduct would not violate section 83.03(b), for the following three reasons.

First, foreign governments cannot be a "terrorist group" under the *Criminal Code*, which means taxes or fees paid to foreign governments cannot violate section 83.03(b). What constitutes a foreign government under the *Criminal Code* is determined by customary international law. Since the Taliban is the government of Afghanistan under customary international law, taxes or fees paid to it do not violate section 83.03(b).

Second, even if foreign governments can be a terrorist group, the payment of taxes or fees to the Taliban would not violate section 83.03(b). The payment of a tax is not the provision of property or financial services. Moreover, if section 83.03(b) is interpreted in a manner consistent with

section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), the payment of taxes or fees would not be done with the knowledge that it would benefit the Taliban.

Third, if paying taxes or fees to the Taliban violates section 83.03(b), it would have the absurd consequence of rendering inadmissible to Canada precisely the Afghans whom the Canadian government has pledged to resettle, under the *Immigration and Refugee Protection Act* ("*IRPA*"). The reason is that section 36(2) of *IRPA* renders inadmissible foreign nationals for "committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament" – which would include section 83.03(b).

Foreign governments cannot be a "terrorist group" under the* Criminal Code. *The Taliban is the government of Afghanistan, which means taxes or fees paid to it do not violate section 83.03(b)

Section 83.03(b) prohibits the provision of property or financial services to a "terrorist group". Section 85.01(1) defines a terrorist group as an "entity", which in turn under section 83.01(1) is "a person, group, trust, partnership or fund or an unincorporated association or organization". Ordinary principles of statutory interpretation preclude defining "group" or "entity" to include governments, including foreign governments.

The exclusion of foreign governments from the definition of a "terrorist group" is supported by the use of the term "government" in Part II.1 of the *Criminal Code*. In those provisions, the term "government" refers to both Canadian and foreign governments interchangeably. Section 83.01(1)(b) defines terrorism as "an act or omission, in or outside Canada … with the intention of" *inter alia* "compelling a government … whether the government … is inside or outside Canada", which includes both Canadian and foreign governments. Section 83.02 creates the offence of providing or collecting property for certain activities to include "any other act or omission … to compel a government … to do or refrain from doing any act", which also encompasses both Canadian and foreign governments. Finally, section 83.06(1)(a) permits the Minister of Public Safety and Emergency Preparedness to make an application to a judge for "the admission of information obtained in confidence from a government an institution or an agency of a foreign state" – i.e., a foreign government. The statutory scheme clearly differentiates between governments and entities that can constitute a terrorist group. It follows that taxes or fees paid to a foreign government do not violate section 83.03(b).

The *Criminal Code* does not define what constitutes a foreign government. The term falls be interpreted in accordance with its meaning under the rules of customary international law, which "are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law": *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 94.

Under customary international law, it has long been established that the criterion for the existence of a government is effective control and not democratic legitimacy: *Tinoco Arbitration, Great Britain v. Costa Rica* (1923) 1 R.I.A.A. 369. Accordingly, most states no longer formally recognize foreign governments. A recognising state has no special authority to determine the status of that which is recognised: *The Creation of States in International Law*, 2nd ed. at 152. Canada itself issued a statement abandoning the formal recognition of governments in 1988: (1989) 27 *Can.Y.B.Int'l L.* 335 at 387-8.

The question of whether the Taliban is the government of Afghanistan under customary international law is be determined by objective criteria. Recognition or non-recognition by Canada is not legally determinative. These criteria include whether the Taliban are in effective control of Afghanistan; whether they enjoy habitual obedience or acquiescence of the population; whether there are there any rival governments; and what dealings if any there are between the Taliban and foreign states.

On the basis of the evidence available to us, it is our opinion that the Taliban are the government of Afghanistan. They are in effective control of Afghanistan and enjoy habitual obedience or acquiescence of a significant proportion of the population. There are no rival governments. Moreover, there have been dealings between foreign states and the Taliban; Canada's non-participation in some of these meetings has no legal relevance.

Moreover, the non-recognition of the Taliban is a matter of political discretion, not a legally binding obligation under the *United Nations Charter* or applicable rules of customary international law. It is true that States may be placed under a legally binding duty by the United Nations General Assembly not to recognise a government; such an obligation may also flow from United Nations Security Council ("UNSC") Resolutions. However, neither General Assembly Resolutions, nor the UNSC Resolutions on Afghanistan adopted in the wake of the Taliban's victory in 2021, impose any such duty. On the contrary, UNSC Resolution 2593 (2021) is unequivocal in its explicit recognition that the Taliban is the governing authority in Afghanistan, in calling on "all donors and international humanitarian actors to provide humanitarian assistance to Afghanistan and major refugee-hosting countries", where Afghanistan means the government of Afghanistan – i.e., the Taliban.

Since the Taliban is the government of Afghanistan under customary international law, it cannot simultaneously be a terrorist group, and taxes or fees paid to it do not violate section 83.03(b). Indeed, under customary international law, Canada is under a duty to mitigate the consequences of the non-recognition of a government or state where it results in undue hardship to individuals, example by harming private rights or interests, or on humanitarian grounds: *Cyprus v. Turkey*, No. 25781/94 (European Court of Human Rights) at paras. 93 to 98. For example, Canada is under an international legal duty to give legal effect to the issuance of travel documents; the incorporation of companies; and the registration of births, deaths and marriages. This duty extends to not criminalizing compliance with routine administrative obligations, such as paying taxes or fees: *The Creation of States in International Law*, 2nd ed. at 17 to 18.

The payment of taxes or fees to the Taliban would not violate section 83.03(b)

The payment of a taxes or fees to the Taliban would satisfy neither the *actus reus* nor the *mens rea* requirements of section 83.03(b), if the latter is interpreted in a manner consistent with the principles of fundamental justice protected by section 7 of the *Charter*.

Section 83.03(b) criminalizes the provision or collection or invitation to collect "property". Section 2 of the *Criminal Code* defines "property" to include "real or personal property of every description" and includes anything that has been converted or exchanged for that property. The plain and ordinary meaning of the payment of taxes or fees is not the provision of property. In addition, section 83.03(b) also prohibits making available "financial or other related services". This phrase

should be interpreted to give effect to the 1999 *International Convention for the Suppression of the Financing of Terrorism*, which was one of the main purposes for enacting Part II.1. The *Convention* is limited in scope to the lending or transfer of money. The plain and ordinary meaning of the payment of taxes or fees is not the provision of financial services.

In addition, the *actus reus* of section 83.03(b) should be read consistently with the interpretation of the *actus reus* of the participation offence, section 83.18. Section 83.18 has been construed to exclude innocent activity that presents only "a negligible risk of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity" which "a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity": *R. v. Khawaja*, 2012 SCC 69 paras. 50, 51. Section 83.18 has also been read to require conduct that involves "a risk of harm beyond *de minimis*": *R. v. Ansari*, 2015 ONCA 575 at para. 186. Applied to section 83.03(b), any benefit provided to the Taliban should be beyond a minimal benefit, must present more than only a negligible risk of benefitting the group in relation to committing or facilitating acts of terrorism, and must materially enhance the abilities of a terrorist group to engage in terrorist activities.

The *mens rea* of section 83.03(b) requires proof beyond a reasonable doubt that the accused knew that their action will be used by or will benefit a terrorist group. Unlike sections 83.02, 83.03(a) and 83.04, the *mens rea* for section 83.03(b) does not require a purpose or intent in relation to a specific "terrorist activity" as defined in section 83.01(1). Section 83.03(b) appears to be based on the controversial proposition that the provision of any property, service or financial benefit to the non-terrorist activities of a terrorist group contributes to terrorism by freeing up resources within the organization to finance terrorism. This proposition was affirmed by a majority of the United States Supreme Court, *Holder v. Humanitarian Law Project*, 61 U.S. 1 (2010). As such, section 83.03(b) goes beyond UNSC Resolution 1373, which directed governments to implement the terms of the *International Convention on the Suppression of Terrorism Financing*. Article 2 of the *Convention* requires criminalization of the financing of various acts of violent terrorism.

In our opinion, the limited *mens rea* of section 83.03(b) may well violate section 7 of the *Charter*, on the basis that it is overbroad in relation the legitimate purposes of criminalizing terrorism financing and preventing terrorism and/or is grossly disproportionate to that end: Kent Roach, "Canada's New Anti-Terrorism Law" [2002] *Sing. J. of Legal Studies* 122 at 135. Given the Supreme Court's decision *Khawaja* as well as in *Appulonappa v. Canada*, 2015 SCC 59 (to be discussed below), we believe that courts would likely either read down section 83.03(b) to require intent or purpose in relation to a terrorist activity, or strike down section 83.03(b) as an unjustified violation of section 7. This is analogous to how the dissenting justices in *Holder v. Humanitarian Law Project* reasoned that the state cannot proceed on a "speculative" basis that a terrorist group will use any support for even peaceful activities to support violent ends, given that terrorism offences restricted fundamental freedoms and can result in up to ten years in imprisonment.

Finally, since Part II.1 of the *Criminal Code* gives effect to UNSC Resolutions 1988 (2011) and 2255 (2015), which called on all states to take measures against the Taliban and their associates, section 83.03(b) must be interpreted in the context of later UNSC Resolutions on the Taliban as well as on terrorism financing. UNSC Resolution 2615 (2021) provides that that "humanitarian assistance along with other activities that support basic needs in Afghanistan" do not violate Resolution 2255

(2015) and "the processing and payment of funds, other financial assets or economic resources, and the provision of goods and services necessary to ensure the timely delivery of such assistance or support such activities are permitted". In our opinion, any humanitarian measures to assist the resettlement of Afghans falls squarely within the humanitarian exception of Resolution 2615, and therefore cannot violate section 83.03(b).

If paying taxes or fees to the Taliban violates section 83.03(b), it would have the absurd consequence of rendering inadmissible under IRPA precisely the Afghans whom the Canadian government has pledged to resettle in Canada

The Canadian government has publicly committed to resettling thousands of Afghans from inside Afghanistan because they are at risk of persecution by the Taliban. The process of admitting non-citizens to Canada involves a determination of admissibility under section 36(2)(c) of *IRPA*:

> A foreign national is inadmissible on grounds of criminality for … committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament;

Section 83.01(1) has the effect of giving section 83.03(b) extra-territorial effect, including in Afghanistan. If it is correct that an individual violates section 83.03(b) by paying taxes or fees to the Taliban, vast numbers of persons in Afghanistan will breach that provision on an ongoing basis by engaging in a routine, compelled and inescapable activity for individuals living under a governing authority. Section 83.03(b) would ensnare for example, a Canadian journalist reporting from Afghanistan, any NGO delivering humanitarian aid in Afghanistan, or any Afghan simply subsisting day to day.

The absurd consequence of the proffered interpretation would be that precisely the Afghans whom the Canadian government has pledged to resettle because of the risk they face from the Taliban could be inadmissible under section 36(2)(c).

In our opinion, the correct approach to reading section 36(2)(c) is to follow the Supreme Court's interpretation of sections 37(1)(b) of and 117 of *IRPA* to avoid an equally absurd consequence, in *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 and *Appulonappa*. Section 117(1) of *IRPA*, as it then existed, created a quasi-criminal offence of people smuggling:

> No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

In *Appulonappa*, the government took the position that section 117(1) encompassed those refugee claimants, their families and humanitarian actors who aided the irregular movement of refugee claimants to Canada, even though irregular entry by refugees is not an offence. The Supreme Court rejected this interpretation of section 117(1) as overbroad and unconstitutional to the extent that it criminalized conduct "with no connection to and no furtherance of organized crime": *Appulonappa* at para. 70.

In *B010*, the government further argued that that since refugee claimants violate section 117(1) by participating in their own irregular entry, they were inadmissible under section 37(1)(b) *IRPA* for participating in organized crime. The Supreme Court rejected this interpretation because it yielded an absurd result (at para. 71):

> It is well established that Parliament should be presumed not to intend absurd results when it enacts legislation. Take, for example, the scenario proposed by B010 involving a family fleeing persecution, where the mother arranges to procure false travel documents, the father pays for the documents, and the daughter hides the documents as they flee their home. Upon arrival in Canada, they promptly disclose that their travel documents were false, and claim asylum. Without a financial or material benefit component, each family member has engaged in "people smuggling" and is inadmissible under s. 37(1)(*b*). As B010 phrases it, "Without the financial benefit requirement, it is not possible to differentiate the 'smuggler' from the 'smuggled'". The absurdity flows, in part, from the fact that, if each family member had procured, purchased, and concealed their own travel documents, without providing any mutual aid, it is undisputed that s. 37(1)(*b*) would not apply.

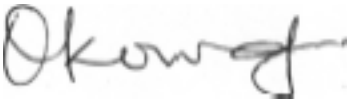
In parallel fashion, section 83.03(b) should be interpreted to avoid the absurd result that Afghans fleeing persecution at the hands of the Taliban become inadmissible when they pay taxes or fees to the Taliban in its role as governing authority of Afghanistan.

Thank you for your consideration. We would welcome the opportunity to discuss this opinion letter with you and your officials.

Sincerely,

Sujit Choudhry
Hāki Chambers
suj@choudhry.law
sujit.choudhry@hakichambers.com

Audrey Macklin
University of Toronto
audrey.macklin@utoronto.ca



Phoebe Okowa
Queen Mary University London
Hāki Chambers
Member (Elect), UN International Law Commission
p.n.okowa@qmul.ac.uk
phoebe.okowa@hakichambers.com

Kent Roach
University of Toronto
kent.roach@utoronto.ca