

# DE-CONFLICTING CANADA'S ANTI-TERRORISM LEGISLATION: KHAWAJA AND THE ONGOING CHALLENGES OF THE 'ARMED CONFLICT' EXCLUSION

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*The definition of 'terrorist activity' is fundamental to Canada's anti-terrorism legislation. Following the recent trial of Momin Khawaja before the Ontario Superior Court of Justice, it is clear that the 'armed conflict' exclusion – exempting wartime activities undertaken in accordance with international law – poses serious challenges to the coherence of this legislative regime, threatening the effectiveness of future domestic terrorism prosecutions. This article examines the 'armed conflict' exclusion and its judicial treatment in Khawaja, identifying key challenges and making specific recommendations to address them. Coupled with other issues arising from the 'armed conflict' exclusion, Khawaja serves to highlight a clear and pressing need for amendment of the statutory definition of 'terrorist activity.'*

*La définition d'« activité terroriste » est un élément fondamental de la législation canadienne contre le terrorisme. Suite au récent procès de Momin Khawaja devant la Cour supérieure de justice de l'Ontario, il est clair que l'exclusion « conflit armé » - qui fait exemption d'activités en temps de guerre entreprises conformément au droit international – présente des défis importants à la cohérence de ce régime législatif, menaçant l'efficacité de poursuites contre le terrorisme au Canada à l'avenir. Cet article examine l'exclusion « conflit armé » et le traitement juridique que l'on en fait dans Khawaja, identifiant des défis-clés et faisant des recommandations précises pour en traiter. En conjonction avec d'autres questions que soulève l'exclusion « conflit armé », Khawaja sert à mettre en évidence un besoin clair et pressant de modification à la définition statutaire d'« activité terroriste ».*

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## I. INTRODUCTION

On 29 October 2008, Momin Khawaja was convicted under Canada's post-9/11 anti-terrorism legislation.<sup>1</sup> He had been the first person charged under the *Criminal Code* provisions enacted in late 2001 as part of the omnibus *Anti-terrorism*

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1 *R. v. Khawaja*, [2008] O.J. No. 4244 [Khawaja].

*Act [ATA].*<sup>2</sup> As a result, his trial before Justice Douglas Rutherford of the Ontario Superior Court of Justice served as a litmus test for this legislation, and highlighted numerous areas of potential ongoing concern.

Not surprisingly, the definition of 'terrorist activity' is a fundamental element of this statutory regime, and its specific meaning played a key role in Khawaja's trial. Indeed, all of the charges against Khawaja required a direct or indirect link between him and the commission or facilitation of 'terrorist activity.'<sup>3</sup>

This article focuses on one particularly challenging area of this definition, relating to the meaning and application of a clause that excludes lawful activities undertaken during armed conflict from characterization as 'terrorist activity.' While other aspects of Justice Rutherford's reasoning have garnered far greater attention – in particular his decision to sever the requirement of a 'political, religious or ideological purpose, objective or cause' from the definition of 'terrorist activity'<sup>4</sup> – this 'armed conflict' exclusion nonetheless played a substantial role in Khawaja's trial and it can be expected to have a profound impact on future terrorist prosecutions in Canada.

The 'armed conflict' exclusion as it is currently worded ensures that courts conducting terrorist prosecutions will frequently be faced with international humanitarian law [IHL] issues relating to conflicts occurring partially or wholly outside of Canada. With some notable exceptions, Canadian courts have not had widespread experience in applying the vast and difficult body of IHL in domestic proceedings to date.<sup>5</sup> As a result, any legislative exclusion based largely on IHL considerations could have been expected to pose challenges. In the case of Canada's anti-terrorism legislation, however, these inherent challenges have been exacerbated by serious issues arising from the specific wording of the 'armed conflict' exclusion itself.

Part II of this article details the 'armed conflict' exclusion and its statutory context, as well as the legislative process leading to its enactment. Part III summarizes the judicial treatment of this provision in *Khawaja*. Drawing upon this case as an illustration, Part IV identifies some of the key challenges of the 'armed conflict' exclusion, in particular the difficulty of determining and then applying the appropriate international legal framework. Part V follows with specific recommendations to address these concerns.

2 Part II.1 ("Terrorism") of the *Criminal Code*, R.S.C. 1985, c. C-46, adopted as part of *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism 2001*, S.C. 2001, c. 41 [*Anti-terrorism Act* or *ATA*].

3 See e.g., *Khawaja*, *supra* note 1 at para. 1, outlining the charges against Khawaja. See also para. 85. Charges either referred directly to 'terrorist activity' or to his connection to a 'terrorist group,' which is a defined term itself referring back to 'terrorist activity,' as discussed in more detail below.

4 *R. v. Khawaja, Ruling on Charter Challenge to Certain Provisions of Part II.1 - Criminal Code*, 24 October 2006, [2006] O.J. 4245, application for leave to appeal to Supreme Court of Canada, dismissed 5 April 2007 [*Khawaja, Charter Challenge*].

5 For more detailed discussion of domestic reception of IHL and an overview of key general challenges for its application, see Christopher K. Penny, "Domestic Reception and Application of International Humanitarian Law: Coming Challenges for Canadian Courts in the 'Campaign against Terror'" in C. Carmody, ed., *Is Our House in Order? Canada's Implementation of International Law* (Montreal: McGill-Queen's University Press, forthcoming).

*Khawaja* illustrates not only the difficulty of applying IHL in Canadian courts, but also the significant problems that may arise for future domestic terrorist prosecutions if issues relating to the 'armed conflict' exclusion are not recognized and effectively addressed. Coupled with other challenges arising from the 'armed conflict' exclusion, *Khawaja* serves to highlight a clear and pressing need for amendment of the *ATA* definition of 'terrorist activity.'

## II. THE 'ARMED CONFLICT' EXCLUSION

The 'armed conflict' exclusion has substantial implications for the application of Canada's anti-terrorism legislation given its relationship to, and qualification of, the overarching definition of 'terrorist activity.' The following section outlines the specific content of the 'armed conflict' exclusion and its place in the larger statutory definition of 'terrorist activity,' as well as providing an overview of the process leading to its adoption in 2001. As demonstrated in later sections, the resulting ambiguity of this provision, coupled with its overall statutory importance, poses significant ongoing concerns.

### A. 'Terrorist Activity' and the 'Armed Conflict' Exclusion

Not surprisingly, the definition of 'terrorist activity' is a fundamental element of the anti-terrorism provisions of the *Criminal Code*. Reference to 'terrorist activity' is specifically incorporated throughout this legislation: the definition of 'terrorist group,'<sup>6</sup> the establishment of particular criminal offences,<sup>7</sup> procedures for the listing of terrorist entities<sup>8</sup> and numerous other provisions all rely, directly or indirectly, upon this definition. The definition is also expressly incorporated into other statutes, including the *National Defence Act* [*NDA*]<sup>9</sup> and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* [*Terrorist Financing Act*].<sup>10</sup> As a result, the specific meaning of 'terrorist activity' will have a profound impact on Canada's anti-terrorism efforts, as will any corresponding limitations imposed by the 'armed conflict' exclusion.

6 Para. 83.01(1) establishes that:  
'terrorist group' means

- (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
- (b) a listed entity,

and includes an association of such entities.

7 See e.g. ss. 83.03 and 83.04, establishing offences relating to terrorist financing. Interestingly, s. 83.02 also establishes a terrorist financing offence, but in doing so does not employ the entire definition of 'terrorist activity.' This issue is discussed in more detail in Part V, below.

8 Paragraph 83.05(1) establishes that an entity may be listed by the Governor in Council where "there are reasonable grounds to believe that [...] the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity" or that "the entity is knowingly acting on behalf of, at the direction of or in association with" such an entity.

9 R.S.C. 1985, c. N-5 [*NDA*]. Paragraph 2(1) establishes, *inter alia*, that for the purposes of the *NDA*, "'terrorist activity' has the same meaning as in subsection 83.01(1) of the *Criminal Code*."

10 S.C. 2000, c. 17 [*Terrorist Financing Act*]. Section 2 directly incorporates the *Criminal Code* definition of 'terrorist activity.'

For the purposes of the anti-terrorism provisions of the *Criminal Code*, Section 83.01(1) establishes, *inter alia*, that

“terrorist activity” means

- a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

[subparagraphs (i) – (x) reference general *Criminal Code* provisions implementing some of Canada’s obligations under specified multilateral anti-terrorism treaties], or

- b) an act or omission, in or outside Canada,

- (i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

- (ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person’s life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, *but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict*, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.<sup>11</sup>

As the 'armed conflict' exclusion is found in the tail section of the definition of 'terrorist activity,' it is therefore applicable to the entire range of activities described in the definition, whether in paragraph (a) or (b). As a result, this exclusion can be expected to have a considerable impact on the application of anti-terrorism legislation in Canada, most obviously with respect to domestic terrorism prosecutions.

## B. Legislative History of the 'Armed Conflict' Exclusion

The anti-terrorism provisions of the *Criminal Code* came into force on 24 December 2001, and were enacted as part of Bill C-36 (the *ATA*), an omnibus bill drafted and adopted quickly in the immediate aftermath of the 9/11 terrorist attacks.<sup>12</sup> Prior to its adoption, the *ATA* received significant attention by both the House and Senate, particularly in lengthy hearings before the House Committee on Justice and Human Rights and the Special Senate Committee on Bill C-36.<sup>13</sup> However, the sheer size of the *ATA*, the controversial and wide-ranging nature of many of its provisions and the ultimate closure of legislative debate limited the issues that could be addressed in any depth.<sup>14</sup>

Despite its importance as a qualification of the entire definition of 'terrorist activity,' the specific wording of the 'armed conflict' exclusion received virtually no sustained parliamentary attention prior to its adoption. From first reading to enactment, the 'armed conflict' exclusion remained unchanged. While this specific provision was raised in the House and Senate committees, attention focused on issues relating to its application rather than its drafting.

More specifically, discussion of the 'armed conflict' exclusion centred around its effect on armed resistance movements, with particular emphasis on its application to self-determination struggles such as that of the African National

11 Emphasis added.

12 See e.g. discussion of C-36 development in *Khawaja, Charter Challenge*, *supra* note 4, at para. 10.

13 The latter was originally named the Special Senate Committee on the Subject Matter of Bill C-36.

14 A Member of the House Committee, Peter MacKay, MP, observed, "[w]e are literally overwhelmed [...] when you start to break this bill down and go through it with a fine-toothed comb. The legislation is complex, it's comprehensive, and casts a very broad net in some of the definitions." Standing Committee on Justice and Human Rights, Meeting 48, Thursday, 8 November 2001, at 1250 online: Parliament of Canada <[www2.parl.gc.ca/HousePublications/Publication.aspx?Doid=1041128&Language=E&Mode=1&Parl=37&Se s=1](http://www2.parl.gc.ca/HousePublications/Publication.aspx?Doid=1041128&Language=E&Mode=1&Parl=37&Se s=1)>.

Congress [ANC]. While various other internal conflicts were raised, both real (e.g. Sudan, Chechnya, Northern Ireland, Turkey) and hypothetical (e.g. Cuba, China), the exclusion of ANC support from characterization as ‘terrorist activity’ was the principal concern of most who spoke on this issue, witnesses and committee members alike.<sup>15</sup> Under the circumstances, this was hardly surprising: Nelson Mandela received honorary Canadian citizenship on 19 November 2001, while parliamentary hearings on the *ATA* were still ongoing.

Anne McLellan, then-Minister of Justice and Attorney-General, declined to discuss specific examples, but addressed these concerns more broadly by noting that:

[u]nder the 1977 protocols, which are additional to the Geneva Convention of 1949, an armed conflict includes people fighting against colonial domination, alien occupation, or racist regimes in the exercise of their right of self-determination. That is the definition with which we operate, and it is the definition that is accepted globally. That, in fact, does cover... I should not, I guess, discuss specific examples. That is a clarification for the purposes of international law, by which we are governed, with regard to the language that appears in that section.<sup>16</sup>

In response to a subsequent question distinguishing between “legitimate liberation movements” and “purely terrorist movements,” Department of Justice legal counsel stated that for “groups that might be involved in a war of national liberation:”

[...] the bill explicitly provides an exclusion for armed conflict that is in accordance with customary international law or conventional international law. [...] Clearly, the charter of the United Nations recognizes that people have the right to struggle for independence and that that might at times involve armed conflict. Where that occurs and where that is in accordance with international law, and when that is recognized by international law, then it is not a terrorist activity. This bill protects the rights of people to engage in armed conflict for purposes that are recognized under international law.<sup>17</sup>

15 Evidence presented to House and Senate committees, and transcripts of discussion of Bill C-36 in Parliament, is available on LEGISinfo, 37th Parliament - 1st Session (Jan. 29, 2001-Sept. 16, 2002), *Status of the Bill: Bill C-36* at online: Parliament of Canada <[www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=9&Type=0&Scope=I&query=2981&List=stat](http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=9&Type=0&Scope=I&query=2981&List=stat)>.

16 House Standing Committee on Justice and Human Rights, Meeting 49, Tuesday, November 20, 2001, at 1335, online: Parliament of Canada <[www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041152&Language=E&Mode=1&Parl=37&Ses=1](http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041152&Language=E&Mode=1&Parl=37&Ses=1)>.

17 Assistant Senior General Counsel, Criminal Law Policy Section, Department of Justice, in response to a question from Senator Marcel Prud'homme, Proceedings of the Special Senate Committee

Although heavy with implication, these statements carefully avoided conclusions regarding the application of the 'armed conflict' exclusion to particular cases, including that of the ANC.<sup>18</sup>

Throughout the hearings, many witnesses and committee members noted the need to avoid justifying deliberate attacks on civilians, whatever the motive. Some witnesses felt that the wording of the 'armed conflict' exclusion accomplished this end, while others did not.<sup>19</sup> This issue and various other legal and practical implications of the 'armed conflict' exclusion remained unresolved during parliamentary hearings themselves.

### III. KHAWAJA

The subsequent trial of Momin Khawaja highlighted substantial remaining ambiguity concerning the application and interpretation of the 'armed conflict' exclusion (and other aspects of the *ATA*). Khawaja was arrested in Ottawa in 2004 as a result of his involvement in what Justice Rutherford would later characterize as "violent Jihad."<sup>20</sup> By the end of 2005, he had been charged with seven offences under the anti-terrorism provisions of the *Criminal Code*. Following 27 days of trial in 2008, Khawaja was ultimately convicted of five terrorism-related offences and two lesser included offences. The Justice subsequently imposed a sentence of 10½ years imprisonment, in addition to the five years Khawaja had already served in custody awaiting trial and sentencing. In early 2009, Khawaja filed an appeal against his conviction and sentence, with the Crown also appealing his sentence. As the following section illustrates, the 'armed conflict' exclusion played an important role throughout the trial before Justice Rutherford; his treatment of this issue constitutes one of the grounds of appeal raised by Khawaja.<sup>21</sup>

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on the Subject Matter of Bill C-36 Issue 4, Monday, October 29, 2001 online: Parliament of Canada <[www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36e/04ee.htm?Language=E&Parl=37&Ses=1&comm\\_id=90](http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36e/04ee.htm?Language=E&Parl=37&Ses=1&comm_id=90)>.

18 Nonetheless, at least one Senator was left with the clear impression that support for the ANC would not constitute 'terrorist activity' under the *ATA*. Expressly relying on the Attorney General's statements, Senator Joan Fraser concluded that "Nelson Mandela and the African National Congress are explicitly not covered by these definitions." Proceedings of the Special Senate Committee on Bill C-36 (formerly the Subject Matter of Bill C-36), Wednesday, 5 December 2001, online: Parliament of Canada <[www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/08eva-e.htm?Language=E&Parl=37&Ses=1&comm\\_id=90](http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/08eva-e.htm?Language=E&Parl=37&Ses=1&comm_id=90)>. However, at no time were the specific activities of the ANC during its struggle for self-determination discussed in detail by witnesses or by committee members.

19 See e.g. discussion in the Standing Committee on Justice and Human Rights, Meeting 33, 24 October 2001, online: Parliament of Canada <[www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041053&Language=E&Mode=1&Parl=37&Ses=1](http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041053&Language=E&Mode=1&Parl=37&Ses=1)>. As discussed in more detail below, the provision likely accomplishes this goal, though it could have done so in a more straightforward manner.

20 See e.g. *Khawaja*, *supra* note 1 at para.10. Khawaja himself frequently referred to his own activities as supporting 'jihad,' often at times connected to the use of violence.

21 The third ground of appeal raised by Khawaja is "[t]hat the learned Trial Judge erred in law in finding that the 'armed conflict' exception to the definition of terrorist activity did not apply to the Appellant's actions because he himself was not engaged in armed combat." *R. v. Khawaja*, Notice of Appeal, Ontario Court of Appeal, Court File No. 04-G30282, 9 April 2009.

The facts of the case were largely undisputed, relating to activities undertaken by Khawaja between January 2002 and March 2004. These activities revolved around his connection with and support of various individuals in the United Kingdom, many of whom were themselves convicted of terrorism-related offences in 2007, as well as other individuals in Pakistan. Perhaps most sensationally, Khawaja worked to develop the ‘hifidigimonster,’ a device designed to facilitate remote detonation of improvised explosive devices. His involvement in ‘Jihad’ also included possession of personal weapons and weapons training, as well as providing money and supplies to various other individuals, along with the use of a family residence in Pakistan. Khawaja also travelled abroad during this period, including one trip where he sought, unsuccessfully, to join the “front-lines of Jihad” in Pakistan.<sup>22</sup>

All of the resulting charges against Khawaja relied upon his connection to ‘terrorist activity’ as defined in the *Criminal Code*. Five of the charges referred directly to Khawaja’s involvement in or assistance with ‘terrorist activity,’ and the other two involved explosives-related offences committed in conjunction with a ‘terrorist group.’ As a result, the precise meaning of ‘terrorist activity’ played a fundamental role in his trial, with the ‘armed conflict’ exclusion featuring prominently in Crown and defence arguments, and the trial rulings and final judgment.

During the trial, Justice Rutherford, rejected a motion for directed verdicts of acquittal in which defence counsel had argued the ‘armed conflict’ exclusion should preclude linkage of Khawaja’s actions to the definition of ‘terrorist activity.’ In his ruling, Rutherford J. found that the exclusion “simply had no bearing on the case,”<sup>23</sup> stating that its intent was instead:

to remove from the ambit of the terrorism provisions of the *Criminal Code*, acts conducted by participants in armed conflicts, acts such as killing enemy combatants, inflicting substantial damage to property or to public facilities and essential services, and with the kind of intimidating intention as found in (i)(B) of the definition, all of which is necessarily a part of war, so long as those war activities are conducted in accordance with the customary or conventional rules of war. The provision applies to those actually engaged in armed combat. ... Momin Khawaja was not so engaged.<sup>24</sup>

As a result, he concluded that “[t]here is no burden on the prosecution to negate or establish that the exception is inapplicable. It simply is inapplicable to the facts of this case.”<sup>25</sup>

Despite a defence request to revisit his opinion, Justice Rutherford upheld this conclusion in final judgment. Here too he noted that neither Khawaja nor the

<sup>22</sup> For detailed discussion of relevant facts in *Khawaja*, *supra* note 1, see discussion at paras. 4ff.

<sup>23</sup> Discussed *ibid.* at para. 127.

<sup>24</sup> Cited *ibid.*

<sup>25</sup> *Ibid.*

individuals he supported were “engaged in armed conflict,” since there “was no such conflict in Canada, the United Kingdom or in Pakistan where the acts with which Khawaja is charged, were carried out,” and that in any case, “the ‘armed conflict’ exclusion should not be extended to their non-combatant activity.”<sup>26</sup>

Although the Justice did not find a prosecution requirement to negative application of the ‘armed conflict’ exclusion, he ultimately concluded that this issue was not determinative to the conviction of Khawaja on the particular facts before him. Instead, he found that Khawaja:

knew that the group he was training with, supporting, helping to finance, [otherwise assisting], and building triggering devices to enable to remotely detonate IEDs for, was far more than just a support mechanism for front line armed combat in accordance with the international rules of war.<sup>27</sup>

The group with which Khawaja associated in the United Kingdom was, *inter alia*, “zeroing in on possible civilian targets.”<sup>28</sup> Though his knowledge of specific potential attacks within the United Kingdom itself was not established, Khawaja himself had extolled the virtues of suicide bombing of civilian targets, and had even at one point suggested that an associate be sent on a suicide mission within Israel.<sup>29</sup> As a result, Rutherford J. found “ample evidence apart from the support and preparation for violent Jihad with the Mujahideen in Afghanistan or elsewhere, establishing that Momin Khawaja knew he was dealing with a group whose objects and purposes included activity that meets the *Code* definition of terrorist activity.”<sup>30</sup>

#### IV. CHALLENGES

Judicial treatment of the ‘armed conflict’ exclusion in *Khawaja* serves to highlight some of the key ongoing challenges of this provision. Given his apparent support for the targeting of innocent civilians, many of these concerns are likely not material to Khawaja’s ultimate conviction, as will be discussed in more detail below. However, this case illustrates substantial difficulties relating to the ‘armed conflict’ exclusion that may and likely will arise whenever courts are called upon to assess the potential exclusion of conduct from the definition of ‘terrorist activity’ on this basis. While some of these challenges arise due to the complex nature of IHL and the inherent difficulties of applying this body of law in a domestic context, many others arise directly as a result of the particular wording of the current ‘armed conflict’ exclusion itself.

The ‘armed conflict’ exclusion applies to ‘an act or omission that is committed during an armed conflict and that, at the time and in the place of its

<sup>26</sup> *Ibid.* at paras. 128-129.

<sup>27</sup> *Ibid.* at para. 130.

<sup>28</sup> *Ibid.* at para 90.

<sup>29</sup> See e.g. *ibid.* at paras. 33, 40, 101.

<sup>30</sup> *Ibid.* at para. 131.

commission, is in accordance with customary international law or conventional international law applicable to the conflict.’ This provision requires Canadian courts to assess the legality of conduct, and its potential exclusion from ‘terrorist activity,’ using international rather than domestic law as a primary reference point. However, the provision is ambiguous regarding the specific international legal framework to apply, leading to substantial interpretive challenges. Coupled with the further difficulty of then applying that law fully and accurately to the facts of a particular case, the resulting problems undermine the coherence and threaten the overall effectiveness of Canada’s anti-terrorism legislation.

The following section assesses specific areas of concern relating to the interpretation and application of the ‘armed conflict’ exclusion, drawing where appropriate on discussion of these issues in *Khawaja*. Part A examines the issue of precisely whose legal obligations are applicable to the ‘armed conflict’ exclusion. This is followed in Part B with assessment of the implications of the statutory reference to adherence to either customary or conventional international law. Part C addresses the ambiguity surrounding whether IHL alone should be the frame of reference for the ‘armed conflict’ exclusion, or whether *jus ad bellum* factors should also be considered. Finally, Part D discusses the difficulties arising when determining whether a particular act has occurred ‘during an armed conflict.’ As the following section demonstrates, many of these issues presented challenges in *Khawaja*, and all pose potentially serious problems for future Canadian terrorism prosecutions.

### A. ‘At the Time and in the Place of its Commission’

On its face, the ‘armed conflict’ exclusion requires courts to assess conduct in light of obligations in force ‘at the time and in the place of its commission.’ This is an important and justifiable qualification, avoiding the extraterritorial application of Canadian domestic law and reflecting the basic criminal law principle of *nullum crimen sine lege*.<sup>31</sup> However, it also means that the appropriate legal framework for the ‘armed conflict’ exclusion will, or at least should, vary from case to case.

International law is not a monolithic regime. Instead, legal obligations differ from state to state, often widely. This is particularly true with international conventional (i.e. treaty) law, which establishes a patchwork of international obligations resting on formal state consent to be bound.<sup>32</sup> Indeed, there are very few universal treaty regimes (though one such regime is the *Geneva Conventions* of 1949,<sup>33</sup> the same is not true of their 1977 *Additional Protocols*<sup>34</sup>). Although

31 The principle of *nullum crimen sine lege* provides that ‘there can be no crime without (prior) law,’ in essence requiring that acts not be criminalized retroactively. It is a tenet of both Canadian and international criminal law. See e.g. *Canadian Charter of Rights and Freedoms*, s. 11(g) and the *Rome Statute of the International Criminal Court*, art. 22, respectively.

32 For a concise overview of the international treaty regime, See e.g. John Currie, “The Law of Treaties” in *Public International Law*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2008) 123.

33 The 1949 *Geneva Conventions* are: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31 [*Geneva Convention I*]; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135; and, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287.

34 The 1977 *Additional Protocols* are: *Protocol Additional to the Geneva Conventions of 12 August*

varied, information concerning the status of IHL treaty ratification is, at least, readily available.<sup>35</sup>

Customary international law may also vary from state to state, albeit to a much more limited degree.<sup>36</sup> Even assuming its generally-universal application, determining the precise content of customary law governing armed conflicts is an ongoing challenge. While the customary nature of basic IHL provisions is not in doubt (in particular, those codified in Common Article 3 of the *Geneva Conventions*, protecting “[p]ersons taking no active part in hostilities”<sup>37</sup>), the status and precise content of other principles remains somewhat fluid. A recent detailed study by the International Committee of the Red Cross [ICRC] has made a substantial contribution to clarifying the current customary content of this body of law,<sup>38</sup> however, although authoritative, its methodology and, in some cases, particular findings, have also been criticized.<sup>39</sup> In any event, customary law governing armed conflict will also continue to evolve in light of ongoing state practice and *opinio juris*.

Since the ‘armed conflict’ exclusion requires that acts be assessed in light of the law applicable ‘at the time and in the place’ of their commission, courts applying this provision should therefore undertake a contextual analysis of the legal regime applicable to the conflict in question, rather than examining Canada’s international legal obligations (subject to a drafting issue discussed below). This could require detailed assessment of the legal obligations of other states, both customary and conventional, posing unnecessary and potentially significant burdens for legal counsel and courts. The variations in applicable law may also reduce the precedential value of ATA-related judicial decisions, which will also not (necessarily) reflect Canada’s own IHL obligations.

On its face, the only situation in which Canada’s international treaty commitments should affect the ‘armed conflict’ exclusion would be when the act in question relates to a conflict to which Canada is a party and its international

1949, and Relating to the Protection of Victims of International Armed Conflict, 15 August 1977, UN Doc. A/32/144 [Additional Protocol I]; and, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, 15 August 1977, UN Doc. A/32/144 [Additional Protocol II].

35 See e.g. online: International Committee of the Red Cross <[www.icrc.org/ihl.nsf/Pays?ReadForm](http://www.icrc.org/ihl.nsf/Pays?ReadForm)>.

36 Albeit not widespread, limitations on universal customary international law may result from possible ‘persistent objector’ status, as well as the potential development of regional norms of customary law. For a concise overview of customary international law, see e.g. Currie, “Customary International Law” in *supra* note 32, at 185-217.

37 See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] I.C.J. Rep. 14 at paras. 218-19. See also *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, at para. 102 [Tadić].

38 Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, (Cambridge: Cambridge University Press, 2005) [Customary IHL].

39 See e.g. John B. Bellinger III & William J. Hayes II, “A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law” (2007) 866 Int’l Rev. Red Cross 443-71. See also Tomasz Zych, “The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law,” in this volume of the Windsor Y.B. Access Just. for discussion of this issue with respect to a specific principle of customary IHL.

legal obligations apply. Even here, the legal framework may vary from conflict to conflict, as at least some of Canada's international obligations apply only on a reciprocal basis.<sup>40</sup> In addition, in some cases the legal regime applicable to a conflict is governed by territorial reference rather than to the treaty obligations of particular parties; for example, *Additional Protocol II* applies to conflicts "tak[ing] place in the territory of a High Contracting Party," without reference to the obligations of participating non-territorial states.<sup>41</sup> Thus even in cases involving Canada, the application of the 'armed conflict' exclusion may not be uniform.

Despite reference in the 'armed conflict' exclusion to international law applicable 'at the time and in the place' in question, a further concern arises because the broader statutory regime may have (problematically) incorporated Canada's international treaty obligations as a reference point in circumstances where they would not otherwise apply. Although not a defined term in the *Criminal Code*, 'conventional international law' is defined in the *Crimes Against Humanity and War Crimes Act* [CAHWCA].<sup>42</sup> Section 2(1) establishes that

"conventional international law" means any convention, treaty or other international agreement

(a) that is in force and to which Canada is a party; or

(b) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved.

In principle, this definition should not be applied in the context of the *Criminal Code* 'armed conflict' exclusion, as it provides for the assessment of conduct in light of Canada's obligations, rather than the obligations actually applicable to the conflict in question. Its application is not appropriate in light of the patchwork nature of international treaty obligations, where some states are parties to treaties not involving Canada, and vice versa. It appears to contradict statutory reference to the law applicable 'at the time and in the place.'

This internal contradiction could pose significant problems. On the one hand, it may lead to the unnecessary exclusion of conduct from the definition of 'terrorist activity,' as this may not capture conduct that was in fact unlawful at the time and place of commission on the basis of treaty obligations in force for that state but not Canada. On the other hand, and more controversially, this internal contradiction may also undermine the *nullum crimen sine lege* principle by holding foreign individuals to a standard derived from the extraterritorial application of Canada's international obligations rather than the law actually applicable to

40 Even the *Geneva Conventions* themselves only apply, for the most part, to conflicts between High Contracting Parties (See e.g. Common Article 2), although the effect of this qualification is limited given their universal adherence. In addition, their basic principles are largely applicable as a matter of customary international law, to all conflicts, as discussed in greater detail below.

41 *Additional Protocol II*, art. 1(1), *supra* note 34. For example, this might exclude application to foreign military forces operating in support and with the invitation of a territorial state, where the foreign states are parties to *Additional Protocol II* but the territorial state is not.

42 S.C. 2000, ch. 24 [CAHWCA].

them at the time and in the place in question. Although not relevant to Khawaja, as he was a Canadian citizen and the acts in question took place subsequent to adoption of the *ATA*, such concerns could nonetheless arise in future terrorism prosecutions.

There is an ongoing danger that Canadian courts will be called upon to apply this definition of 'conventional international law' for the purposes of the 'armed conflict' exclusion in such cases. The *CAHWCA* also adopts this definition at the same time that it too establishes specific offences by (potentially contradictory) reference to the international legal regime applicable "at the time and in the place" of the act in question.<sup>43</sup> As a result, the statutory context between the *CAHWCA* and the 'armed conflict' exclusion is almost identical in this respect, and courts may be hard pressed not to use the definition provided for one situation for the purpose of interpreting the other.<sup>44</sup> Ideally, this issue should be addressed by amending the definition of 'conventional international law' in the *CAHWCA*, as it does not appear to be appropriate in this circumstance either. At minimum, for the purposes of Canada's anti-terrorism legislation, steps should be taken to ensure its non-application for the purposes of the 'armed conflict' exclusion.

In no case should the 'armed conflict' exclusion require prior incorporation or implementation of Canada's international obligations in its domestic law, as the provision expressly refers to the *international* law applicable to the situation in question. Mention of the doctrine of adoption in *Khawaja* therefore appears unnecessary and a possible harbinger of future judicial confusion. Rutherford J. noted that "[t]here are authorities suggesting that through the doctrine of adoption, customary rules of international law are directly incorporated into Canadian domestic law in the absence of conflicting legislation, thus permitting courts to take judicial notice of them."<sup>45</sup> He ultimately concluded that the doctrine was not in any event useful to determining the actual facts of the insurgency in Afghanistan; however, discussion of adoption itself is likely still out of place. The issue for the 'armed conflict' exclusion should not be whether the wartime conduct in question was a violation of domestic Canadian law, but rather of applicable international law.<sup>46</sup>

## B. Accordance with Customary or Conventional Law

Further substantial concern arises from the exclusion of conduct from char-

43 The definitions of 'war crime,' 'crime against humanity' and 'genocide' all incorporate similar concepts, albeit with slight variations in wording that may raise additional interpretive challenges for the *CAHWCA* beyond this apparent internal contradiction. For example, the definition of "war crime" speaks to the legal regime "applicable to armed conflicts," rather than that applicable to the conflict in question. While these statutory issues are beyond the scope of this article, they clearly warrant further analysis.

44 See e.g. *Criminal Code*, s. 4(4), which provides that "[w]here an offence that is dealt with in this Act relates to a subject that is dealt with in another Act, the words and expressions used in this Act with respect to that offence have, subject to this Act, the meaning assigned to them in that other Act."

45 *Khawaja*, *supra* note 1, at para. 111.

46 Even the problematic definition of 'conventional international law' discussed above does not purport to require domestic implementation of Canada's treaty obligations prior to consideration.

acterization as ‘terrorist activity’ on the basis of its ‘accordance with customary international law *or* conventional international law.’ Although the *ATA* adapted this language from the existing statutory basis of the *CAHWCA*,<sup>47</sup> it did so in a manner that may pose considerable difficulties for the future application of the ‘armed conflict’ exclusion if it is not addressed.

The *CAHWCA* establishes offences based on violations of applicable customary or conventional law (therefore implicitly also excluding activities undertaken in compliance with these regimes). For example, Section 4(3) establishes that:

“war crime” means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

The definitions of ‘genocide’ and ‘crime against humanity’ similarly focus on acts violating international law. When establishing a criminal offence, reference to the act or omission being a violation of either customary international law *or* conventional law is entirely appropriate.<sup>48</sup>

In contrast, the *ATA* exemption uses compliance with international law as a basis for excluding conduct from the definition of ‘terrorist activity,’ rather than incorporating specific violations of international law as offences. As a result, the perspective of the ‘armed conflict’ exclusion is wholly reversed from that of the *CAHWCA*, creating a potentially serious and no doubt unintended loophole. Where the *CAHWCA* establishes that an offence has been committed if an act or omission is contrary to either customary law or conventional law, the ‘armed conflict’ exclusion appears to exclude conduct from characterization as ‘terrorist activity’ if it complies with either body of law, not necessarily both; the *ATA* exclusion requires only that an act be in *accordance* with customary *or* conventional law.

This raises concerns, since numerous acts may be in accordance with customary law yet prohibited by conventional law, or vice versa. International law is prohibitive, rather than permissive, and as a result acts should generally be considered ‘in accordance with’ international law unless they are specifically re-

47 The relationship to the *CAHWCA* was remarked upon in committee hearings. Irwin Cotler, MP, noted that “[t]he legislation is not intended to cover an act committed during an armed conflict that at the time and place of its commission, let’s say, was in accordance with customary international law and treaty law. This language was taken almost directly out of the *Crimes Against Humanity and War Crimes Act* and inserted here.” Standing Committee on Justice and Human Rights, Meeting 33, Wednesday, 24 October 2001, at 1730 online: Parliament of Canada <[www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041053&Language=E&Mode=1&Parl=37&Ses=1](http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041053&Language=E&Mode=1&Parl=37&Ses=1)>.

48 Aside from problems arising from the narrow definition of ‘conventional international law’ identified above.

stricted.<sup>49</sup> With respect to the conduct of hostilities, for example, IHL typically prohibits particular methods and means of warfare, rather than expressly permitting specific activities. While there is a multitude of international treaties, these do not cover all activities or all states, and accepted standards of conduct in particular situations may be established by customary law alone; for example, customary law governing internal armed conflict is arguably more developed than the applicable treaty law regime (which, in any event, states are free to accept or reject). Similarly, in areas where international practice has not yet led to the crystallization of specific customary prohibitions, states may restrict various wartime activities on a bilateral or multilateral treaty basis alone. In each instance, legitimate questions will arise concerning the application of the 'armed conflict' exclusion as it is currently worded.

This may be a legal distinction without a practical difference, particularly in the most egregious cases involving potential 'terrorist activity.' Deliberate direct targeting of innocent civilians during an armed conflict is prohibited both as a matter of treaty law and customary law, and this prohibition is a fundamental principle of modern IHL.<sup>50</sup> As a result, such wartime activity would not be excluded from possible characterization as 'terrorist activity' even through the application of the current provision. However, at minimum, the current disjunctive wording may require courts to undertake complex and unnecessary assessments of customary international law, even where a wartime activity is clearly in violation of an applicable treaty, and vice versa.

If the purpose of the 'armed conflict' exclusion is solely to shield otherwise lawful acts from characterization as 'terrorist activity,' then one way to remedy this concern would be to amend the 'armed conflict' exclusion to apply to conduct that is 'in accordance with customary international law *and* conventional international law.' The exclusion would therefore not apply once a violation of one body of law or the other was established, without requiring exhaustive assessment of the other. While a court may simply read the current provision as conjunctive, this cannot be assumed; for example, Rutherford J. referred to both the disjunctive and conjunctive perspectives at various points in *Khawaja*.<sup>51</sup>

Regardless, there are additional concerns that strongly militate against basing any exclusion on a requirement of wholesale compliance with customary and conventional international law, whether on a disjunctive or conjunctive basis. Ironically, while the above issue highlights a potentially unnecessary exclusion from the definition of 'terrorist activity,' far greater concerns arise from this clause narrowing the exclusion so far that it becomes difficult to apply at all.

49 See e.g. *The Case of the SS Lotus (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No. 10 at 18: "[r]estrictions upon the independence of States cannot therefore be presumed."

50 See e.g. *Rome Statute*, arts. 8(2)(b)(i) and 8(2)(e)(i), *Additional Protocol I*, art. 51(2) at *supra* note 34, and *Customary IHL*, *supra* note 38. This basic aspect of the *Customary IHL* study is not controversial.

51 In addressing the defence motions for directed verdicts of acquittal, he referred to the exclusion of activities that "are conducted in accordance with the customary or conventional rules of war." Cited in *Khawaja*, *supra* note 1, at para. 127. Later, in his final judgment, he stated that the exclusion applied to combatants when "their actions are in accordance with the conventional and customary principles governing warfare." at para. 128.

Legitimate wartime conduct by professional soldiers frequently involves the commission or facilitation of activities described in subparagraph (b)(ii) of the definition of 'terrorist activity,' whether it be 'causing death or serious bodily harm,' 'endangering life,' 'causing health or safety risks,' 'causing property damage' or 'interfering with essential services.' While deliberate targeting of innocent civilians during armed conflict is unlawful, targeting of opposing military personnel and property is not, even with serious collateral civilian impact, so long as the latter is unavoidable and not excessive under the circumstances.<sup>52</sup> Apart from the 'armed conflict' exclusion, the definition of 'terrorist activity' does not distinguish between violence directed against combatants, on the one hand, and innocent civilians and other persons not participating in hostilities, on the other; for example, it includes intentionally "caus[ing] death or serious bodily harm to a person by the use of violence."<sup>53</sup>

The risk of not excluding legitimate wartime conduct from potential characterization as 'terrorist activity' is heightened by severing the 'political, religious or ideological purpose' requirement in sub-subparagraph (b)(i)(A) of the definition of 'terrorist activity.' However, while Rutherford J. severed this requirement, his approach on this point has not been followed in subsequent decisions.<sup>54</sup> This issue may be revisited in the appeal of *Khawaja*.<sup>55</sup>

The remaining intent requirement in sub-subparagraph (b)(i)(B) may capture ordinary military activities; at least from a strategic perspective, it is certainly arguable that most military action is directed, in part if not in whole, toward 'compelling a government to do or refrain from doing any act.' Indeed, Rutherford J. himself recognized that "acts such as killing enemy combatants, inflicting substantial damage to property or to public facilities and essential services, and with the kind of intimidating intention as found in (i)(B) of the definition, [are] necessarily a part of war."<sup>56</sup>

Wartime activities of this nature would not appear to be excluded from the definition of 'terrorist activity' on the basis of the second exemption in the tail section either, as this refers to 'the activities undertaken by military forces of a state in the exercise of their official duties,' but only where these are 'governed by other rules of international law' – that is, only when these do not occur 'during an armed conflict' and are not governed by law 'applicable to the conflict.'<sup>57</sup>

If compliance with international law is the standard of measure, how serious

52 See e.g. *Additional Protocol I*, *supra* note 34, art. 51.

53 *Criminal Code*, s. 83.01(1), definition of 'terrorist activity,' sub-subparagraph (b)(i)(A).

54 See e.g. *United States of America v. Nadarajah*, [2009] O.J. No. 946, at para. 25ff.

55 The issue is raised, indirectly, in the first ground of appeal, which concerns the decision of Rutherford J. to continue to apply the definition of 'terrorist activity' following his severance of this provision.

56 *Khawaja*, *supra* note 1, at para. 127.

57 Although beyond the scope of this article, a drafting concern arises in the context of this exclusion as well. The 'armed conflict' exclusion requires that the act or omission in question be 'in accordance with' applicable international law (albeit customary or conventional). The 'official duties' exception requires only 'that those activities are governed by international law, not that they actually be 'in accordance' with these provisions. In many states, 'official duties' of military forces may result in peacetime acts that are governed by - *but contrary to* - various rules of international law.

does the violation of international law have to be before related wartime conduct is not protected by the 'armed conflict' exclusion? Is a concurrent minor or technical violation of IHL sufficient to warrant the potential characterization of all related actions as 'terrorist activity?' Here it is extremely important to note that only certain violations of IHL are considered grave breaches or are otherwise criminalized, while most others only give rise to state legal responsibility. Even if the 'armed conflict' exclusion is read as requiring compliance only with those IHL obligations entailing individual criminal responsibility upon violation, many of these same questions would still arise; indeed, this would raise a further question concerning the distinction between war crimes and 'terrorist activity.' These issues become far more significant given statutory, legislative and judicial ambiguity concerning whether the 'armed conflict' exclusion should be viewed in light of IHL adherence alone, or whether compliance with *jus ad bellum* is also required, as outlined below.

### C. 'Applicable to the Conflict'

The 'armed conflict' exclusion involves assessment of conduct according to the international legal principles 'applicable to the conflict' during which it occurs. In addition to determining which state's legal obligations should apply to this assessment, as already discussed, this raises two further distinct and potentially problematic issues: first, deciding whether the frame of reference should be limited to IHL, or should include *jus ad bellum* considerations relating to the legality of the conflict as a whole; and, second, with respect to IHL, determining exactly what law applies to the specific conflict, in light of its characterization as either international or internal. While the latter issue stems from the inherent complexities of the IHL regime, and may arise in any case directly requiring its application, the former arises from the particular statutory wording of the 'armed conflict' exclusion itself and its subsequent legislative and judicial treatment.

Statutory reference to the international legal regime 'applicable to the conflict' raises questions concerning whether *jus ad bellum* has been incorporated along with IHL. The effects of such an expansive definition would be both substantial and problematic, as discussed below. Nonetheless, explanatory statements in parliamentary committees addressing the *ATA*, and subsequent rulings in *Khawaja*, both appear to incorporate *jus ad bellum* considerations, highlighting - and contributing to - ongoing ambiguity on this issue. Background information published by the Department of Justice does not clarify this issue, noting only that this exclusion "provides certainty that such military actions, since taken in accordance with international law or governed by other rules of international law, do not constitute 'terrorist activity.'"<sup>58</sup>

As previously noted, substantial discussion of the 'armed conflict' exclusion in parliamentary committees focused on its application to the ANC. However, virtually all of this attention focused, implicitly or explicitly, on the legitimacy

58 "The Anti-Terrorism Act: Definition of 'Terrorist Activity': Exception for Conduct Committed During An Armed Conflict in Accordance with International Law" online: Department of Justice Canada <[www.justice.gc.ca/eng/antiter/sheet-fiche/DEF\\_TER/def\\_ter4.html#efccdaaciawil](http://www.justice.gc.ca/eng/antiter/sheet-fiche/DEF_TER/def_ter4.html#efccdaaciawil)>.

of the ANC cause – in essence a *jus ad bellum* question – rather than the legality of the particular method of its pursuit thereof. Though the Minister spoke in general terms of the IHL framework applicable to conflicts of self-determination, another Department of Justice witness clearly invoked *jus ad bellum* considerations with the statement that ‘the charter of the United Nations recognizes that people have the right to struggle for independence and that that might at times involve armed conflict ... [and] this bill protects the rights of people to engage in armed conflict for purposes that are recognized under international law.’ While this would be accurate, whether or not the ‘armed conflict’ exclusion required *jus ad bellum* assessment, the statement also concluded that ‘[w] here that occurs and where that is in accordance with international law, and when that is recognized by international law, then it is not a terrorist activity.’ While also ambiguous, this certainly suggests the possible relevance of *jus ad bellum* considerations.

Judicial treatment of the ‘armed conflict’ exclusion in *Khawaja* focused primarily on (implicit) IHL considerations; however, it nonetheless also added to the ambiguity concerning the precise role of *jus ad bellum*, as discussed below. Rutherford J. appears to have adopted an IHL perspective when noting that “[t]he exception shields those who do acts while engaged in an armed conflict that would otherwise fit the definition of terrorist activity from prosecution as terrorists as long as the acts are within the internationally recognized principles governing warfare.”<sup>59</sup> However, there is no detailed treatment in *Khawaja* of any of these ‘recognized principles governing warfare,’ or their application to the conduct of the insurgency in Afghanistan or Iraq or elsewhere. Indeed, Rutherford J. expressly laments the absence of “expert evidence as to the geo-political situation in Afghanistan and particularly as to the conduct of the hostilities by the insurgents opposing the Afghan and coalition forces.”<sup>60</sup>

This was not determinative in *Khawaja*, given judicial findings connecting *Khawaja* to the direct targeting of civilians. However, much more detailed application of IHL provisions may be required in future cases, even where civilian deaths have resulted from the activities of an accused. Not all wartime civilian deaths result from violations of IHL; as noted above, while the direct targeting of innocent civilians is unlawful, IHL nonetheless recognizes that lawful military actions may result in incidental or collateral impact on civilians or civilian objects so long as such impact is necessary and not “excessive” when compared to the anticipated military advantage.<sup>61</sup>

In contrast to limited and largely implicit discussion of IHL principles applicable to armed conflict, *Khawaja* makes lengthy reference to the *jus ad bellum* framework of the conflict in Afghanistan, including relevant UN Security Council resolutions. Rutherford J. ultimately distinguishes *jus ad bellum* considerations from the ‘armed conflict’ exclusion, concluding that

59 *Khawaja*, *supra* note 1, at para. 127, citing the ruling on defence motions for directed verdicts of acquittal.

60 *Ibid.*, at para. 110.

61 See e.g. *Additional Protocol I*, *supra* note 34, art. 51.

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it seems to me beyond debate that, *subject to the applicability of the exclusionary armed conflict clause*, those who support and participate in the insurgent armed hostilities against the civilian population, the government, and government and coalition forces attempting to reconstruct and maintain peace, order and security in Afghanistan, are, by definition, engaging in terrorist activity. Seen through the lens of a court of Canada, a Member State of the United Nations, I do not think it can be viewed otherwise.<sup>62</sup>

However, while focusing on (largely implicit) IHL considerations in determining that the particular activities of Khawaja and others did not meet the 'armed conflict' exclusion, Rutherford J. also appears to view *jus ad bellum* considerations as an important contextual basis for the 'terrorist activity' definition as a whole. In this case, the particular context of the Afghanistan conflict certainly supports such considerations; the United Nations Security Council had specifically linked the Taliban regime to a range of international terrorist activities since well before the 9/11 attacks.<sup>63</sup>

However, the 'armed conflict' exclusion should nonetheless not be read as requiring compliance with or consideration of *jus ad bellum*, despite these parliamentary and judicial references, and the ambiguity of the provision itself.

To begin, as a general rule, IHL is clearly and consciously differentiated from *jus ad bellum* considerations, which ensures that all sides to a conflict are held to the same standard of conduct and avoids lengthy and difficult assessments of which side's cause is legally just. As a result, deliberately and directly targeting innocent civilians is always unlawful, regardless of the overall legitimacy of one's cause. This issue would pose challenges for the exclusion of all ANC activity from the definition of 'terrorist activity,' despite its justifiable motivations. Although the South African Truth and Reconciliation Commission found that the ANC generally adhered to IHL, it nonetheless also concluded that the ANC was involved in "breaches of international law" including "[a] number of incidents involving indiscriminate bombings that led to the injury and death of civilians."<sup>64</sup> Incorporating *jus ad bellum* considerations into the 'armed conflict' exclusion would blur this important line.

Second, the incorporation of *jus ad bellum* would require courts to undertake detailed assessments of the legality of foreign conflicts, a process fraught with potential problems, particularly given the wording of the current exclusion requiring 'accordance' with international law. As noted above, if the 'armed con-

<sup>62</sup> *Khawaja*, *supra* note 1, at para. 125.

<sup>63</sup> Indeed, as early as 1999 – almost two full years before the 9/11 attacks – the Security Council had required the Taliban to cease providing shelter to Osama bin Laden and to surrender him "to be brought to justice." SC Res, 1267 UNSC (1999).

<sup>64</sup> "Holding the ANC Accountable," Vol. 6, Sect. 5, Chap. 3, *Truth and Reconciliation Commission of South Africa Report*, 2003, at 647, para. 24 online: South African Government Information <[www.info.gov.za/otherdocs/2003/trc/5\\_3pdf](http://www.info.gov.za/otherdocs/2003/trc/5_3pdf)>. Although lawful military attacks may also lead to civilian injury and death, IHL prohibits *indiscriminate* attacks (whether or not they actually affect the civilian population).

flict' exclusion does not apply, many wartime acts of professional soldiers could be characterized as 'terrorist activity' under the *Criminal Code* definition. Here it is important to note that the legality of many modern conflicts remains open to significant debate.<sup>65</sup> While in particular circumstances United Nations Security Council resolutions may link one side of a conflict to international terrorism, such as in Afghanistan, this will generally not be the case.

For the purpose of Canada's anti-terrorism legislation, courts should not be called upon to make such problematic, highly-politicized and ultimately unnecessary *jus ad bellum* legal determinations. At minimum, the 'armed conflict' exclusion should be read to require activities be 'in accordance with' applicable IHL only, though this too would leave remaining ambiguity.

While IHL applies during any situation characterized as an 'armed conflict' (a definition discussed in more detail in Part D below), its substantive provisions nonetheless vary depending on the nature of the conflict in question. Indeed, the majority of conventional IHL applies only to international armed conflict, although a substantial body of law has also developed to regulate the conduct of non-international armed conflicts.<sup>66</sup> While their substantive differences have recently been reduced, each body of IHL remains distinct. As a result, properly distinguishing between international and non-international armed conflict remains necessary and important.<sup>67</sup>

However, such classifications can be difficult, particularly when faced with either transnational non-state armed groups or non-state actors involved in conflict within the territory of a single state but with support of another state. For example, the ICTY has characterized the conflicts in the former Yugoslavia during the early 1990s as, at various times, international and, at others, non-international.<sup>68</sup> Adding further nuance, IHL governing international armed conflicts can apply to a conflict in exercise of a people's right of self-determination, even where the conflict is confined to the territory of a single state and does not involve outside actors (as alluded to by Minister McLellan during *ATA* committee hearings).<sup>69</sup>

Conflict classification can be expected to arise frequently in cases requiring direct IHL determinations, as it is necessary in order to ascertain the relevant

65 Most obviously, considerable legal controversy surrounds the US-led invasion of Iraq in 2003. Although it is difficult to foresee how a case requiring such a determination might come before a Canadian court directly, it may nonetheless have other unintended consequences; for example, might this raise defence arguments that support of the Iraqi insurgency should be considered defence of third parties against 'terrorist activity?' See e.g. *Criminal Code* s. 27 ('Use of force to prevent commission of an offence'). Recent conflicts involving Canadian military personnel have also not been without legal controversy, notably the 1999 Kosovo bombing campaign.

66 For example, only one article in the 1949 *Geneva Conventions* applies to internal conflicts. However, this discrepancy was addressed, to a degree, with *Additional Protocol II* and the *Rome Statute*.

67 There is a slight distinction between the situations in which Common Article 3 and *Additional Protocol II* apply, making this division into two categories simplistic; however, discussion of two general categories of international and non-international armed conflict is sufficient for the purposes of the present analysis.

68 See e.g. discussion in *Tadic*, *supra* note 37 at para. 77.

69 See e.g. *Additional Protocol I*, art. 1(4), *supra* note 34.

body of law. That said, this may lead to counter-intuitive results when applying the present 'armed conflict' exclusion. The legal regime applicable to international armed conflict is far more developed, and it may be more difficult for conduct to be 'in accordance with' all aspects of this regime as a result. In contrast, the legal regime in internal conflict is, in some respects, more permissive (though basic IHL protections apply in either case). While civil conflict may violate the law of the state in question, compliance with domestic law itself is not required for application of the 'armed conflict' exclusion.

The issue of conflict classification was not addressed in *Khawaja*. However, the ongoing conflict in Afghanistan provides a clear example of the difficulties inherent in such determinations. This conflict likely began as an international armed conflict in 2001, with the military forces of various countries engaged against those of the *de facto* Taliban government, but later evolved into a non-international conflict when these (and other) international military forces subsequently began operating with the consent and in support of the lawfully recognized government of that country.<sup>70</sup> Although this distinction would not have been material to some of the activities alleged in *Khawaja* (e.g. the deliberate direct targeting of innocent civilians is an offence in either context), it could have had an impact on Rutherford J.'s conclusions regarding the location of the conflict itself, as discussed in more detail below.

#### D. "During an Armed Conflict"

The challenges of the current 'armed conflict' exclusion do not end with the identification of an appropriate international legal framework. Once established, its application raises further difficulties. In particular, the 'armed conflict' exclusion only serves to preclude characterization of an act or omission as 'terrorist activity' if it is committed 'during an armed conflict.' This gives rise to questions concerning when and where such conflicts take place, and the precise connection required between specific conduct and the particular conflict in question.

There is no comprehensive definition of 'armed conflict' in either the *Geneva Conventions* or their *Additional Protocols*, or in other relevant international treaties.<sup>71</sup> However, in its first case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia [ICTY] found that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>72</sup> The Tribunal further concluded that IHL "applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the

70 See e.g. *Amnesty International et al. v. Chief of the Defence Staff for the Canadian Forces et al.*, Reasons for Order and Order Motion Pursuant to Rule 107, 12 March 2008, 2008 FC 336, discussing the current characterization of the Afghanistan conflict as non-international.

71 However, it is clear that not all internal strife is captured by the concept of 'armed conflict.' article 1(2) of *Additional Protocol II supra* note 34, provides that "[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Emphasis added.

72 *Tadic, supra* note 37, at para. 70.

case of internal conflicts, a peaceful settlement is achieved.”<sup>73</sup> An ‘armed conflict’ does not require a formal declaration of war.<sup>74</sup> This provides a useful benchmark for the temporal limitations of ‘armed conflict.’

When assessing whether conduct occurred ‘during an armed conflict,’ the location of the conflict in question may and often will also be at issue, and conflict classification should play a significant role in any such determination (difficult though such classifications may be in some circumstances). In the case of international armed conflict, IHL applies throughout the territory of the parties, whether or not actual conflict is taking place in any given location.<sup>75</sup> In contrast, in non-international armed conflict, IHL generally applies only in the territory of a single state. As a result, conflict classification not only plays a significant role in determining what body of IHL applies to the conflict in question, it also helps to establish where the conflict is taking place as a matter of law, which may differ substantially from where actual combat is occurring.

The implications of these issues for the ‘armed conflict’ exclusion are highlighted by *Khawaja*. Without undertaking a conflict classification assessment, Rutherford J. concluded that “[t]here was no such armed conflict in Canada, the United Kingdom or in Pakistan where the acts with which *Khawaja* is charged were carried out.”<sup>76</sup> However, charges against *Khawaja* related to activities undertaken between January 2002 and March 2004. It is during this period that the conflict in Afghanistan likely evolved from an international to a non-international armed conflict; although this issue requires detailed analysis beyond the scope of this article, it was not until 24 December 2002 that the United Nations Security Council recognized the Afghan Transitional Authority as the lawful government of Afghanistan.<sup>77</sup> As a result, for at least part of the period in question, there was arguably an armed conflict occurring in Canada (and the United Kingdom) as a matter of law, despite the absence of actual combat activities. Conduct occurring solely within Canada and the UK could, therefore, have taken place ‘during’ an armed conflict, which has clear implications for the application of the ‘armed conflict’ exclusion.<sup>78</sup>

This difficulty becomes more pronounced when *Khawaja*’s potential connection to the conflict in Iraq is included; Rutherford J. noted that his support for Jihad could possibly have been directed to this conflict (as well as, or instead of, Afghanistan, Pakistan, the United Kingdom or elsewhere).<sup>79</sup> This conflict began in early 2003, at the latest, as an international armed conflict between the

73 *Ibid.*

74 See e.g. *Geneva Convention I*, *supra* note 33 at art. 2.

75 *Tadic*, *supra* note 37, at para. 70, establishes that until the end of the ‘armed conflict’ as described above, “international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”

76 *Khawaja*, *supra* note 1, at para. 128.

77 United Nations Security Council Resolution 1453 (24 December 2002). See also *Khawaja*, *supra* note 1, at para. 121.

78 It is also at least arguable that an armed conflict was (and is) also occurring in Pakistan, although this does not (necessarily) require a formal connection to the conflict in Afghanistan (though this likely exists).

79 See e.g. *Khawaja*, *supra* note 1, at para. 101

military forces of the American-led coalition and those of the Iraqi government. Khawaja's subsequent activities, prior to his arrest in early 2004, likely all took place when the conflict in Iraq was still considered international (or, possibly, a post-war occupation); it likely did not become a non-international armed conflict until later in 2004, when coalition forces began operating in support of the newly-installed Iraqi government, and with its consent (along with that of the UN). While Canada was not a party to this conflict, the United Kingdom certainly was, and an 'armed conflict' was arguably taking place there, during at least some of this period, as a result.

That said, the mere existence of an 'armed conflict' does not mean that any co-incident conduct should necessarily be considered to have occurred 'during' it. In *Khawaja*, Rutherford J. concluded that "[i]n my view, the term 'during' has the meaning of 'in the course of' and does not just mean 'contemporaneously with, or 'at the same time as.'"<sup>80</sup> This is consistent with international jurisprudence concerning the scope of IHL application; for example, the ICTY has found that "[i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."<sup>81</sup>

This issue may nonetheless have warranted further examination, as at least some of Khawaja's activities appeared substantially connected to particular armed conflicts, including his failed attempt to join the 'front-lines of Jihad' from Pakistan (to the extent that this related to direct participation in ongoing hostilities in either Pakistan or Afghanistan). Others, such as designing the 'hifidigimonster' detonator, may also have had such a connection, depending, among other things, on the location and nature of the intended target. While not determinative in this particular case – the deliberate direct targeting of innocent civilians is prohibited even when committed 'during an armed conflict' – this illustrates an additional challenge that may arise from the 'armed conflict' exclusion in other circumstances.

Indeed, ascertaining a connection to an armed conflict may also necessitate difficult and controversial determinations concerning whether and to what extent an individual was participating in the hostilities in question, particularly when not involving a member of a regular armed force. Rutherford J. suggested that unprivileged participation in hostilities itself may not be sufficient to preclude application of the 'armed conflict' exclusion, finding that it applies to "combatants, *lawful or otherwise*, who actually engage in armed conflict."<sup>82</sup> This comment highlights a difficult IHL issue, where in at least some circumstances the direct or indirect participation of civilians in hostilities may be prohibited by domestic but not international law, if it is prohibited at all (particularly in the case of non-international conflicts).<sup>83</sup> In this light, additional analysis may be

80 *Khawaja*, *ibid.* at para. 127, citing ruling in response to defence request for directed verdicts of acquittal.

81 *Tadic*, *supra* note 37, at para. 70.

82 *Khawaja*, *supra* note 1, at para. 128 [emphasis added].

83 For example, *Additional Protocol I*, *supra* note 34, simply recognizes the right of national authorities to institute penal proceedings relating to an individual's participation in an internal conflict, subject to specific due process guarantees, rather than establishing an international prohibition against such participation.

warranted in support of Rutherford J.'s observation that:

I do not accept the argument that Khawaja's activities, even if all in support of and with the object of participation in Taliban or Mujahideen insurgent combat activity in Afghanistan, cannot fall within the definition of 'terrorist activity' because of the 'armed conflict' exception within that definition[.]<sup>84</sup>

While the ICRC has recently established guidelines for establishing when civilians are directly participating in armed conflict (for the purpose of determining when and to what extent they may lose their protection from military attack), these are not universally-accepted (as recognized by the ICRC itself), and their precise application in specific cases remains contentious.<sup>85</sup>

Further related complexity arises when applying the 'armed conflict' exclusion to offences involving 'facilitating' rather than 'carrying out' 'terrorist activity.' Many of the specific offences established by the *ATA* incorporate facilitation in addition to direct commission of 'terrorist activity,' and *Criminal Code* s. 83.19 establishes that "[e]very one who knowingly facilitates a terrorist activity is guilty of an indictable offence." In *Khawaja*, all of the charges included direct or indirect reference to facilitation of 'terrorist activity,' with the seventh relying solely on the assertion that Khawaja "did knowingly facilitate a terrorist activity."<sup>86</sup>

While activity that is 'carried out' must obviously take place 'during an armed conflict' for the 'armed conflict' exclusion to apply, facilitation should not be possible once the underlying acts or omissions that have been facilitated have themselves been excluded from the definition of 'terrorist activity' on this basis. It does not (necessarily) follow that facilitation itself requires direct participation in hostilities. This is not a material issue in *Khawaja*, given judicial findings connecting him to specific activities targeting civilians. Even in the context of the charge resting solely on facilitation, one of the activities relied upon by Rutherford J. in his finding of guilt was Khawaja's suggestion that a colleague be "sent on a suicide mission to Israel."<sup>87</sup> However, if the current wording of the 'armed conflict' exclusion is maintained, this is a further area that may pose significant challenges. Similar issues will also arise when prosecuting conduct involving aiding or abetting 'terrorist activity.'<sup>88</sup>

## V. RECOMMENDATIONS

As the previous section illustrates, the ambiguous nature of the current 'armed

<sup>84</sup> *Khawaja*, *supra* note 1, at para. 127.

<sup>85</sup> "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law" (2008) 90(872) *Int'l Rev. Red Cross* 991.

<sup>86</sup> *Khawaja*, *supra* note 1, at para. 1. Indirect reference to facilitation is found in charges alleging a connection between Khawaja and a 'terrorist group.' This term is itself defined in *Criminal Code* s. 83.01(1) as "an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity."

<sup>87</sup> *Ibid.* at para. 138.

<sup>88</sup> See *Criminal Code*, paras. 21(1)(b) and (c), establishing that a person who aids or abets an offence is themselves a "party to an offence."

conflict' exclusion raises serious concerns relating to the scope of its application and the nature of the conduct therefore excluded from the definition of 'terrorist activity.' On the one hand, it is possible that any breach of IHL, or possibly even *jus ad bellum*, could lead to the potential characterization of related wartime activity as 'terrorist activity.' On the other hand, it is possible that acts which should be captured by the definition may be excluded inadvertently. In either case, it is clear that, because of the 'armed conflict' exclusion, the definition of 'terrorist activity' is much more complicated than necessary, presenting substantial and unnecessary interpretation and application challenges for Canada's anti-terrorism legislation.

As a result, there is a strong argument that the definition of 'terrorist activity' should be amended to refer instead to specific offences – in particular those committed against innocent civilians – whether committed during peacetime or armed conflict. Such a formulation would eliminate the need for an 'armed conflict' exclusion at all. Not only would this avoid many of the interpretation challenges identified above, it would also be consistent with the general international approach to these issues, as well as the current domestic understanding of terrorism in immigration matters.

When the *ATA* was drafted there was not (nor is there yet) a comprehensive definition of terrorism at international law. Nonetheless, there were already numerous treaties addressing specific aspects of this phenomenon, which, where applicable, also sought to exempt activities lawfully conducted during armed conflict from characterization as terrorism. However, treaty provisions on this subject have generally included within the definition of prohibited activity acts that are already unlawful during armed conflict (rather than the *ATA* approach of excluding otherwise lawful activities from the definition). For example, Article 2 of the *International Convention for the Suppression of the Financing of Terrorism* establishes that:

(1) Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: [...]

(b) *Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*<sup>89</sup>

Adopting a definition of 'terrorist activity' modeled on this provision for the

<sup>89</sup> Emphasis added.

purposes of the *Criminal Code* would avoid many, if not most, of the interpretive issues identified above. Although narrow, this provision offers considerable precision concerning specific prohibited conduct. Some interpretation would nonetheless still be required, as the provision necessarily distinguishes between attacks on civilians generally and those occurring during ‘armed conflict;’ reference to ‘persons not taking an active part in the hostilities’ in the latter context avoids criminalization of wartime targeting of civilians who *are* participating in hostilities. However, these remaining interpretive issues would result from the complex nature of IHL itself, rather than unnecessary legislative ambiguity.

Domestically, the *Terrorist Financing Convention* provision cited above already forms the basis for the definition of terrorism adopted by the Supreme Court of Canada for the purpose of interpreting immigration legislation, rather than the definition found in the *ATA*. The Court utilized this definition even after the *ATA* had been adopted – and before Canada was even a party to the *Terrorist Financing Convention*.<sup>90</sup> As a result, Canadian courts are already familiar with this provision, and its adoption for criminal justice purposes would provide consistency and certainty. Indeed, the bifurcated nature of the current domestic legal regime was noted in subsequent review of the *ATA*.<sup>91</sup>

This much simpler definition could – and likely should – be adopted in lieu of the entirety of paragraph (b) of the definition of ‘terrorist activity’ in *Criminal Code* s. 83.01(1) (apart from reference to ‘an act or omission in or outside of Canada’). The tail section ‘armed conflict’ exclusion could then be eliminated (along with the ‘official duties’ exclusion). In addition to addressing the above concerns, this would also avoid unnecessary application of the ‘armed conflict’ exclusion to the various offence provisions derived from international treaties, as outlined in paragraph (a).

This approach has already been incorporated into specific aspects of the anti-terrorism provisions of the *Criminal Code*. Although some terrorist financing offences incorporate the statutory definition of ‘terrorist activity,’<sup>92</sup> s. 83.02 provides instead that:

Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out

90 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paras. 97-98. Although the Court in *Suresh* expressly noted, at para. 98, that “Parliament is not prevented from adopting more detailed or different definitions of terrorism,” it did not discuss the specific aspects of the *ATA* definition, which came into force only weeks before the judgment was issued. In contrast, though Canada had signed the *Terrorist Financing Convention*, it had not yet been ratified nor had it entered into force at the time the definition was adopted by the Court (it was ratified by Canada on 19 February 2002 and entered into force on 10 April 2002).

91 See e.g. Special Senate Committee on the Anti-terrorism Act, “Definition of ‘Terrorist Activity,’” *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, February 2007, online: Parliament of Canada < [92 See e.g. ss. 83.03 and 83.04.](http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07-e.htm#DEFINITION_OF_“TERRORIST_ACTIVITY”></a>.</p>
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(a) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of "terrorist activity" in subsection 83.01(1),

or

(b) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

This revised provision has also been incorporated by reference into the *Terrorism Financing Act*.<sup>93</sup> The legislative rationale for using a different definition in this particular context is unclear; however, it provides a precedent for, and illustrates the feasibility of, adopting a similar definition for the statutory anti-terrorism regime as a whole.

Acts other than directly targeting civilians could also be incorporated into a revised 'terrorist activity' definition, should this be desired; however, this approach is not recommended. Most other acts falling under the general definition of 'terrorist activity' in paragraph 83.01(1)(b) already involve a breach of other *Criminal Code* provisions, at least when committed in Canada.<sup>94</sup> The *CAHWCA* captures numerous other unlawful activities committed both during and outside of armed conflict, whether inside or outside of Canada. Focusing on the deliberate and direct targeting of innocent civilians would go to the heart of terrorism. In the context of armed conflicts, it would also clearly delineate the difference between being a terrorist and an ordinary war criminal.

## VI. CONCLUSION

*Khawaja* presents a valuable learning opportunity, highlighting the challenges and implications of the current wording of the 'armed conflict' exclusion and

93 While s. 2 establishes, *inter alia*, that 'terrorist activity' has the same definition as the *Criminal Code*, it also defines "terrorist activity financing offence" to include violations of s. 83.02.

94 The *Criminal Code* also already addresses some issues relating to mere participation of Canadian citizens in armed conflicts against Canada, though it could be clarified to ensure application to conflicts involving non-state armed groups taking place outside of Canada. In contrast, the *Foreign Enlistment Act* establishes clear offences relating to Canadian citizen participation in foreign conflicts, including regulatory authority to address foreign civil wars, but these only apply to armed conflicts against allied states and not Canada itself. See e.g. *Criminal Code*, s. 46 and *Foreign Enlistment Act*, R.S. 1985, c. F-28, ss. 3 and 19(a).

the corresponding need for statutory amendment. The concerns identified above will likely provide little comfort for Khawaja himself given the judicial rationale offered for his conviction - in particular his apparent support for the deliberate targeting of innocent civilians. Although they may call for changes to the underlying reasoning in this case, these issues will likely have little impact on the overall finding of criminal responsibility. However, their broader implications must not be underestimated.

The definition of 'terrorist activity' is fundamental to Canada's anti-terrorism legislation, and it is clear that the 'armed conflict' exclusion poses serious challenges to its coherence and effectiveness. Terrorist prosecutions can be expected to continue for the foreseeable future. The underlying statutory foundation for such existential proceedings should be as clear, simple and unambiguous as possible; however, the current definition of 'terrorist activity,' and the 'armed conflict' exclusion in particular, is none of the above. The *Terrorist Financing Convention* offers a viable and compelling alternative definition, particularly in light of its domestic judicial and legislative treatment to date. Although the problems resulting from the 'armed conflict' exclusion are substantial, they are also largely avoidable, and they should be addressed before they undermine future anti-terrorism efforts in Canada.