



**INTERIM REPORT ON
CANADA'S RESTRICTIONS ON HUMANITARIAN AID TO AFGHANISTAN**

Standing Senate Committee on Human Rights

FIFTH REPORT

The Honourable Senator Salma Ataullahjan, Chair

December 2022

MEMBERS OF THE COMMITTEE WHO HAVE PARTICIPATED IN THE STUDY

The Honourable Senator Salma Ataullahjan, Chair

The Honourable Senator David Arnot

The Honourable Senator Amina Gerba

The Honourable Senator Nancy J. Hartling

The Honourable Senator Fabian Manning

The Honourable Senator Ratna Omidvar

EX-OFFICIO MEMBERS OF THE COMMITTEE:

The Honourable Senator Marc Gold, P.C., or Raymonde Gagné

The Honourable Senator Donald Plett or Yonah Martin

OTHER SENATORS WHO HAVE PARTICIPATED IN THE STUDY:

The Honourable Senators Audette, McPhedran and Pate

PARLIAMENTARY INFORMATION, EDUCATION AND RESEARCH SERVICES, LIBRARY OF PARLIAMENT:

Robert Mason, Analyst

Brendan Naef, Analyst

SENATE COMMITTEES DIRECTORATE:

Sébastien Payet, Committee Clerk

Barbara Reynolds, Procedural Clerk

Lori Meldrum, Committee Administrative Assistant

SENATE COMMUNICATIONS DIRECTORATE:

Amely Coulombe, Communications Officer, Committees

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Thursday, March 3, 2022:

The Honourable Senator Atallahjan moved, seconded by the Honourable Senator Wells:

That the Standing Senate Committee on Human Rights, in accordance with rule 12- 7(14), be authorized to examine and report on such issues as may arise from time to time relating to human rights generally; and

That the committee submit its final report to the Senate no later than June 12, 2025.

The question being put on the motion, it was adopted.

Clerk of the Senate

Gérald Lafrenière

INTRODUCTION

On 5 December 2022, the Standing Senate Committee on Human Rights (the committee) undertook a short study on humanitarian assistance to Afghanistan under its general order of reference. The study examined how Canada's terrorism financing laws affect the delivery of aid to vulnerable people in Afghanistan.

The Government of Canada has acknowledged that Canadian organizations undertaking humanitarian efforts in Afghanistan run the risk of violating the *Criminal Code*, and that this “has a negative impact on their international assistance operations.”¹ In its response to the June 2022 report of the House of Commons Special Committee on Afghanistan (the Special Committee), *Honouring Canada’s Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety*,² the government agreed with the Special Committee’s recommendation “to act immediately” and stated that it:

will consider measures, including legislative options, to address the need for exemptions for some Canadian organizations seeking to conduct humanitarian and other essential activities in regions controlled by a terrorist group and Canadian officials who assist them while avoiding the legal risk of committing a terrorist financing offence. The Government of Canada recognizes the challenges facing Canadian organizations and the need to provide clarity and assurances in relation to Canada’s sanctions and anti-terrorism financing law and regulations.³

However, more than a year since the Taliban’s return to power in Afghanistan, more than six months since the Special Committee’s report, and more than two months since the government agreed that it should “act immediately” on this issue, no such clarity or assurances have been provided.

The committee echoes previous calls to action on this issue from other parliamentary committees.⁴ With the arrival of winter and with more than one million children in Afghanistan at risk of starvation, Canada must act quickly.⁵

The committee wishes to thank all the witnesses who appeared before the committee and who provided valuable testimony as part of this study. The committee also wishes to note, however, that it invited three ministers and three parliamentary secretaries to provide an update on the

¹ [Government Response to the Report of the Special Committee on Afghanistan, entitled “Honoring Canada’s Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety”](#), 6 October 2022, p. 8.

² House of Commons, Special Committee on Afghanistan, [Honouring Canada’s Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety](#), First report, June 2021.

³ [Government Response to the Report of the Special Committee on Afghanistan, entitled “Honoring Canada’s Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety”](#), 6 October 2022, p. 8.

⁴ In addition to the Special Committee on Afghanistan’s June 2022 report, on 2 November 2022, the House of Commons Standing Committee on Foreign Affairs and International Development [called](#) on the Government of Canada “to fix the barriers that are preventing vital humanitarian aid from getting into Afghanistan.”

⁵ Standing Senate Committee on Human Rights (RIDR), [Evidence](#), 5 December 2022 (Adeena Niazi, Executive Director, Afghan Women’s Organization Refugee and Immigrant Services).

government's position on this issue and its timeline for action.⁶ All six declined to appear, citing previous commitments. While the committee acknowledges that the government has many important and sometimes competing priorities, the committee believes that the absence of all of these officials was at odds with the assurance from the department officials who did appear that this issue is a priority for the government.⁷

This report briefly highlights the context for this issue and makes five priority recommendations.

THE HUMANITARIAN SITUATION IN AFGHANISTAN

Following the withdrawal of United States (U.S.) and North Atlantic Treaty Organization (NATO) forces from Afghanistan in 2021 and the corresponding return to power of the Taliban by force, the humanitarian situation in Afghanistan has become particularly dire. Millions of people in Afghanistan are in need of humanitarian assistance due to the combined effects of war, natural disasters, drought, the COVID-19 pandemic, and chronic poverty.

Adeena Niazi, Executive Director, Afghan Women's Organization Refugee and Immigrant Services, emphasized that news reports do not accurately reflect the severity of the crisis in Afghanistan. She provided a disturbing overview of the situation, highlighting that over 35 million Afghans have been displaced, with 80% of these being women and children. This has left them vulnerable to starvation and facing the winter without shelter, with over one million children at risk of starving to death.⁸

International humanitarian assistance is essential to provide basic needs and to protect the fundamental rights of vulnerable people in Afghanistan, particularly for women, children and minorities, who are disproportionately affected by the humanitarian crisis. Martin Fischer, Head of Policy, World Vision Canada, highlighted that the resilience of Afghan communities and families is being tested perhaps more than ever before, and that child survival is at risk.⁹

INTERNATIONAL SANCTIONS AGAINST THE TALIBAN AND HUMANITARIAN EXCEPTIONS

On 21 December 2015, the United Nations (UN) Security Council adopted Resolution 2255, which reiterated and clarified the scope of international sanctions against the Taliban and its associated entities. This included an obligation on all states to freeze "financial and economic resources of every kind" used to support the Taliban.¹⁰

⁶ The committee invited the Minister of Justice and Attorney General of Canada, the Minister of Public Safety, the Minister of International Development, the Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, the Parliamentary Secretary to the Minister of Public Safety and the Parliamentary Secretary to the Minister of International Development.

⁷ RIDR, [Evidence](#), 5 December 2022 (Sébastien Aubertin-Giguère, Acting Assistant Deputy Minister, Public Safety Canada).

⁸ RIDR, [Evidence](#), 5 December 2022 (Adeena Niazi, Executive Director, Afghan Women's Organization Refugee and Immigrant Services).

⁹ RIDR, [Evidence](#), 5 December 2022 (Martin Fischer, Head of Policy, World Vision Canada).

¹⁰ United Nations Security Council (UNSC), [Resolution 2255 \(2015\)](#), S/RES/2255(2015), 21 December 2015.

Following the Taliban's return to power in Afghanistan, humanitarian aid carried new risks of violating international sanctions by incidentally benefitting the Taliban, which had effectively taken control of the taxation and customs systems in the country.

Consequently, on 22 December 2021 the UN Security Council adopted Resolution 2615, which clarified that humanitarian assistance in Afghanistan would not constitute a violation of Resolution 2255. However, it also strongly encouraged providers of humanitarian assistance "to use reasonable efforts to minimize the accrual of any benefits, whether as a result of direct provision or diversion, to individuals or entities [such as the Taliban]."¹¹

Several countries have implemented Resolution 2615 through legislative or policy changes within their domestic legal framework, providing humanitarian exceptions to criminal prohibitions relating to terrorism financing. For example, Australia and the United Kingdom have amended their legislation to create humanitarian exceptions, while the U.S. has long had a system that allows general licences to be issued to provide exceptions relating to sanctions and terrorist financing.¹²

ELIMINATING CANADIAN BARRIERS TO HUMANITARIAN AID

Section 83.03(b) of Canada's *Criminal Code* makes it an indictable offence to provide property or financial services – directly or indirectly – "knowing that, in whole or part, they will be used by or will benefit a terrorist group."

Under section 83.01(1), a terrorist group is defined as either "an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity" or "a listed entity," meaning one that has been designated as such by the Governor in Council. In Canada, the Taliban has been listed as a terrorist entity since 2013.¹³ Consequently, Canadian organizations are currently unable to provide humanitarian assistance in Afghanistan without risking criminal prosecution if, for example, they pay taxes to the de facto government.

Amy Avis, General Counsel, Canadian Red Cross, highlighted the impact of this barrier, explaining that for the Canadian Red Cross, critical programming that includes the provision of midwives in remote areas is no longer being provided.¹⁴ She added that as the situation in Afghanistan becomes increasingly dire, shipments of aid remain paused, and supplies sit ageing in warehouses.

As noted by Mr. Fischer, an overly restrictive interpretation of section 83.03(b) has a profound impact on the most vulnerable people in Afghanistan, including the women and girls that Canada's Feminist International Assistance Policy purports to champion.¹⁵

Marie-Louise Hannan, Director General, South Asia, Public Safety Canada, told the committee that certain large organizations are able to operate in Afghanistan without violating the *Criminal Code*.

¹¹ UNSC, [Resolution 2615 \(2021\)](#), S/RES/2615(2021), 22 December 2021.

¹² RIDR, [Evidence](#), 5 December 2022 (Robert Brookfield, Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice Canada). See also United States Department of State, "[Issuance of Additional General Licenses and Guidance in Support of Assistance to Afghanistan](#)," 22 December 2021.

¹³ Public Safety Canada, "[Taliban](#)," *Currently listed entities*.

¹⁴ RIDR, [Evidence](#), 5 December 2022 (Amy Avis, General Counsel, Canadian Red Cross).

¹⁵ RIDR, [Evidence](#), 5 December 2022 (Martin Fischer, Head of Policy, World Vision Canada).

She explained that organizations with operations both inside and outside Afghanistan can negotiate contract provisions that include assurances that fees are not paid to the Taliban, as well as other specific arrangements regarding where the funds will be used. She explained that the Government of Canada has therefore delivered its aid through larger partners, including the International Organization for Migration, the UN High Commissioner for Refugees, the UN Office for the Coordination of Humanitarian Affairs, the World Food Programme, and the UN Humanitarian Air Service.¹⁶

Mr. Fischer expressed a high degree of frustration that despite the controls that World Vision has put in place, they are still unable to continue operations in Afghanistan. He noted that large and medium-sized humanitarian organizations have checks and balances in place that include screenings of recipients, third party screenings, memoranda of understanding, and very clear beneficiary lists.¹⁷ Mr. Fischer assured the committee that World Vision has the expertise necessary to mitigate risks.¹⁸ He urged the Government of Canada to follow up on the commitments included in the Response to the Special Committee report and to permit aid organizations to operate with the safeguards they have implemented, as they have done in similar situations elsewhere.

Ms. Niazi questioned how allowing children to starve or freeze to death without shelter, or limiting her organization from providing services to a girls' orphanage, could be justified in any way. Moreover, she emphasized that the lack of sufficient humanitarian assistance should be understood as a direct threat to national security. She specified that desperation and hunger can drive some Afghans to join terrorist groups such as ISIS.¹⁹

Providing an assurance of non-prosecution

Section 83.24 of the *Criminal Code* provides that proceedings for terrorism offences can only be commenced with the consent of the Attorney General. Witnesses discussed the possibility of using this discretion to provide an assurance of non-prosecution to organizations seeking to provide vital humanitarian aid in good faith.

Kent Roach, Professor, Faculty of Law, University of Toronto, suggested that an assurance of non-prosecution in such cases could be done quickly, adding that non-prosecution agreements are common in the corporate context and that there is no particular reason why similar statements could not be made in the humanitarian and human rights context.²⁰

Robert Brookfield, Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice Canada, identified one limitation of this approach, noting that, while the Attorney General of Canada would normally be the relevant decision maker in such cases, in

¹⁶ RIDR, [Evidence](#), 5 December 2022 (Marie-Louise Hannan, Director General, South Asia, Global Affairs Canada).

¹⁷ RIDR, [Evidence](#), 5 December 2022 (Martin Fischer, Head of Policy, World Vision Canada).

¹⁸ Ibid.

¹⁹ RIDR, [Evidence](#), 5 December 2022 (Adeena Niazi, Executive Director, Afghan Women's Organization Refugee and Immigrant Services).

²⁰ RIDR, [Evidence](#), 5 December 2022 (Kent Roach, Professor, Faculty of Law, University of Toronto).

principle at least, the ‘Attorney General’ referenced in section 83.24 could be provincial attorneys general.²¹

Regardless of the possible limitations of this approach, the committee believes that this type of assurance is an important first step in facilitating increased humanitarian assistance in Afghanistan.

Recommendation 1

That, in accordance with section 83.24 of the *Criminal Code*, the Attorney General of Canada immediately publish a guarantee that proceedings will not be commenced under section 83.03(b) in cases where legitimate humanitarian aid – absent any terrorist intent – results in an incidental benefit to a terrorist group.

Recommendation 2

That the Attorney General of Canada urgently consult with provincial counterparts to seek guarantees that proceedings will not be commenced under section 83.03(b) of the *Criminal Code* in cases where legitimate humanitarian aid – absent any terrorist intent – results in an incidental benefit to a terrorist group.

Clarifying the government’s position

Professor Roach and Sujit Choudhry, Head of Chambers, Haki Chambers Global, argued that section 83.03(b), properly interpreted, does not criminalize the payment of incidental fees to the Taliban in the context of humanitarian assistance.²² In particular, Professor Roach cited the Supreme Court of Canada’s unanimous decision in *R. v. Khawaja*, in which the Court stated that:

The Terrorism section of the *Criminal Code*, like any statutory provision, must be interpreted with regard to its legislative purpose. That purpose is “to provide means by which terrorism may be prosecuted and prevented” ... not to punish individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to a terrorist activity.²³

Professor Roach and Mr. Choudhry argued that the Government of Canada should issue a formal legal opinion on the scope of section 83.03(b) that is consistent with their interpretation, thereby providing another form of assurance to organizations seeking to provide vital humanitarian assistance in Afghanistan.

While emphasizing that he was not at liberty to debate this proposal, Mr. Brookfield noted that the Canadian government does not have the authority to unilaterally reinterpret legislation, and that *Criminal Code* provisions are charged by a place of jurisdiction, decided by independent prosecutors, and adjudicated by courts.²⁴

²¹ RIDR, [Evidence](#), 5 December 2022 (Robert Brookfield, Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice Canada).

²² RIDR, [Evidence](#), 5 December 2022 (Sujit Choudhry, Head of Chambers, Haki Chambers Global).

²³ [R. v. Khawaja](#), 2012 SCC 69, para 44.

²⁴ RIDR, [Evidence](#), 5 December 2022 (Robert Brookfield, Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice Canada).

The committee is aware that the federal government does not have the authority to unilaterally determine how legislation will be interpreted, but is also aware that the Attorney General of Canada regularly takes positions on the interpretation of federal legislation. The committee believes that doing so in this context will provide an important signal to the Canadian charitable sector that they can help the people of Afghanistan without fear of prosecution.

Recommendation 3

That the Department of Justice immediately publish its position on the scope of section 83.03(b) of the *Criminal Code*, including whether it applies to legitimate humanitarian aid in the current context in Afghanistan, taking into consideration the Supreme Court of Canada's decision in *R. v. Khawaja*.

Creating an express humanitarian exemption

The government response to the Special Committee report indicated that the government is considering legislative solutions to this issue, such as an amendment to section 83.03(b).²⁵ Media reports indicate that the government intends to introduce and pass such legislation in Parliament by late spring 2023.²⁶

Professor Roach and Mr. Choudhry took the position that such an amendment is not necessary if section 83.03(b) is properly interpreted, but that if this section is interpreted in an overbroad manner, Parliament should seriously consider repealing it.²⁷

In contrast, Ms. Avis argued that section 83.03 needs to be amended to create an express humanitarian exemption, stating that no matter what, Parliament should amend the *Criminal Code* to guard against similar situations in the future.²⁸

The committee welcomes the government's recently announced commitment to a legislative approach. However, given the dire situation communicated by witnesses to the committee, it also wishes to emphasize the need for an immediate solution, as outlined in the previous recommendations.

²⁵ [Government Response to the Report of the Special Committee on Afghanistan, entitled "Honoring Canada's Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety"](#), 6 October 2022, p. 8.

²⁶ Marie Woolf, "[Anti-terror law to be tweaked for aid groups to operate in Afghanistan, Sajjan says](#)," *The Globe and Mail*, 12 December 2022.

²⁷ RIDR, [Evidence](#), 5 December 2022 (Kent Roach, Professor, Faculty of Law, University of Toronto).

²⁸ RIDR, [Evidence](#), 5 December 2022 (Amy Avis, General Counsel, Canadian Red Cross).

Recommendation 4

That the Department of Justice urgently introduce legislation to create an explicit humanitarian exemption to section 83.03(b) of the *Criminal Code*, clarifying that legitimate humanitarian aid – absent any terrorist intent – that results in an incidental benefit to a terrorist group would not fall within the ambit of this provision.

Increasing the government's humanitarian assistance

While section 83.03(b) has not prevented the Canadian government from providing some humanitarian assistance in Afghanistan, the committee nevertheless heard that Canada has a moral obligation to do more. At the same time, Canada must continue to take reasonable steps to minimize benefits to the Taliban or other terrorist groups.²⁹

In 2022, the Government of Canada provided more than \$143 million in humanitarian assistance to Afghanistan and neighbouring countries.³⁰ Asma Faizi, President, Afghan Women's Organization Refugee and Immigrant Services, cited drastically escalating needs and called for the government to increase its humanitarian assistance to the region to at least \$250 million for 2023.³¹

Recommendation 5

That the Government of Canada urgently increase its humanitarian assistance to Afghanistan and neighbouring countries, and continue to ensure that reasonable steps are taken to minimize the accrual of benefits to the Taliban.

²⁹ RIDR, [Evidence](#), 5 December 2022 (Sébastien Aubertin-Giguère, Acting Assistant Deputy Minister, Public Safety Canada).

³⁰ RIDR, [Evidence](#), 5 December 2022 (Marie-Louise Hannan, Director General, South Asia, Global Affairs Canada).

³¹ RIDR, [Evidence](#), 5 December 2022 (Asma Faizi, President, Afghan Women's Organization Refugee and Immigrant Services).

WITNESSES

December 5, 2022

As individuals

- Sujit Choudhry, Head of Chambers, Haki Chambers Global
- Kent Roach, Professor, Faculty of Law, University of Toronto

Canadian Red Cross

- Amy Avis, General Counsel

World Vision Canada

- Martin Fischer, Head of Policy

Afghan Women's Organization Refugee and Immigrant Services

- Asma Faizi, President
- Adeena Niazi, Executive Director

Department of Justice Canada

- Robert Brookfield, Director General and Senior General Counsel, Criminal Law Policy Section
- Glenn Gilmour, Counsel, Criminal Law Policy Section

Public Safety Canada

- Sébastien Aubertin-Giguère, Acting Assistant Deputy Minister

Global Affairs Canada

- Nancy Segal, Acting Director, Crime and Terrorism Policy Division
- Marie-Louise Hannan, Director General, South Asia