

# Afghan resistance is `terrorist' under Canadian law, Khawaja trial judge rules

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In the first major prosecution under Canada's Anti-Terrorism Act, Mohammad Momin Khawaja, a 29-year-old Ottawa-area software developer arrested almost five years ago, was convicted October 29 on five charges of participating in a "terrorist group" and helping to build an explosive device "likely to cause serious bodily harm or death to persons or serious damage to property."

However, the prosecution was unsuccessful on its two major charges, which alleged that Khawaja had been part of a plot to commit deadly bombings in London, England — for which five individuals, all Muslims like Khawaja, were sentenced to life imprisonment in England in April 2007.

The verdict was not surprising. A lengthy non-jury trial that began in June produced no evidence to link Khawaja directly to the alleged London bomb plot, although there was extensive police evidence that Khawaja knew at least some of the London group. On the other hand Khawaja, through his lawyer Lawrence Greenspon, admitted building an explosive device, a remote detonator that he termed a "hi-fi digimonster," at their behest.

A striking aspect of the verdict, however, although it was given little attention in the media coverage, was the rationale given by Justice Douglas Rutherford for rejecting Khawaja's defence. That defence was that Khawaja thought the detonator was for use in fighting the NATO occupation of Afghanistan — for example in triggering the improvised explosive devices commonly used by the Afghan resistance. This activity, the defence argued, fell outside the definition of "terrorist activity" in the legislation, which excepts "an act or omission that is committed during an armed conflict. . . in accordance with customary international law or conventional international law applicable to the conflict."

## Judge endorses Canada's war in Afghanistan

The Ontario Superior Court judge acknowledged "an abundance of evidence that Momin Khawaja's central objective was to play a role in the fighting in Afghanistan...." But in ruling that any such role would be "terrorist activity," he explicitly underwrote the excuse given by successive Liberal and Conservative governments for Canada's Afghan war.

The judge adopted the justification given for the initial imperialist attack on Afghanistan: "In response to the attack on the twin towers in New York on 9/11, the U.S.A. and the U.K. sent troops and equipment into Afghanistan with the objective of capturing Bin Laden, destroying al Qa'eda and removing the Taliban regime." (paragraph 114 of the judgment)

Then, citing a series of United Nations Security Council resolutions subsequently endorsing

the assault on Afghanistan and authorizing continued occupation and fighting by the NATO-led International Assistance Security Force [ISAF], the judge declared that he took “judicial notice as well, that Canada, along with other North Atlantic Treaty Organization countries, has contributed personnel and resources to the ISAF and that to date some 100 of Canada’s armed forces personnel have been killed in fighting with insurgent forces opposing the initial American and British and subsequent United Nations intervention in support of a reconstructed and democratic Afghanistan.” (paragraph 124)

(By “judicial notice,” the Judge was referring to the legal doctrine that courts, without hearing evidence on the matter, are entitled, as the Judge says, to “resort to certain notorious facts . . . which I think are beyond dispute among reasonable people.”)

And he concluded:

.” . . . 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. News reports of insurgent attacks in Afghanistan are characterized daily in the news as ‘terrorist’ and not surprisingly since, subject to the armed conflict clause, they meet the definition of terrorist activity in the Criminal Code. It seems self-evident that the armed insurgency in Afghanistan is

“- intended in whole or in part to intimidate the population or that segment of it that supports the legitimate government and those assisting it in its reconstruction and establishing of peace and order with regard to their security, and intended to compel the population, the government, NATO, the United Nations and all those agencies supporting the reconstruction and democratization efforts to refrain and desist, and

“- that consequential death and destruction is caused and reported throughout the world on a daily basis.” (paragraph 125)

Largely on that basis, the judge held that the “armed conflict” exception in the Anti-Terrorism Act had no application to the case. He quoted his ruling in a motion on the defence argument during the trial:

“The 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. Momin Khawaja was not so engaged.”

In other words, Canadian troops could not be convicted of “terrorist activity” while fighting in Afghanistan. But Afghan insurgents fighting in self-defence and to expel occupying armies — or those assisting the insurgents — could be so charged and convicted.

### **Pattern of anti-Muslim repression**

The defence adduced no evidence on the nature of the war in Afghanistan, nor did it attempt to rebut the ideological rationale of the UN Security Council, dominated by the

major imperialist powers. The defence strategy did not seek to expose Canada's Afghan intervention and its effect on young Muslims like Khawaja who, outraged by this war of conquest, sympathize with the armed resistance in Afghanistan.

Momin Khawaja is due to be sentenced on November 18. Under the Anti-Terrorism Act, he faces possible life imprisonment for committing an offence "for the benefit of, at the direction of or in association with a terrorist group." The Act is draconian legislation rushed through Parliament in 2001 in the wake of the September 9 attacks on the twin towers and Pentagon.

The Act, which amended the Criminal Code, is a virtual license for courts to override long-standing principles of due process in the application of criminal law. For example, in the only other trial to date under the Act, an under-age youth was convicted recently in Brampton, Ontario, of being an "eager acolyte" to and participating in a "terrorist group" — the "terrorist group" in question being comprised, as the judge found, of other co-accused who were not before him and have not yet been tried. In effect, the co-accused have already been convicted in absentia of "terrorism." The group in question, originally 17 but now reduced to 11 as a result of acquittals and dropping of charges, is comprised mainly of young Muslims, many under-age, who were arrested in a "sting" entrapment operation. (See "The Toronto `Anti-Terror' Arrests: An Attack on Muslims and Antiwar Opinion" <<http://www.socialistvoice.ca/?p=108>>)

Meanwhile, Canada still has five Muslim men who have been jailed— or, after years of incarceration, subjected to heavily monitored house arrest in the forced custody of family members — all without being charged with any specific offence, simply on the basis of being certified by two government Ministers that they were somehow engaging in terrorism, subversion or espionage. As non-citizens albeit permanent residents, they have been jailed under Canada's immigration legislation. Three are still being held in Kingston, Ontario, at Canada's "Guantanamo North." They can be held indefinitely without charge or trial once a judge determines, on the basis of a secret hearing without the presence of the accused or his counsel, that they are somehow a threat to national security. (See the "Report of the People's Commission on Security Measures" <[http://peoplescommission.org/files/commpop\\_fullreport.pdf](http://peoplescommission.org/files/commpop_fullreport.pdf)>).

All of the "security certificate" victims are under threat of expulsion from Canada to repressive regimes in North Africa or Asia, with probable torture and possible death as a result of being labelled terrorists by the Canadian government. Their potential fate has been underscored by the horrendous case of Maher Arar, the Canadian tortured for more than a year in Syria on the basis of Canadian police reports falsely linking him with "terrorists," and, more recently, the case of three Muslim Canadians — Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin — whom retired Supreme Court judge Frank Iacobucci has confirmed were tortured in Syria and Egypt, again, on the basis of Canadian police reports falsely linking them with terrorist activities.

### **Political overtones**

The judge's reasoning in the Khawaja case is a fresh reminder of the close connection between Canada's "war on terrorism" and its war in Afghanistan. The political overtones were evident throughout the trial. Summing up the case for the Crown, the prosecutor told the court that "It was his [Khawaja's] intention to bring death and destruction to the West." This was the theme repeated over and over in the lurid media coverage. It is, of course, an

underlying theme in the constant propaganda against Muslims in the media.

This was an important trial for the government, as it was the only case so far in which the Canadian police had managed to come up with substantial evidence of a plot by some Muslims to engage in violent acts that could somehow fit within the definition of “terrorism” in Canadian law. (The lack of such evidence is clearly the reason why none of the security certificate victims has been accused of any specific crime.) Yet even in Khawaja’s trial, it was impossible to ignore the political context. It was dramatically illustrated when prosecution witness Zeba Khan, Khawaja’s ex-fiancée, testifying by video link from her home in Dubai, explained that his references to “jihad” in his numerous emails to her, which the police had seized as evidence, had nothing to do with terrorism.

“Jihad and terrorism are different things,” she told the court. “You will not meet a young Muslim man in the world who is not angry about something. Anyone who watches the news, if he wasn’t mad then (a) there’s something wrong with him or (b) he’s ignorant.” Not surprisingly, the prosecution limited its examination-in-chief of this witness to less than 10 minutes! In her July 2004 statement to police, Khan had said fighting troops in Muslim lands “is not an act of terrorism.” As reported by the Ottawa Citizen, she and Khawaja had “shared a belief in jihad — struggle — that fell far short of terrorism.”

Further evidence of what motivated Mohammad Khawaja was revealed in an Ottawa Citizen profile last June that began:

“Four days after the 2001 terrorist attacks in New York and Washington, a gang of white males in Orléans (an Ottawa suburb) pulled a 15-year-old Muslim boy off his bicycle and beat him unconscious. ... Buried in the Citizen story of the boy’s beating was a quote by a 22-year-old man named Mohammad Khawaja.

“‘I didn’t think something like that would happen in Orléans,’ he told a Citizen reporter during a random interview at the Orléans mosque. ‘It’s shocking.’”

On a pre-trial motion, Khawaja’s lawyer Lawrence Greenspon got Justice Rutherford to strike down on constitutional grounds the Anti-Terrorism Act’s requirement that a “terrorist act” be one committed “for a political, religious or ideological purpose, objective or cause.” The decision raised eyebrows in the legal defence community as it seemed to widen the potential for terrorism charges to be laid in connection with activities that had no such motivation, such as a strike by workers on wage issues. Greenspon defended his motion, however:

“It gave the right for police to investigate people on the basis of their religious, ideological or political beliefs, which we knew would be Muslim males aged 22 to 45,” he told the Ottawa Citizen.

“We’ve been down that road before in the name of security,” he adds. “Let’s target a particular group of people and put them in a camp — the Italians, the Japanese Canadians — or the FLQ and its sympathizers in the jails of Montreal. What we have now is a definition of terrorism that is a lot closer to the definitions in other western countries.”

## Ominous precedent?

In any event, the judge held in his verdict that “there is an abundance of evidence that what was being done by Khawaja . . . and his associates was clearly motivated `in whole or in part for a political, religious or ideological purpose, objective or cause.’ Whether that is an essential ingredient of these offences or not, it has been abundantly proven.” No doubt this finding will play some role in the probable appeal.

The Khawaja verdict makes clear that the “terrorist” label can be slapped on any armed resistance to Canadian and NATO troops in Afghanistan or elsewhere. It ominously echoes the reasoning of the Bush Administration in another case involving a young Canadian Muslim — Omar Khadr, the Canadian child soldier who has been imprisoned and tortured by the U.S. military in Guantánamo since 2001, and is now charged with killing a U.S. soldier in Afghanistan during a U.S. attack on his family’s residence that killed his father. There is now eyewitness evidence that Khadr did not shoot the soldier in question. And there is a mounting movement in Canada demanding the return to this country of this last remaining citizen of a Western power being held in Guantánamo.

However, even if Khadr is returned to Canada what is his likely fate? He may not be prosecuted for murder. But following the judge’s reasoning in Khawaja’s case, is it excluded that Khadr, as a non-military “enemy combatant” in Afghanistan, could be considered a “terrorist” in Canadian law and subject to the extreme penalties in the Anti-Terrorism Act?

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