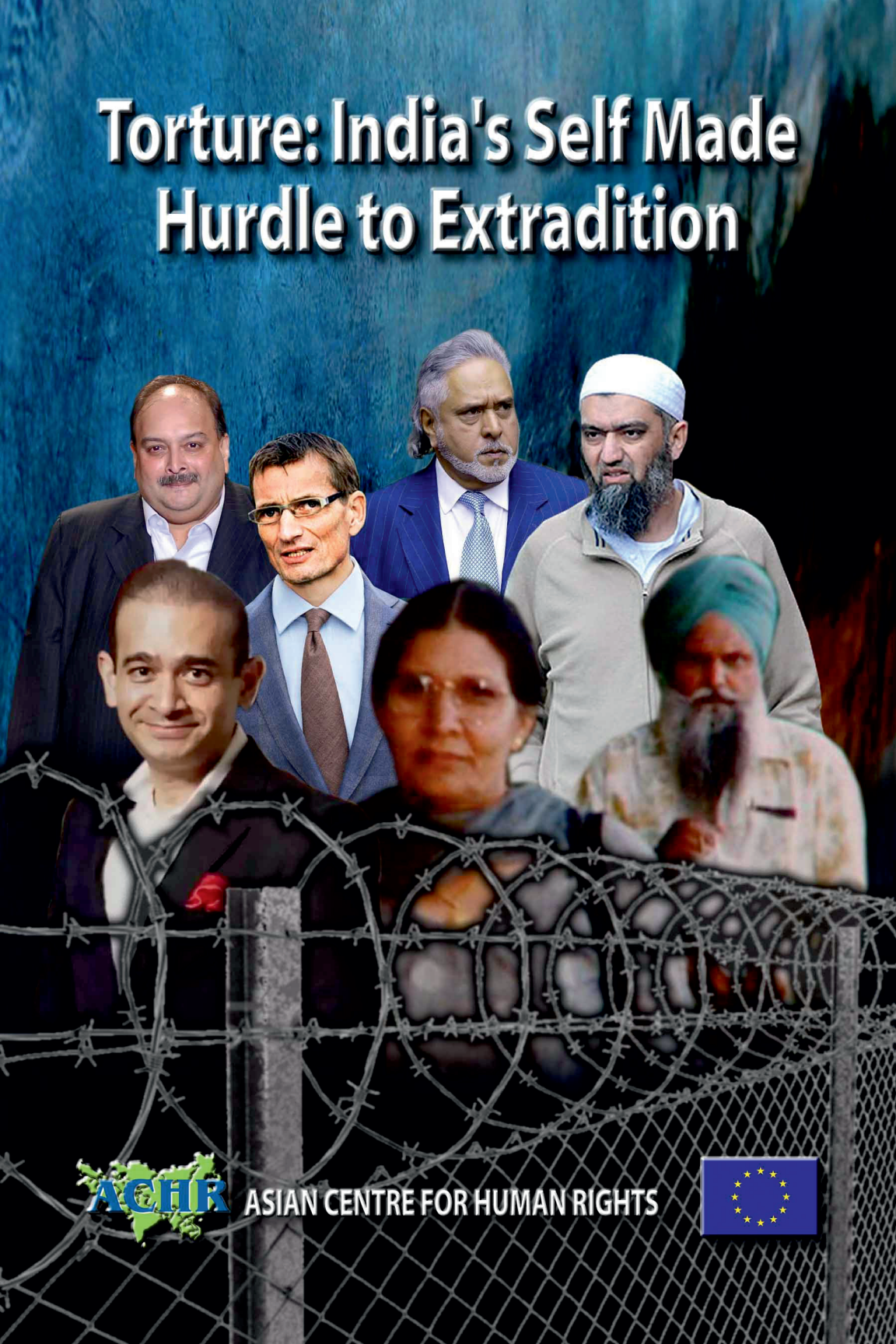
Torture: India's Self Made Hurdle to Extradition



ASIAN CENTRE FOR HUMAN RIGHTS

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1. Executive summary: "Diplomatic assurances" not sufficient to extradite fugitives to India

As this report is released on 10th December 2018, the Government of India is awaiting the judgment of the Chief Magistrate Court, London, United Kingdom (UK) on its request for extradition of poster boy of India's economic fugitives, Vijay Mallya. During the hearing, Mallya, *inter alia*, had submitted that prison conditions in India amount to torture, inhuman and degrading treatment. India provided the evidence of prison conditions as directed by the court and further gave diplomatic assurances to upgrade Mumbai's Arthur jail, where Mallya will be held, on his extradition to European standards.

While both Mallya and Government India have the right to appeal against the judgment of the Chief Magistrate's Court, London upto the European Court of Human Rights, India's diplomatic assurances effectively means the *Desi*[1] prisoners can rot in jails like "animals"[2] while European returnee fugitives shall be provided facilities at par with European standards. Even if the Courts in the United Kingdom were to accept India's assurances, there are serious doubts whether India's "diplomatic assurances" shall stand scrutiny of the European Court of Human Rights or the UN Committee Against Torture[3] in the event of further legal challenge following exhaustion of the domestic procedures of the UK.

Despite successful extradition of Christian Michel, the alleged middleman in the AgustaWestland chopper deal from the United Arab Emirates (UAE) on 4 December 2018[4], India is unlikely to secure extradition of most of the fugitives from the countries which have independent judiciary and ratified the European Convention on Human Rights (ECHR) and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

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[1]. Desi means national / country origin.

[2]. SC slams State Govts on 600% overcrowding of Jails: Prisoners cannot be kept in jail like "Animals". Read Order, Latestlaws, 30 March 2018 available at https://www.latestlaws.com/latest-news/sc-slams-state-govts-on-600-overcrowding-of-jails-prisoners-cannot-be-kept-in-jail-like-animals/

[3]. United Kingdom has not accepted the competence of the UNCAT but is bound by the European Court of Human Rights.

[4]. VVIP Chopper "Middleman" Christian Michel In Delhi Court Today: 10 Points", NTDV, 5 December 2018 available at https://www.ndtv.com/india-news/vvip-chopper-case-accused-christian-michel-in-india-tonight-10-points-1957833?pfrom=home-topscroll

Out of the 68 fugitives[5] extradited to India from 2002 to 4 December 2018, 20 fugitives or 29% of the total fugitives were extradited from the United Arab Emirates (UAE) only. Since the signing of the Extradition Treaty with the UK in 1992, India secured extradition of only Samirbhai Vinubhai Patel out of the 60 fugitives[6] demanded only after Patel voluntarily agreed to return without challenging India's extradition request.[7]

1.1 India's extradition requests mostly rejected by the UN and European Courts on grounds of '*danger of being subjected to torture*'

Majority of India's extradition requests from countries known for the rule of law have been repeatedly rejected because of the prohibition of refoulement/return/ extradition of a person "*to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture*" as per Article 3 of the UNCAT[8], Article 3 of the ECHR[9] and Article 33 of the United Nations Convention Relating to the Status of Refugees, 1951[10].

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[5]. List of fugitives extradited by foreign governments to India as on 31st October 2018 provided by the Ministry of External Affairs, Government of India (available at https://www.mea.gov.in/toindia.htm) while extradition of Mr Christian Michel from the UAE took place on 4 December 2018

[6]. UK has extradited only one Indian fugitive in 26 years. Will Vijay Mallya be next?, India Today, 31 July, 2018, https://www.indiatoday.in/india/story/vijay-mallya-extradition-case-1301201-2018-07-31

[7]. Id.

[8]. Article 3 of the UNCAT states,

"*1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

[9]. Article 3 of the ECHR relating to prohibition of torture states, "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*".

[10]. Article 33 - Prohibition of expulsion or return ("refoulement") of the Refugee Convention states,

"*1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The prohibition of torture is absolute and it cannot be justified under any circumstances "*whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency*" as provided under Article 2.2 of the UNCAT. The prohibition against refoulement at the risks of torture has attained the rank of a peremptory norm of international law, or *jus cogens*.[11] "Even if an individual is not eligible for asylum, the State may not remove him or her to a country where he or she would face a real risk of torture."[12]

In a series of judgments such as *Karamjit Singh Chahal* v. *United Kingdom*[13], *Nirmal Singh* v. *Canada*[14], *Harminder Singh Khalsa et al.* v. *Switzerland*[15], *Bachan Singh Sogi v. Canada*,[16] the European Court of Human Rights and the UN Committee Against Torture held that return/extradition to India shall constitute a breach of Article 3 of the UNCAT considering, *inter alia*, incidents of torture in police custody, widespread impunity for perpetrators, established and foreseeable risk of being tortured. The UN Committee Against Torture in *Harminder Singh Khalsa et al.* v. *Switzerland*[17] held that India not ratifying the UNCAT means that *Harminder Singh Khalsa et al* "*would be in danger, in the event of expulsion to India, not only of being subjected to torture but of no longer having the legal possibility of applying to the UN Committee for protection*". The High Court of Denmark also rejected India's request for extradition of Kim Davy, an

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[11]. See, for example, International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Anto Furundzija, Trial Chamber, Judgement of 10 December 1998, at paragraphs 134–164. See also the judgement of the House of Lords in Pinochet Ugarte, re. [1999] 2 All ER 97, at paragraphs 108–109.

[12]. Report No.273 titled "*Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation*", Law Commission of India, 17 October 2017 available at http://lawcommissionofindia.nic.in/reports/Report273.pdf

[13]. *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: https://www.refworld.org/cases,ECHR,3ae6b69920.html

[14]. *Nirmal Singh v. Canada*, CAT/C/46/D/319/2007, UN Committee Against Torture (CAT), 8 July 2011, available at: https://www.refworld.org/cases,CAT,4eeb376e2.html

[15]. *Harminder Singh Khalsa et al. v. Switzerland*, CAT/C/46/D/336/2008, UN Committee Against Torture (CAT), 7 July 2011, available at: https://www.refworld.org/cases,CAT,4eeb365c2.html

[16]. *Bachan Singh Sogi v. Canada*, CAT/C/39/D/297/2006, UN Committee Against Torture (CAT), 16 November 2007, available at: http://www.worldcourts.com/cat/eng/decisions/2007.11.16_Bachan_Singh_Sogi_v_Canada.htm

[17]. *Harminder Singh Khalsa et al. v. Switzerland*, CAT/C/46/D/336/2008, UN Committee Against Torture (CAT), 7 July 2011, available at: https://www.refworld.org/cases,CAT,4eeb365c2.html, Para 11.7

accused of the Purulia arms dropping case[18], on the ground that India had not ratified the UNCAT.

1.2 No change on grounds of torture: The statements of the government of India and the Supreme Court

For considering extradition/refoulement/return or expulsion, Article 3(2) of the UNCAT requires that "*for the purpose of determining whether there are such grounds (of torture), the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights*".

Despite a series of rejection of India's extradition requests, India has not taken any tangible measures to remove the legal hurdle to facilitate extradition to India. Rather, the statements of the Government of India, National Human Rights Commission (NHRC) and the Supreme Court of India confirm that the risks of torture in case of extradition to India cannot be underestimated.

i. Individual risks of torture: The statements of the Government of India

On 14 March 2018, Minister of State for Home Affairs Shri Hansraj Gangaram Ahir in the reply to Unstarred Question No. 2135 informed the Rajya Sabha that a total of 1,674 cases of custodial deaths in 334 days (1 April 2017 to 28 February 2018) were registered by the National Human Rights Commission (NHRC) i.e. over five deaths in custody every day. There is no count of cases of torture not resulting into death. Foreign national courts, the European Court of Human Rights and the UN Committee Against Torture are likely to consider the statements of the Government of India as evidence about the risks of torture in case of refoulement/extradition to India.[19]

Torture is "endemic" and regularly used during questioning and in detention centres.

[18]. Purulia arms dropping case relates to dropping unauthorised arms, including hundreds of AK-47 rifles, anti-tank grenades, pistols, rocket launchers and thousands of rounds of ammunition, from an aircraft in Purulia district of West Bengal on 17 December 1995.

[19]. Response of Minister of State for Home Affairs Hansraj Gangaram Ahir to Unstarred Question No. 21351 in Rajya Sabha on 14 March 2018, https://mha.gov.in/MHA1/Par2017/pdfs/par2018-pdfs/ls-14032018/2135.pdf

ii. Torturous prison conditions

Prison conditions in India are totally incompatible with human dignity and amount to torture and other cruel, inhuman or degrading treatment or punishment. Almost all the fugitives raised the issue while opposing India's extradition request. The same has been acknowledged by the Government of India, the NHRC and the Supreme Court of India.

On 08 August 2017, Minister of State in the Ministry of Home Affairs, Government of India Shri Hansraj Gangaram Ahir in his reply to Starred Question No. 303 before the Lok Sabha stated that 149 jails had an overcrowding rate of from 200% to staggering 1166.7% as on 31.12.2015.[20] There has not been any improvement of the situation. According to provisional figures provided by the government in Rajya Sabha in April 2018, the country's 1,412 jails were overall overcrowded by 114% of their capacity, with a count of 4.33 lakh prisoners against a capacity of less than 3.81 lakh until December 31, 2016.[21]

This deplorable situation in the prisons led the Supreme Court to remark in March 2018 that prisoners "*cannot be kept in jail like animals.*"[22] The Supreme Court has been hearing two Writ Petitions, one based on a letter written by former Chief Justice of India Mr R.C. Lahoti on 13 June 2013[23] and the other registered *suo motu*[24] following surprise visit of Supreme Court Justices Adarsh Kumar Goel to the detention facilities in Faridabad. The Supreme Court in its judgment dated 25 September 2018 constituted a three member panel on prison reforms to be headed by Justice (Retd.) Amitava Roy as the Chairman but during the hearing on 22 November 2018, the Supreme Court expressed concern about the lack of facilities given to Justice Amitava Roy Committee and directed

[20]. Reply of the Ministry of Home Affairs to Starred Question No. 303 answered on 08.08.2017 before the Lok Sabha available at http://164.100.47.190/loksabhaquestions/annex/12/AS303.pdf

[21]. Jails at 14 per cent over capacity, two in three prisoners undertrials, Indian Express, 10 April 2018 available at https://indianexpress.com/article/explained/overcrowding-in-jails-prisos-reforms-tihar-jails-police-ncrb-5130869/

[22]. SC slams State Govts on 600% overcrowding of Jails: Prisoners cannot be kept in jail like "Animals". Read Order, Latestlaws, 30 March 2018 available at https://www.latestlaws.com/latest-news/sc-slams-state-govts-on-600-overcrowding-of-jails-prisoners-cannot-be-kept-in-jail-like-animals/

[23]. Writ Petition (Civil) No. 406 of 2013

[24]. Writ Petition (Civil) N0. 749 of 2018

the Government of India to provide details of the infrastructure provided to the Committee.[25]

There is no doubt that the overcrowding itself, not to mention about other violations of human rights, do not meet the requirement of the Article 3 of the UNCAT.

iii. Death penalty

Though India in principle imposes death penalty in the rarest of the rare cases, death penalty is imposed by the courts almost on daily basis. During 2004-2013, a total of 5,054 convicts or an average of 505 convicts per year were sentenced to death by the Sessions Courts in India.[26] The number of death sentences further increased following the enactment of the Criminal Law Amendment Act in 2013 extending death penalty in certain cases of aggravated rape[27] and the Criminal Law Amendment Act in 2018 providing death penalty for child rape[28].

However, Section 34C of the Extradition Act of 1962 provides for provision of life imprisonment for death penalty where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Government of India and the laws of that foreign State do not provide for a death penalty for such an offence.

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[25]. Supreme Court slams primeval conditions in jails, observation homes, The Hindu, 22 November 2018; Available at; https://www.thehindu.com/news/national/supreme-court-slams-primeval-conditions-in-jails-observation-homes/article25569788.ece

[26]. *The State of Death Penalty in India 2013*, Asian Centre for Human Rights, February 2015, available at http://www.achrweb.org/info-by-country/india/the-state-of-death-penalty-in-india-2013-discriminatory-treatment-amongst-the-death-row-convicts/

[27]. Under Section376A of the Criminal Law Amendment Act provides that if a person committing the offence of sexual assault, "*inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death*".

[28]. Lok Sabha passes Bill to provide death to child rape convicts, The Economic Times, 30 July 2018 available at https://economictimes.indiatimes.com/news/politics-and-nation/lok-sabha-takes-up-bill-to-provide-death-penalty-to-child-rape-convicts/articleshow/65201070.cms

1.3 Diplomatic assurances: A loophole to escape non-refoulement principle widened by India's credibility crisis

"Diplomatic assurances" to secure extradition have been described by the UN Committee Against Torture in its General Comment No. 4(2017)[29] as a loophole to undermine the principle of non-refoulement set out in Article 3 of the Convention.[30] Diplomatic assurances have been rejected by the UN Committee Against Torture and the European Court of Human Rights, among others, because of the fact that there is "*no mechanism for their enforcement*".[31]

In a number of cases such as *Inass Abichou* v *Germany*[32], *Abdussamatov et al. v. Kazakhstan*,[33] *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*,[34] the UN Committee Against Torture unequivocally held that "*diplomatic assurances cannot be used as an instrument to avoid the application of the principle of non refoulement*" and that "*diplomatic assurances were not sufficient grounds to ignore the obvious risks of torture*".

The European Court of Human Rights too in a series of landmark judgments such as *Saadi* v *Italy*,[35] *Ben Khemais v. Italy*,[36] *Muminov v.*

[29]. UN Committee Against Torture (CAT), *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, available at: http://www.refworld.org/docid/5a903dc84.html [accessed 13 October 2018], para.20

[30]. *Agiza v. Sweden*, para. 13.4, supra fn. 3; and communications No. 538/2013, *Tursunov v. Kazakhstan*, decision of 8 May 2015, para. 9.10; and No. 747/2016, *H.Y. v. Switzerland*, decision adopted on 9 August 2017, para. 10.7.

[31]. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para 13.4, available at: http://www.refworld.org/cases,CAT,42ce734a2.html [accessed 13 October 2018]

[32]. *Abichou vs Germany*, Communications No 430/2010, UN Doc. CAT/C/50/D/430/2010, 21 May 2013

[33]. CAT communication No. 444/2010

[34]. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, available at: http://www.refworld.org/cases,CAT,42ce734a2.html [accessed 13 October 2018]

[35]. *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: https://www.refworld.org/cases,ECHR,47c6882e2.html

[36]. *Ben Khemais v. Italy*, Application no. 246/07, European Court of Human Rights, 24 February 2009

Russia,[37] *Khaydarov v. Russia,*[38] *Baysakov and others v. Ukraine,*[39] *Koktysh v. Ukraine,*[40] *Soldatenko v. Ukrainem,*[41] *Sultanov v. Russia,*[42] *Yuldashev v. Russia,*[43] *Ismoilov and others v. Russia,*[44] *Makhmudzhan Ergashev v. Russia,*[45] had rejected extradition or expulsions based on the diplomatic assurances.

India's only extradition request adjudicated by the European Court of Human Rights was that of *Chahal v. UK.*[46] On India's diplomatic assurance, the European Court of Human Rights had held that although it did not 'doubt the good faith of the Indian Government in providing the assurances'. However, given that the violation of human rights by certain members of the security forces in Punjab and elsewhere in India was 'a recalcitrant and enduring problem', the Court was not persuaded that the assurances given 'would provide Mr Chahal with an adequate guarantee of safety'. The Court rejected the order for expulsion of Chahal.

India faces serious credibility crisis with respect to its diplomatic assurances. The Portugal High Court ordered revocation of the extradition of underworld don Abu Salem on the grounds of violations of the conditions under which he was permitted to be taken to India in November 2005

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37. *Muminov v. Russia,* Appl. no. 42502/06, Council of Europe: European Court of Human Rights, 11 December 2008, available at: https://www.refworld.org/cases,ECHR,49413f202.html

38. *Khaydarov v. Russia,* Application no. 21055/09, Council of Europe: European Court of Human Rights, 20 May 2010, available at: https://www.refworld.org/cases,ECHR,4bf661112.html

39. *Baysakov and Others v. Ukraine,* Application no. 54131/08, Council of Europe: European Court of Human Rights, 18 February 2010, available at: https://www.refworld.org/cases,ECHR,4cbeb81c2.html

40. *Koktysh v Ukraine,* App no 43707/07 (ECtHR, 10 December 2009)

41. *Soldatenko v. Ukraine,* Appl. no. 2440/07, Council of Europe: European Court of Human Rights, 23 October 2008, available at: https://www.refworld.org/cases,ECHR,4906f2272.html

42 . *Sultanov v Russia,* App no 15303/09 (ECtHR, 4 November 2010) para 73

43. *Yuldashev v. Russia,* Application no. 1248/09, Council of Europe: European Court of Human Rights, 8 July 2010, available at: https://www.refworld.org/cases,ECHR,4c3716732.html

44. *Ismoilov and others v Russia,* App no 2947/06 (ECtHR, 24 April 2008) para 127;

45. *Makhmudzhan Ergashev v. Russia,* Application no. 49747/11, Council of Europe: European Court of Human Rights, 16 October 2012, available at: https://www.refworld.org/cases,ECHR,512643102.html

46. *CASE OF CHAHAL v. THE UNITED KINGDOM,* Application no. 22414/93, European Court of Human Rights, 15 November 1996, available at: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Chahal.pdf

to face trial in eight cases including 1993 Mumbai blasts.[47] After the Lisbon High Court cancelled the deportation order, Portugal's Supreme Court of Justice questioned the legal rights of the Indian authorities to challenge the cancellation of the extradition order.[48] Abu Salem's petitions on the issue are pending before the European Court of Human Rights and the judgment of the European Court shall have far reaching consequences on India's credibility with respect to its diplomatic assurances.

Further, the UN Committee Against Torture while declaring Canada's extradition of Bachan Singh Sogi to India in violation of the Article 3 and Article 22 of the UNCAT noted that Sogi was "*beaten and subjected to ill-treatment by the local authorities*"[49] following extradition.

India could have removed the principal hurdle to extradition by ratifying the UNCAT and enacting a national law against torture to meet the key requirements of non-refoulement i.e. legal undertaking against prohibition of torture and providing the legal possibility for protection at par with the countries from where extradition is sought.

India has abysmally failed on that count. The ratification of the UNCAT by India and adoption of a national law has been a saga of empty promises – (i) non implementation of the assurance given to the Lok Sabha on 3 May 2000 to ratify the UNCAT; (ii) non implementation of three assurances given to the UN Human Rights Council since 2008 to ratify the UNCAT in 2008, 2012 and 2017; (iii) failure of the Government of India to place two Prevention of Torture Bill drafted by the Parliamentary Select Committee of the Rajya Sabha in December 2010 and the Law Commission of India in October 2017 respectively before the parliament as on date; (iv) non-implementation of the assurance given to the Supreme Court of India during the hearing of the Writ Petition (Civil) No. 738/ 2016 on 27 November 2017 to act on the Bill drafted by the Law Commission of India; and (v) thwarting two public interest ligations filed before the Kolkata High Court in 2011 and the Supreme Court of

[47]. Portugal high court terminates Abu Salem's extradition, Rediff.com, 27 September 2011, https://www.rediff.com/news/report/slide-show-1-abu-salem-extradition-terminated-portugal-court/20110927.htm

[48]. Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose for role in 1993 Mumbai blasts case, The New Indian Express, 7 September 2017, http://www.newindianexpress.com/nation/2017/sep/07/thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose-for-role-in-1993-m-1653790.html

[49]. *Bachan Singh Sogi v. Canada*, CAT/C/39/D/297/2006, UN Committee Against Torture (CAT), 16 November 2007, available at: http://www.worldcourts.com/cat/eng/decisions/2007.11.16_Bachan_Singh_Sogi_v_Canada.htm

India in 2016 respectively for the ratification of the UNCAT and enactment of a domestic law, among others, to facilitate extradition of the fugitives.

While providing oral evidence to the Parliamentary Committee at their sittings held on 21 July 2015 and 31 August 2015, India's Foreign Secretary stated, "*I completely accept the Hon'ble Member's point that if after 15 years, an Assurance (ratification of the UNCAT) is pending, it does not reflect well on the Government and on my Ministry. I readily admit that point*".[50]

There has not been any seriousness to ratify the UNCAT. The reference made to the Law Commission of India on the ratification of the UNCAT while the Bill drafted by the Select Committee of the Rajya Sabha has already been pending since 2010 was an attempt to weaken the Bill drafted by the Rajya Sabha Select Committee, push for amendments of the Indian Penal Code to criminalise torture instead of enacting a stand-alone legislation on torture and indeed further delay ratification of the UNCAT. Not surprisingly, no action has been taken on the Prevention of Torture Bill, 2017 as drafted by the Law Commission of India as on date.

1.4 The only way out to bring the fugitives: Ratify the UNCAT

The only way forward for India is to ratify the UN Convention against Torture and frame a stand-alone law on torture and undertake progressive prison reforms in line with international standards and thereby improve the general prison conditions to protect the human rights of all prisoners, and not just for the few extradited fugitives.

Otherwise, India shall manage extradition of those who take shelter in countries like the UAE but the fugitives who managed to flee to countries having independence of judiciary will remain out of the bounds of India.

[50]. Committee on Government Assurances (2015-2016), Sixteenth Lok Sabha ,Thirtieth Report Review of Pending Assurances Pertaining to the Ministry of External Affairs presented to Lok Sabha on 16 March 2016 available at http://164.100.47.193/lsscommittee/Government%20Assurances/16_Government_Assurances_30.pdf

2. Analysis of the Extradition Act of India and the Extradition Treaties

2.1 The Extradition Act of India

The Extradition Act of 1962 provides India's legislative basis for extradition.

A request for extradition can be initiated against a fugitive criminal, who is formally accused of, charged with, or convicted of an extradition offence. '*Fugitive Criminal*'[51] means a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires, attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign State.

The Ministry of External Affairs takes up extradition requests with the concerned foreign countries when a request for extradition is received from the relevant law enforcement agencies in India.

The Extradition Act of 1962 makes no reference to "torture" but Section 34C of the provides for provision of life imprisonment for death penalty where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Government of India and the laws of that foreign State do not provide for a death penalty for such an offence. In a number of Extradition Treaties, India has already provided the guarantee not to impose death penalty.

2.2 Extradition Treaties: Grounds for refusal of extradition

As on 30 August 2018, India has signed extradition treaties with 43 countries while it has extradition arrangements with another 10 countries.[52]

Though the extradition agreements provide for various grounds for refusal of extradition, the risk of torture is not one of the grounds.

[51]. Guidelines for Indian law enforcement agencies for extradition of fugitives from abroad, available at https://www.mea.gov.in/extraditionguidelinesabroad.htm

[52]. Countries with which India has Extradition Treaties/Arrangements, available at https://www.mea.gov.in/leta.htm

i. Extradition can be refused for offence of political nature

All the extradition treaties signed by India, except with Switzerland and Netherlands, have a clause that extradition shall not/may not be granted for offences of political nature/character. Extradition treaties signed with Republic of Azerbaijan[53], the US,[54] France,[55] Germany,[56] Turkey,[57] Saudi Arabia[58], Vietnam[59], Mexico[60], Indonesia,[61] Malaysia,[62] South Africa,[63] Belgium, etc provide that "extradition shall not be granted" if the offence for which extradition is requested is an offence of a political nature. However, extradition treaties signed with the following countries have used the words "extradition may be refused" for political offences: the UK,[64] Canada[65], Australia,[66] Spain[67], UAE[68], Bangladesh,[69]

[53]. Article 3(1)(a), "Extradition Treaty between the Republic of India and the Republic of Azerbaijan"

[54]. Article 4(1), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[55]. Article 3(1), Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

[56]. Article 3(1), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[57]. Article 5(1), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[58]. Article 3(1), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[59]. Article 4(1), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[60]. Article 7(1), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[61]. Article 3(1)(a), Extradition Treaty between the Republic of India and the Republic of Indonesia

[62]. Article 6(1)(a), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

[63]. Article 3(1), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

[64]. Article 5(1), Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

[65]. Article 5(1), Extradition Treaty between India and Canada

[66]. Article 4(2), Extradition Treaty between the Republic of India and Australia

[67]. Article 3(1), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[68]. Article 6(1), Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

[69]. Article 6(1), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

Philippines[70], Iran,[71] and Mauritius[72].

The extradition treaties excluded the following offences from being political offences: murder or other willful crime against the Head of the State or Head of the Government or any member of their families (Azerbaijan, the US[73], Australia[74], Spain[75], Turkey,[76] UAE[77], Philippines,[78] Saudi Arabia[79], Vietnam[80], Indonesia,[81] Malaysia,[82] and South Africa[83]); terrorist offences (Azerbaijan, the UK, Canada[84], Australia[85], Spain[86], Turkey,[87] UAE[88],

[70]. Article 4(1), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

[71]. Article 4(1)(d), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

[72]. Article 5(1), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[73]. Article 4(2)(a), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[74]. Article 4(2)(b), Extradition Treaty between the Republic of India and Australia

[75]. Article 3(3), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[76]. Article 5(2)(f), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[77]. Article 6(1)(a), Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

[78]. Article 4(1)(b), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

[79]. Article 3(1)(a-b), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[80]. Article 4(2)(b), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[81]. Article 3(2)(a), Extradition Treaty between the Republic of India and the Republic of Indonesia

[82]. Article 6(2)(a), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

[83]. Article 3(1)(c), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

[84]. Article 3(e), Extradition Treaty between India and Canada

[85]. Article 4(2)(e), Extradition Treaty between the Republic of India and Australia

[86]. Article 3(2)(o), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[87]. Article 5(2)(p), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[88]. Article 6(1)(c), Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

Bangladesh,[89] Saudi Arabia[90], Vietnam,[91] Mexico,[92] Iran,[93] Indonesia[94], and Mauritius[95]); murder, manslaughter or culpable homicide (Azerbaijan, the UK, Canada[96], Australia[97], France,[98] Germany[99], Spain[100], Turkey,[101] UAE[102], Bangladesh,[103] Philippines,[104] Saudi Arabia,[105] Vietnam,[106] Mexico[107], Iran,[108] South Africa,[109] and

[89]. Article 6(2)(l), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

[90]. Article 3(1)(j), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[91]. Article 4(2)(f), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[92]. Article 7(2)(l), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[93]. Article 4(1)(d), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

[94]. Article 3(2)(c), Extradition Treaty between the Republic of India and the Republic of Indonesia

[95]. Article 5(2)(o), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[96]. Article 3(f), Extradition Treaty between India and Canada

[97]. Article 4(2)(c), Extradition Treaty between the Republic of India and Australia

[98]. Article 3(1), Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

[99]. Article 3(3)(f), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[100]. Article 3(2)(e-f), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[101]. Article 5(2)(e)&(g), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[102]. Article 6(1)(b), Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

[103]. Article 6(2)(b-c), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

[104]. Article 4(1)(c), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

[105]. Article 3(1)(c), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[106]. Article 4(2)(c), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[107]. Article 7(2)(b-c), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[108]. Article 4(1)(d), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

[109]. Article 3(1)(b), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

Mauritius[110]); kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage (Azerbaijan, the UK, Canada[111], Germany[112], Spain[113], Bangladesh,[114] Philippines[115], Saudi Arabia,[116] Vietnam[117], Mexico[118], Iran,[119] South Africa,[120] and Mauritius[121]); Aircraft hijacking offences (the US[122], the UK, Canada[123], Germany[124], Spain[125], Turkey,[126], and Mauritius[127]); acts of aviation sabotage (the US[128],

[110]. Article 5(2)(e-f), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[111]. Article 3(f), Extradition Treaty between India and Canada

[112]. Article 3(3)(g), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[113]. Article 3(2)(m), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[114]. Article 6(2)(j), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

[115]. Article 4(1)(d), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

[116]. Article 3(1)(i), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[117]. Article 4(2)(g), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[118]. Article 7(2)(j), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[119]. Article 4(1)(d), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

[120]. Article 3(1)(f), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

[121]. Article 5(2)(m), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[122]. Article 4(2)(b), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[123]. Article 3(a), Extradition Treaty between India and Canada

[124]. Article 3(3)(a), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[125]. Article 3(2)(a), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[126]. Article 5(2)(a), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[127]. Article 5(2)(a), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[128]. Article 4(2)(c), Extradition Treaty between the Government of Republic of India and the government of the United States of America

the UK, Canada[129], Germany[130], Spain[131], Turkey,[132] and Mauritius[133]); crimes against internationally protected persons, including diplomats (the US[134], the UK, Germany[135], Spain[136] and Turkey[137]); hostage taking (the US[138], the UK, Canada[139], Germany[140], Spain[141], Turkey,[142] and Mauritius[143]); offences related to illegal drugs (the US[144] and Spain[145]); Sexual assault/rape (South Africa,[146] Belgium,[147] and

[129]. Article 3(b), Extradition Treaty between India and Canada

[130]. Article 3(3)(b), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[131]. Article 3(2)(b), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[132]. Article 5(2)(b), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[133]. Article 5(2)(b), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[134]. Article 4(2)(d), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[135]. Article 3(3)(c), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[136]. Article 3(2)(c), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[137]. Article 5(2)(c), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[138]. Article 4(2)(e), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[139]. Article 3(c), Extradition Treaty between India and Canada

[140]. Article 3(3)(d), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[141]. Article 3(2)(e), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[142]. Article 5(2)(d), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[143]. Article 5(2)(c), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[144]. Article 4(2)(f), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[145]. Article 3(2)(f), Extradition Treaty Between the Republic of India and The Kingdom of Spain

[146]. Article 3(1)(e), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

[147]. Article 1 (14), Extradition treaty between India and Belgium for the Mutual Extradition of Fugitive Criminals

Switzerland[148]); the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life (Azerbaijan, the UK, Canada[149], Australia[150], Spain[151], Turkey,[152] Bangladesh,[153] Saudi Arabia[154], Mexico,[155] and Mauritius[156]); the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person (Azerbaijan, the UK, Bangladesh,[157] Saudi Arabia,[158] and Mauritius[159]); the causing of an explosion likely to endanger life or cause serious damage to property (Azerbaijan, the UK, Canada[160], Australia[161], France,[162] Germany[163], Spain[164], Turkey,[165] Bangladesh,[166]

148. Article II (9), Extradition treaty between India and Switzerland

149. Article 3(f), Extradition Treaty between India and Canada

150. Article 4(2)(d), Extradition Treaty between the Republic of India and Australia

151. Article 3(2)(j), Extradition Treaty Between the Republic of India and The Kingdom of Spain

152. Article 5(2)(k), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

153. Article 6(2)(g), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

154. Article 3(1)(f), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

155. Article 7(2)(g), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

156. Article 5(2)(j), Treaty on Extradition between the Republic of India and the Republic of Mauritius

157. Article 6(2)(k), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

158. Article 3(1)(g), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

159. Article 5(2)(a), Treaty on Extradition between the Republic of India and the Republic of Mauritius

160. Article 3(f), Extradition Treaty between India and Canada

161. Article 4(2)(d), Extradition Treaty between the Republic of India and Australia

162. Article 3(1), Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

163. Article 3(3)(h), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

164. Article 3(2)(h), Extradition Treaty Between the Republic of India and The Kingdom of Spain

165. Article 5(2)(i), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

166. Article 6(2)(e), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

Philippines,[167] Saudi Arabia,[168] Vietnam,[169] Mexico,[170] South Africa,[171] and Mauritius[172]); any offence specified in an international conventions to which both Contracting Parties are a Party, which obligates the parties to prosecute or extradite the fugitives of such offence (Azerbaijan, the US[173], Canada[174], Australia[175], Germany[176], UAE[177], Philippines[178], Saudi Arabia[179], Vietnam[180], Mexico,[181] Iran,[182] Indonesia,[183] Malaysia,[184] and South Africa[185]); and a conspiracy or attempt to commit any of the foregoing offences or aiding or abetting a person who commits or attempts to

[167]. Article 4(1)(e), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

[168]. Article 3(1)(h), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[169]. Article 4(2)(d), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[170]. Article 7(2)(e), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[171]. Article 3(1)(g), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

[172]. Article 5(2)(h-i), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[173]. Article 4(2)(g), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[174]. Article 3(d), Extradition Treaty between India and Canada

[175]. Article 4(2)(a), Extradition Treaty between the Republic of India and Australia

[176]. Article 3(3)(e), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[177]. Article 6(1)(d), Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

[178]. Article 4(1)(a), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

[179]. Article 3(1)(k), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[180]. Article 4(2)(a), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[181]. Article 7(2)(a), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[182]. Article 4(1)(d), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

[183]. Article 3(2)(b), Extradition Treaty between the Republic of India and the Republic of Indonesia

[184]. Article 6(2)(b), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

[185]. Article 3(1)(a), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

commit such an offence (Azerbaijan, the US[186], the UK, Canada[187], Australia[188], France,[189] Germany,[190] Spain[191], Turkey,[192] UAE[193], Bangladesh,[194] Philippines[195], Saudi Arabia,[196] Vietnam,[197] Mexico,[198] Iran,[199] Indonesia,[200] Malaysia,[201] South Africa,[202] and Mauritius[203]).

However, the Extradition Treaty signed between India and Russia does not specifically mention that extradition can be refused if offence is of political nature.[204]

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186. Article 4(2)(h), Extradition Treaty between the Government of Republic of India and the government of the United States of America

187. Article 3(g), Extradition Treaty between India and Canada

188. Article 4(2)(e), Extradition Treaty between the Republic of India and Australia

189. Article 3(1), Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

190. Article 3(3)(j), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

191. Article 3(2)(p), Extradition Treaty Between the Republic of India and The Kingdom of Spain

192. Article 5(2)(q), Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

193. Article 6(1)(e), Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

194. Article 6(2)(m), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

195. Article 4(1)(g), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

196. Article 3(1)(l), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

197. Article 4(2)(e), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

198. Article 7(2)(m), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

199. Article 4(1)(d), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

200. Article 3(2)(d), Extradition Treaty between the Republic of India and the Republic of Indonesia

201. Article 6(2)(c), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

202. Article 3(1)(h), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

203. Article 5(2)(p), Treaty on Extradition between the Republic of India and the Republic of Mauritius

204. Article 5 (1.4), Extradition Treaty between the Government of Republic of India and the Russian Federation

ii. Prosecution based on race, religion, nationality or political opinion

Extradition Treaties with a number of countries prohibit extradition if there are substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of his "race, religion, nationality or political opinion, or that person's position may be prejudiced for any of these reasons".

The Extradition Treaty between India and Canada states, "*There is no duty to extradite a person where the request for extradition is made for the purpose of discrimination against that person on account of his race, religion, colour or ethnic origin*".[205] This prohibition also exists in the treaties signed with Azerbaijan,[206] the United Kingdom,[207] Australia,[208] France,[209] Germany[210], Russia,[211] Mexico,[212] Indonesia,[213] South Africa,[214] and Tajikistan.[215]

iii. Death penalty

Many countries have refused to extradite a person to India wanted for an offence punishable by death unless the Requesting Party gives assurances that death penalty, if imposed, will not be carried out. Countries which bar extradition to India if the accused person faces death penalty are

[205]. Article 1(3), Extradition Treaty between India and Canada

[206]. Article 3(1)(b), "Extradition Treaty between the Republic of India and the Republic of Azerbaijan"

[207]. Article 9(1)(a), Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

[208]. Article 4(3)(b), Extradition Treaty between the Republic of India and Australia

[209]. Article 3(3), Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

[210]. Article 3(2), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[211]. Article 5 (1.2), Extradition Treaty between the Government of Republic of India and the Russian Federation

[212]. Article 8(6), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[213]. Article 3(1)(b), Extradition Treaty between the Republic of India and the Republic of Indonesia

[214]. Article 3(2), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

[215]. Article 5(1.2), Extradition Treaty between the Republic of India and the Republic of Tajikistan

Azerbaijan,[216] the UK,[217] the United States[218], Canada,[219] Australia,[220] France,[221] Germany,[222] Spain[223], Turkey,[224], Russia,[225] Philippines,[226] Mexico[227], Iran,[228] Indonesia,[229] South Africa,[230] Tajikistan,[231] and Mauritius[232].

The Extradition Treaty with Malaysia allows extradition in case of offence punishable with death.[233] Treaties signed by India with UAE, Bangladesh, Saudi Arabia and Vietnam also do not bar extradition if the accused person faces the death penalty after extradition.

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216. Article 12, "Extradition Treaty between the Republic of India and the Republic of Azerbaijan"

217. Article 16, Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

218. Article 18, Extradition Treaty between the Government of Republic of India and the government of the United States of America

219. Article 6, Extradition Treaty between India and Canada

220. Article 4(1)(c), Extradition Treaty between the Republic of India and Australia

221. Article 8, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

222. Article 11, Treaty between the Republic of India and the Federal Republic of Germany on Extradition

223. Article 11, Extradition Treaty Between the Republic of India and The Kingdom of Spain

224. Article 13, Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

225. Article 14, Extradition Treaty between the Government of Republic of India and the Russian Federation

226. Article 13, Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

227. Article 8(9), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

228. Article 12, Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

229. Article 3(1)(g), Extradition Treaty between the Republic of India and the Republic of Indonesia

230. Article 4(3), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

231. Article 14, Extradition Treaty between the Republic of India and the Republic of Tajikistan

232. Article 14, Treaty on Extradition between the Republic of India and the Republic of Mauritius

233. Article 2(1), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

iv. Offence under military law

The Requested State may refuse extradition for offences under military law, which are not offences under ordinary criminal law. This guarantee is provided in the Extradition Treaties signed with Republic of Azerbaijan[234], the UK,[235] the US[236], Canada,[237] Australia,[238] France,[239] Germany[240], Spain[241], Turkey,[242] Russia,[243] Philippines,[244] Saudi Arabia,[245] Vietnam,[246] Mexico,[247] Indonesia,[248] Malaysia,[249] South Africa,[250] Tajikistan[251] and Mauritius.[252]

The extradition treaty with UAE is silent on extradition for offences under military law.

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234. Article 3(1)(c), "Extradition Treaty between the Republic of India and the Republic of Azerbaijan"

235. Article 9(1)(d), Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

236. Article 5, Extradition Treaty between the Government of Republic of India and the government of the United States of America

237. Article 5(2), Extradition Treaty between India and Canada

238. Article 4(1)(a), Extradition Treaty between the Republic of India and Australia

239. Article 4, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

240. Article 4, Treaty between the Republic of India and the Federal Republic of Germany on Extradition

241. Article 4, Extradition Treaty Between the Republic of India and The Kingdom of Spain

242. Article 6, Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

243. Article 5 (1.5), Extradition Treaty between the Government of Republic of India and the Russian Federation

244. Article 6(1)(a), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

245. Article 3(2), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

246. Article 3(3), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

247. Article 8(7), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

248. Article 3(1)(c), Extradition Treaty between the Republic of India and the Republic of Indonesia

249. Article 6(3)(a), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

250. Article 3(4), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

251. Article 5(1.5), Extradition Treaty between the Republic of India and the Republic of Tajikistan

252. Article 7(1)(b), Treaty on Extradition between the Republic of India and the Republic of Mauritius

v. Nationality of the accused

Many extradition treaties do not provide for extradition of own nationals. The extradition treaty of India with Azerbaijan does not allow extradition of a citizen of the Requested State.[253] India's extradition treaties with France[254], Germany[255], Turkey,[256] Russia,[257] UAE[258], Saudi Arabia[259], Vietnam[260], Iran,[261] and Tajikistan[262] also have similar provision but state that in such a case, the Requested State shall submit the case to its competent authorities for prosecution.

However, the Extradition Treaties signed by India with the UK,[263] the United States,[264] Australia,[265] Spain[266], Bangladesh,[267] Philippines[268],

[253]. Article 3(1)(e), "Extradition Treaty between the Republic of India and the Republic of Azerbaijan"

[254]. Article 5, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

[255]. Article 6, Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[256]. Article 8, Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[257]. Article 5 (1.1), Extradition Treaty between the Government of Republic of India and the Russian Federation

[258]. Article 5, Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

[259]. Article 4, Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[260]. Article 6, Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[261]. Article 4(1), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

[262]. Article 5(1.1), Extradition Treaty between the Republic of India and the Republic of Tajikistan

[263]. Article 4, Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

[264]. Article 3, Extradition Treaty between the Government of Republic of India and the government of the United States of America

[265]. Article 5, Extradition Treaty between the Republic of India and Australia

[266]. Article 6, Extradition Treaty Between the Republic of India and The Kingdom of Spain

[267]. Article 5, Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

[268]. Article 3, Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

Mexico,[269] Malaysia,[270] South Africa,[271] and Mauritius[272] allow extradition of own nationals of the Requested state to the Requesting State.

vi. Trivial offence or extradition not in the interest of justice

Extradition may be refused if the Requested State having regard to all the circumstances believes that it would be unjust or oppressive to repatriate a person or the offence is of trivial nature. This provision exists in the Extradition Treaties signed by India with Germany[273], the UK,[274] Canada,[275] Russia,[276] Bangladesh,[277] Vietnam,[278] Malaysia,[279] Tajikistan,[280] and Mauritius.[281]

The Extradition Treaty with Iran states that extradition may be refused if "*the request for extradition is contrary to the Constitution or domestic laws of the Requested Party*".[282] The Extradition Treaty with Tajikistan also provides similar guarantee i.e. extradition may be refused if "*the extradition is not*

[269]. Article 5, Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[270]. Article 3(1), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

[271]. Article 4(4), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

[272]. Article 4, Treaty on Extradition between the Republic of India and the Republic of Mauritius

[273]. Article54, Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[274]. Article 9(1)(c), Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

[275]. Article 5(1)(b), Extradition Treaty between India and Canada

[276]. Article 5 (1.3), Extradition Treaty between the Government of Republic of India and the Russian Federation

[277]. Article 8, Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

[278]. Article 3(2), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[279]. Article 6(3)(b), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

[280]. Article 5(1.3), Extradition Treaty between the Republic of India and the Republic of Tajikistan

[281]. Article 7(1)(a), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[282]. Article 4(1)(c), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

permitted according to the laws of the Requested Party".[283] The treaty with Russia also states that a person may not be extradited if "*the extradition is not permitted according to the laws of the Requested Party*."[284]

vii. Bar on prosecution for any other offence

The Extradition Treaties signed by India specifically provide that a person extradited may not be detained, tried or punished in the Requesting State except for the offence for which extradition has been granted.[285] This provision has been provided in the Extradition Treaty signed with the US,[286] Azerbaijan,[287] the UK, [288] Canada,[289] Australia,[290] France,[291] Germany,[292] Spain[293], Turkey,[294] Russia,[295] UAE,[296] Bangladesh,[297]

[283]. Article 5(1.4), Extradition Treaty between the Republic of India and the Republic of Tajikistan

[284]. Article 5 (1.4), Extradition Treaty between the Government of Republic of India and the Russian Federation

[285]. Article 17(1), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[286]. Article 17(1), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[287]. Article 9(1), "Extradition Treaty between the Republic of India and the Republic of Azerbaijan"

[288]. Article 13(1), Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

[289]. Article 14(1), Extradition Treaty between India and Canada

[290]. Article 15(1), Extradition Treaty between the Republic of India and Australia

[291]. Article 16, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

[292]. Article 19(1)(1), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[293]. Article 15, Extradition Treaty Between the Republic of India and The Kingdom of Spain

[294]. Article 16, Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

[295]. Article 11(1), Extradition Treaty between the Government of Republic of India and the Russian Federation

[296]. Article 17, Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

[297]. Article 12(1), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

Philippines[298], Saudi Arabia,[299] Vietnam,[300] Mexico,[301] Iran,[302] Indonesia,[303] Malaysia,[304] South Africa,[305] Tajikistan,[306] Mauritius[307], etc.

viii. Prohibition on re-extradition to a third State

The Extradition Treaties signed by India specifically prohibit a general principle re-extradition of a fugitive to a third State without the consent of the Requested State. The Extradition Treaties signed with Azerbaijan,[308] the US,[309] UK,[310] Canada,[311] Australia,[312] France,[313] Germany[314], Spain[315],

[298]. Article 10(1), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

[299]. Article 14(1), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

[300]. Article 15(1), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

[301]. Article 17(1), Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

[302]. Article 9(1), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

[303]. Article 14, Extradition Treaty between the Republic of India and the Republic of Indonesia

[304]. Article 19(1), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

[305]. Article 17, Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

[306]. Article 11(1), Extradition Treaty between the Republic of India and the Republic of Tajikistan

[307]. Article 11(1), Treaty on Extradition between the Republic of India and the Republic of Mauritius

[308]. Article 9(1), Extradition Treaty between the Republic of India and the Republic of Azerbaijan

[309]. Article 17(2), Extradition Treaty between the Government of Republic of India and the government of the United States of America

[310]. Article 13(4), Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

[311]. Article 14(2), Extradition Treaty between India and Canada

[312]. Article 15(2), Extradition Treaty between the Republic of India and Australia

[313]. Article 17, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

[314]. Article 19(1)(2), Treaty between the Republic of India and the Federal Republic of Germany on Extradition

[315]. Article 16, Extradition Treaty Between the Republic of India and The Kingdom of Spain

Turkey,[316] Russia,[317] UAE,[318] Bangladesh,[319] Philippines,[320] Saudi Arabia[321], Vietnam[322], Mexico[323], Iran,[324] Indonesia,[325] Malaysia,[326] South Africa,[327] and Mauritius[328] prohibit re-extradition to a third State after extradition.

ix. Humanitarian considerations

The Extradition Treaty with South Africa states that in exceptional cases, the Requested State may refuse extradition if it considers that because of the personal circumstances, such as age, mental or physical ability to stand trial, of the person sought, the extradition would be incompatible with humanitarian considerations. [329]

The Extradition Treaty India and Australia also states that extradition may be refused if the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the Requesting State by an extraordinary or ad hoc court or tribunal; and if the Requested State believes that the surrender is likely to have exceptionally serious

316. Article 17, Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

317. Article 11(1), Extradition Treaty between the Government of Republic of India and the Russian Federation

318. Article 18, Extradition Treaty between the Government of the Republic of India and the United Arab Emirates

319. Article 12(4), Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

320. Article 10(4), Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

321. Article 14(3), Extradition Treaty between the Republic of India and the Kingdom of Saudi Arabia

322. Article 15(2), Treaty on Extradition between the Republic of India and the Socialist Republic of Vietnam

323. Article 18, Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

324. Article 9(4), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

325. Article 14, Extradition Treaty between the Republic of India and the Republic of Indonesia

326. Article 19(1), Extradition Treaty between the Government of the Republic of India and the Government of Malaysia

327. Article 18, Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

328. Article 11(4), Treaty on Extradition between the Republic of India and the Republic of Mauritius

329. Article 4(4), Treaty on Extradition between the Government of the Republic of India and the Government of the Republic of South Africa

consequences for the person whose extradition is sought including because of the person's age or state of health.[330]

The extradition treaty signed with France also states that extradition may be refused if the surrender is likely to have dire consequences for the person claimed, namely on the grounds of his age or health.[331]

x. Prosecution without extradition

The Extradition Treaty with the UK gives the option to the Requested State to either Extradite the person or to prosecute him/her for extradition offence in its own courts.[332] This provision also exists in the Extradition Treaty signed with Canada,[333] Australia,[334] Turkey,[335] Bangladesh,[336] Philippines[337], Mexico[338], Iran[339], Indonesia,[340] Tajikistan,[341] and Mauritius[342].

The Extradition Treaty with the UK also provides that a person may not be extradited until it has been decided by the courts of the Requested State that he is liable to be extradited.[343]

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330. Article 4(3)(c), Extradition Treaty between the Republic of India and Australia

331. Article 7(5), Extradition Agreement between the Government of the Republic of India and the Government of the French Republic

332. Article 8, Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

333. Article 4, Extradition Treaty between India and Canada

334. Article 6, Extradition Treaty between the Republic of India and Australia

335. Article 3, Extradition Agreement between the Government of the Republic of India and the Government of the Republic of Turkey

336. Article 7, Treaty between the Republic of India and the People's Republic of Bangladesh Relating to Extradition

337. Article 5, Extradition Treaty between the Government of the Republic of India and the Government of the Republic of the Philippines

338. Article 6, Treaty of Extradition between the Government of the Republic of India and the Government of United Mexican States

339. Article 4(2), Extradition Treaty between the Government of the Republic of India and Government of the Islamic Republic of Iran

340. Article 3(4), Extradition Treaty between the Republic of India and the Republic of Indonesia

341. Article 5(3), Extradition Treaty between the Republic of India and the Republic of Tajikistan

342. Article 6, Treaty on Extradition between the Republic of India and the Republic of Mauritius

343. Article 10(2), Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

3. International human rights standards on prohibition of refoulement against danger of being subjected to torture

3.1 Absolute prohibition of refoulement where there are substantial grounds for believing the danger of being subjected to torture

The prohibition of torture under international law is absolute. The UN Convention Against Torture prohibits the use of torture under all circumstances "*whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency*". The European Convention on Human Rights also prohibits torture.[344] Torture is defined as one of the "crime against humanity" or "war crime" under the Rome Statute of the International Criminal Court.[345]

Article 3(1) of the UNCAT further prohibits return or extradition of a person "*to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture*". Article 3(2) of the UNCAT further requires that "*for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights*". The prohibition against refoulement at the risks of torture has attained the rank of a peremptory norm of international law, or *jus cogens*.[346] Even if an individual is not eligible for asylum, the State may not remove him or her to a country where he or she would face a real risk of torture.[347]

The European Court of Human Rights at Strasbourg began[348]

344. Article 3 of the European Convention on Human Rights states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

345. Article 7 and Article 8 of the Rome Statute of the International Criminal Court

346. See, for example, International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. AntoFurundzija, Trial Chamber, Judgement of 10 December 1998, at paragraphs 134–164. See also the judgement of the House of Lords in Pinochet Ugarte, re. [1999] 2 All ER 97, at paragraphs 108–109.

347. Report No.273 titled "Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation", Law Commission of India, 17 October 2017 available at http://lawcommissionofindia.nic.in/reports/Report273.pdf

348. Presentation of Ledi Bianku, judge of the European Court of Human Rights at Dialogue between judges on "Non-refoulement as a principle of international law and the role of the judiciary in its implementation" on 27 January 2017 available at https://www.echr.coe.int/Documents/Dialogue_2017_ENG.pdf

consideration of the non-refoulement with the celebrated case of *Soering v. United Kingdom,* which was a fundamental step for the acknowledgment of the responsibility of States parties to the European Convention on Human Rights (ECHR) in cases where an individual is to be returned to a third State where he or she might face torture or ill-treatment in breach of Article 3 of the ECHR. The European Court of Human Rights in *Soering v. United Kingdom* (1989) held that the United Kingdom's extradition of a German national to face capital murder charges in Virginia, United States would violate its obligations under Article 3 of the ECHR, which prohibits cruel, inhuman, or degrading treatment or punishment. The Court's decision was based on its review of death row conditions and the anticipated time that Soering would have to spend on death row if sentenced to death which amounts to torture. In compliance with the *Soering* decision, the U.K. sought and received assurances from the United States that the state of Virginia would not impose a death sentence. Thereafter, Soering was extradited, convicted, and sentenced to life.[349]

The judgment in *Soering* was soon extended in the 1990s to asylum cases, by the judgments in *Cruz Varas*[350], *Vilvarajah*[351], and *Karamjit Singh Chahal*[352].

The UN Committee Against Torture over the last two decades has developed a substantial jurisprudence on the issue of non-refoulement under the UNCAT. *Balabou Mutombo* v. *Switzerland*[353] of 1994 was the first decision of the UN Committee Against Torture in which the Committee found that in the given circumstances of the complainant's case, expulsion of Mr. Mutombo to Zaire would constitute a violation of Article 3 of the Convention. This was followed by *Tahir Hussain Khan* v. *Canada*[354], where the Committee concluded that substantial grounds exist

[349]. Extradition, The Cornell Center on the Death Penalty Worldwide, Cornell Law Centre available at http://www.deathpenaltyworldwide.org/extradition.cfm

[350]. *Cruz Varas and Others v. Sweden,* Citation 46/1990/237/307 dated 20 March 1991 available at https://www.refworld.org/cases,ECHR,3ae6b6fe14.html

[351]. *Vilvarajah and others v. The United Kingdom,* Application Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991 available at http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Vilvarajah_0_0.pdf

[352]. *Chahal v. The United Kingdom,* 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: https://www.refworld.org/cases,ECHR,3ae6b69920.html

[353]. *Balabou Mutombo v. Switzerland,* CAT/C/12/D/013/1993, UN Committee Against Torture (CAT), 27 April 1994, available at: https://www.refworld.org/cases,CAT,3ae6b6784.html

[354] . *Tahir Hussain Khan v. Canada,* CAT/C/13/D/15/1994, UN Committee Against Torture (CAT), 18 November 1994, available at: https://www.refworld.org/cases,CAT,402748ce4.html

for believing that Tahir Hussain Khan would be in danger of being subjected to torture and, consequently, his expulsion to Pakistan from Canada in the prevailing circumstances would constitute a violation of article 3 of the Convention. Further, in 1996, the Committee had considered two communications, namely, *Mrs. Pauline Muzonzo Paku Kisoki* v. *Sweden*[355] and *Alan v. Switzerland*[356] and in both cases, the Committee had concluded that the State parties have an obligation to refrain from forcibly returning the complainants/petitioners.

Death sentence including prolong period of time in the death row has been held as 'cruel, inhuman, or degrading treatment or punishment' and it has been consistently used to prevent refoulement at national level.

In *Judge v. Canada*,[357] the United Nations Human Rights Committee found that Canada had violated Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) relating to the right to life by deporting Roger Judge to the United States to face a death sentence in 1998. Roger Judge had been sentenced to death in Pennsylvania, but escaped from prison and fled to Canada. While there, he was convicted of two robberies and sentenced to ten years. In 1998, Canada deported him to the United States to serve his death sentence. The Committee concluded that an abolitionist country violates the right to life protected by Article 6 of the ICCPR when it deports a detainee to the United States without seeking assurances that the death penalty will not be carried out.[358]

The Supreme Court of Canada likewise held that extraditions of suspects to face the death penalty are constitutionally prohibited. In *Burns and Rafay*,[359] both the accused were 18 years old at the time when they allegedly murdered Rafay's parents and sister in the state of Washington and then fled to Canada. Washington charged them with first-degree murder, a capital crime.[360]

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355. *Mrs. Pauline Muzonzo Paku Kisoki v. Sweden*, CAT/C/16/D/41/1996, UN Committee Against Torture (CAT), 8 May 1996, available at: https://www.refworld.org/cases,CAT,3ae6b706c.html

356. *Alan v. Switzerland* , CAT/C/16/D/21/1995, UN Committee Against Torture (CAT), 8 May 1996, available at: https://www.refworld.org/cases,CAT,3ae6b6a118.html

357. Communication No. 829/1998 (U.N. Doc. CCPR/C/78/D/829/1998 (2003)

358. Extradition, The Cornell Center on the Death Penalty Worldwide, Cornell Law Centre available at http://www.deathpenaltyworldwide.org/extradition.cfm

359. *Minister of Justice v. Burns and Rafay,* 2001 SCC 7 (S.C. Canada, 22 March 2001)

360. Extradition, The Cornell Center on the Death Penalty Worldwide, Cornell Law Centre available at http://www.deathpenaltyworldwide.org/extradition.cfm

The Italian Constitutional Court has gone one step further, refusing to extradite suspects even in the face of assurances. In the case of Pietro Venezia, the Italian Constitutional Court held that under no circumstances would Italy extradite an individual to a country where the death penalty existed, despite the United States' assurances of not imposing death penalty.[361]

Under a 1978 treaty with the United States, Mexico, which has no death penalty, cannot extradite anyone facing possible execution. To get a fugitive extradited, U.S. prosecutors must give guarantees that he/she would not be executed.[362]

South African law prohibits the extradition of persons to countries that impose the death penalty. On 27 July 2012, the Constitutional Court of South Africa refused to extradite two Botswana nationals, Emmanuel Tsebe and Jerry Phale, on the ground that the South African Government cannot surrender a person to a country where he or she faces the death penalty without first seeking an assurance that the death penalty would not be imposed. Further on 23 September 2014, the High Court in Pretoria, South Africa, ruled that the extradition to Botswana of Edwin Samotse, a man sought on murder charges in that country was a violation of the South African Constitution and therefore, illegal.[363]

For extradition, the Philippines also seeks assurance that the death penalty will not be carried out. Article X of the Extradition Treaty Between the Republic of the Philippines and the Republic of Indonesia states, "*If the crime for which extradition is requested is punishable by death under the law of the requesting Party; and if in respect of such crime the death penalty is not provided for by the law of the requested party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out*".[364]

India also provided guarantees not to impose death penalty to the extradited persons in the Extradition Treaties signed with Azerbaijan,

[361]. *Venezia v. Ministero di Grazia & Giustizia*, Corte coste, 27 June 1996, 79 Rivista di Diritto Internazionale 815 (1996) please see http://www.deathpenaltyworldwide.org/extradition.cfm

[362]. U.S. fugitives in Mexico spared death penalty, NBCNews.com, 17 January 2008, http://www.nbcnews.com/id/22717899/ns/us_news-crime_and_courts/t/us-fugitives-mexico-spared-death-penalty/#.Vc2Rbvmqqko

[363]. India: Not Safe for Extradition of those facing Death Penalty?, Asian Centre for Human Rights, 15 August 2015

[364]. Extradition Treaty between the Republic of the Philippines and the Republic of Indonesia available at http://www.chanrobles.com/rpindonesiaextraditiontreaty.htm#.Vc2WX_mqqko

the UK, the United States , Canada, Australia, France, Germany, Spain , Turkey, Russia, Philippines, Mexico , Iran, Indonesia, South Africa, Tajikistan, and Mauritius.

3.2 Guidelines for assessment of the substantial grounds for believing the danger of being subjected to torture

Article 3 of the UNCAT imposes an obligation upon states to prohibit torture, inhuman and degrading treatment or punishment. This obligation is not only restricted to the duty to simply prohibit, but the European Court of Human Rights and the UN Treaty Bodies have developed substantive jurisprudence to also extend a positive duty upon states to protect individuals from refoulement to situations where they would face torture or inhuman living conditions in the prisons if returned.

The UN Committee Against Torture also elaborated the guidelines for assessment of the substantial grounds for believing the danger of being subjected to torture through jurisprudence. The UN Committee Against Torture broadly examined existence of a consistent pattern of gross, flagrant or mass violations of human rights; existence of a personal, present and foreseeable risk; assessment of risks; profile of the complainant whether sufficiently high profile; whether the State where the person is being extradited to is a ratifying party to the UNCAT or not and burden of proof for assessing individual risks.

The UN Committee Against Torture in its General Comment No. 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22 relating to acceptance of the competence of the Committee, elaborated the duties of States parties to consider specific human rights situations in which the principle of non-refoulement applies.

The UN Committee Against Torture in its General Comment General Comment No. 4 (2017) observed that the infliction of cruel, inhuman or degrading treatment or punishment, whether or not it amounts to torture, to which an individual or the individual's family were exposed in their State of origin or would be exposed in the State to which the individual is being deported, constitutes an indication that the person is in danger of being subjected to torture if deported to one of those States. Such an indication should be taken into account by States parties as a basic element justifying the application of the principle of non-refoulement.

The UN Committee Against Torture in its General Comment No. 4 (2017) developed some non-exhaustive examples of human rights

situations that may constitute an indication of risk of torture, to which they should give consideration in their decisions on the removal of a person from their territory and take into account when applying the principle of "non-refoulement", in particular:

(a) Whether the person concerned had previously been arrested arbitrarily in the person's State of origin without a warrant and/or has been denied fundamental guarantees for a detainee in police custody, such as:[365]

(i) Notification of the reasons of the person's arrest in writing and in a language that the person understands;[366]

(ii) Access to a family member or a person of the concerned individual's choice for informing them of the arrest;[367]

(iii) Access to a lawyer free of charge when necessary and, upon request, access to a lawyer of the person's choice at the person's own expense for the person's defence;[368]

(iv) Access to an independent medical doctor for an examination and treatment of the person's health or, for this purpose, to a medical doctor of the person's choice at the person's own expense;[369]

(v) Access to an independent specialized medical entity to certify the person's allegations of having been subjected to torture;[370]

(vi) Access to a competent and independent judicial institution that is empowered to judge the person's claims for the treatment in detention within the time

[365]. See, for example, *Ali Fadel v. Switzerland,* paras. 7.7 and 7.8.

[366]. See, for example, *Sylvie Bakatu-Bia v. Sweden* (CAT/C/46/D/379/2009), paras. 2.2 and 10.5; and *Ali Fadel v. Switzerland,* para. 7.7.

[367]. See, for example, *Ramiro Ramírez Martínez and others v. Mexico* (CAT/C/55/D/500/2012), para. 17.5; and *Patrice Gahungu v. Burundi* (CAT/C/55/D/522/2012), para. 7.6.

[368]. See, for example, *Tony Chahin v. Sweden* (CAT/C/46/D/310/2007), para. 9.4; and *Nasirov v. Kazakhstan,* paras. 2.2, 11.6 and 11.9.

[369]. See, for example, *Ramiro Ramírez Martínez and others v. Mexico*, para. 17.5; *Patrice Gahungu v. Burundi*, para. 7.7; and *X. v. Burundi* (CAT/C/55/D/553/2013), para. 7.5.

[370]. See, for example, *Combey Brice Magloire Gbadjavi v. Switzerland* (CAT/C/48/D/396/2009), paras. 2.1 and 7.5–7.8; and *Ali Fadel v. Switzerland,* paras. 2.4 and 7.6–7.8.

frame set by law or within a reasonable time frame to be assessed for each particular case;[371]

(b) Whether the person has been a victim of brutality or excessive use of force by public officials on the basis of any form of discrimination in the State of origin or would be exposed to such brutality in the State to which the person is being deported;[372]

(c) Whether, in the State of origin or in the State to which the person is being deported, the person has been or would be a victim of violence, including gender-based or sexual violence, in public or in private, gender-based persecution or genital mutilation, amounting to torture, without the intervention of the competent authorities of the State concerned for the protection of the victim;[373]

(d) Whether the person has been judged in the State of origin or would be judged in the State to which the person is being deported in a judicial system that does not guarantee the right to a fair trial;[374]

(e) Whether the person concerned has previously been detained or imprisoned in the State of origin or would be detained or imprisoned, if deported to a State, in conditions amounting to torture or cruel, inhuman or degrading treatment or punishment;[375]

(f) Whether the person concerned would be exposed to sentences of corporal punishment if deported to a State in which, although corporal punishment is permitted by national law, that punishment would amount to torture or cruel, inhuman or degrading treatment or punishment according to customary international law and the jurisprudence of the Committee and of other recognized international and regional mechanisms for the protection of human rights;[376]

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[371]. See, for example, *Ramiro Ramírez Martínez and others v. Mexico*, paras. 17.5 and 17.6; *Patrice Gahungu v. Burundi*, para. 7.7; and *X. v. Burundi*, 7.5 and 7.6.

[372]. See, for example, *F.K. v. Denmark* (CAT/C/56/D/580/2014), paras. 7.5 and 7.6.

[373]. See, for example, *Sylvie Bakatu-Bia v. Sweden*, paras. 10.5–10.7.

[374]. See, for example, *Agiza v. Sweden*, para. 13.4; and *Ali Fadel v. Switzerland*, para. 7.8.

[375]. See, for example, *Tony Chahin v. Sweden*, para. 9.5; and *Tursunov v. Kazakhstan*, para. 9.8.

[376]. See, for example, *Rouba Alhaj Ali v. Morocco* (CAT/C/58/D/682/2015), paras. 8.5–8.8.

(g) Whether the person concerned would be deported to a State in which there are credible allegations or evidence of crimes of genocide, crimes against humanity or war crimes within the meaning of articles 6, 7 and 8 of the Rome Statute of the International Criminal Court that have been submitted to the Court for its consideration;[377]

(h) Whether the person concerned would be deported to a State party to the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto where there are allegations or evidence of its violation of common article 3 of the four Geneva Conventions of 12 August 1949 and/or article 4 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II),[378] and, in particular, of: (i) article 3 (1) (a) of the four Geneva Conventions;[379]and (ii) article 4 (1) and (2) of Protocol II;[380]

[377]. See, for example, concluding observations on the combined fourth and fifth periodic reports of Croatia (CAT/C/HRV/CO/4-5), para. 11; and concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia (CAT/C/MKD/CO/3), para. 16.

[378]. While not quoting directly the provisions of the Geneva Conventions and the Additional Protocols thereto, the Committee has referred in its jurisprudence to situations covered by those provisions, among others, in the concluding observations on the fourth periodic report of Turkey (CAT/C/TUR/CO/4, paras. 12 and 23–26); and the concluding observations on the combined fifth and sixth periodic reports of Italy (CAT/C/ITA/CO/5-6, paras. 20–23).

[379]. Article 3 (1) (a) of the four Geneva Conventions stipulates that in the case of armed conflict not of an international character, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture are and shall remain prohibited with respect to persons taking no active part in the hostilities. See, for example, concluding observations on the fourth periodic report of the Russian Federation (CAT/C/RUS/CO/4), para. 24; and concluding observations on the sixth periodic report of Ukraine (CAT/C/UKR/CO/6), para. 11.

[380]. Article 4 (1) of Protocol II, adopted on 8 June 1977, stipulates that all persons who do not take a direct part or who have ceased to take part in hostilities (with reference to armed conflicts referred to in article 2 of the Geneva Conventions and article 1 of the Additional Protocols thereto), whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. Article 4 (2) of the Protocol stipulates that the following acts against the persons referred to in article 4 (1) are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; and (h) threats to commit any of the foregoing acts. See, for example, concluding observations on the initial report of Lebanon (CAT/C/LBN/CO/1), para. 11; and concluding observations on the fourth periodic report of Turkey (CAT/C/TUR/CO/4), para. 12.

(i) Whether the person concerned would be deported to a State where there are allegations or evidence of its violation of article 12 of the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention);[381]

(j) Whether the person concerned would be deported to a State where there are allegations or evidence of its violation of articles 32 or 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention);[382] or article 75 (2) of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I);[383]

(k) Whether the person concerned would be deported to a State where the inherent right to life is denied, including the exposure of the person to extrajudicial killings or enforced disappearance, or where the death penalty is in force[384] and considered as a form of torture or cruel, inhuman or degrading treatment or punishment by the deporting State party, in particular:

(i) If the latter has abolished the death penalty or established a moratorium on its execution;[385]

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381. Article 12 of the Third Geneva Convention provides, inter alia, that prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. See, for example, concluding observations on the initial report of Chad (CAT/C/TCD/CO/1), para. 17.

382. Article 45 of the Fourth Geneva Convention provides, inter alia, that protected persons may be transferred by the Detaining Power only to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.

383. Article 75 (2) of Additional Protocol I stipulates that the following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) the taking of hostages; (d) collective punishments; and (e) threats to commit any of the foregoing acts. See, for example, concluding observations on the initial report of Chad (CAT/C/TCD/CO/1), para. 34.

384. See, for example, concluding observations on the second periodic report of Belgium (CAT/C/BEL/CO/2), para. 10.

385. See, for example, *RoubaAlhaj Ali v. Morocco*, paras. 8.5–8.8.

(ii) Where the death penalty would be imposed for crimes that are not considered by the deporting State party as the most serious crimes;[386]

(iii) Where the death penalty is carried out for crimes committed by persons below the age of 18 years[387] or on pregnant women, nursing mothers or persons who have a severe mental disability;

(l) The State party concerned should also evaluate whether the circumstances and the methods of execution of the death penalty and the prolonged period and conditions of the person on death row[388] could amount to torture or cruel, inhuman or degrading treatment or punishment for the purpose of applying the principle of "non-refoulement";[389]

(m) Whether the person concerned would be deported to a State where reprisals amounting to torture have been or would be committed against the person, members of the person's family or witnesses of the person's arrest and detention, such as violent and terrorist acts against them, the disappearance of those family members or witnesses, their killings or their torture;[390]

(n) Whether the person concerned would be deported to a State where the person was subjected to or would run the risk of being subjected to slavery and forced labour[391] or trafficking in human beings;

(o) Whether the person concerned is below the age of 18 years and would be deported to a State where the person's fundamental child rights were previously violated and/or

386. See, for example, *X. v. Switzerland* (CAT/C/53/D/470/2011), para. 7.8; and *Asghar Tahmuresi v. Switzerland* (CAT/C/53/D/489/2012), para. 7.5.

387. See, for example, concluding observations on the second periodic report of Afghanistan (CAT/C/AFG/CO/2), para. 34 (c).

388. See concluding observations on the combined third to fifth periodic reports of the Republic of Korea (CAT/C/KOR/CO/3-5), para. 30 (b).

389. See, for example, concluding observations on the second periodic report of Afghanistan (CAT/C/AFG/CO/2), para. 34; and concluding observations on the second periodic report of Mongolia (CAT/C/MNG/CO/2), para. 22.

390. See, for example, *Hussein Khademi and othersv. Switzerland* (CAT/C/53/D/473/2011), paras. 7.4–7.6; *Nasirov v. Kazakhstan*, para. 11.9; and *N.A.A. v. Switzerland* (CAT/C/60/D/639/2014), paras. 7.7–7.11.

391. See, for example, *Tony Chahin v. Sweden*, para. 9.5.

would be violated, creating irreparable harm, such as the person's recruitment as a combatant participating directly or indirectly in hostilities[392] or for providing sexual services.

The UN Committee Against Torture in its General Comment further directed the State parties to "*refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control, or whose acts it is unable to prevent or whose impunity it is unable to counter*".[393]

3.3 Diplomatic assurances: The instrument to avoid the application of the principle of non-refoulement rejected by the UNCAT and ECHR

The term "*diplomatic assurances*" as used in the context of the transfer of a person from one State to another, refers to a formal commitment by the receiving/requesting State to the effect that the person concerned will be treated in accordance with conditions set by the sending State and in accordance with international human rights standards.[394]

It has been described as an instrument to avoid the application of the principle of non-refoulement. The UN Committee Against Torture held that "*diplomatic assurances provided no mechanism for their enforcement" and "protect against manifest risk*" of torture.[395]

i. Jurisprudence of the UN Committee Against Torture

General Comment No. 4(2017)[396] of the UN Committee Against Torture reiterates that diplomatic assurances from a State party to the Convention

[392]. See, for example, concluding observations on the initial report of Chad (CAT/C/TCD/CO/1), para. 34.

[393]. See, for example, *S.S. Elmi v. Australia* (CAT/C/22/D/120/1998), paras. 6.8 and 6.9; and *M.K.M. v. Australia* (CAT/C/60/D/681/2015), para. 8.9.

[394]. UN Committee Against Torture (CAT), General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 9 February 2018, available at: http://www.refworld.org/docid/5a903dc84.html [accessed 13 October 2018], para.19

[395]. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para 13.4, available at: http://www.refworld.org/cases,CAT,42ce734a2.html [accessed 13 October 2018]

[396]. UN Committee Against Torture (CAT), *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, available at: http://www.refworld.org/docid/5a903dc84.html [accessed 13 October 2018], para.20

to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.[397]

In *Inass Abichou* v *Germany*[398], the complainant, Inass Abichou, born in Lebanon, and residing in France, submitted the complaint on behalf of her husband, Onsi Abichou, born in Tunisia, who is of French nationality and was detained in Saarbrücken prison in Germany at the time of the submission of the complaint to the UN Committee Against Torture. She contended that the extradition of Mr. Abichou to Tunisia would constitute a violation of Article 3 of the UNCAT. On 25 March and 6 May 2010, the State party i.e. Germany sent two notes verbales to Tunisia requesting diplomatic assurances that Mr. Abichou's rights would be protected in the event of his extradition to Tunisia. In response, the Tunisian Ministry of Foreign Affairs sent two letters in which it provided diplomatic assurances that the proceedings that would be initiated upon Mr. Abichou's extradition would be conducted in accordance with the International Covenant on Civil and Political Rights, which has been ratified by Tunisia, and, in the event of a conviction, Mr. Abichou would serve his sentence in a prison that abided by the United Nations Standard Minimum Rules for the Treatment of Prisoners.

In *Abichou* case, the UN Committee Against Torture recalled that "*the prohibition against torture is absolute and non-derogable and that no exceptional circumstances whatsoever may be invoked by a State party to justify acts of torture. While taking note of the follow-up measures implemented by the State party, the Committee recalled that diplomatic assurances cannot be used as a justification for failing to apply the principle of non-refoulement as set forth in article 3 of the Convention*".[399] The Committee concluded that "*The fact that diplomatic assurances were obtained was not sufficient grounds for the State party's decision to ignore this obvious risk, especially since none of the guarantees that were provided related specifically to protection against torture or ill-treatment*".[400]

397. Agiza v. Sweden, para. 13.4, supra fn. 3; and communications No. 538/2013, Tursunov v. Kazakhstan, decision of 8 May 2015, para. 9.10; and No. 747/2016, H.Y. v. Switzerland, decision adopted on 9 August 2017, para. 10.7.

398. Abichou vs Germany, Communications No 430/2010, UN Doc. CAT/C/50/D/430/2010, 21 May 2013

399. Abichou vs Germany, Communications No 430/2010, UN Doc. CAT/C/50/D/430/2010, 21 May 2013, para 11.5, available at http://www.worldcourts.com/cat/eng/decisions/2013.05.21_Abichou_v_Germany.pdf

400. Abichou vs Germany, Communications No 430/2010, UN Doc. CAT/C/50/D/430/2010, 21 May 2013, para 11.7, available at http://www.worldcourts.com/cat/eng/decisions/2013.05.21_Abichou_v_Germany.pdf

In *Abdussamatov et al*. v. *Kazakhstan*,[401] the UN Committee Against Torture while pointing to a breach by the State party of articles 3 and 22 of the Convention has stated that "*Moreover, the State party has invoked the procurement of diplomatic assurances as sufficient protection against this manifest risk. The Committee recalls that diplomatic assurances cannot be used as an instrument to avoid the application of the principle of nonrefoulement. The Committee notes that the State party failed to provide any sufficiently specific details as to whether it has engaged in any form of monitoring and whether it has taken any steps to ensure that the monitoring is objective, impartial and sufficiently trustworthy*."

In *Abdussamatov et al. v. Kazakhstan*, the complainants who were 27 Uzbek and 2 Tajik nationals claimed that their extradition to Uzbekistan would constitute a violation by Kazakhstan of Article 3 of the UNCAT. The complainants referred to the concluding observations by the UN Human Rights Committee for Uzbekistan, in which it expressed concerns about the limitations and restrictions on freedom of religion and belief and about the use of criminal law to penalize the apparently peaceful exercise of religious freedom, including for members of nonregistered religious groups and the persistent reports of charges and imprisonment of such individuals , as well as to a report by Human Rights Watch stating that Uzbek authorities have targeted and imprisoned Muslims and other religious believers who practise their faith outside official institutions or who belong to unregistered religious organizations.

On the issue of diplomatic assurances, the counsel of *Abdussamatov et al* argued that the UN Human Rights Committee, in its concluding observations concerning Kazakhstan in July 2011, had specifically warned the State party to exercise utmost care in relying on diplomatic assurances when considering the return of foreign nationals to countries where they are likely to be subjected to torture or serious human rights violations. The counsel further submitted that the diplomatic assurances were submitted belatedly and that they were vague, not specific, and did not provide for any effective follow up mechanism. The UN Committee concluded that "*diplomatic assurances cannot be used as an instrument to avoid the application of the principle of nonrefoulement*".[402]

[401]. CAT communication No. 444/2010

[402]. CAT communication No. 444/2010, Decision adopted by the Committee at its forty-eighth session, 7 May-1 June 2012, available at http://www.worldcourts.com/cat/eng/decisions/2012.06.01_Abdussamatov_v_Kazakhstan.pdf

In *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*[403], the UN Committee Against Torture expressed the view that the procurement of diplomatic assurances provided no mechanism for their enforcement and did not suffice to "*protect against this manifest risk.*" The complainant, Ahmed Hussein Mustafa Kamil Agiza, an Egyptian national was detained in Egypt at the time of submission of the complaint. He claimed that his removal by Sweden to Egypt on 18 December 2001 violated Article 3 of the UNCAT.

The counsel of *Ahmed Hussein Mustafa Kamil Agiza* provided a copy of a Human Rights Watch report to the Committee entitled "*Recent Concerns regarding the Growing Use of Diplomatic Assurances as an Alleged Safeguard against Torture*". The report surveys recent examples of State practice in the area of diplomatic assurances by Germany, the United States of America, the Netherlands, the United Kingdom and Canada. The report argued that such assurances are increasingly viewed as a way of escaping the absolute character of non-refoulement obligations, and are expanding from the anti-terrorism context into the area of refugee claims. It contended that assurances tend to be sought only from countries where torture is a serious and systematic problem, which thus acknowledges the real risk of torture presented in such cases.[404]

ii. Jurisprudence of the European Court of Human Rights

The European Court of Human Rights too developed substantial jurisprudence to reject diplomatic assurances against torture and other ill-treatment in the context of Article 3 of the European Court of Human Rights.

In the landmark case of *Saadi* v *Italy*,[405] the Court had set out the principles that guide its current approach to assurances. The case[406] had established

[403]. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, available at: http://www.refworld.org/cases,CAT,42ce734a2.html [accessed 13 October 2018]

[404]. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, papa 11.14, available at: http://www.refworld.org/cases,CAT,42ce734a2.html [accessed 13 October 2018]

[405]. *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: https://www.refworld.org/cases,ECHR,47c6882e2.html

[406]. The case concerned a Tunisian national who was arrested in Italy on suspicion of involvement in, inter alia, international terrorism. Italy ordered his expulsion to Tunisia on the grounds of national security and the international fight against terrorism. In doing so, the Italian authorities requested from the Tunisian Government diplomatic assurances that if the applicant were to be expelled to Tunisia he would not be subjected to treatment contrary to Article 3 ECHR.

the jurisprudence that the Contracting States cannot satisfy their obligations under Article 3 of the ECHR by merely obtaining assurances from the authorities of the receiving States. In this case, the Court found that diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention.[407]

The decision in *Saadi* was relied upon in many later cases such as the *Ben Khemais v. Italy*[408], where the ECHR referred to the principle that assurances are not in themselves sufficient to avoid responsibility under article 3 of the ECHR, unless the absence of a risk of ill-treatment is established firmly.

As early as in 1996, the European Court of Human Rights in *Chahal v. UK*[409] had held that although it did not 'doubt the good faith of the Indian Government in providing the assurances', given that the violation of human rights by certain members of the security forces in Punjab and elsewhere in India was 'a recalcitrant and enduring problem', the Court was not persuaded that the assurances given 'would provide Mr Chahal with an adequate guarantee of safety'.

In the case of *Muminov v. Russia*[410] concerning the expulsion of the applicant from Russia to Uzbekistan,[411] Russia claimed that it had received assurances from the Uzbek authorities. However, as the Russian Government '*did not submit a copy of any diplomatic assurances indicating that the applicant would not be subjected to torture or ill-treatment*', the European Court of Human Rights held that his expulsion breached Article 3 ECHR.

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407. *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: https://www.refworld.org/cases,ECHR,47c6882e2.html, para 147-148

408. *Ben Khemais v. Italy*, Application no. 246/07, European Court of Human Rights, 24 February 2009

409. *CASE OF CHAHAL v. THE UNITED KINGDOM*, Application no. 22414/93, European Court of Human Rights, 15 November 1996, available at: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Chahal.pdf

410. *Muminov v. Russia*, Appl. no. 42502/06, Council of Europe: European Court of Human Rights, 11 December 2008, available at: https://www.refworld.org/cases,ECHR,49413f202.html

411. *Muminov v. Russia*, Appl. no. 42502/06, Council of Europe: European Court of Human Rights, 11 December 2008, available at: https://www.refworld.org/cases,ECHR,49413f202.html

In the case of *Khaydarov v. Russia*[412] concerning extradition from Russia to Tajikistan, the European Court of Human Rights found the letters of the Tajikistani authorities to be insufficient as they '*contained no reference whatsoever to the protection of the applicant from treatment proscribed by Article 3 of the Convention*'. Thus, the assurances got rejected by the Court as they lacked explicit and specific guarantees against the subjection of the applicant to the proscribed treatment.

In the case *Baysakov and others v. Ukraine*[413], the First Deputy General Prosecutor of the Republic of Kazakhstan sent to the Ukrainian authorities' assurances that the applicants, if extradited, would not be subjected to ill-treatment. The Court, however, rejected the assurances as unreliable because '*it was not established that the First Deputy Prosecutor General of Kazakhstan or the institution which he represented was empowered to provide such assurances on behalf of the State*'.

In the case of *Koktysh v. Ukraine*[414], which concerned the planned extradition of the applicant from Ukraine to Belarus, the European Court held that given that the applicant had been previously ill-treated by the Belarusian authorities the assurances provided would not suffice to guarantee against the serious risk of ill-treatment, concluding that his extradition would constitute a breach of Article 3 ECHR.

In the case of *Soldatenko v. Ukraine*[415] , the European Court rejected the assurances citing lack of international co-operation of the Turkmen authorities in the field of human rights, as well as the lack of an effective system of torture prevention in Turkmenistan.

In *Sultanov v. Russia*[416], *Yuldashev v. Russia*[417] and *Ismoilov and others v. Russia*[418], the European Court rejected the assurances given by the Uzbek

412. *Khaydarov v. Russia,* Application no. 21055/09, Council of Europe: European Court of Human Rights, 20 May 2010, available at: https://www.refworld.org/cases,ECHR, 4bf661112.html

413. *Baysakov and Others v. Ukraine,* Application no. 54131/08, Council of Europe: European Court of Human Rights, 18 February 2010, available at: https://www.refworld.org/cases,ECHR, 4cbeb81c2.html

414. *Koktysh v Ukraine,* App no 43707/07 (ECtHR, 10 December 2009)

415. *Soldatenko v. Ukraine,* Appl. no. 2440/07, Council of Europe: European Court of Human Rights, 23 October 2008, available at: https://www.refworld.org/cases,ECHR, 4906f2272.html

416. *Sultanov v Russia,* App no 15303/09 (ECtHR, 4 November 2010) para 73

417. *Yuldashev v. Russia,* Application no. 1248/09, Council of Europe: European Court of Human Rights, 8 July 2010, available at: https://www.refworld.org/cases,ECHR, 4c3716732.html

418. *Ismoilov and others v Russia,* App no 2947/06 (ECtHR, 24 April 2008) para 127;

authorities on the ground that "*reliable sources described the practice of torture in Uzbekistan as systematic*", and consequently, the Court was not 'persuaded that assurances from the Uzbek authorities offer a reliable guarantee against the risk of ill-treatment'.

The case of *Makhmudzhan Ergashev v. Russia*[419], dealt with the extradition of a Kyrgyzstani national of Uzbek origin to Kyrgyzstan. Here the European Court held that the situation in the south of the receiving state where the complainant is to be extradited was characterized by torture and ill treatment of ethnic Uzbeks by law enforcement officers, and under such prevailing circumstances the Court held that the authorities south of the country might not abide by the assurances given by the Kyrgyz authorities in practice.

[419]. *Makhmudzhan Ergashev v. Russia*, Application no. 49747/11, Council of Europe: European Court of Human Rights, 16 October 2012, available at: https://www.refworld.org/cases,ECHR,512643102.html

4. Summary of judgments of the foreign courts and the UN Committee Against Torture on India's extradition requests

As of 10 December, only 68 fugitives were extradited to India[420] since 2002 while as on 05 April 2018, a total of 150 extradition requests of India were pending with various foreign countries.[421]

An analysis of those 68 fugitives extradited to India shows that 20 fugitives of 29% of the fugitives were extradited from United Arab Emirates, not known for independence of judiciary or respect for rule and law and human rights. It is followed by nine (09) from United States of America, four (04) each from Canada and Thailand, three (03) each from Germany and South Africa, two (02) each from Belgium, Australia, Bangladesh, Singapore, Indonesia, Mauritius and Portugal, one (01) each from Bulgaria, Nigeria, Hong Kong, United Republic of Tanzania, Nicaragua, Bahrain, Oman, Peru, Saudi Arabia, Morocco and United Kingdom.

Since the extradition treaty signed between India and the UK, India managed to legally secure extradition of only one fugitive out of the 60 fugitives sought by India.[422] Samirbhai Vinubhai Patel, an accused in one of the 2002 Gujarat riots cases agreed to return to India in October 2016 without challenging India's extradition request.[423]

The following emblematic cases explain as to how India's non-ratification of the UNCAT and non-compliance with Article 3 of the UNCAT resulted in the rejection of India's extradition requests.

Case 1: Judgment of the European Court of Human Rights in Karamjit Singh Chahal v. United Kingdom (1996)

In 1996 the European Court of Human Rights (ECHR) had applied Article 3 of the European Convention on Human Rights in the case of

[420]. 67 fugitives were extradited as on 31.10.2018 and thereafter, Christian Michel was extradited to India from UA on 4th December 2018. For the LIST OF FUGITIVES EXTRADITED BY FOREIGN GOVERNMENTS TO INDIA , https://www.mea.gov.in/toindia.htm

[421]. RAJYA SABHA UNSTARRED QUESTION NO-4338 ANSWERED ON-05.04.2018

[422]. UK has extradited only one Indian fugitive in 26 years. Will Vijay Mallya be next?, India Today, 31 July, 2018, https://www.indiatoday.in/india/story/vijay-mallya-extradition-case-1301201-2018-07-31

[423]. Id.

Chahal v. United Kingdom[424] and prohibited the deportation of Sikh separatist Mr Chahal to India because of the risk of violations of Article 3, in the form of torture or inhuman or degrading treatment or punishment.

Karamjit Singh Chahal was an Indian citizen who was born in 1948. He entered the United Kingdom illegally in 1971 in search of employment. In 1974 he applied to the Home Office to regularise his stay and on 10 December 1974 was granted indefinite leave to remain under the terms of an amnesty for illegal entrants who arrived before 1 January 1973. Since 16 August 1990 he had been detained for the purposes of deportation in Bedford Prison. Chahal applied for British citizenship in December 1987 which was refused on 4 April 1989.

On 1 January 1984, Mr Chahal travelled to Punjab with his wife and children to visit relatives. He submitted that during this visit he attended at the Golden Temple on many occasions. At around this time Mr Chahal was baptised and began to adhere to the tenets of orthodox Sikhism. He also became involved in organising passive resistance in support of autonomy for Punjab. On 30 March 1984 he was arrested by the Punjab police. He was taken into detention and held for twenty-one days, during which time he was, he contended, kept handcuffed in insanitary conditions, beaten to unconsciousness, electrocuted on various parts of his body and subjected to a mock execution. He was subsequently released without charge. He was able to return to the United Kingdom on 27 May 1984, and had not visited India since.

On his return to the United Kingdom, Mr Chahal became a leading figure in the Sikh community, which reacted with horror to the storming of the Golden Temple. He helped organize a demonstration in London to protest at the Indian Government's actions, became a full-time member of the committee of the "gurdwara" (temple) in Belvedere (Erith, Kent) and travelled around London persuading young Sikhs to be baptised.

In October 1985, Mr Chahal was detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 ("PTA") of the United Kingdom on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister, Mr Rajiv Gandhi, during an official visit to the United Kingdom. He was released for lack of evidence.

[424]. *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: https://www.refworld.org/cases,ECHR,3ae6b69920.html

In 1986 he was arrested and questioned twice (once under the PTA), because he was believed to be involved in a conspiracy to murder moderate Sikhs in the United Kingdom. On both occasions he was released without charge. Mr Chahal denied involvement in any of these conspiracies.

In March 1986, he was charged with assault and affray following disturbances at the East Ham gurdwara in London. During the course of his trial on these charges in May 1987 there was a disturbance at the Belvedere gurdwara, which was widely reported in the national press. Mr Chahal was arrested in connection with this incident, and was brought to court in handcuffs on the final day of his trial. He was convicted on both charges arising out of the East Ham incident, and served concurrent sentences of six and nine months.

He was subsequently acquitted of charges arising out of the Belvedere disturbance. On 27 July 1992, the Court of Appeal quashed the two convictions on the grounds that Mr Chahal's appearance in court in handcuffs had been seriously prejudicial to him.

On 14 August 1990, the Home Secretary (Mr Hurd) decided that Mr Chahal ought to be deported because his continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism.

A notice of intention to deport was served on Mr Chahal on 16 August 1990. He was then detained for deportation purposes pursuant to paragraph 2(2) of Schedule III of the Immigration Act 1971.

Chahal claimed that if returned to India he had a well-founded fear of persecution within the terms of the United Nations 1951 Convention on the Status of Refugees and applied for political asylum on 16 August 1990. He was interviewed by officials from the Asylum Division of the Home Office on 11 September 1990 and his solicitors submitted written representations on his behalf. He claimed that he would be subjected to torture and persecution if returned to India.

On 27 March 1991, the Home Secretary refused the request for asylum and expressed the view that the latter's known support of Sikh separatism would be unlikely to attract the interest of the Indian authorities unless that support were to include acts of violence against India. Mr Chahal's solicitors informed the Home Secretary that he intended to make an application for judicial review of the refusal of asylum, but would wait until the advisory panel had considered the national security case against him.

On 25 July 1991, the Home Secretary (Mr Baker) signed an order for Mr Chahal's deportation, which was served on 29 July.

On 9 August 1991, Mr Chahal applied for judicial review of the Home Secretaries' decisions to refuse asylum and to make the deportation order. Leave was granted by the High Court on 2 September 1991. The asylum refusal was quashed on 2 December 1991 and referred back to the Home Secretary. The court found that the reasoning behind it was inadequate, principally because the Home Secretary had neglected to explain whether he believed the evidence of Amnesty International relating to the situation in Punjab and, if not, the reasons for such disbelief. The court did not decide on the validity of the deportation order. Mr Justice Popplewell expressed "enormous anxiety" about the case.

After further consideration, on 1 June 1992 the Home Secretary (Mr Clarke) took a fresh decision to refuse asylum. Mr Chahal applied for judicial review of this decision.

On 16 July 1992 the High Court granted leave to apply for judicial review of the decisions of 1 June 1992 to maintain the refusal of asylum and of 2 July 1992 to proceed with the deportation. Although the Court was of the opinion that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside State boundaries, it also attached significance to the fact that attested allegations of serious human rights violations had been leveled at the police elsewhere in India. In this respect, the Court noted that the United Nations' Special Rapporteur on torture had described the practice of torture upon those in police custody as "endemic" and complained that inadequate measures were being taken to bring those responsible to justice. The NHRC had also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and had called for a systematic reform of the police throughout India. The Court was of the view that the violation of human rights by certain members of the security forces in Punjab and elsewhere in India was a recalcitrant and enduring problem despite the authorities' efforts.

At the backdrop of such reports, the Court held that the diplomatic assurances would not provide Mr Chahal with an adequate guarantee of safety. The Court further considered that the applicant's high profile would be more likely to increase the risk to him of harm than otherwise and that there was a real risk of Mr Chahal being subjected to treatment contrary to Article 3 of the ECHR if he was returned to India. Accordingly, the order for his deportation to India would, if executed, gave rise to a violation of Article 3.

The principal issue before the European Court of Human Rights concerned the nature of the prohibition against torture and degrading treatment guaranteed under Article 3 of the European Convention of Human Rights, namely whether this protection was absolute or could be qualified in the interests of national security and the prevention of terrorism.

The Court held that Article 3 of the ECHR set out an absolute prohibition against "*torture or inhumane or degrading treatment*", regardless of the circumstances of the case; the primary consideration in the present case was not national security but rather the possibility that Chahal would be subjected to such treatment in the event of his deportation. As there was substantial evidence of serious human rights abuses by the Indian authorities and as their assurances of Chahal's safety were not wholly convincing, the Court held that his deportation would violate Article 3.

The ECHR also found that there had been violations of Article 5.4 in the refusal to allow recourse to domestic appeal procedures, as it should be possible to protect confidential information without denying access to the court system.

Case 2: Abu Salem (2005) case - European Court of Human Rights examining violations of terms of extradition

Abu Salem was wanted in India to face trial in the March 1993 blasts case which killed 257 and injured more than 700 others.[425] Several other cases were filed against him all over the country. Abu Salem worked in the "D-Company" gang of Dawood Ibrahim as a driver transporting weapons and contraband. Later he rose among the ranks. He was convicted for transporting weapons from Gujarat to Mumbai. He also confessed to delivering one of these many consignments to actor Sanjay Dutt's house. Abu Salem was well known for extorting money from Bollywood film producers and actors and usurping overseas distribution rights.[426]

Salem and his former actress girlfriend Monica Bedi were both arrested by the InterPol in Lisbon on 20 September 2002.[427] In 2005, a Portuguese

[425]. Abu Salem Sentenced To Life, 2 Get Death In Mumbai Blasts Case: 10 Points, NDTV, 7 September 2017, https://www.ndtv.com/india-news/abu-salem-4-others-to-be-sentenced-in-1993-blasts-case-today-10-updates-1746998

[426]. Who is Abu Salem and Why He Was Once Feared in Mumbai, The Quint, 7 September 2017, https://www.thequint.com/news/india/who-is-abu-salem

[427]. Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose for role in 1993 Mumbai blasts case, The New Indian Express, 7 September 2017, http://www.newindianexpress.com/nation/2017/sep/07/thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose-for-role-in-1993-m-1653790.html

court agreed to the extradition of Abu Salem to India to stand trial for his role in the 1993 blasts case, after negotiations based on a UN convention for cooperation in terror investigations between countries. As India and Portugal had no formal extradition treaty, the agreement reached between Indian and Portuguese authorities were to be treated as an extradition treaty for the purposes of the Indian Extradition Act 1962. The two were handed over to the Indian agencies in November 11, 2005.[428]

One of the important clauses in the treaty between India and Portugal for extradition of Salem was an assurance by the Indian government to the government of Portugal that he would not be sentenced to death or a jail term that exceeded 25 years.[429]

On 7 September 2017, the Special Terrorist and Disruptive Activities (TADA) court sentenced him to 25 years imprisonment for his role in the March 1993 Mumbai serial blasts. He was spared the death penalty as per the extradition clause.[430]

"*As per the Extradition Treaty between India-Portugal, this is the maximum sentence permissible to him since the death penalty is banned in Portugal where he was first arrested,*" Special Public Prosecutor Deepak Salve said after the verdict.[431]

In September 2011, Indian authorities slapped fresh charges on Salem that could attract the death sentence. Portugal accused India of violating the extradition treaty conditions.[432] The Portugal High Court ordered

[428]. Why Abu Salem Didn't Get the Death Sentence in 1993 Blasts Case, The Quint, 9 September 2017, https://www.thequint.com/news/india/mumbai-blasts-why-no-death-penalty-for-abu-salem

[429]. Mumbai blasts 1993: Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose, Financial Express, 7 September 2017, https://www.financialexpress.com/india-news/mumbai-blasts-1993-thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose/845526/

[430]. Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose for role in 1993 Mumbai blasts case, The New Indian Express, 7 September 2017, http://www.newindianexpress.com/nation/2017/sep/07/thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose-for-role-in-1993-m-1653790.html

[431]. Mumbai blasts 1993: Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose, Financial Express, 7 September 2017, https://www.financialexpress.com/india-news/mumbai-blasts-1993-thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose/845526/

[432]. Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose for role in 1993 Mumbai blasts case, The New Indian Express, 7 September 2017, http://www.newindianexpress.com/nation/2017/sep/07/thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose-for-role-in-1993-m-1653790.html

revocation of the extradition of underworld don Abu Salem accusing Indian probe agencies of violating the conditions under which he was permitted to be taken to India in November 2005 to face trial in eight cases including 1993 Mumbai blasts.[433] After the Lisbon High Court cancelled the deportation order, Portugal's Supreme Court of Justice questioned the legal rights of the Indian authorities to challenge the cancellation of the extradition order.[434]

In the aftermath of the Portugal High Court decision, Abu Salem also moved the Supreme Court in India with a plea for quashing all proceedings after Portugal's apex court terminated his extradition to India. The Supreme Court held that the verdict of Portugal court is "not binding" on courts here and Salem's extradition to India is still "valid in the eyes of law". However, the bench headed by Chief Justice P. Sathasivam, allowed the Central Bureau of Investigation (CBI) to drop additional charges slapped on Salem under TADA and Explosive Substances Act after his extradition.[435]

Following the Portugal SC's order, he had also appealed to the TADA court, saying that the trial against him should be closed. He then filed a petition in the high court at Lisbon, alleging violation of the "Rule of Speciality". In the ruling on 19 September 2012, the Lisbon court said there had been a breach of the undertaking given by India.[436]

In 2015, Salem had moved the Administrative Court in Portugal seeking direction to the Portuguese government to execute the order of that country's apex court cancelling his extradition. Besides the March 1993 Mumbai blasts case, Salem has already been sentenced to life in February 2015, in the builder Pradeep Jain's murder case of 7 March 1995 at Juhu.[437]

433. Portugal high court terminates Abu Salem's extradition, Rediff.com, 27 September 2011, https://www.rediff.com/news/report/slide-show-1-abu-salem-extradition-terminated-portugal-court/20110927.htm

434. Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose for role in 1993 Mumbai blasts case, The New Indian Express, 7 September 2017, http://www.newindianexpress.com/nation/2017/sep/07/thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose-for-role-in-1993-m-1653790.html

435. SC says Abu Salem's extradition to India still valid, Livemint, 5 August 2013, https://www.livemint.com/Politics/v5Du5NFIJk2cjCm6hTHCKM/SC-says-Abu-Salems-extradition-to-India-still-valid.html

436. SC says Abu Salem's extradition to India still valid, Livemint, 5 August 2013, https://www.livemint.com/Politics/v5Du5NFIJk2cjCm6hTHCKM/SC-says-Abu-Salems-extradition-to-India-still-valid.html

437. Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose for role in 1993 Mumbai blasts case, The New Indian Express, 7 September 2017, http://www.newindianexpress.com/nation/2017/sep/07/thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose-for-role-in-1993-m-1653790.html

In 2017 Salem moved to the European Court of Human Rights (ECHR) with the prayer to send him back to Portugal from where he was extradited to India to face the trial. Salem contended that after the Portugal court terminated the 2014 order of his extradition, his entire trial in India has become illegal.[438] In his plea to the ECHR, Salem sought directions to Portugal to take steps for his return. Salem also provided details of two attempts on his life while in prison. Salem further contended that he is being tried for those charges which were not mentioned in the treaty. He also submitted that he is being kept in a solitary confinement which is prohibited by ECHR.[439]

In 2018, Abu Salem once again moved the European Court of Human Rights (ECHR), pleading to cancel his extradition to India and transfer him back to Portugal. In his fresh plea, Salem claimed his conviction in the 1993 blasts cases is yet another breach of extradition order by Indian government.[440]

Taking note of his repeated complaints, officials from the Portuguese embassy in Delhi, along with members of the Central Bureau of Investigation (CBI), visited the Taloja jail in Navi Mumbai on 12 June 2018 to check its overall condition and the facilities given to him.[441]

The life term awarded to Abu Salem has triggered a complex legal debate. Abu Salem's lawyer argued that Courts have to consider the assurance given by the Indian government of not sentencing him for a term beyond 25 years.[442] The prosecution sought life imprisonment for Salem stating that he deserved nothing but death penalty but considering the treaty he cannot be sentenced to death or be imprisoned for more than 25 years.

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438. Abu Salem moves ECHR seeking to call him back to Portugal, Indian Express, 18 June 2017, http://www.newindianexpress.com/nation/2017/jun/18/abu-salem-moves-echr-seeking-to-call-him-back-to-portugal-1618177.html

439. Salem moves ECHR seeking to call him back to Portugal, The Daily News & Analysis, 18 June 2017, https://www.dnaindia.com/india/report-salem-moves-echr-seeking-to-call-him-back-to-portugal-2476395

440. Gangster Abu Salem moves European Court of Human Rights to cancel his extradition to India, Hindustan Times, 10 February 2018, https://www.hindustantimes.com/india-news/1993-mumbai-blasts-convict-abu-salem-moves-european-court-of-human-rights-to-cancel-his-extradition-to-india/story-PRi3hzLdn6zQywSqrAU06J.html

441. Portuguese team checks on Abu Salem after he complains about prison blues, Hindustan Times, 13 June 2018, https://www.msn.com/en-in/news/india/portuguese-team-checks-on-abu-salem-after-he-complains-about-prison-blues/ar-AAyziYb

442. 'Life term for Abu Salem violates treaty with Portugal', The Hindu, 7 September 2017, https://www.thehindu.com/news/national/life-term-for-abu-salem-violates-treaty-with-portugal/article19638247.ece

The fact remains the trial court did not take the extradition treaty into consideration while awarding him life imprisonment.[443]

Salem, in his petition before the European Court of Human Rights (ECHR) claimed that life imprisonment is violative of the extradition terms and that he be returned to Portugal.[444]

Case 3: Decision of the UN Committee Against Torture in *Bachan Singh Sogi* versus *Canada* (2007)

The complainant, Bachan Singh Sogi[445], an Indian national residing in Canada at the time of submission of the complaint to the UN Committee Against Torture and was subject to an order for his removal to India. He claimed that his removal would amount to a violation of Article 3 of the UNCAT.

The UN Committee Against Torture requested the State party not to deport the complainant to India while his complaint was being considered. However, on 28 June 2006 the Committee was informed by the complainant and Canada that the complainant would be removed despite the UN Committee's request for a suspension of removal. By note verbale of 30 June 2006 the Committee repeated its request to the State party to suspend removal of the complainant.

Subsequently, the UN Committee was informed by the counsel that the complainant had been expelled on 2 July 2006 and that the Canadian Border Services Agency (CBSA) refused to reveal the destination. Canada confirmed that Sogi had been returned to India and justified the decision by the fact that he had failed to establish that there was a substantial risk of torture in his country of origin. On 5 July 2006, the complainant's counsel informed the UN Committee that the complainant was in a local prison in Gurdaspur, in Punjab, India, and that, according to police information; he had been beaten and subjected to ill-treatment by the local authorities.

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443. 'Life term for Abu Salem violates treaty with Portugal', The Hindu, 7 September 2017, https://www.thehindu.com/news/national/life-term-for-abu-salem-violates-treaty-with-portugal/article19638247.ece

444. Gangster Abu Salem moves European Court of Human Rights to cancel his extradition to India, Hindustan Times, 10 February 2018, https://www.hindustantimes.com/india-news/1993-mumbai-blasts-convict-abu-salem-moves-european-court-of-human-rights-to-cancel-his-extradition-to-india/story-PRi3hzLdn6zQywSqrAU06J.html

445. *Bachan Singh Sogi v. Canada*, CAT/C/39/D/297/2006, UN Committee Against Torture (CAT), 16 November 2007, available at: http://www.worldcourts.com/cat/eng/decisions/2007.11.16_Bachan_Singh_Sogi_v_Canada.htm

According to the facts presented by Sogi, he and his family were falsely accused of being Sikh militants and on the basis of that allegation were arrested and tortured several times in India. He was therefore compelled to leave the country.

Sogi further stated that in May 1991, February 1993, August 1997, December 1997 and January 2001, he was arrested by the police on suspicion of belonging to the Sikh militant movement. He also claimed that whenever an attack took place that was attributable to the terrorist militants in the region, the police turned up at his home and searched the house. His brother and his uncle had also been accused of being terrorists and his uncle had been killed by the police in 1993. He further stated that his father had also been killed in an exchange of fire between terrorist militants and police in 1995.

Sogi was in the United Kingdom from July 1995 to February 1997 and applied for refugee status there which was rejected. His brother had earlier left India for Canada and been granted refugee status there. The complainant also fled to Canada in May 2001.

Upon his arrival in Toronto, he claimed refugee status. In August 2002 the Canadian Security and Intelligence Service (CSIS) issued a report stating that there were reasonable grounds to believe that the complainant was a member of the Babbar Khalsa International (BKI) terrorist group, an alleged Sikh terrorist organization and on the basis of the report, a warrant was issued for his arrest as he was deemed a threat to Canada's national security. On 8 October 2002 after a hearing was conducted, the Immigration and Refugee Board issued an order for his removal.

Sogi thereafter applied for judicial review of the removal decision which was upheld by the Federal Court. On 2 December 2003, the Minister's delegate rejected the complainant's application for protection. While recognizing that there was a risk of torture in the event of deportation, the Minister decided, after having weighed the interests at stake that Canada's overall security interests should prevail in this case.

Sogi applied for judicial review of the decision of the Minister's delegate. On 11 June 2004, the Federal Court in Toronto noted that, according to Supreme Court case law, in particular the *Suresh* judgment cited by the complainant,[446] the prohibition of torture was "an emerging peremptory norm of international law" and international law rejected deportation to

446. *Suresh v. Canada (Minister of Citizenship and Immigration), [2002]* 1 S.C.R. 3, 2002 SCC 1, Canada: Supreme Court, 11 January 2002, available at: https://www.refworld.org/cases,CAN_SC,3c42bdfa0.html

torture even where national security interests were at stake. The Court found that, in the deportation decision, the Minister's delegate had erred in two respects. Firstly, the decision did not address any alternatives to deportation to torture: any such decision must consider, in the balancing exercise, any alternatives proposed to reduce the threat. Secondly, the decision failed to adequately describe and explain the threat posed to national security. Consequently the Court referred the deportation decision back for the Minister's delegate to prepare a revised version of the decision which would consider the alternatives to deportation suggested by the applicant and specifically define and explain the threat.

On 6 June 2005 the Court of Appeal upheld the appeal and referred the case back for a fresh pre-removal risk assessment (PRRA). A second PRRA decision found that the complainant was at risk of torture in India since he was suspected of being a senior member of the BKI. On 11 May 2006 another decision on protection was handed down by the Minister's delegate wherein the Minister had determined that the complainant would run no risk of torture if he was returned to India. The Minister also determined that the complainant posed a threat to national security. The request for protection was therefore denied.

Sogi argued that the 2 December 2003 decision denying him protection was taken on the basis of irrelevant criteria such as the nature and gravity of past actions and the threat he posed to Canada's security, and that it violates the Convention Against Torture, which allows for no exceptions with respect to return to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. He also claimed that the Minister's delegate had put him in even greater danger in her 11 May 2006 decision by attributing to him crimes he had not personally committed.

Canada maintained that Sogi's plea should be rejected on merits because he failed to establish that he personally would run a real and foreseeable risk of torture in India. Canada also stated that the human rights situation in Punjab had improved considerably since the end of the Sikh uprising.

Sogi's counsel argued that, by sending the complainant back to India, Canada violated his rights under the procedure for determining the risks of torture and Article 3 of the Convention.

While considering on the merits of the complaint, the UN Committee Against Torture noted the complainant's contention that the Minister's delegate, in her decision of 2 December 2003, used irrelevant criteria as grounds for refusing protection, namely that the person constituted a

threat to Canada's security. The UN Committee recalled that Article 3 affords absolute protection to anyone in the territory of a State party, regardless of the person's character or the danger the person may pose to society.

The UN Committee also took note of the complainant's argument that, in the decision of 11 May 2006, the Minister's delegate did not take into account the complainant's particular situation, and in denying protection merely cited a supposed improvement in the general conditions in the Punjab. The UN Committee observed that the Minister's delegate decision denied the real, personal threat of torture based on the fresh assessment, and merely accepted that a new law had been adopted in India apparently protecting accused persons from torture, without regard to whether the law would effectively be implemented or how it would affect the complainant's specific situation.

The UN Committee therefore concluded that the complainant did not enjoy the necessary guarantees in the pre-removal procedure. Canada is obliged, in determining whether there is a risk of torture under Article 3, to give a fair hearing to persons subject to expulsion orders.

The UN Committee also noted that, according to various sources and the reports provided by the complainant Sogi, the Indian security and police forces continue to use torture, notably during questioning and in detention centres, especially against suspected terrorists.

The UN Committee stated that Article 3 affords absolute protection to anyone in the territory of state party regardless of the person's character or the danger the person may pose to society. The state argued that the complainant is a security threat to Canada.

The UN Committee faulted Canada on two counts for violation of Convention. First, by the time he was returned, the complainant had provided sufficient evidence to show that he personally ran a real and foreseeable risk of being subjected to torture were he to be returned to his country of origin. Therefore, under the circumstances, the complainant's removal to India constituted a violation of article 3 of the Convention. Second, by sending the complainant back to India despite the Committee's repeated requests for interim measures, Canada committed a breach of its obligations under articles 3 and 22 of the Convention.

Case 4: Decision of the UN Committee Against Torture in Harminder Singh Khalsa et al. v. Switzerland (2011)

The complainants[447], Mr. Harminder Singh Khalsa and his family, Mr. Karan Singh and his family, Mr. Jasvir Singh and Mr. Dalip Singh Khalsa were Indian citizens belonging to the ethnic Sikh community. The complainants were Indian citizen residing in Switzerland since 1995 and were ordered to leave for India after their asylum applications were rejected by Federal Administrative Tribunal. They were allegedly involved in incidents of hijacking planes in India. The first, second and third complainants were ordered to leave by 22 February 2008 and the fourth by 31 January 2008. The complaint was made on 18 February 2008. The complainants claimed that their deportation from Switzerland to India would constitute a violation of article 3 of the UN Convention against Torture because they would face serious threats to their health and lives, and that the Indian security forces still want to prosecute them for having hijacked two Indian planes.

The Committee brought the complaint to the State party's attention on 25 February 2008; and the Rapporteur on new complaints and interim measures requested the State party not to deport the complainants to India while their case was under consideration by the Committee. The State party informed the Committee that the complainants would not be deported while their case was being examined by the Committee.

As per the facts submitted by the complainants, on 29 September 1981, Karan Singh and Jasvir Singh were among a group of five persons who had hijacked an airplane of the Indian Airlines on its flight between New Delhi and Srinagar (Kashmir) to Lahore in Pakistan to protest against the arrest of Mr. Sant Jarnail Singh Bhindranwala, the leader of the movement fighting to have a separate Sikh state, and the killing of 36 Sikhs by the Indian security forces. At the time of this event, Karan Singh and Jasvir Singh were both members of groups which wanted a separate Sikh state, respectively the All India Sikh Students' Federation and Dal Khalsa. In 1984, Dalip Singh Khalsa and Harminder Singh Khalsa were among a group of nine persons who highjacked an airplane of the Indian Airlines to Pakistan to respond to the attack of the Indian army on the Sikh Holy City of Amritsar and to draw the attention of the international community to the killings of thousands of innocent Sikhs. The group belonged to the All India Sikh Students' Federation.

[447]. *Harminder Singh Khalsa et al. v. Switzerland*, CAT/C/46/D/336/2008, UN Committee Against Torture (CAT), 7 July 2011, available at: https://www.refworld.org/cases,CAT,4eeb365c2.html

None of the passengers in either airplane was injured. The complainants were arrested by the Pakistan police and they were tried before a special court in Lahore. In January 1986, Dalip Singh Khalsa and Harminder Singh Khalsa were sentenced to death but their sentences were commuted into life imprisonments based on a general amnesty following the accession of Mrs. Benazir Bhutto to the post of Prime Minister. Karan Singh and Jasvir Singh were sentenced to life imprisonment. All complainants were released from prison at the end of 1994 and were ordered to leave the country. They left Pakistan and went to Switzerland where they applied for asylum immediately upon arrival in 1995.

In Switzerland, the complainants were heard by the Swiss Federal Office for Refugees, which rejected their asylum claims on 10 July 1998. The complainants filed appeals, which the Swiss Asylum Board rejected on 7 March 2003. From 7 March 2003 to 19 December 2007, the complainants filed several petitions for reconsideration of the negative asylum decisions, which were all rejected. On 19 December 2007, the Federal Administrative Tribunal gave its final decision, confirming the refusal to grant them asylum, reasoning that it could not find any good reasons to believe that the Indian security forces would consider the complainants as dangerous enemies of the Indian State.

The complainants have been living peacefully in Switzerland since 1995. Two of the complainants have founded families. They were very active in the Sikh community. Karan Singh became the President of the first Sikh temple built in Switzerland. Mr. Harminder Singh Khalsa became Vice-President. The complainants submitted that they continued to be involved in political activities during their stay in Switzerland and that the Indian authorities are well aware of that.

They also participated at various demonstrations and conferences. The complainants claimed that relatives in India were harassed by the police because of their actions.

The complainants submitted that their deportation from Switzerland to India would constitute a violation of article 3 of the Convention against Torture because they would face serious threats to their health and lives. They claimed that the Indian security forces still want to prosecute them for having hijacked two Indian planes. In support of their claims, they submitted that on 22 June 1995, the Indian Central Bureau of Investigation wrote a letter to the Canadian immigration authorities, requesting their assistance in capturing two of the participants in the 1984 airplane's hijacking.

The complainants also indicated that two members of the group who participated in the 1984 hijacking, and who had been acquitted by the Pakistan Special Court in 1986 and released from prison, were killed by the Indian Security Forces in mysterious circumstances when they returned to India in 1990. The complainants also referred to the case of Mr. K.S. who had also participated in the hijacking of a civilian Indian aircraft in 1984 and who, after having served a 12 years imprisonment sentence in India was released. However, a month after being released from prison, his dead body which showed marks of injuries was found in a canal in a village in Rajasthan and a magistrate inquiry concluded that he had been tortured prior to being thrown in the canal.

The complainants submitted that Indian security forces are actively searching for them because they have a high profile and their names appear constantly in newspapers reporting that their asylum claims had been rejected in Switzerland and that they would be soon deported to India.

The complainants further submitted that, because of their past involvement in the hijackings and their current political activities, they have high profiles as men who want a separate Sikh state. They maintained that the Indian authorities consider them a threat and are actively searching for them and that in case of their forced return to India they would be immediately arrested, subjected to torture or even killed.

The State party argued that even if the Indian criminal justice authorities were still looking for the complainants at present that in itself would not be sufficient to conclude that they would be subjected to treatment contrary to the Convention.

The State party also submitted that, as of 1993, the situation in Punjab has become more stable and noted that the Terrorist and Other Disruptive Activities Act was abolished eight years after its promulgation. Even after the assassination of the Chief Minister Beant Singh on 31 August 1995, the situation remained calm.

The State party argued that there are no serious reasons to fear that the complainants would be exposed to real, concrete and personal risk of being tortured if returned to India and therefore, the deportation of the complainants to India would not amount to a violation of article 3 of the Convention

The issue before the Committee was whether the forced return of the three remaining complainants to India would violate the State party's obligation under article 3 of the Convention not to expel or to return a

person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.

The Committee observed that according to the available information, such as recent reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on extrajudicial, summary or arbitrary executions, ill-treatment and torture of individuals held in detention, as well as deaths in custody or following detention continue to be a problem in India. Special Rapporteurs also expressed their concerns relating to reports of alleged impunity for criminal acts committed by officials.

The Committee observed that the complainants have submitted information regarding cases, similar to theirs, where individuals who had participated in hijackings had been arrested, detained in inhuman conditions, tortured and/or killed. The Committee recalled its general comment on the implementation of article 3, in which it states that the risk of torture "must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable".[448]

The Committee noted that the complainants are clearly known to the authorities as Sikh militants and that they have submitted to the Swiss authorities and to the Committee several statements from public officials in India indicating them by name, which demonstrate that the criminal justice authorities were looking for them as late as in 2005. The Committee also noted that the complainants are well known to the Indian authorities because of their political activities in Switzerland and their leadership roles in the Sikh community abroad.

Taking these facts into consideration, the Committee opined that the complainants had provided sufficient evidence that their profile was sufficiently high to put them at risk of torture if extradited to India. The Committee also noted that it does not consider that the complainants would be able to lead a life free of torture in other parts of India.

The Committee also considered the status of India not being a party to the Convention against Torture, and stated that "*in view of the fact that India is not a party to the Convention, the complainants would be in danger, in the event of expulsion to India, not only of being subjected to torture but of*

[448]. General Comment No 1: Implementation of article 3 of the Convention in the context of article 22 (Refoulement and communications), A/53/44, annex IX, paragraph 6.

no longer having the legal possibility of applying to the Committee for protection".[449]

The Committee concluded that the complainants have established a personal, present and foreseeable risk of being tortured if they were to be returned to India and therefore under the circumstances, the complainants' removal to India would constitute a violation of article 3 of the Convention.

Case 5: Decision of the UN Committee Against Torture in Nirmal Singh versus Canada (2011)

In *Nirmal Singh* versus *Canada*[450], the complainant, Mr. Nirmal Singh, an Indian national born in 1963, was residing in Canada at the time of submission of the complaint dated 20 June 2007 and subject to an order for his deportation to India. He claimed that his return to India would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant also alleged lack of judicial control required by the international human rights law on the administrative deportation decision and that he did not have an effective remedy to challenge the deportation decision.

The complainant is a baptized Sikh and was a part-time Sikh priest in the Indian provinces of Punjab and Haryana. Because of his preaching activities, frequent travel in the region and well-built body, he was questioned and harassed by the Indian police on several occasions. The Indian police, he claimed, suspected him of being a terrorist or a sympathiser of the militant organization Khalistan Liberation Force (KLF) in India, as well as having helped militants by sheltering them. He was detained twice on false accusations, the first time for over three years from 1988 to 1991, and the second time in 1995.

On 10 April 1988, officers of the Shahbad police station, Haryana arrested the complainant, his brother and three other individuals without explaining the reasons for their arrest. At the police station the brothers were separated. The complainant was accused of involvement in a murder in the city of Shahbad and of being associated with one Daya Singh. The complainant denied the allegations. While in detention, the complainant

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449. *Harminder Singh Khalsa et al. v. Switzerland*, CAT/C/46/D/336/2008, UN Committee Against Torture (CAT), 7 July 2011, available at: https://www.refworld.org/cases,CAT,4eeb365c2.html, Para 11.7

450. *Nirmal Singh v. Canada*, CAT/C/46/D/319/2007, UN Committee Against Torture (CAT), 8 July 2011, available at: https://www.refworld.org/cases,CAT,4eeb376e2.html

was severely beaten and humiliated by the investigating officers and forced to confess his guilt. After three years of detention, the complainant and his brother were bailed out on 14 March 1991. On 19 February 1998, the complainant was acquitted of all charges related to the first accusation, but police officers continued to harass him under the pretext of visiting his home and place of religious services.

On 14 September 1995, an inspector of the Kotwali police station, Punjab accompanied by police officers, raided the complainant's house and arrested him. The complainant was handcuffed and his house was searched but no illegal items were discovered. The complainant was taken to the interrogation room at the police station and questioned by the inspector about one Paramjit Singh, who allegedly was involved in the assassination of Punjab Chief Minister Beant Singh in August 1995. The inspector alleged that the complainant had sheltered Paramjit Singh at his house before the Chief Minister's assassination.

He was subjected to various forms of torture to extract a confession. He was charged with harbouring a dangerous offender but released on bail on 30 September 1995. The Patiala court acquitted him of the above charges on 19 March 1997.

After his acquittal in both cases, the complainant became a member of the Sarab Hind Shiromani Akali Dal (Akali Dal), the main Punjabi nationalist party, and on 4 July 1999, he was appointed as a Secretary-General of Akali Dal in Haryana province.

On the basis on an invitation of a Sikh temple in British Columbia, the complainant received a Canadian visa on 16 September 2003 and arrived in Vancouver, Canada on 24 September 2003.

After his arrival in Canada the complainant preached in two Sikh temples for a year and a half on voluntary basis. The complainant travelled to Montreal where, on 28 March 2005, he filed an application for refugee status and protection. The complainant's refugee claim was heard by the Immigration and Refugee Board ("the Board") on 3 October 2005. On 16 November 2005, the Board determined that he was not a Convention refugee. The Board concluded that the applicant was not credible, that his behaviour was not remonstrative of a person fearing for his life and that his departure related to the invitation by the Sikh religious community to work in Canada.

The complainant applied to the Federal Court for leave to apply for judicial review of the Board's Decision, which was granted on 16 March 2006.

The request for judicial review of this decision was heard on 7 June 2006 and it was denied by the Federal Court on 13 June 2006. The Court concluded that the decision was not patently unreasonable, largely on grounds of the delay in claiming refugee status after arrival to the country and failure to provide credible or trustworthy evidence as to the complainant's background information in India.

After the refusal of refugee status and the decision from the Federal Court, on 27 December 2006, the complainant filed an application for stay for humanitarian reasons, submitting additional evidence under article 25(2) of the Immigration and Refugee Protection Act. The application was refused on 27 March 2007 by a Pre-Removal Risk Assessment (PRRA) Officer who concluded that the applicant did not establish that he would be at risk should he return to India. The complainant applied to the Federal Court for leave to apply for judicial review of the H&C decision, which was dismissed without reasons on 6 September 2007.

On 12 December 2006, the complainant had also submitted an application for protection from Canada under the PRRA programme. On 27 March 2007, the latter was rejected by the same PRRA Officer who refused the H&C application. The stated reason for rejection was that the documentary evidence submitted by the complainant did not demonstrate that he might be listed or wanted by the Indian authorities; that the complainant had never claimed that he was a Sikh militant or a supporter of the militants; that he had not established that he held a high profile, nor that he was a person of interest for the Indian authorities. Therefore, the evidence submitted by the complainant did not corroborate that he might face a personal and objectively identifiable risk should he return to India.

After the PRRA application was refused, the complainant applied to the Federal Court for leave to apply for judicial review of the PRRA decision. The Federal Court dismissed his application without reasons on 14 August 2007.

The complainant applied to the Federal Court for a stay of execution of his removal order. A detailed affidavit about the present level of danger was submitted with a motion for stay of deportation that was heard on 18 June 2007 and refused on 20 June 2007. The deportation of the complainant was scheduled for 21 June 2007.

In his complaint communication before the Committee against Torture, the complainant contended that he has exhausted all available and effective domestic remedies and he complained a violation of article 3 of the

Convention against Torture by Canada if he is to be deported to India in the light of the treatment suffered by him in police custody in the past and continuing interest in him by the police in India. The complainant also submitted that Sikhs in India who are suspected of militant activities are routinely arrested, tortured and murdered by police with impunity.

The complainant also stated that he did not have an effective remedy to challenge the deportation decision as guaranteed in article 2 of the International Covenant for Civil and Political Rights (ICCPR). The complainant also submitted that the PRRA procedure of risk analysis is implemented by immigration agents who are not competent in matters of international human rights and are not independent, impartial and do not possess recognized competence in the matter. He claimed that in the immigration department there is an extremely negative attitude towards refugee claimants and that its decisions do not undergo independent scrutiny as required by the international human rights law.

In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention by Note Verbale, dated 21 June 2007. At the same time, the Rapporteur for new complaints and interim measures requested the State party not to deport the complainant to India while his case was under consideration by the Committee, in accordance with rule 108, paragraph 1, of the Committee's *Rules of procedure*. The State party informed the Committee that the complainant had not been deported.

The State party submitted that the complainant has failed to substantiate on a *prima facie* basis that there were substantial grounds to believe that he personally faces a risk of torture on return to India. The State party referred to the Committee's General Comment No.1, which states that it is the complainant's responsibility to establish a *prima facie* case for the purpose of admissibility of his or her communication.

The State party also maintained that the complainant has failed to show that he is personally at substantial risk of torture if returned to India; and that the general human rights situation in the country cannot by itself be sufficient to establish that the complainant would be personally at risk if returned; and that the current human rights situation in India does not support the complainant's allegations of risk.

The State party maintained that the complainant has failed to show in his submissions that he would be unable to lead a life free of torture in another part of India and makes reference to the previous practice of the Committee that while the complainant may face hardship should he not

be able to return to his home, such hardship would not amount to torture or ill-treatment.

The complainant submitted that he is personally at risk of torture if returned to India because: he had previously been accused of participation in militant activities in 1988 and in 1995; he was detained for three and a half years between 1988 and 1991 and subjected to torture while in detention and previous detainees for militant activities are one of the main risk groups according to human rights reports; he was a prominent Sikh priest at some of the most important Sikh temples in Punjab and Haryana and therefore is a high-profile figure, since prominent Sikh religious figures are among the most targeted figures by the security services; he was a prominent figure in the Akai Dal in Haryana; he has personal family links with well known militants, as confirmed by the submitted report of the Punjab Human Rights Organization.

On the issue of maintainability of the complaint, the Committee noted the State party's contention that the complaint of a violation of article 3 of the Convention, based on the return of the complainant to India is manifestly unfounded and therefore inadmissible. The Committee, however, considered that the complainant had provided sufficient substantiation to permit it to consider the case on the merits.

On the consideration of merits of the complaint, the Committee noted the State party's argument that the human rights situation in the Punjab and in India has improved and stabilized in recent years. However, the Committee observed that reports submitted both by the complainant and the State party, confirm *inter alia* that numerous incidents of torture in police custody continue to take place, and that there is widespread impunity for perpetrators.

The Committee observed that the complainant submitted evidence in support of his claims that he was tortured during detention on at least three occasions in 1988, 1995 and 2003, including medical reports, as well as written testimony corroborating these allegations. It also noted the medical reports from clinics in India and Canada, which conclude that there is sufficient objective physical and psychological evidence corroborating his subjective account of torture and that the State party had not contested the complainant's allegations that he had been subjected to torture in the past.

The Committee observed that the complainant has provided documentary evidence that he has a history of being investigated and prosecuted as an alleged Sikh militant, that he was appointed as Secretary General of the

Haryana unit of the Akali Dal party and that he served as a Sikh priest. The Committee accordingly considered that the complainant has provided sufficient evidence that his profile is sufficiently high to put him at risk of torture if arrested.

The Committee also noted that he would not be able to lead a life free of torture in other parts of India given that the complainant has submitted evidence that he had been arrested in three different provinces - Haryana, Punjab and Uttar Pradesh. The Committee concluded that the complainant has established a personal, present and foreseeable risk of being tortured if he were to be returned to India.

The Committee concluded that the complainant did not have access to an effective remedy against his deportation to India, in violation of article 22 of the Convention against Torture and the committee opined that the State party's decision to return the complainant to India, if implemented would constitute a breach of article 3 of the Convention. The Committee also considered that in the instant case the lack of an effective remedy against the deportation decision constitutes a breach of article 22 of the Convention.

The Committee against Torture, acting under article 22, paragraph 7, of the UNCAT, considered that the State party's decision to return the complainant to India, if implemented would constitute a breach of Article 3 of the Convention. The Committee also considered that in the instant case the lack of an effective remedy against the deportation decision constitutes a breach of article 22 of the Convention.

Case 6: Decision of Denmark High Court on extradition of Kim Davy (2011)

Niels Holck is a Danish Citizen who, under the alias Kim Davy, along with other accomplices, dropped unauthorised arms, including hundreds of AK-47 rifles, anti-tank grenades, pistols, rocket launchers and ammunition from an An-26 aircraft in Bengal's Purulia district on the night of 17 December 1995.[451] The crew consisted of five Latvian citizens and British national Peter Bleach, all of whom were arrested. Davy, the prime accused in the case, had managed to escape. The crew members were released from a Kolkata jail in 2000 after requests from the Russian

[451]. Purulia arms drop case: Fresh request to extradite Kim Davy, The Indian Express, 18 December 2016, https://indianexpress.com/article/india/purulia-arms-drop-case-fresh-request-to-extradite-kim-davy-4432962/

authorities. Bleach was given a Presidential pardon in 2004 following requests by the UK government.[452]

Indian authorities traced Kim Davy in Denmark. In 2002, India officially requested to extradite Kim Davy for trial in India. The Danish government acceded to the demand and an extradition order was passed by the Danish government on 9 April 2010. However, Davy approached a local court challenging the order of the Danish government. The lower court had set aside the order of extradition.[453]

Upon appeal by the Danish authorities against the lower court decision, the High Court also rejected their plea citing poor prison conditions, including overcrowding, torture and poor human rights record of India. A five-judge panel of the Danish High Court had unanimously upheld the lower court verdict not to extradite Niels Holck to India to face charges of weapons smuggling because he would risk inhumane treatment in India.[454]

"*As the charges against (Niels Holck) are of rebellion against the Indian authorities, the Court finds that extradition to face charges in India would involve a real risk that he would be subjected to treatment that contravenes the European Human Rights Convention Article 3*," the court said.[455]

Significantly, the court also added that India had not signed the United Nations Convention Against Torture and that it had elicited information from among others independent human rights organisations and government sources.[456]

"*There is information that in India there is a continued widespread and systematic use of torture and inhumane or degrading treatment of people in police and prison custody, and serious problems with killings and deaths among such people*," the Court said.[457]

The Danish High Court upheld the lower court decision that rejected the government's move to allow the CBI's request for Davy's extradition despite getting a number of sovereign assurances from India, including

452. Ibid

453. India may push for trial of Kim Davy in embassy in Denmark, rediff.com, 24 September 2012, https://www.rediff.com/news/report/india-may-push-for-trial-of-kim-davy-in-embassy-in-denmark/20120924.htm,

454. No extradition due to India torture fears, Politiken, 30 June 2011, https://politiken.dk/newsinenglish/art5014913/No-extradition-due-to-India-torture-fears

455. Ibid

456. Ibid

457. Ibid

that no death penalty would be imposed on him and permission to serve imprisonment, if any, in Denmark prisons.[458]

After two similar verdicts, the Danish prosecutor, according to Danish legal tradition, opted not to appeal to the Supreme Court.[459]

An enraged India downgraded diplomatic ties with Denmark in June 2011 when Copenhagen refused to appeal against the Danish Court order rejecting Davy's extradition order.[460]

India has made a fresh extradition appeal in 2016. The Denmark government is learnt to have written to the government of India and inquired about the details of the place where Davy, if extradited, would be lodged.[461]

Case 7: Extradition of Tiger Hanif pending before the Court in UK (2012)

Mohammed Hanif Umerji Patel, known as "Tiger Hanif", is an accused in the 1993 Gujarat bombing case. He has been charged with involvement in a grenade attack in a crowded market at Surat in January 1993, in which an eight-year-old schoolgirl was killed and more than a dozen people were injured. He has also been accused of leading an attack on a railway platform at Surat three months later, in which 12 people were seriously wounded.[462]

The first explosion occurred on 28 January 1993 in a market on the Varacha Road in Surat and killed an eight year old girl and caused many injuries. The second explosion took place on 22 April 1993 at Surat railway station and caused many injuries and significant property damage. The Appellant is alleged to have been a principal conspirator in relation

458. Danish court says 'no' to Kim Davy's extradition, The Hindu, 30 June, 2011, https://www.thehindu.com/news/national/Danish-court-says-lsquonorsquo-to-Kim-Davys-extradition/article13725211.ece

459. INDIA & DENMARK CONTESTED PERSPECTIVES, Torturemag, 25 June 2014, http://torturemag.org/india-denmark-contested-perspectives,

460. Denmark Set To Extradite Kim Davy To India, Business Television India, 12 July 2018, https://www.btvi.in/opinion/denmark-set-to-extradite-kim-davy-to-india/85557

461. India step closer to Kim Davy's extradition, The Economic Times, 1 August, 2017, https://economictimes.indiatimes.com/news/politics-and-nation/india-step-closer-to-kim-davys-extradition/articleshow/59854125.cms

462. U.K. court orders extradition of 'Tiger' Hanif, The Hindu, 4 May 2012, https://www.thehindu.com/todays-paper/tp-national/tp-kerala/uk-court-orders-extradition-of-tiger-hanif/article3382521.ece

to these two bomb attacks, and to have been part of the Muslim group which acquired firearms and ammunition.[463]

After the attacks, which followed anti-Muslim riots in the State in 1992, Hanif fled to Pakistan before arriving in Britain. He was arrested in February 2010, after Scotland Yard detectives, acting on an Interpol warrant, found him working in a grocery store at Bolton town.[464] He is said to be an associate of underworld don Dawood Ibrahim.[465]

He was initially refused asylum but he was later given a British passport in 2005.[466]

The Government of India has submitted an extradition request to the United Kingdom for the surrender of Hanif Patel so that he may face trial in relation to terrorist offences he allegedly committed in India during 1993.[467]

Lawyers for Hanif opposed the extradition order on the ground that he would be tortured by Indian officials, and that confessions of others involved with the bombings had been allegedly gained through torture interrogations.[468] But a Westminster magistrate on 2 May 2012 rejected the claims and ordered his extradition, describing him as a "classic fugitive." The District Judge sent the extradition request to the Secretary of State for her decision as to whether the accused should be extradited.

Rejecting his case, the District Judge stated, "*I am not satisfied the Appellant was tortured. I consider it more likely than not that he has invented this false*

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463. *Hanif Mohammaed Umerji Patel versus The Government of India and the Secretary of State for the Home Department*, England and Wales High Court, Judgment dated 18 April 2013, available at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/819.html

464. U.K. court orders extradition of 'Tiger' Hanif to India, The Hindu, 3 May 2012, https://www.thehindu.com/news/international/uk-court-orders-extradition-of-tiger-hanif-to-india/article3380893.ece

465. UK court orders Tiger Hanif's extradition to India, NDTV, 3 May, 2012, https://www.ndtv.com/india-news/uk-court-orders-tiger-hanifs-extradition-to-india-480437

466. Terror suspect wanted over two Indian bombings which killed a schoolgirl is allowed to stay in Britain after working as a greengrocer for 17 years, Mail Online, 7 August, 2016, https://www.dailymail.co.uk/news/article-3727833/Terror-suspect-wanted-two-Indian-bombings-killed-schoolgirl-allowed-stay-Britain-working-greengrocer-17-years.html

467. *Hanif Mohammaed Umerji Patel versus The Government of India and the Secretary of State for the Home Department*, England and Wales High Court, Judgment dated 18 April 2013, available at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/819.html, para 1

468. UK court orders extradition of Tiger Hanif to India, India Today, 3 May 2012, https://www.indiatoday.in/india/story/uk-court-extradition-tiger-hanif-india-100964-2012-05-03

claim. Most probably the claim is only advanced in an attempt to defeat this extradition request. His credibility is therefore seriously compromised."[469]

One of his pleas to prevent extradition – that he would be tortured in Indian jails – was overruled by the judge in the Westminster Magistrates Court. The court sent a team to Gujarat to examine jail conditions and to assess the validity of Hanif's plea, but the judge dismissed it and called him a "classic fugitive".[470] This was the first ever foreign expert inspection of an Indian jail allowed by the Government of India.[471]

The Secretary of State ordered the Appellant's extradition on 26 June 2012. In her decision for extradition, the Secretary of State stated that extradition was not prohibited by section 95 of the 2003 Act, which requires her to consider whether there are specialty arrangements with the requesting state.

On 9 July 2012 the Appellant appealed against that decision before the High Court.

Arguments put forward at the High Court by Patel included claims that the continuing pursuit of extradition by the Government of India "*for the purpose of an unviable prosecution*" was an "*abuse of the process of the court*", that there was a real risk his trial would constitute a flagrant denial of justice and his extradition would violate his rights under Article 6 ECHR and that there was "*a real risk of torture contrary to Article 3 ECHR* " in the light of new evidence.[472]

Dismissing the challenge against the decision of the district judge, Mr Justice Kenneth Parker said in relation to the torture ground, there was "nothing" in the further material relied upon by Patel that would "tend to undermine the conclusion reached by the district judge that the

[469]. *Hanif Mohammaed Umerji Patel versus The Government of India and the Secretary of State for the Home Department*, England and Wales High Court, Judgment dated 18 April 2013, para. 55, available at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/819.html

[470]. 24 years on, UK extradites first in list of India's most wanted, Hindustan Times, 19 October 2016, https://www.hindustantimes.com/world-news/24-years-on-uk-extradites-first-in-list-of-india-s-most-wanted/story-ANqMPozi4BXkaCYB3MfdpK.html

[471]. 2013 Country Reports on Human Rights Practices – India, refworld, 27 February 2014, https://www.refworld.org/docid/53284acb14.html

[472]. *Hanif Mohammaed Umerji Patel versus The Government of India and the Secretary of State for the Home Department*, England and Wales High Court, Judgment dated 18 April 2013, para. 11, available at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/819.html

appellant has failed to provide substantial evidence that he would be at real risk of torture" if extradited.[473]

Tiger Hanif lost his legal challenge in April 2013 and has since made a final appeal to the home secretary, who is yet to rule on it.[474]

The Daily Star Sunday reported on 7 August 2016 that papers have been sitting unsigned on the desk of then-Home Secretary Mrs. Teresa May since April 2013 and that the case had since been passed to new Home Secretary Amber Rudd for consideration.[475]

It has been reported that Hanif had made further representations to the Home Secretary in 2016. The Hindustan Times quoted a Home Office Spokesperson having stated that "Further representations have been made to the home secretary in this case and they are currently being carefully considered." [476]

Even if the decision of the Home Secretary goes against him, Hanif has the right to file appeal upto the European Court of Human Rights in Strasbourg.

Case 8: Decision of the UN Committee Against Torture in 'A' versus Canada (2016)

The few cases where refoulement was allowed to India pertain to individual complaints where the complainants have failed to provide sufficient evidence in support of their claims.

For instance, in ***A*** versus ***Canada***[477], the complainant "A", an India national was subject to removal to India from Canada at the time of submission of the complaint. He claimed that his removal to India would constitute a violation by Canada of article 3 of the Convention. Under rule 114

[473]. Man arrested in Bolton loses extradition appeal over India attacks, Manchester Evening News, 18 April 2013, https://www.manchestereveningnews.co.uk/news/greater-manchester-news/tiger-hanif-arrested-bolton-over-2768354

[474]. A short history of extradition from UK to India, The Mint, 19 April 2017, https://www.livemint.com/Companies/ajoMykZ2e3I5lM3SlCvz4L/A-short-history-of-extradition-from-UK-to-India.html

[475]. PM Theresa May allowed Muslim terror suspect wanted in India to stay in Britain, Daily Star Sunday, 7 August 2016, https://www.dailystar.co.uk/news/latest-news/535893/prime-minister-theresa-may-terror-suspect-wanted-india-allowed-remain-UK-home-office

[476]. Dawood aide Tiger Hanif makes new bid to avoid extradition to India, Hindustan Times, 21 March 2016, https://www.hindustantimes.com/world/dawood-aide-tiger-hanif-makes-new-bid-to-avoid-extradition-to-india/story-xOO3Vz1SoCw4ToltLtLjAM.html

[477]. *A versus Canada*, CAT/C/57/D/583/2014, UN Committee Against Torture (CAT), 9 May 2016.

(1) of its rules of procedure, on 17 January 2014, the Committee requested the State party to refrain from removing the complainant to India while his complaint was under consideration by the Committee. On 12 August 2014, the Committee granted the State party's request to lift interim measures. On 23 April 2015, the State party informed the Committee that the complainant had been removed to New Delhi on 23 March 2015.

As per the facts presented by the complainant, the complainant is of the Sikh faith and was born in Jalandhar, Punjab in India and was targeted by local authorities because his cousin M. was accused of assisting militants. On 3 November 2008, the police raided and searched the complainant's home, where M. was staying and arrested them both. The police accused the complainant of assisting militants and detained him for four days during which he was subjected to various forms of torture. On 7 November 2008, he was released after his family paid a substantial bribe and secured the intervention of local officials. In July 2009, the police came to the complainant's house to arrest him again, but he was not present. Fearing for his life, he left his village and went to stay with relatives. On 8 December 2009, the complainant was arrested in Chandigarh and beaten by police officers. He was then taken to Phagwara, where he was tortured by police officers. The officers accused him of helping militants and planning with M. to kill unspecified leaders. The complainant was again released on 10 December 2009.

He claimed that the police threatened him and instructed him to produce his cousin within two months and provide information about unspecified militants failing which he would be killed. Out of fear for his life, he fled India and arrived in Canada on a student visa on 18 January 2010.

The complainant claimed that he has exhausted domestic remedies. On 20 December 2011, he filed a refugee claim in Canada. In June 2013, the Immigration and Refugee Board, a division of the Refugee Protection Division (RPD), rejected his claim. Thereafter, he applied to the Federal Court of Canada for leave to file for judicial review of the Board's decision; this application was rejected on 18 October 2013. The complainant alleged that he is unable to submit an application for a pre-removal risk assessment (PRRA), as individuals whose refugee claims have been denied must wait at least one year before filing such an application. The complainant became subject to a removal order and, on 13 January 2014, he was detained in an immigration facility in Montreal. He was released on bail on 15 January 2014.

The complainant claimed that he has been repeatedly advised by family members that he should not return to India for his safety and that the Indian police and security forces were actively searching for him and have been harassing and threatening his family since he left India.

Therefore, the complainant asserted that the State party would violate his rights under article 3 of the Convention by forcibly removing him to India, where he would risk being subjected to torture and cruel treatment due to his imputed affiliation with Sikh terrorism in Punjab. He stated that he was twice arrested and subjected to brutal torture by agents of the Indian police force, which continue to actively search for him and harass and torture his family members. He argued that the State party's domestic authorities erred in their assessment of the risk faced by the complainant in India. The complainant also submitted that according to credible reports, India faces serious human rights problems, including abuse by police, extrajudicial killings and torture.

The state party defended its action by arguing that the complainant did not provide any evidence to the Committee or to the Canadian decision makers indicating that he was perceived as being a high-profile militant or a terrorist suspect and therefore failed to establish any prospect of irreparable harm if returned to India. The determinations of the Refugee Protection Division and the pre-removal risk assessment officer were based on a full and impartial consideration of both the complainant's allegations and the situation in India, as described in objective reports. The Refugee Protection Division rejected the complainant's claims on the basis that they were not credible.

While considering the merits of the complaint, the Committee assessed the risk of torture that the complainant would face in the event of return.

Considering all the facts and circumstances before it, the Committee observed that the complainant had not provided sufficient detailed information to substantiate his claims. For instance, he has not indicated the specific activities in which the police suspected that he was involved in or the persons with whom he was suspected of collaborating in carrying out these activities. The Committee also noted the State party's observation that its domestic authorities found that the complainant lacked credibility because, inter alia, he prepared for three years to leave India and his actions evinced an intention to pursue studies in Canada: he obtained a passport in 2008; he took various English courses in 2009; he applied for a Canadian student visa after enrolling in a management and health-care technology programme; he never alleged that he had been affiliated with any political or militant activities; and he had no difficulty leaving India

on a valid passport and with a Canadian student visa, despite allegedly being suspected by police of conspiring to assassinate a leader.

The Committee also took into consideration the documentation provided by the complainant to substantiate that he was subjected to torture. However, the Committee noted that the State party's competent authorities thoroughly evaluated the evidence presented by the complainant and found it to be of limited probative value due to its content and timing. In addition, the Committee observed that the complainant did not present any documentary evidence that there are any criminal proceedings pending against him or that the Indian authorities have issued a warrant for his arrest. The Committee considered that the State party's authorities adequately explored the fundamental aspects of the complainant's claims before drawing an adverse conclusion as to his credibility. The Committee therefore did not attribute material weight to the complainant's assertion that, although he left India in January 2010, the authorities in Punjab continue to harass and interrogate his family members in order to ascertain his whereabouts. The Committee relied on paragraph 5 of its general comment No. 1, according to which the burden of presenting an arguable case is on the author of a communication; and according to the Committee, the complainant had not fulfilled this burden of proof.

Taking into consideration these aspects of the complaint and on the basis of all the information submitted by the parties, the Committee came to the view that the complainant has not provided sufficient evidence to enable it to conclude that his forcible removal to India would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention. And, accordingly, the Committee concluded that the complainant's removal to India would not constitute a breach of article 3 of the Convention.

Case 9: Decision of the Supreme Court of Canada in the extradition of Surjit Badesha and Mrs. Malkit Kaur Sidhu (2017)

Surjit Singh Badesha and Malkit Kaur Sidhu, both Canadian citizens of Indian origin, and residing in Canada are wanted in connection with the murder of Jaswinder Kaur Sidhu, also known as "Jassi". Malkit is Jassi's mother and Badesha is her uncle.[478]

[478]. Canada extradites two to India over honour killing, The Indian Express, 9 September 2017, https://indianexpress.com/article/world/canada-extradites-two-to-india-over-honour-killing-4835552/

On 9 June 2000, the body of Jaswinder Kaur Sidhu was discovered with her throat slit in a village in Punjab. Indian prosecutors alleged that she was the victim of an honour killing planned by her mother and uncle, who opposed the young woman's marriage to a poor rickshaw driver, something the victim had kept secret for a year.[479]

After revealing her marriage to her family, the victim reportedly flew from Canada to India to reunite with her husband, Sukhwinder Singh Sidhu.[480] On June 8, 2000, Jaswinder Kaur Sidhu and her husband, Sukhwinder Singh Sidhu, were travelling by scooter in Punjab when they were attacked by a group of armed men. Sukhwinder was seriously injured in the assault. The assailants forced Jaswinder into a car and drove away. The next day, Jaswinder's body was discovered with her throat slit on the bank of a canal in a village close to where the attack had taken place.[481]

A year earlier, the couple had married in India without the knowledge of Jaswinder's family. Jaswinder's family was from a high socio-economic class whereas her husband was from a low socio-economic class and was a rickshaw driver from a poor family.

It is alleged by the Indian authorities that Mr. Badesha and Ms. Sidhu strongly opposed the marriage of Jaswinder and Sukhwinder, and made numerous efforts to try to end it, and when those efforts failed, they arranged for a number of persons in India to attack and kill the couple. The family has denied involvement in the killing.

India requested that Mr. Badesha and Ms. Sidhu be extradited on a charge of conspiracy to commit murder as a court in India had already convicted the pair of murder. The pair had fought extradition for years, arguing they would face substandard prison conditions in India. Sidhu and Badesha also claimed that they are in poor health and will require medical care in custody.[482]

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479. Canada extradites two to India over honour killing, The Indian Express, 9 September 2017, https://indianexpress.com/article/world/canada-extradites-two-to-india-over-honour-killing-4835552/

480. Canada extradites two citizens to India over 2000 honour killing incident, The New Indian Express, 9 September 2017, http://www.newindianexpress.com/world/2017/sep/09/canada-extradites-two-citizens-to-india-over-2000-honour-killing-incident-1654618.html

481. Canada extradites two citizens to India over 2000 honour killing incident, The New Indian Express, 9 September 2017, http://www.newindianexpress.com/world/2017/sep/09/canada-extradites-two-citizens-to-india-over-2000-honour-killing-incident-1654618.html

482. Extradition halted at last minute for pair accused in 'honour' killing in India, CTV News, 22 September 2017, https://www.ctvnews.ca/canada/extradition-halted-at-last-minute-for-pair-accused-in-honour-killing-in-india-1.3601471

Eleven other people stood trial in India for the murder case. Initially, seven were convicted and four acquitted, but four more were acquitted on appeal. Three people were serving life sentences for their roles in the attack.[483]

The accused duo was arrested in Canada in 2012 under the Extradition Act following an international investigation by the Royal Canadian Mounted Police (RCMP) and Indian authorities.[484] By a diplomatic note, India sought their extradition for the offence of conspiracy to commit murder under the Indian *Penal Code* following which the Minister of Justice issued an Authority to Proceed, authorizing extradition proceedings against Mr. Badesha and Ms. Sidhu on the corresponding Canadian offences of conspiracy to commit murder, attempt to commit murder and murder.

In its submissions to the Minister of Justice, Mr. Badesha argued that his surrender was unjust or oppressive under Section 44(1) (a)[485] of the Extradition Act[486] because (1) there was no guarantee India would honour a death penalty assurance, (2) he would not have a fair trial in India, (3) prison conditions in India rendered his surrender contrary to principles of fundamental justice, given his advanced age and health problems, and (4) there were significant weaknesses in the evidence.[487]

Canada's Minister of Justice ordered their surrenders and granted an extradition in 2014 after receiving assurances from India regarding their treatment if incarcerated, including health, safety and consular access, and determining, in accordance with s. 44(1) (a) of the *Extradition Act* , that their surrenders would not be unjust or oppressive.

The Minister's surrender decision, commenting on the death penalty concern, stated that "*absent evidence of bad faith on the part of India, he was*

[483]. Extradition halted at last minute for pair accused in 'honour' killing in India, CTVNews, 22 September 2017, https://www.ctvnews.ca/canada/extradition-halted-at-last-minute-for-pair-accused-in-honour-killing-in-india-1.3601471

[484]. Canada's top court hears Jassi Sidhu extradition case, BBC News, 21 March 2017, https://www.bbc.com/news/world-us-canada-39261793

[485]. Section 44 (1) (a) of the Extradition Act provides that "*The Minister shall refuse to make a surrender order if the Minister is satisfied that (a) the surrender would be unjust or oppressive having regard to all the relevant circumstances.* "

[486]. S.C. 1999, c. 18, available at: https://qweri.lexum.com/w/calegis/sc-1999-c-18-en#!fragment/Short_Title__658/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoBlEPUgfXwEtSAbQ22gNgFYAOASgA0ybKUIQAiokK4AntADk8gRDi5szZgGEkaaAEJkywmFwJJ0uYqMmEFGgCE5AJQCiAGRcA1AIIA5TS4CpGAARtCk2HB8fEA

[487]. *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, judgment dated 8.9.2017, Supreme Court of Canada, para.13, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16771/index.do

entitled to presume that the Indian authorities would honour any assurances they provided, including an assurance regarding the death penalty — and he made the surrender order contingent on receiving such an assurance".[488]

As for Mr. Badesha's right to a fair trial, the Minister was satisfied that, while there were ongoing concerns with respect to corruption and intimidation in India, there was no information before him to suggest that Mr. Badesha would be subjected to these abuses. In the absence of evidence to the contrary, he was entitled to assume that Mr. Badesha would receive a fair trial in India and that his surrender would not violate the principles of fundamental justice on this basis. However, as a precautionary measure, the Minister made his surrender order conditional upon India providing an assurance that it would allow Canadian officials to attend the court proceedings on request.[489]

With respect to prison conditions in India, the Minister noted that the Ministry of External Affairs of India ("MEA") had advised Canada that the treatment and safety of inmates in prisons in Punjab, the region in which Mr. Badesha would be incarcerated, was governed by the *Punjab Jail Manual*. Under the terms of the *Manual*, medical officers are required to make frequent visits to the prisons, are on-call 24 hours a day, and are obliged to take such measures as are necessary for the maintenance of the prison and the health of inmates. The MEA further indicated to the Minister that prisons have modern equipment to provide medical treatment and that specialist doctors visit the jails to see and treat inmates.[490]

Mr. Badesha and Ms. Sidhu applied for judicial review of the Minister's decision to the British Columbia Court of Appeal in 2016. By a majority, the court concluded that it was unreasonable for the Minister to find that surrendering Mr. Badesha and Ms. Sidhu would not be unjust or oppressive in the circumstances.

While recognizing that the Minister's decision was subject to a standard of reasonableness, the majority maintained that for the Minister to reasonably accept diplomatic assurances from a requesting state, the assurances had to "*address meaningfully the risks that they are intended to mitigate*".[491]

488. Ibid

489. Ibid

490. Ibid

491. Ibid

Accordingly, the Court ordered that the Minister's decision be set aside and that the matter be remitted to the Minister for further consideration.[492] The Court of Appeal, therefore, concluded that the Minister's orders were unreasonable and set them aside.

The Attorney General of Canada appealed to Canada's highest court after the surrender order was struck down by the British Columbia appellate court in 2016.

After hearing the appeal, Canada's Supreme Court on 8 September 2017 restored the surrender orders of the Minister and ruled that two of its citizens can be extradited to India to face trial.[493]

The Supreme Court judgment read:

> "*In this case, the Minister was satisfied that, based on the assurances he received from India regarding their treatment, B and S would not face a substantial risk of torture or mistreatment. The Minister took into account relevant factors in assessing the reliability of the assurances, which formed a reasonable basis for the Minister's conclusion that their surrenders would not violate the principles of fundamental justice. The inquiry for the reviewing court is not whether there is no possibility of torture or mistreatment, but whether it was reasonable for the Minister to conclude that there was no substantial risk of torture or mistreatment. Given the circumstances, the Minister's decision to order the surrenders of B and S fell within a range of reasonable outcomes*".[494]

The majority also noted that there was a "valid basis for concern" that Mr. Badesha and Ms. Sidhu would be subjected to violence, torture or neglect in India if surrendered.

In a dramatic turn of events, their extradition was halted even as they have boarded the plane to India as the Court of Appeal had stayed the surrender order after their lawyer had filed a last minute application for a judicial review. Sidhu and Badesha had already travelled from Maple Ridge to Vancouver and then flown to Toronto. But while they were waiting for a connecting flight to India, they learned the B.C. Court of Appeal

[492]. Canada extradites two citizens to India over 2000 honour killing incident, The New Indian Express, 9 September 2017, http://www.newindianexpress.com/world/2017/sep/09/canada-extradites-two-citizens-to-india-over-2000-honour-killing-incident-1654618.html

[493]. *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, judgment dated 8.9.2017, Supreme Court of Canada.

[494]. Ibid.

had accepted their judicial review request, halting the extradition.[495] They were reportedly asked to alight just before the plane was to take off.

A three-member Punjab police team which had gone to Canada to bring back the accused persons had to return back empty handed. It has been reported that the Canadian Department of Justice had not provided a clear road map on how long it would take to decide the review petition filed before it.[496]

Lawyers for the accused alleged that the Canadian government "secretly" conspired with India to 'secretly' extradite the duo even before their legal options had been exhausted and without regard for new evidence[497], terming it a 'clear abuse of process".[498]

Badesha's lawyer, Michael Klein stated that he requested the judicial review after receiving new and relevant information. In October 2017, an application has been filed in court asking that the 2014 extradition surrender order for Malkit Kaur Sidhu be set aside permanently on the ground that the requesting state, India, had tried to remove Sidhu before her legal rights had been exhausted and therefore, violated her rights.[499]

Case 10: Judgments of the UK Courts on the extradition of Sanjeev Chawla (2017)

A request was made by India to the UK authorities for the extradition of Sanjeev Kumar Chawla in order to prosecute him for his role in the fixing of cricket matches played between India and South Africa during the tour of the South African Cricket Team to India under the captainship of Hansie Cronje in February-March 2000.

495. Extradition halted at last minute for pair accused in 'honour' killing in India, CTV News, 22 September 2017, https://www.ctvnews.ca/canada/extradition-halted-at-last-minute-for-pair-accused-in-honour-killing-in-india-1.3601471

496. Jassi Case: Punjab Police team to return tomorrow as extradition fails, The Tribune, 24 September 2017, https://www.tribuneindia.com/news/punjab/jassi-case-punjab-police-team-to-return-tomorrow-as-extradition-fails/471738.html

497. Canada worked with India in attempt to 'secretly' extradite honour killing suspects: defence lawyers, National Post, 10 January, 2018, https://nationalpost.com/news/canada/canada-worked-with-india-in-attempt-to-secretly-remove-honour-killing-suspects-defence-lawyers

498. Canada worked with India in attempt to 'secretly' extradite honour killing suspects: defence lawyers, National Post, 10 January, 2018, https://nationalpost.com/news/canada/canada-worked-with-india-in-attempt-to-secretly-remove-honour-killing-suspects-defence-lawyers

499. B.C. pair accused in 'honour killing' want extradition set aside permanently, Surrey-Now Leader, 11 January 2018, https://www.surreynowleader.com/news/application-sought-to-set-aside-extradition-permanently/

It was alleged that Chawla was introduced to Hansie Cronje, the South African cricket team captain, in January/February 2000. It was suggested to Hansie Cronje, by Chawla and another, that he could make significant amounts of money if he agreed to lose cricket matches. Money was paid to Hansie Cronje at the time of the pending South African tour to India. The tour took place in February/March 2000, and it was alleged that Chawla, Hansie Cronje and others conspired to fix cricket matches in exchange for payment wherein Chawla played a central role, including direct contact with Hansie Cronje.

According to court documents in the Chawla extradition case, the Delhi-born businessman had moved to the UK on a business visa in 1996, where he has been based while making trips back and forth to India. After his Indian passport was revoked in 2000, the 50-year-old obtained a UK passport in 2005 and is now a British citizen.

On 18.05.2015 Bhisham Singh, Deputy Commissioner of Police, Crime Branch (South), Delhi Police, swore an affidavit setting out the details of the allegation and the extradition request. The request was made by the Indian authorities on 01.02.16 following which a warrant was issued at Westminster Magistrates' Court on 17.05.17. Chawla was arrested on the warrant on 14.06.16 and first appeared before Westminster Magistrates' Court on 14.06.16 and was granted bail. Chawla didn't consent to his extradition and hence proceedings were formally opened.

Chawla's main defence was that the conditions of the prison, where he would be kept during his trial and after any conviction, were not compatible with Article 3 of ECHR that states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

The district judge had also dismissed Chawla's objections to his extradition on the ground of 'passage of time'[500] (over 15 years elapsed since the

[500]. Section 79(l)(c) of Extradition Act 2003 requires the judge to decide whether the RP's extradition is barred by reason of the passage of time. Section 82 of Extradition Act 2003 provides that a person's extradition is barred by reason of the passage of time if (and only if) it appears it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence .

alleged crime in India) and 'right to family life' [501] (he has been living in the UK with his family i.e. with wife and two sons since 1996).

Based on the evidence provided by the Judicial Authority, in 4 bundles labeled Requests 1-4 with annexures A-W2 and the affidavit of Bhisham Singh, the Deputy Commissioner of Police, dated 18.05.15, which contained a very detailed summary of the evidence, the Judge was satisfied that there was a prima facie case against Chawla over his role in the fixing of cricket matches played between India and South Africa during the tour of the South African Cricket Team to India under the captainship of Hansie Cronje in February-March 2000.

Dr Alan Mitchell gave expert evidence in relation to Indian prison conditions before the Court. He is a licensed medical practitioner, medical officer at a Scottish prisons 1996-1998, Medical Advisor and Head of Healthcare within the Scottish Prison Service 1998-2002, Clinical Director at NHS Great Glasgow & Clyde until his retirement in January 2017, Visiting General Medical Practitioner at an Immigration Removal Centre, Member of the Scottish Human Rights Commission since 2015, expert with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ['CPT'] since 2002 for whom he has visited numerous prisons in Europe, instructed on behalf of the United Arab Emirates to inspect a prison, and inspected prisons in Russian and Kuwait.

The Indian authorities refused a request for him to visit the Tihar prison complex. He prepared two reports, dated 13.11.16 and 26.02.17 based on documentations such as i) 'Torture in India'- report by Asian Centre for Human Rights- 2011, ii) Report of Judge Senthikumaresan, City Civil Court (Chennai) - 14.08.15;, iii) Supreme Court of India, Writ Petition (Civil), Re: Inhuman Conditions in 1382 Prisons- order of Madan B. Lokur J.-dated 05.02.16; and various other media reports.[502]

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[501]. Article 8 of the European Convention on Human Rights provides:

a) Everyone has the right to respect for his private and family life, his home and his correspondence.

b) There shall be no interference by a public authority with the exercise of this right except in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well4 being of the country, for the prevention of crime or disorder, for the protection of public morals or for the protection of the rights and freedoms of others.

[502]. India versus Sanjeev Kumar Chawla, IN THE WESTMINSTER MAGISTRATES' COURT, judgment dated 16.10.2017, para.37, available at https://www.matrixlaw.co.uk/wp-content/uploads/2017/10/Chawla-v-India.pdf

Bases on the expert evidence from Dr Alan Mitchell the Judge ruled in favour of Chawla on the grounds that his human rights would be violated in Tihar jail under Section 87, Article 3, relating to "prohibition of torture or inhuman or degrading treatment".

The Judge observed that,

> "*The level of occupation at Tihar prison shows severe overcrowding. Given Dr Mitchell's expertise, I accept his opinion that the level of overcrowding alone is sufficient to consider that there is a real risk of the RP 's article 3 rights being breached if he is held in the Tihar complex*", and that reports by the "*Asian Centre for Human Rights Report-2011, Commonwealth Report-2009, Amnesty International Report- 2015/ 2016, Human Rights Watch Report dated 19.12.16 paint a picture of a prison system where ill treatment and torture are widespread . There is a failure to reform the system and a lack of accountability. The problems have persisted for many years and there is no sign of improvement. Although different areas have their own rules, there is nothing to indicate that Delhi differs from the rest of the country*".

The Judge concluded his finding as thus:

> "*I am not satisfied that there is an effective system of protection against torture in the receiving state. Whilst the Supreme Court in India has raised concerns about prison conditions in a number of decisions, the court has found that little has changed in practice and overcrowding remains a problem. The evidence from the NGO reports, Home Office report and US report is that the monitoring systems which exist in India are not effective in practice. There is no international independent monitoring of the prisons*".[503]

Given the finding that there are substantial grounds for believing that the Chawla's Article 3 rights would be breached if he is detained in the Tihar prison complex, the court deliberated on the question as to whether and if the assurance provided by the Indian authorities is sufficient to meet those concerns. On assurances provided by India, the Court was of the view that the nature of the assurances was general and there was *lack of an effective system of protection, and therefore the assurance is insufficient in its current form to ensure that the risk to the Article 3 rights of the RP are mitigated*.[504]

[503]. Ibid

[504]. Ibid

After considering the documentary evidence placed before the Court, along with the submissions made on behalf of both parties, the District Judge (MC) Rebecca Crane discharged the RP under section 87 of the Extradition Act 2003 on 16.10.17.

In a significant development, the UK High Court on 16 November, 2018 quashed the lower court's order against extraditing Sanjeev Chawla to India and directed the District Judge to re-start extradition proceedings against him after the Court has accepted the assurances given by India regarding the condition of Tihar jail.[505]

The lower court will now re-start extradition proceedings against Chawla. The judgment by Lord Justice Leggatt and Mr. Justice Dingemans at the Royal Courts of Justice stated that new assurances provided by India showed there was "*no real risk that Mr. Chawla will be subjected to impermissible treatment in Tihar prisons*".[506]

The judges noted that a third assurance, provided by the Joint Secretary to the Government of India in June, promises the accused of accommodation in a cell to be occupied exclusively by him, with proper "safety and security" and complying with the "personal space and hygiene requirements" the court expects.[507]

"*In these circumstances, having regard to all of the information available to this Court about Tihar prisons, the terms of the third assurance (which was not before the District Judge) are sufficient to show that there will be no real risk that Mr Chawla will be subjected to impermissible treatment in Tihar prisons,"* the High Court judgment concluded.[508]

In the light of the high court ruling, the magistrate's court will now set a date to hear the case.

Mr Chawla can appeal the decision of the High Court before the Supreme Court of the UK and thereafter, before the European Court of Human Rights.

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505. UK Court Accepts Assurances About Indian Prisons in Sanjeev Chawla Extradition Case, The Wire, 16 November 2018, https://thewire.in/law/indian-prison-fine-says-british-court-extradition-case-bookie-sanjeev-chawla

506. Victory for India in Sanjeev Chawla case, The Hindu, 17 November 2018, https://www.thehindu.com/news/national/victory-for-india-in-sanjeev-chawla-case/article25520612.ece

507. Extradition of alleged bookie Chawla: UK court rules no 'real risk' in Tihar Jail, The Week, 16 November 2018, https://www.theweek.in/news/sports/2018/11/16/Extradition-of-alleged-bookie-Chawla-UK-court-rules-no-real-risk-in-Tihar-Jail.html

508. Ibid

5. Status of 'substantial grounds for believing the danger of being subjected to torture' in India

India's human rights record is subject to scrutiny by the foreign courts, the UN Human Rights Committee and the UN Committee Against Torture whenever it sought extradition of fugitive criminals. India's key extradition requests have been rejected so far due to existence of substantial grounds for believing the danger of being subjected to torture' in India on extradition and absence of national law against torture and non-ratification of the UNCAT.

Despite rejection of India's key extradition requests for major terror offences and economic offenders, there is no improvement on the ground to mitigate the substantial grounds for believing the danger of being subjected to torture' in India.

5.1 Prevalence of torture in India: NHRC data highlight the scale of torture and the risks of torture

Nothing exemplifies the rampant use of torture in India than the staggering number of custodial deaths in India. The same is stated by the Government of India.

On 14 March 2018, Minister of State for Home Affairs Shri Hansraj Gangaram Ahir while replying to Unstarred Question No. 2135 informed the Rajya Sabha that the NHRC registered a total of 1,674 cases of custodial deaths including 1,530 deaths in judicial custody and 144 deaths in police custody from 1 April 2017 to 28 February 2018. This implies 1,674 deaths in 334 days (11 months) i.e. over five deaths in custody per day.[509]

During this period (1 April 2017- 28 February 2018), the highest number of custodial deaths took place in Uttar Pradesh (374) followed by Maharashtra (137), West Bengal (132), Punjab (128), Madhya Pradesh (113), Bihar (109), Rajasthan (89), Tamil Nadu (76), Gujarat (61), Odisha (56), Jharkhand (55), Chhattisgarh (54), Haryana (48), Delhi (47), Assam (37), Andhra Pradesh (35), Uttarakhand and Telangana (17 each), Karnataka (15), Himachal Pradesh (8), Arunachal Pradesh and Tripura (6 each), Jammu & Kashmir and Meghalaya (4 each), Mizoram (3), Manipur, Chandigarh, Sikkim and Nagaland (2 each). The States and Union Territories where no custodial death took place are

[509]. Response of Minister of State for Home Affairs Hansraj Gangaram Ahir to Unstarred Question No. 21351 in Rajya Sabha on 14 March 2018, https://mha.gov.in/MHA1/Par2017/pdfs/par2018-pdfs/ls-14032018/2135.pdf

Goa, Dadra & Nagar Haveli, Andaman & Nicobar, Daman & Diu, Lakshadweep, and Puducherry.

The custodial death of five persons per day during 2017-2018 is a significant increase from the custodial death of four persons per day during 2001 to 2010.Tthe National Human Rights Commission recorded 14,231 i.e. 4.33 persons died in police and judicial custody in India during 2001 to 2010,. This includes 1,504 deaths in police custody and 12,727 deaths in judicial custody from 2001- 2002 to 2009-2010. A large majority of these deaths are a direct consequence of torture in custody. These deaths reflect only a fraction of the problem with torture and custodial deaths in India. Not all the cases of deaths in police and prison custody are reported to the NHRC. The NHRC does not have jurisdiction over the armed forces under Section 19 of the Human Rights Protection Act. Further, the NHRC does not record statistics of torture not resulting into death. Torture remains endemic, institutionalised and central to the administration of justice and counter-terrorism measures.[510]

There is no count of cases of torture not resulting into death. The United Nations' Special Rapporteur on torture had described the practice of torture upon those in police custody as "endemic". Indian security and police forces continue to use torture, notably during questioning and in detention centres, especially against suspected terrorists.

5.2 Inhuman and degrading prison conditions: Statements of the Government of India and findings/observations of the Courts

i. Inhuman prison conditions: 149 jails have overcrowding from 200% to 1166.7%

The UN's Standard Minimum Rules for the Treatment of Prisoners requires that prison accommodation shall be mindful of "*minimum floor space, lighting, heating and ventilation*".[511] That despicable detention/prison conditions in India are totally incompatible with human dignity and amount to torture and other cruel, inhuman or degrading treatment or punishment.

[510]. The data of the NHRC was collated by the Asian Centre for Human Rights for the report, *Torture in India 2011*

[511]. Rule 13 of UN's Standard Minimum Rules for the Treatment of Prisoners: All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard 6 UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

These facts are stated by the Government of India, the NHRC and the Supreme Court of India, not to mention about judgments of the various High Courts.

Minister of State in the Ministry of Home Affairs, Government of India Shri Hansraj Gangaram Ahir in his Starred Question No. answered 08 August 2017 before the Lok Sabha stated that 149 jails had an overcrowding rate of from 200% to 1166.7% as on 31.12.2015. The details of such jails as given by the MHA are reproduced below.[512]

Jail-wise and State/UT-wise name, total sanctioned capacity, total actual inmates and overcrowding as on 31.12.2015 as placed by the MHA before the Lok Sabha

Sl. No.	Jail Type	Jail Name	Total Sancti--oned Capacity	Total Immates	Over--crowding Rate
ANDHRA PRADESH*					
	SUB JAIL	Special Sub jail, Tirupathi	120	261	217.5
ASSAM					
	DISTRICT JAIL	District Jail, Hailakandi	58	125	215.5
	DISTRICT JAIL	District Jail, Abhayapuri	50	131	262
BIHAR					
	DISTRICT JAIL	DJ Araria	162	469	289.5
	DISTRICT JAIL	DJ Jamui	188	378	201.1
	DISTRICT JAIL	DJ Madhepura	99	295	298
	DISTRICT JAIL	DJ Nawda	218	488	223.9
	DISTRICT JAIL	DJ Sitamarhi	286	606	211.9
	SUB JAIL	S.J. Barh	167	347	207.8
	SUB JAIL	S.J. Danapur	87	182	209.2
	SUB JAIL	S.J. Patna City	37	97	262.2

[512]. Reply of the Ministry of Home Affairs to Starred Question No. 303 answered on 08.08.2017 before the Lok Sabha available at http://164.100.47.190/loksabhaquestions/annex/12/AS303.pdf

CHHATTISGARH					
	CENTRAL JAIL	Central Jail Raipur	1190	3061	257.2
	CENTRAL JAIL	Central Jail Bilaspur	1028	3167	308.1
	CENTRAL JAIL	Central Jail Ambikapur	1015	2107	207.6
	CENTRAL JAIL	Central Jail Durg	396	1871	472.5
	DISTRICT JAIL	Dist. Jail Mahasamund	170	366	215.3
	DISTRICT JAIL	Dist. Jail Kanker	165	434	263
	DISTRICT JAIL	Dist. Jail Dantewada	150	547	364.7
	DISTRICT JAIL	Dist. Jail Raigarh	225	594	264
	DISTRICT JAIL	Dist. Jail Korba	110	257	233.6
	DISTRICT JAIL	Dist. Jail Janjgir	70	185	264.3
	DISTRICT JAIL	Dist. Jail Rajnandgaon	156	326	209
	DISTRICT JAIL	Dist. Jail Kabirdham	50	153	306
	SUB JAIL	Sub Jail Sarangarh	50	111	222
	SUB JAIL	Sub Jail Ramanujganj	210	434	206.7
	SUB JAIL	Sub Jail Bemetara	50	190	380
CHHATTISGARH			**7552**	**17662**	233.9
GUJARAT					
	SUB JAIL	Navsari Sub Jail	230	476	207
HARYANA*					
	DISTRICT JAIL	District Jail Sonepat	363	1017	280.2
	DISTRICT JAIL	District Jail Rewari	30	127	423.3
HIMACHAL PRADESH*					
	SUB JAIL	Sub Jail Una	28	60	214.3
	OPEN JAIL	Dharmshala	50	390	780

JAMMU & KASHMIR*					
	DISTRICT JAIL	District Jail Anantnag	70	160	228.6
JHARKHAND					
	DISTRICT JAIL	Dist. Jail Chaibasa	321	1124	350.2
	DISTRICT JAIL	Dist. Jail Saraikela	298	607	203.7
	DISTRICT JAIL	Dist. Jail Latehar	166	460	277.1
	DISTRICT JAIL	Dist. Jail Gumla	215	752	349.8
	DISTRICT JAIL	Dist. Jail Garhwa	198	453	228.8
KARNATAKA*					
	CENTRAL JAIL	Central Jail, Mysore	506	1050	207.5
	DISTRICT JAIL	District Jail, Mangalore	150	393	262
KERALA*					
	SUB JAIL	Sub Jail, Aluva	26	54	207.7
	SUB JAIL	Sub Jail, Tirur	17	48	282.4
	SUB JAIL	Sub Jail, Vadakara	13	52	400
	SUB JAIL	Sub Jail, Koyilandy	20	46	230
	SUB JAIL	Sub Jail, Ernakulam	28	66	235.7
	SPECIAL JAIL	Special Sub Jail, Kottarakkara	50	130	260
	SPECIAL JAIL	Special Sub Jail, Kasargod	28	67	239.3
	SPECIAL JAIL	Special Sub Jail, Palakkad	32	93	290.6
	SPECIAL JAIL	Special Sub Jail, Vythiri	22	46	209.1
	SPECIAL JAIL	Special Sub Jail, Irinjalakkuda	11	77	700
MADHYA PRADESH					
	CENTRAL JAIL	Central Jail Indore	1150	2301	200.1
	CENTRAL JAIL	Central Jail Rewa	696	1436	206.3

	CENTRAL JAIL	Central Jail Satna	384	1378	358.9
	DISTRICT JAIL	District Jail Khandwa	168	563	335.1
	DISTRICT JAIL	District Jail Shahdol	220	570	259.1
	DISTRICT JAIL	District Jail Seoni	132	485	367.4
	DISTRICT JAIL	District Jail Shivpuri	135	340	251.9
	DISTRICT JAIL	District Jail Khargone	100	245	245
	DISTRICT JAIL	District Jail Raisen	100	212	212
	DISTRICT JAIL	District Jail Baidhan	70	372	531.4
	DISTRICT JAIL	District Jail Harda	90	201	223.3
	DISTRICT JAIL	District Jail Dindori	50	124	248
	SUB JAIL	Sub Jail Begamganj	40	91	227.5
	SUB JAIL	Sub Jail Waraseoni	50	113	226
	SUB JAIL	Sub Jail Bagli	50	112	224
	SUB JAIL	Sub Jail Jora	50	104	208
	SUB JAIL	Sub Jail Ambah	50	154	308
	SUB JAIL	Sub Jail Niwari	50	141	282
	SUB JAIL	Sub Jail Beohari	50	121	242
	SUB JAIL	Sub Jail Sujalpur	50	115	230
	SUB JAIL	Sub Jail Lateri	50	106	212
	SUB JAIL	Sub Jail Khurai	90	192	213.3
	SUB JAIL	Sub Jail Barwaha	50	102	204
MAHARASHTRA*					
	CENTRAL JAIL	Mumbai	804	2692	334.8
	CENTRAL JAIL	Thane	1105	2711	245.3
	CENTRAL JAIL	Aurangabad	579	1209	208.8
	DISTRICT JAIL	Kalyan	540	1430	264.8

	DISTRICT JAIL	Alibag	82	190	231.7
	DISTRICT JAIL	Buldhana	101	217	214.9
	DISTRICT JAIL	Beed	161	328	203.7
	DISTRICT JAIL	Nanded	135	361	267.4
	DISTRICT JAIL	Solapur	141	349	247.5
	DISTRICT JAIL	Ahemadnagar	69	166	240.6
	SUB JAIL	Gadhinglaj	6	21	350
	SUB JAIL	Shrirampur	12	25	208.3
	SUB JAIL	Roha	3	35	1166.7
MEGHALAYA*					
	DISTRICT JAIL	District Jail, Shillong	150	391	260.7
ODISHA					
	DISTRICT JAIL	Anguljail	233	495	212.4
	SUB JAIL	Boudh	130	295	226.9
	SUB JAIL	Baragarh	81	166	204.9
	SUB JAIL	Jajpur	133	267	200.8
	SUB JAIL	Jharsuguda	86	255	296.5
	SUB JAIL	Nuapada	48	117	243.8
PUNJAB					
	SUB JAIL	Sub Jail Moga	46	130	282.6
RAJASTHAN*					
	DISTRICT JAIL	Rajasmand	55	165	300
	SUB JAIL	Balotra	28	63	225
	SUB JAIL	Nainwa	10	22	220
	SUB JAIL	Salumber	27	57	211.1
TAMIL NADU*					
	SUB JAIL	Sub Jail Walaja	19	43	226.3
	SUB JAIL	Sub Jail Kallakurichi	18	46	255.6
	SUB JAIL	Sub Jail Tindivanam	29	92	317.2
	SUB JAIL	Sub Jail Sathyamangalam	16	200	1250

	SUB JAIL	Sub Jail Mayiladuthurai	24	68	283.3
UTTAR PRADESH					
	CENTRAL JAIL	C.P. Agra	1050	2169	206.6
	DISTRICT JAIL	D.J. Agra	1015	2119	208.8
	DISTRICT JAIL	D.J. Firozabad	720	1656	230
	DISTRICT JAIL	D.J. Mainpuri	498	1035	207.8
	DISTRICT JAIL	D.J. Mathura	554	1395	251.8
	DISTRICT JAIL	D.J, Aligarh	1088	2718	249.8
	DISTRICT JAIL	D.J. Jhansi	416	1038	249.5
	DISTRICT JAIL	D.J. Lalitpur	100	334	334
	DISTRICT JAIL	D.J. Badaun	529	1747	330.2
	DISTRICT JAIL	D.J. Shahjahanpur	511	1660	324.9
	DISTRICT JAIL	D.J. Moradabad	611	2998	490.7
	DISTRICT JAIL	D.J. Etawah	610	1415	232
	DISTRICT JAIL	D.J. Bulandshaher	890	2172	244
	DISTRICT JAIL	D.J. Ghaziabad	1704	3504	205.6
	DISTRICT JAIL	D.J. Saharanpur	533	1283	240.7
	DISTRICT JAIL	D.J. Muzaffar Nagar	870	2349	270
	DISTRICT JAIL	D.J. Varanasi	747	1610	215.5
	DISTRICT JAIL	D.J. Jaunpur	320	845	264.1
	DISTRICT JAIL	D.J. Mirzapur	332	968	291.6
	DISTRICT JAIL	D.J. Gyanpurr	114	352	308.8

	DISTRICT JAIL	D.J. Banda	567	1317	232.3
	DISTRICT JAIL	D.J. Deoria	533	1219	228.7
	DISTRICT JAIL	D.J. Basti	480	1073	223.5
	DISTRICT JAIL	D.J. Sultanpur	443	924	208.6
	DISTRICT JAIL	D.J. Bahraich	540	1386	256.7
	DISTRICT JAIL	D.J. Azamgarh	320	1057	330.3
	DISTRICT JAIL	D.J. Balia	339	747	220.4
UTTARAKHAND*					
	DISTRICT JAIL	District Jail, Dehradun	580	1181	203.6
	SUB JAIL	Sub Jail, Haldwani	250	843	337.2
WEST BENGAL*					
	DISTRICT JAIL	District Jail, Raiganj	113	304	269
	DISTRICT JAIL	District Jail, Malda	272	727	267.3
	SUB JAIL	Sub Jail, Islampore	50	155	310
	SUB JAIL	Sub Jail, Lalbagh	50	159	318
	SUB JAIL	Sub Jail, Kandi	19	117	615.8
	SUB JAIL	Sub Jail, Jangipur	23	193	839.1
	SUB JAIL	Sub Jail, Contai	39	149	382.1
	SUB JAIL	Sub Jail, Barrackpore	160	331	206.9
	SUB JAIL	Sub Jail, Bongaon	90	594	660
	SUB JAIL	Sub Jail, Basirhat	59	397	672.9
	SUB JAIL	Sub Jail, Ranaghat	61	128	209.8
	SUB JAIL	Sub Jail, Uluberia	53	136	256.6
	SUB JAIL	Sub Jail, Arambagh	15	65	433.3

	SUB JAIL	Sub Jail, Diamond Harbour	62	137	221
DELHI					
	CENTRAL JAIL	Central Jail No.1	565	2230	394.7
	CENTRAL JAIL	Central Jail No.3	740	2361	319.1
	CENTRAL JAIL	Central Jail No.4	740	2722	367.8
	CENTRAL JAIL	Central Jail No.7	350	871	248.9
DELHI			**6250**	**14251**	228

According to provisional figures provided by the government in Rajya Sabha in April 2018, the country's 1,412 jails are crowded to 114% of their capacity, with a count of 4.33 lakh prisoners against a capacity of less than 3.81 lakh until December 31, 2016.[513]

In March 2018, the Supreme Court while hearing a Public Interest Litigation pulled up the state governments and Union territories over the condition of jails, saying that prisoners "*cannot be kept in jail like animals*" after the Amicus Curiae informed that there were a large number of jails where "overcrowding is well above 150% and in one case it is as high as 609%.[514]

That nothing has changed with respect to prison conditions in India is recorded by the Supreme Court judgments.

On 12.4.1984, a prisoner of Central Jail, Bangalore, one Rama Murthy, wrote a letter to the Hon'ble Chief Justice of the Supreme Court making grievance about some jail matters. The Supreme Court turned the letter into a writ petition. On 23 December 1996, the Supreme Court delivered *Ramamurthy v. State of Karnataka*[515] judgment identifying nine major problems which need immediate attention for implementation of prison reforms. The court observed that the present prison system is affected

513. Jails at 14 per cent over capacity, two in three prisoners undertrials, Indian Express, 10 April 2018 available at https://indianexpress.com/article/explained/overcrowding-in-jails-prisos-reforms-tihar-jails-police-ncrb-5130869/

514. SC slams State Govts on 600% overcrowding of Jails: Prisoners cannot be kept in jail like "Animals". Read Order, Latestlaws, 30 March 2018 available at https://www.latestlaws.com/latest-news/sc-slams-state-govts-on-600-overcrowding-of-jails-prisoners-cannot-be-kept-in-jail-like-animals/

515. *Ramamurthy v. State of Karnataka*, judgment dated 23 December, 1996 available at https://indiankanoon.org/doc/748775/

with major problems i.e. overcrowding, delay in trial, torture and ill treatment, neglect of health and hygiene, insufficient food and inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits and management of open air prisons. In this case, the Apex Court had also touched upon the issue of torture and ill-treatment reported in prisons, and observed that:

"There are horror stories in this regard. The cellular jail on Port Blair resounds with the cries of the prisoners who were subject to various forms of torture. This is now being brought home in the Light and Sound programme being organised in that jail, which after Independence has been declared as a national monument. Other jails would also tell similar stories.

Apart from torture, various other physical ill- treatment like putting of fetters, iron bars are generally taken recourse to in jails. Some of these are under the colour of provisions in Jail Manuals. The permissible limits of these methods have been spelt out well in many earlier decisions of this Court to which reference has been already made. We do not propose to repeat".[516]

Almost two decades later, on 13 June 2013 former Chief Justice of Supreme Court of India Mr R.C. Lahoti himself wrote a letter to Chief Justice of India drawing attention to the inhuman conditions prevailing in 1,382 prisons of India. On 5th July 2013 the Supreme Court once again turned the letter into a writ petition and issued notice to the appropriate authorities after obtaining a list from the office of the learned Attorney General.[517]

Deploring prison conditions, the Supreme Court vide judgment on 25 September 2018[518] directed the Government of India to constitute a three member panel on prison reforms to be headed by Justice (Retd.) Roy as chairman and Inspector General of Police, Bureau of Police Research and Development and Director General (Prisons) Tihar Jail, New Delhi as its

[516]. Ibid

[517]. Prisoners, like all human beings, deserve to be treated with dignity; SC issues landmark Guidelines on Prison Reforms by M.A. Rashid, 5 February 2016 available at at: https://www.livelaw.in/prisoners-like-all-human-beings-deserve-to-be-treated-with-dignity-sc-issues-landmark-guidelines-on-prison-reforms/

[518]. Writ Petition (Civil) No. 406 of 2013

Members with 17 Terms of Reference[519] (ToRs) that holistically address the bodywork done on prison conditions and prisoners' rights in India. The Supreme Court further advised the Committee to give its recommendations in respect of the first three Terms of References i.e. Sl. 1 to 3, preferably within a period of three months from the date on which the necessary facilities are provided by the Government of India for functioning of the Committee.

During the hearing on 22 November 2018, the Supreme Court lashed out at the Central government and State governments over pathetic

[519]. (1) review the implementation of the Guidelines contained in the Model Prison Manual 2016 by States and Union Territories (UT's); (2) review the implementation by the States and UTs of the recommendations made by the Parliamentary Committee on Empowerment of Women in its report tabled in the Parliament titled 'Women in Detention and Access to Justice,' and the advisory issued by the Ministry of Home Affairs (MHA) in this regard; (3) review the two training manuals for prison personnel prepared by Bureau of Police Research & Development (BPR&D), 'Training Manual of Basic Course for Prison Officers 2017' and 'Training Manual of Basic Course for Prison Warders 2017'; (4) review the recommendations made in the report of the Ministry of Women and Child Development in collaboration with the National Commission for Women and the National Law University Delhi on 'Women in Prisons'; (5) review the recommendations made in the report of the National Commission for Women on 'Inspection of Prisons/Jails/ Custodial Homes housing Women'; (6) review the implementation by States and UTs of the Guidelines contained in 'Living conditions in Institutions for Children in Conflict with Law' prepared by the Ministry of Women and Child Development (MWCD) and the Model Rules and Procedures prepared by the MWCD under the Juvenile Justice (Care & Protection of Children) Act, 2015 and Juvenile Justice (Care and Protection of Children) Model Rules, 2016; (7) review the status of the implementation of the guidelines and advisories issued by MHA to the States and UTs: (8) give consolidated recommendations based on the above and suggest measures to improve the implementation of the aforementioned guidelines and advisories, subject to budgetary resources available with the States and the UTs; (9) examine the extent of overcrowding in prisons and correctional homes and recommend remedial measures, including an examination of the functioning of Under Trial Review Committees, availability of legal aid and advice, grant of remission, parole and furlough; (10) examine violence in prisons and correctional homes and recommend measures to prevent unnatural deaths and assess the availability of medical facilities in prisons and correctional homes and make recommendations in this regard; (11) assess the availability and inadequacy of staff in prisons and correctional homes and recommend remedial measures; (12) suggest training and educational modules for the staff in prisons and correctional homes with a view to implement the suggestions; (13) assess the feasibility of establishing Open Prisons, the possibility of and the potential for establishing Open Prisons in different parts of the country and give effect to the recommendations; (14) recommend steps for the psycho-social well-being of minor children of women prisoners, including their education and health; (15) examine and recommend measures for the health, education, development of skills, rehabilitation and social reintegration of children in Observation Homes, Places of Safety and Special Homes established under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015; (16) any other recommendation that the Committee may deem appropriate, fit and proper in furtherance of reforms in prisons and correctional homes; and (17) give its suggestions, recommendations changes or amendments to various guidelines contained in the Modern Prison Manual, 2016 and also various directives issued by the Government of India

conditions in the jails across the country, saying that everything has been reduced to a "joke". A bench of Justice Madan B. Lokur and Justice Deepak Gupta said: "*Please visit the jails and the observation homes for children to see the condition. Ask your officials to get out of their offices to see the condition in the jails. Taps are not working, toilets are not working. They are all blocked...they are in a pathetic condition. Ask them to have a look, then they will realise the pathetic condition they (prisoners) are living in.*"[520]

The Supreme Court said that the fact that undertrial prisoners accounted for 62% against the world average of 18-20% of the total prisoners raised questions about the humaneness of the system.[521]

The Supreme Court also expressed concern about the facilities given to Justice Amitava Roy, a retired judge of the Supreme Court, who is heading a committee appointed to review the cases of undertrial prisoners. The court has sought details of the infrastructure for the committee.[522]

The Supreme Court also registered a *suo motu* case[523] with respect of pathetic conditions in a jail and observation home in Haryana's Faridabad city as personally found by Justice Adarsh Kumar Goel and Justice U U Lalit of the Supreme Court of India during a surprise visit to the detention facilities in Faridabad. Invited by the Haryana Legal Services Authority to a function earlier this year, Justices Goel who has retired now and Justice Lalit who is still serving as a Supreme Court Judge had on their own also visited the jail and Observation Home and found the situation was pathetic. Taking cognisance of the findings by the two justices, a bench of former Chief Justice of India Dipak Misra, Justices A M Khanwilkar and D Y Chandrachud had on 13 July 2018 issued directions for taking immediate measures to improve the condition in Faridabad Jail and Observation Home.[524]

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[520]. SC slams Centre, states for 'pathetic condition' in jails, Outlook, 22 November 2018; available at: https://www.outlookindia.com/newsscroll/sc-slams-centre-states-for-pathetic-condition-in-jails/1426207

[521]. Supreme Court slams primeval conditions in jails, observation homes, The Hindu, 22 November 2018; Available at; https://www.thehindu.com/news/national/supreme-court-slams-primeval-conditions-in-jails-observation-homes/article25569788.ece

[522]. Ibid

[523]. Writ Petition (Civil) N0. 749 of 2018

[524]. Justice Goel & Lalit's Visit Set To Improve Condition In Faridabad Jail, Observation Home, Livelaw.com, 13 July 2018; available at: https://www.livelaw.in/justice-goel-lalits-visit-set-to-improve-condition-in-faridabad-jail-observation-home/

i. Emblematic case: Prison conditions in Bihar

There are 58 prisons in Bihar including 5 Central Jails, 31 District Jails, 17 Sub Jails, one Women jail, one Open Jail, and one Special Jail.[525]

As per reply of Minister of State in the Ministry of Home Affairs Shri Hansraj Gangaram Ahir in Rajya Sabha on 21 March 2018, against available capacity of 37,809 inmates in the jails of Bihar, there were 33,102 inmates lodged with occupancy rate of 87.6% as of 31.12.2016.[526] The occupancy rate in 2015 was 75.2%.[527] However, as per a report in *The Times of India* dated 3 January 2018, 27 out of the 57 jails in the state are overcrowded and most of the prisoners are forced to live in unhygienic and inhuman conditions. The report stated that there are more than 25,000 prisoners in these 27 jails against their sanctioned capacity to accommodate around 16,880 inmates only.[528]

In 2015, Justice V.N. Sinha, Judge of Patna High Court and Executive Chairman of the Bihar State Legal Services Authority (BSLSA) commissioned Smita Chakraburtty to inspect all the 58 prisons of Bihar. During her six-month long study, Ms Chakraburtty visited each of the prisons and her inspection reports revealed inhuman conditions of incarceration and custodial violence and torture. She compiled 58 interim reports on each of the prisons in the State and her final report, titled "*Prisons of Bihar: Status Report-2015*",[529] was released on 15 November 2015 by the BSLSA.

The most appalling finding recorded in the report is the near complete absence of medical facilities in the prisons. The final report stated, "*The prisons do not have proper facility of storing medicine, medical store in the prison are ill equipped, medical equipments such as X-Ray machines are dysfunctional, refrigerator for storing medicines are not operational. Medical clinics are usually run by compounders who keep only basic medicines such as paracetemol and some B-Complex vitamins, required medical kits such as pregnancy kits, HIV kits to conduct medical test as mentioned in the Prisoner Health Screening Form is also not available in the prisons. There is a severe shortage of medical staff in prison. Also, lady doctors are only available in around*

525. http://ncrb.gov.in/StatPublications/PSI/Prison2015/TABLE-1.2.pdf

526. Rajya Sabha, Unstarred Question No. 2944

527. http://ncrb.gov.in/StatPublications/PSI/Prison2015/TABLE-2.1.pdf

528. 27 out of 57 jails in state overcrowded, The Times of India, 3 January 2018, https://timesofindia.indiatimes.com/city/patna/27-out-of-57-jails-in-state-overcrowded/articleshow/62342789.cms

529. Bihar State Legal Services Authority, "Prisons of Bihar- Status Report 2015", available at http://bslsa.bih.nic.in/prision-report/bihar-prison-report.pdf

6 out of 58 prisons of the state." It further stated that due to non availability of resident doctors, compounders are incapable of recommending cases to the district hospital. The procedure of sending inmate for medical check-up or treatment, even in emergency cases, to District Hospital was extremely lengthy, leading to inordinate delay which often resulted in loss of life. Even major health conditions failed to receive the required medical attention. One such case was encountered in the Beur Central Prison, where the undertrial prisoner Upender Kumar was lying unconscious, was bleeding and had bedsores, yet the Patna Medical College Hospital did not admit him. There was no facility to treat him in Beur Hospital Ward. More shockingly, there was no arrangement to separate prisoners suffering from the human immunodeficiency virus (HIV) from those suffering from tuberculosis and they were kept in the same ward. If this was the condition of the Beur Jail, which is one of the best equipped prisons located in Patna, one can only shudder to imagine the kind of medical facilities provided in the other 57 prisons which did not have half the facilities provided in Beur Central Jail. She found 102 mentally ill, 26 terminally ill, 23 handicapped, 176 in need of other medical help such as spectacles/hearing aids etc and 4 pregnant prisoners in the jails across the state.

Some of the prisons buildings are over a hundred years old. She stated that colonial era prisons had two problems. First, "The prison architecture being from a colonial era reeks of repression, the objective is punishment of individuals through cadging them, keeping them behind bars. The architecture of these old prisons is intimidating in character. Broadly describing most wards in these prisons resembles gigantic dark pits, huge wards, housing several inmates and very scarce entry of light. Tall lock up gates with thick bars, colossal locks, damp walls, these wards even though of different prisons, situated hundreds of kilometers apart have an identical frightfully depressing aura about them." Second, these British era prisons are in dilapidated state. Mulla Committee Report had suggested back in 1983 that all old prison buildings having outlived their utility should be demolished.[530]

Though in Bihar, overcrowding was not a problem in majority of the prisons but some of them still remained frightfully crowded and inmates in these prisons lived under inhuman conditions. For example, Araria District Prison had a serious problem of overcrowding, especially in the woman ward. The report stated, "*The Woman Ward is a small ward with capacity of 2 inmates. However on the date of inspection 23 inmates, 2 children were lodged there. No crèche. Inmates did not have enough space to sit together*

[530]. Ibid

in the ward leave apart laying down or sleeping. As a practical solution measure the woman ward is not locked up in the night, so the woman sleep in small corridor in front of the ward. What they do during monsoons or during winter remains unknown." She also pointed out the lack of drinking water facility in majority of the prisons and lack of ceiling fans whereas Bihar being a seismic zone, temperature rises to over 45 degree Celsius, coupled with extreme humid conditions. Most prison toilets outside wards were dysfunctional or were too less in number. Under Trial Prisoners were compulsorily forced to work in kitchens without any remuneration which amounted to "a contemporary form of slavery" and unfortunately it is found in full practice in the prisons of Bihar.

The report stated that of the 30,070 prisoners met during the time of inspection, at least 2,978 prisoners (i.e. 10% of the prisoners) did not have lawyers and were in need of legal aid. About 476 prisoners claimed themselves to be juvenile and out of these by conservative estimates over 250 children appeared to be under the age of 16 yrs. Ms. Chakraburtty also documented cases of custodial torture and rape inside the prisons.

Emblematic Case 2: 2000 prisoners death in Uttar Pradesh in the last five years

On 1 November 2018, the National Human Rights Commission has summoned the state chief secretary and the inspector general of police (prisons) of Uttar Pradesh for not responding properly to notices issued by it in respect of deaths of over 2,000 prisoners in the state's overcrowded jails in the past five years. NHRC had directed the two senior officials to appear in person before it on 12 December 2018. In its order, the NHRC stated "*No reports have been submitted by the concerned authorities despite warning of coercive process. In ordinary course the Commission would have issued summons for their personal appearance but one more opportunity is granted to them for submission of requisite reports. Exercising its power given U/S 13 (a) of Protection of Human Rights Act, 1993, the Commission directs that the Inspector General of Prisons, Uttar Pradesh and Chief Secretary, Uttar Pradesh be summoned to appear in person on 12.12.2018 to produce the required information / documents.*"[531]

The deplorable prison conditions admitted by the Government of India and highlighted in the proceedings of the Supreme Court of India do not meet the requirements of the Article 3 of the UNCAT.

[531]. NHRC proceedings dated 11 November 2018 in Case No. 33052/24/48/2017; available at: http://164.100.158.189/oldwebsite/display.asp?fno=33052/24/48/2017

ii. Death sentence as inhuman and degrading punishment

Though India in principle imposes death penalty in the rarest of the rare cases, death penalty is routine and imposed on daily basis. During 2004-2013, a total of 5,054 convicts or an average of 505 convicts per year were sentenced to death by the Sessions Courts in India.[532] The number of death sentences further increased following the enactment of the Criminal Law Amendment Act in 2013 extending death penalty in certain cases of aggravated rape[533] and the Criminal Law Amendment Act in 2018 providing death penalty for child rape[534].

India carried out three executions i.e. Ajmal Kasab[535] on 21 November 2012, Afzal Guru[536] on 9 February 2013 and Yakub Abdul Razak Memon[537] on 15 July 2013.

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532. The State of Death Penalty in India 2013, Asian Centre for Human Rights, February 2015, available at http://www.achrweb.org/info-by-country/india/the-state-of-death-penalty-in-india-2013-discriminatory-treatment-amongst-the-death-row-convicts/

533. Under Section376A of the Criminal Law Amendment Act provides that if a person committing the offence of sexual assault, "inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death".

534. Lok Sabha passes Bill to provide death to child rape convicts, The Economic Times, 30 July 2018 available at https://economictimes.indiatimes.com/news/politics-and-nation/lok-sabha-takes-up-bill-to-provide-death-penalty-to-child-rape-convicts/articleshow/65201070.cms

535. Ajmal Kasab was executed in Pune, Maharashtra on 21 November 2012. Some of the major charges in which Ajmal Kasab was found guilty were: conspiracy to wage war against the Government of India; collecting arms with the intention of waging war against the Government of India; waging and abetting the waging of war against the Government of India; commission of terrorist acts; criminal conspiracy to commit murder; criminal conspiracy, common intention and abetment to commit murder; committing murder of a number of persons; attempt to murder with common intention; criminal conspiracy and abetment; abduction for murder; robbery/dacoity with an attempt to cause death or grievous hurt; and causing explosions punishable under the Explosive Substance Act, 1908.

536. Afzal Guru was executed in Tihar Jail, Delhi on 9 February 2013. The charges against which he was convicted by the designated POTA Court were Sections 121, 121A, 122, Section 120B read with Sections 302 & 307 read with Section 120B of the IPC, sub-Sections (2), (3) & (5) of Section 3 and Section 4(b) of the POTA and Sections 3 & 4 of the Explosive Substances Act, and Section 3(4) of the POTA. See State v Mohd. Afzal And Ors [2003 (3) JCC 1669]

537. Yakub Abdul Razak Memon was executed in Nagpur, Maharashtra on 30 July 2015. The charges in which he was convicted included Section 3(3) of TADA; Section 120-B of IPC; Section 3(3) of TADA; Section 5 of TADA; Section 6 of TADA; and Sections 3 and 4 read with Section 6 of the Explosive Substances Act, 1908. See Yakub Abdul Razak Memon vs State Of Maharashtra

However, Section 34C of the Extradition Act of 1962 provides for provision of life imprisonment for death penalty where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for a death penalty for such an offence.

As stated earlier, in the Extradition Treaties with India, a number of countries such as Azerbaijan, the UK, the United States, Canada, Australia, France, Germany, Spain, Turkey, Russia, Philippines, Mexico, Iran, Indonesia, South Africa, Tajikistan, and Mauritius refused to extradite a person wanted for an offence punishable by death unless the Requesting Party (India) gives assurances that death penalty, if imposed, will not be carried out.

5.3 Absence of national law against torture and non-ratification of the UNCAT: The saga of false promises

India signed the UN Convention Against Torture and other cruel, inhuman degrading treatment or punishment on 14 October 1997. But it failed to ratify the UNCAT as on date.

The ratification of the UNCAT by India and adoption of a national law has been a saga of empty promises – (i) non implementation of the assurance given to the Lok Sabha on 3 May 2000 to ratify the UNCAT; (ii) non implementation of three assurances given to the UN Human Rights Council since 2008 to ratify the UNCAT in 2008, 2012 and 2017; (iii) failure of the Government of India to place two Prevention of Torture Bill drafted by the Parliamentary Select Committee of the Rajya Sabha in December 2010 and the Law Commission of India in October 2017 respectively before the parliament as on date; (iv) non-implementation of the assurance given to the Supreme Court of India during the hearing of the Writ Petition (Civil) No. 738/2016 on 27 November 2017 to act on the Bill drafted by the Law Commission of India; and (v) thwarting two public interest ligations filed before the Kolkata High Court in 2011 and the Supreme Court of India in 2016 respectively for the ratification of the UNCAT and enactment of a domestic law, among others to facilitate extradition of the fugitives.

i. Non implementation of the assurance given to Lok Sabha to ratify the UNCAT

In reply to Unstarred Question No. 5739 dated 03 May 2000 before the Lok Sabha regarding '*Abolition of Torture*', the Government of India stated

that India had not ratified the UN Convention Against Torture because of the need to bring in conformity with the provisions of the Convention is under process. The Government of India gave an assurance that as soon as this process is complete and the necessary amendment of legislation, if found necessary, enacted, the Government would be in a position to ratify the UNCAT.

Over 18 years later, India is yet to ratify the UNCAT.

The Parliamentary Committee on Government Assurances of the ongoing 16th Lok Sabha in its 30th Report submitted to the Lok Sabha on 16.03.2016 while reviewing the assurance of the Ministry of External Affairs dated 03.05.2000 to ratify the UNCAT recommended that the ratification *"be taken to its logical end by amending the relevant status and assurance implemented".*[538] The Parliamentary Committee stated the following:

> *"18. The Committee are perturbed to note that an important Assurance pertaining to 'Abolition of Torture' has been pending for implementation for more than 15 years since May, 2000. A major reason for the delay has been the reported refusal of the nodal Ministry, the Ministry of Home Affairs to accept transfer of this Assurance which is highly deplorable. While explaining the reasons for non-implementation of the Assurance for such a long period of time, the Ministry of External Affairs stated that the key issue regarding ratification of UN Convention against Torture has been the requirement of aligning the country's domestic laws with the provisions of the Convention. After intensive discussion involving various Ministries/Departments of Government of India, it was decided in January, 2008 to have a separate stand alone legislation to give effort to the provisions of the Convention. The Committee, however, find that a draft bill in this regard, namely, the Prevention of Torture Bill, 2010 was introduced in the Lok Sabha only on 26 April, 2010, about 10 years after the Assurance was made. Even though the bill was passed by the Lok Sabha, it was pending in the Rajya Sabha. Subsequently, the Bill was lapsed on the dissolution of the 15th Lok Sabha. The Committee have been informed that the Ministry of Home Affairs has instead proposed to bring suitable amendments in the existing sections of the IPC and CrPC for strengthening the provisions relating to the offence of torture by the public servants. Consequently, a Draft Cabinet Note containing amongst other things the proposal to amend*

[538]. Committee on Government Assurances (2015-2016), Sixteenth Lok Sabha ,Thirtieth Report Review of Pending Assurances Pertaining to the Ministry of External Affairs presented to Lok Sabha on 16 March 2016 available at http://164.100.47.193/lsscommittee/Government%20Assurances/16_Government_Assurances_30.pdf

relevant Sections e.g. Sections 330 and 331 of the IPC pertaining to torture has been sent by the Ministry of Home Affairs to the Legislative Department, Ministry of Law and justice for drawing the draft Amendment Bill which is awaited. However, during evidence, the representative of the Ministry of Home Affairs insisted that he was not aware of this matter. Interestingly, the representative of the Legislative Department submitted that they have prepared the draft Bill and the same would be ready after some clarifications by the Ministry of Home Affairs. The entire sequence of events clearly indicate glaring lack of seriousness and coordination amongst the Ministers of External Affairs, Home Affairs and the Legislative Department as well as utter disregard for the Assurance given on the floor of the House by the Ministry of Home Affairs. The Committee feel that 15 years is too long a period to be wasted when the country earnestly needed to honour the universal human rights norms so as to enhance its prestige, image and status abroad as an emerging world power. The committee, therefore, desire that responsibility should be fixed on all the officials concerned especially in the nodal Ministry of Home Affairs for not taking prompt action to implement the Assurance resulting in a delay of more than 15 years. Since there is no place for organised torture in the modern civilised world and the country needs to occupy an exalted position in the changing world order by ratifying the UN Convention, the Committee recommend that the matter be taken to its logical end by amending the relevant status and assurance implemented."

While providing oral evidence to the Parliamentary Committee at their sittings held on 21 July, 2015 and 31 August, 2015, India's Foreign Secretary on the non-implementation of the assurance given to ratify the UNCAT India's Foreign Secretary stated, "*I completely accept the Hon'ble Member's point that if after 15 years, an Assurance is pending, it does not reflect well on the Government and on my Ministry. I readily admit that point*".[539]

ii. Non implementation of three assurances given to the UN Human Rights Council

The Government of India has as on date failed to implement three assurances it gave to the UN Human Rights Council under the Universal Periodic Review (UPR) of India's human rights record on the ratification of the UNCAT since 2008.

[539]. Committee on Government Assurances (2015-2016), Sixteenth Lok Sabha ,Thirtieth Report Review of Pending Assurances Pertaining to the Ministry of External Affairs presented to Lok Sabha on 16 March 2016 available at http://164.100.47.193/lsscommittee/Government%20Assurances/16_Government_Assurances_30.pdf

During the first UPR held on 10 April 2008, the UN Human Rights Council recommended India to "expedite ratification of the Convention against Torture". India accepted the recommendation and stated that "the ratification of the Convention against Torture is being processed by Government of India".[540] However, no measure was taken by India to ratify the UNCAT till the second UPR.

During the Second UPR held on 24 May 2012, the UN Human Rights Council once again recommended India to "finalise the ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment". India once again accepted the recommendation.[541] However, nothing was done till the third UPR.

During the third UPR on **4 May 2017, the UN Human Rights Council recommended** India to ratify the UNCAT. India once again accepted the recommendation but did precise little to ratify the UNCAT as on date.

Indeed, the number of countries urging India to ratify the UNCAT has also been increasing by each session. During the first UPR on 10 April 2008 only seven countries i.e. United Kingdom, France, Mexico, Nigeria, Italy, Switzerland and Sweden recommended India to ratify the UNCAT.[542] During the second UPR on 24 May 2012, 17 countries i.e. Spain, Sweden, Switzerland, Timor-Leste, UK and Northern Ireland, USA, Australia, Austria, Botswana, Brazil, Czech Republic, Indonesia, Iraq, Italy, Maldives, Portugal and Republic of Korea recommended India to finalise the ratification of the UNCAT.[543] During the 3rd UPR on 17 May 2017, as many as 33 countries from all the regions made 22 individual and joint recommendations to India during the third UPR to ratify the UNCAT.

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[540]. UN Human Rights Council, UNIVERSAL PERIODIC REVIEW Report of the Working Group on the Universal Periodic Review India Addendum Response of the Government of India to the recommendations made by delegations during the Universal Periodic Review of India, A/HRC/8/26/Add.1 25 August 2008

[541]. UN Human Rights Council, Report of the Working Group on the Universal Periodic Review* India Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/21/10/Add.1, 17 September 2012 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/167/57/PDF/G1216757.pdf?OpenElement

[542]. UN Human Rights Council Document No. A/HRC/8/26/Add.1 dated 25 August 2008 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/161/58/PDF/G0816158.pdf?OpenElement

[543]. UN Human Rights Council Document No. A/HRC/21/10/Add.1 dated 17 September 2012 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/167/57/PDF/G1216757.pdf?OpenElement

The recommendations made at the third UPR reproduced below to show the growing concerns and frustration of the member States of the United Nations with India's failure to ratify the UNCAT:

> 161.5 Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as previously recommended (Botswana);
>
> 161.6 Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment urgently and in accordance with its commitments from the 2012 universal periodic review (Norway);
>
> 161.7 Ratify, before the next universal periodic review cycle, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Czechia);
>
> 161.8 Finalize the efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as other international instruments, as recommended by relevant treaty bodies (Bulgaria);
>
> 161.9 Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Greece) (Guatemala) (Italy) (Lebanon) (Montenegro) (Mozambique) (South Africa) (Sweden) (Turkey) (Ukraine) (United States of America);
>
> 161.10 Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Portugal);
>
> 161.11 Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and ensure that the instrument of ratification is consistent with the Convention (Australia);
>
> 161.12 Swiftly ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, ensure that domestic legislation defines torture

in line with international standards, and extend an invitation to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for an official visit to the country (Germany);

161.13 Proceed with early ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the International Convention for the Protection of All Persons from Enforced Disappearance (Japan);

161.14 Ratify the Convention against Torture as soon as possible and further, ratify the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182) of the International Labour Organization and the Optional Protocols to Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Civil and Political Rights and abolish the death penalty as recommended by the Law Commission of India (Ireland);

161.15 Finalize the process of ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance (Kazakhstan);

161.16 Redouble its efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Republic of Korea);

161.17 Speed up the process for the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Israel);

161.18 Advance towards the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Chile);

161.19 Consider completing the process of ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Burkina Faso);

161.20 Complete the process of preparation for the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Russian Federation);

161.21 Intensify efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Denmark);

161.22 Strengthen national efforts towards the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Indonesia);

161.23 Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol and swiftly move ahead with the Prevention of Torture Bill (Estonia);

161.24 Enact the Prevention of Torture Bill currently pending in the parliament in compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Turkey);

161.25 Adopt the draft law on the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment by complying with established international norms (Madagascar);

161.26 Adopt the draft law on the prevention of torture and ensure that it complies with the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Senegal);

161.27 Consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Uruguay)[544]

iii. Failure to place two Draft Prevention of Torture Bills before the parliament

The ratification of the UNCAT requires changes in domestic law. Article 4 of the UNCAT requires adoption of a domestic law to criminalise all acts of torture, attempt to commit torture and complicity or participation in torture. Article 5(1) of the UNCAT further requires development of law "*to establish its jurisdiction over the offences referred to in article 4*" when (a) the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) the alleged offender

[544]. UN Human Rights Council, Report of the Working Group on the Universal Periodic Review* India Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/36/10/Add.1, 6 September 2017

is a national of that State; (c) the victim is a national of that State if that State considers it appropriate. Article 5(2) of the UNCAT requires development of universal jurisdiction and prohibit extradition of offender of torture.

The government of India has so far failed to place two Prevention of Torture Bills drafted by the Select Committee of the Rajya Sabha in December 2010 and the Law Commission of India in October 2017.

The Ministry of External Affairs told the Parliamentary Committee on Government Assurances in August 2015, "*The key issue regarding ratification of UN Convention Against Torture has been the requirement of aligning our domestic laws with the provisions of the Convention. After intensive discussions involving various Ministries/ Department of Government of India, it was decided in January, 2008 to have a separate 'stand-alone legislation' to give effect to the provisions of the Convention. As noted in the adjoining column, this 'stand-alone legislation' has since been introduced in the Parliament.*"[545]

The Government of India however had informed the Rajya Sabha in May 2015 that "*a proposal to suitably amend Section 330 and section 331 of the Indian Penal Code is currently under examination.*"[546] It was clear that India was not in favour of a stand-alone legislation.

In September 2016, the Supreme Court issued notice to the Union of India on a Writ Petition filed by former Chairman of the Rajya Sabha Select Committee on the Prevention of Torture Bill, 2010 Dr. Ashwini Kumar seeking directions for a legal framework and proper guidelines in terms of the UNCAT. Pursuant to the petition filed by Dr Kumar, the Central Government vide its letter dated 8th July, 2017 asked the Law Commission to examine the issue of ratification of UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and submit a report on the matter. On 30th October 2017, the Law Commission of India submitted the draft Prevention of Torture Bill recommending "stand alone legislation". The PIL was disposed off on 27 November 2017 after the Attorney General informed that the report of the Law Commission is being seriously considered by the Government of India.[547]

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[545]. Committee on Government Assurances (2015-2016), Sixteenth Lok Sabha ,Thirtieth Report Review of Pending Assurances Pertaining to the Ministry of External Affairs presented to Lok Sabha on 16 March 2016 available at http://164.100.47.193/lsscommittee/Government%20Assurances/16_Government_Assurances_30.pdf

[546]. Reply of Ministry of Home Affairs, Government of India before Rajya Sabha to Starred Question No.194 answered on 13.05.2015.

[547]. Orders of the Supreme Court in PIL No. 738/2018 in Ashwini Kumar Vs Union of India.

The Government has not placed the Prevention of Torture Bill, 2017 drafted by the Law Commission of India before the parliament as yet. The reference to the Law Commission of India while the Bill drafted by the Rajya Sabha Select Committee was already available with the Government was an attempt to weaken the Bill drafted by the Rajya Sabha Select Committee, push for amendments of the Indian Penal Code to criminalise torture instead of enacting a stand-alone legislation on torture, and indeed further delay ratification of the UNCAT.

iv. Circumventing two Public Interest Litigations to ratify the UNCAT

Two public interest litigations have been filed seeking interventions of the courts to ratify the UNCAT.

The first PIL was filed in September 2011 before the Kolkata High Court which issued notices to the Ministry of Home Affairs and the CBI seeking details about the actions taken by the Government of India to ensure Kim Davy's extradition as the Public Interest Litigation pleaded that if the U.N. Convention against Torture had been ratified by the Government of India, it might have been possible to ensure the extradition of Kim Davy.[548] The petition was filed after India's request for extradition of Kim Davy, who is accused of dropping unauthorised arms, including hundreds of AK-47 rifles, anti-tank grenades, pistols, rocket launchers and thousands of rounds of ammunition, from an aircraft in Purulia district of West Bengal on 17 December 1995 was rejected. The Danish government had decided on 9 April 2010 to extradite Kim Davy to India[549] but the Danish High Court in July 2011 rejected the extradition request on the ground that India is not a ratifying party to the United Nations Convention Against Torture and that he could face inhuman and degrading treatment in Indian prisons.[550] The Danish authorities had decided not to appeal the high court judgment in the Supreme Court.[551]

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548. Kim Davy extradition: time sought to file affidavits, The Hindu, 15 September 2011, http://www.thehindu.com/news/national/kim-davy-extradition-time-sought-to-file-affidavits/article2453673.ece

549. Danish court decision on Kim Davy can encourage terrorists: India, The Times of India, 8 July 2011, http://timesofindia.indiatimes.com/india/Danish-court-decision-on-Kim-Davy-can-encourage-terrorists-India/articleshow/9151887.cms?referral=PM

550. Bhaskar Balakrishnan, "Let's mend fences with Denmark", The BusinessLine, 17 June 2013, http://www.thehindubusinessline.com/opinion/columns/bhaskar-balakrishnan/lets-mend-fences-with-denmark/article4823648.ece

551. Danish court decision on Kim Davy can encourage terrorists: India, The Times of India, 8 July 2011, http://timesofindia.indiatimes.com/india/Danish-court-decision-on-Kim-Davy-can-encourage-terrorists-India/articleshow/9151887.cms?referral=PM

The second PIL No. 738/2016 was filed before the Supreme Court of India by former Chairman of the Rajya Sabha Select Committee Dr. Ashwini Kumar seeking directions for a legal framework and proper guidelines in terms of the UNCAT. On 26 September 2016, the Supreme Court issued notice to the Union of India. With respect to this PIL, the Government of India vide its letter dated 8th July, 2017 asked the Law Commission to examine the issue of ratification of UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and submit a report on the matter. On 30th October 2017, the Law Commission of India submitted the draft Prevention of Torture Bill for consideration by the Government of India. On 27 November 2017, the PIL was disposed off[552] but the Government of India has not placed the Bill before the parliament as yet.

[552]. Proceedings of the PIL No.738/2016 as available in the website of the Supreme Court of India.

6. India's diplomatic assurance: Hell for the Desi prisoners and Euro standards for the Europe returnee fugitives

Given the absolute prohibition on extradition where there are substantial grounds for believing the danger of being subjected to torture, India has been seeking to provide diplomatic assurances in specific cases. It provided diplomatic assurances with respect to Tiger Hanif (wanted in connection with two bomb attacks in Gujarat in 1993), Ravi Shankaran (Indian Navy war room leak case) and Vijay Mallya (financial charges).[553] India had provided the assurance not to impose death penalty for the extradition of Abu Salem and Monica Bedi from Portugal.

6.1 India's assurance to improve prison conditions for European returnee fugitives

The fugitives consistently raised India's deplorable prison conditions as the basis of the substantial grounds for believing the danger of being subjected to torture on extradition to India.

During the hearing of Vijay Mallya's extradition in the court of Judge Emma Arbuthnot, Chief Magistrate of London, UK his defence team argued that India's jail cells are unsafe. UK's prisons expert, Dr Alan Mitchell, told Judge Emma Arbuthnot, the chief magistrate of London during the course of the trial that conditions in all Indian jails are "*far from satisfactory*". Mallya's defense team argued that the cell where the financial fugitive would be kept on extradition to India has "*no natural light in the cell and no fresh air*".[554]

The Chief Magistrate's Court asked the Indian authorities to submit within three weeks a video of a cell at Mumbai's Arthur Road Jail where they plan to keep Mallya if he is extradited. The Indian government reportedly sent the video which is said to prove that the cell intended for Mallya

553. Sanjeev Chawla extradition case: India assures UK court on Tihar facilities, Hindustan Times, 6 June, 2018, https://www.hindustantimes.com/india-news/sanjeev-chawla-extradition-case-india-assures-uk-court-on-tihar-facilities/story-8QVLZewphqxq5QKX0zHrSO.html

554. No Natural Light In Mumbai Jail, Said Vijay Mallya. UK Judge Wants Video, NDTV, 31 July, 2018, https://www.ndtv.com/india-news/uk-judge-asks-india-for-video-of-prison-where-vijay-mallya-will-be-kept-1892793

had natural light, is equipped with television set, personal toilet, washing area and bedding.[555]

During the final hearing on 12 September 2018, Mallya's defence team argued that the Indian authorities had done a "*hasty clean up job*" to the prison cell to circumvent the Court's directives on the prison conditions and demanded an inspection of the jail cell to ensure it meets the UK's human rights obligations related to extradition proceedings.[556]

The government of India appears to have taken two steps.

First, two cells in Barrack No 12 of Arthur Road jail were reportedly revamped prior to the shooting of the video by changing the flooring with new tiles, new wall paints and refurbished toilets. This was to comply with the directions of the UK Court to the Indian authorities to submit a "step by step video" of Barrack 12 of Arthur Road Jail over the availability of natural light in the cell where they plan to keep Mallya post-extradition.[557]

Secondly, Mumbai's Arthur Road jail plans to build new cells in a bid to facilitate millionaire expat Vijay Mallya's stay in prison under humane conditions to circumvent legal requirements compliance of their extradition requests. *The Times of India* reported that the jail authorities are planning to demolish a part of the 93-year-old jail to build a dozen of international standard cells and toilets to house fugitive millionaires who often resist deportation citing deplorable conditions in Indian jails.[558] The State's public works department has reportedly started work and received quotations for demolition of the building. The cells having clean, hygienic toilets, enough sun and light and space to move around are expected to be ready in six months.[559]

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[555]. India sends UK court video showing cell meant for Vijay Mallya has natural light, toilet andTV, India Today, 25 August, 2018, https://www.indiatoday.in/india/story/vijay-mallya-extradition-india-sends-uk-court-video-of-mumbai-jail-where-mallya-will-be-held-1322854-2018-08-25

[556]. Vijay Mallya extradition case hearing | Final day of oral submissions — As it happened, The Hindu, 12 September, 2018, 2018, https://www.thehindu.com/news/national/vijay-mallya-extradition-case-live-updates/article24933895.ece

[557]. See Supra Note. 39

[558]. India to build European-style jail cells to bring back fugitives like Vijay Mallya, Nirav Modi, The Economic Times, 31 August, 2018, https://economictimes.indiatimes.com/news/politics-and-nation/india-to-build-european-style-jail-cells-to-bring-back-fugitives-like-vijay-mallyaniravmodi/articleshow/65618120.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[559]. Id

"*The proposal is under serious consideration. We want to build a new structure which will adhere to all human rights standards, and will meet the standards of European and British prisons. We don't want fugitive millionaires, who have duped the country to the tunes of crores of rupees to evade arrest by citing reason of bad prison condition*," a top Maharashtra government official told CNN-News18.[560]

By ensuring/providing humane prison conditions only for affluent individuals under the pressure of foreign Courts India is effectively following the policy that *Desi* prisoners can rot in Indian jails while the European returnee fugitives will be entitled to European standards.

This is unlikely to meet the test of equality guaranteed under Article 14 of the Constitution of India.

6.2 Diplomatic assurance: An exercise in futility?

The diplomatic assurances have been held undesirable by the UN Committee Against Torture. The UN Committee held that "*the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against the manifest risk of torture*".[561]

The UN Committee Against Torture a number of cases already held diplomatic assurances as inadequate for return/extradition. In *Inass Abichou* v *Germany,*[562] the UN Committee rejected refoulement on the ground that "diplomatic assurances cannot be used as a justification for failing to apply the principle of non-refoulement as set forth in article 3 of the Convention"[563] and the diplomatic assurances were obtained was not sufficient grounds for the State party's decision to ignore this obvious risk, especially since none of the guarantees that were provided related specifically to protection against torture or ill-treatment. In *Abdussamatov*

[560]. Soon, Mumbai's Arthur Road Jail to Have European-Style Cells for Fugitive Millionaires Like Mallya, NEWS 18, 31 August, 2018, https://www.news18.com/news/india/mumbais-arthur-jail-to-get-international-standard-cells-for-mallya-like-fugitive-millionaires-%E2%80%8B-1862731.html?ref=hp_top_pos_8

[561]. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para 13.4, available at: http://www.refworld.org/cases,CAT,42ce734a2.html [accessed 13 October 2018]

[562]. Abichou vs Germany, Communications No 430/2010, UN Doc. CAT/C/50/D/430/2010, 21 May 2013

[563]. CAT communication No. 444/2010, *Abdussamatov et al.* v. *Kazakhstan*, decision adopted by the Committed against Torture on 1 June 2012, para. 13.10, available at: http://www.worldcourts.com/cat/eng/decisions/2012.06.01_Abdussamatov_v_Kazakhstan.pdf

et al. v. *Kazakhstan*,[564] the Committee against Torture also held that "*diplomatic assurances cannot be used as an instrument to avoid the application of the principle of nonrefoulement*". Indeed, in *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*[565], the UN Committee against Torture held that the procurement of diplomatic assurances provided no mechanism for their enforcement and did not suffice to "*protect against this manifest risk*."

India is facing credibility crisis on the diplomatic assurances.

The Portugal High Court ordered revocation of the extradition of underworld don Abu Salem accusing Indian probe agencies of violating the conditions under which he was permitted to be taken to India in November 2005 to face trial in eight cases including 1993 Mumbai blasts.[566] After the Portugal High Court cancelled the deportation order, Portugal's Supreme Court of Justice questioned the legal rights of the Indian authorities to challenge the cancellation of the extradition order.[567] Abu Salem's petitions on the issue are pending before the European Court of Human Rights and the judgment shall have far reaching consequences on India's credibility with respect to its diplomatic assurances.

Further, it is pertinent to mention Bachan Singh Sogi who was repatriated was "beaten and subjected to ill-treatment by the local authorities"[568] following extradition in violation of the decisions of the UN Committee Against Torture.

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564. CAT communication No. 444/2010, Decision adopted by the Committee at its forty-eighth session, 7 May-1 June 2012, available at http://www.worldcourts.com/cat/eng/decisions/2012.06.01_Abdussamatov_v_Kazakhstan.pdf

565. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, available at: http://www.refworld.org/cases,CAT,42ce734a2.html [accessed 13 October 2018]

566. Portugal high court terminates Abu Salem's extradition, Rediff.com, 27 September 2011, https://www.rediff.com/news/report/slide-show-1-abu-salem-extradition-terminated-portugal-court/20110927.htm

567. Thanks to extradition treaty with Portugal, Abu Salem escapes the hangman's noose for role in 1993 Mumbai blasts case, The New Indian Express, 7 September 2017, http://www.newindianexpress.com/nation/2017/sep/07/thanks-to-extradition-treaty-with-portugal-abu-salem-escapes-the-hangmans-noose-for-role-in-1993-m-1653790.html

568. *Bachan Singh Sogi v. Canada*, CAT/C/39/D/297/2006, UN Committee Against Torture (CAT), 16 November 2007, available at: http://www.worldcourts.com/cat/eng/decisions/2007.11.16_Bachan_Singh_Sogi_v_Canada.htm

Annexure 1 :

Extradition Act, 1962

THE EXTRADITION ACT, 1962

ARRANGEMENT OF SECTIONS

CHAPTER I

PRELIMINARY

SECTIONS

CHAPTER II

EXTRADITION OF FUGITIVE CRIMINALS TO FOREIGN STATE TO WHICH CHAPTER III DOES NOT APPLY

CHAPTER III

RETURN OF FUGITIVE CRIMINALS TO FOREIGN STATES WITH EXTRADITION ARRANGEMENTS

CHAPTER IV

SURRENDER OR RETURN OF ACCUSED OR CONVICTED PERSONS FROM FOREIGN STATES

SECTIONS

THE EXTRADITION ACT, 1962

ACT NO. 34 OF 1962

[15*th September*, 1962.]

An Act to consolidate and amend the law relating to the extradition of fugitive criminals [1][and to provide for matters connected therewith or incidental thereto.]

BE it enacted by Parliament in the Thirteenth Year of the Republic of India as follows:—

CHAPTER I
PRELIMINARY

1. Short title, extent and commencement.—(*1*) This Act may be called the Extradition Act, 1962.

(*2*) It extends to the whole of India.

(*3*) It shall come into force on such date[2] as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

[3][(*a*) "composite offence" means an act or conduct of a person occurred, wholly or in part, in a foreign State or in india but its effects or Intended effects, taken as a whole, would constitute an extradition offence in India or in a foreign State, as the case may be;]

(*b*) "conviction" and "convicted" do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term "person accused" includes a person so convicted for contumacy;

[4][(*c*) "extradition offence" means—

(*i*) in relation to a foreign State, being a treaty State, an offence provided for in the extradition treaty with that State;

(*ii*) in relation to a foreign State other than a treaty State an offence punishable with imprisonment for a term which shall not be less than one year under the laws of India or of a foreign State and includes a composite offence;]

(*d*) "extradition treaty" means a treaty [5][,agreement or arrangement) made by India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty [5][,agreement or arrangement] relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India;

(*e*) "foreign State" means any State outside India [6]* * * and includes every constituent part, colony or dependency of such State;

[7][(*f*) "fugitive criminal" means a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires,

1. Added by Act 66 of 1993, s. 2 (w.e.f. 18-12-1993).
2. 5th January, 1963, *vide* Notification No. G.S.R. 55, dated 5th January, 1963, *see* Gazette of India, Extraordinary, Part II, sec. 3(*i*).
3. Subs. by Act 66 of 1993, s. 4, for clause (*a*) (w.e.f. 18-12-1993).
4. Subs. by s. 4, *ibid.*, for clause (*c*) (w.e.f.18-12-1993).
5. Subs. by s. 4, *ibid.*, for "or agreement" (w.e.f.18-12-1993).
6. The words "other than a commonwealth country," omitted by s. 4, *ibid.* (w.e.f. 18-12-1993).
7. Subs. by s. 4, *ibid.*, for clause (*f*) (w.e.f. 18-12-1993).

attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign State;]

(*g*) "magistrate" means a magistrate of the first class or a presidency magistrate;

(*h*) "notified order" means an order notified in the Official Gazette;

(*i*) "prescribed" means prescribed by rules made under this Act; and

(*j*) "treaty State" means a foreign State with which an extradition treaty is in operation.

3. Application of Act.—[1][(*1*) The Central Government may, by notified order, direct that the provisions of this Act, other than Chapter III, shall apply, to such foreign State or part thereof as may be specified in the order.]

(*2*) The Central Government may, by the same notified order as is referred to in sub-section (*1*) or any subsequent notified order, restrict such application to fugitive criminals found, or suspected to be, in such part of India as may be specified in the order.

(*3*) Where the notified order relates to a treaty State,—

(*a*) it shall set out in full the extradition treaty with that State ;

(*b*) it shall not remain in force for any period longer than that treaty; and

(*c*) the Central Government may, by the same or any subsequent notified order, render the application of this Act subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the treaty with that State.

[2][(*4*) Where there is no extradition treaty made by India with any foreign State, the Central Government may, by notified order, treat any Convention to which India and a foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offences specified in that Convention.]

CHAPTER II

EXTRADITION OF FUGITIVE CRIMINALS TO FOREIGN STATE [3]* * * TO WHICH CHAPTER III DOES NOT APPLY

4. Requisition for surrender.—A requisition for the surrender of a fugitive criminal of a foreign State [4]* * * may be made to the Central Government—

(*a*) by a diplomatic representative of the foreign State [4]* * * at Delhi; or

(*b*) by the Government of that foreign State [4]* * * communicating with the Central Government through its diplomatic representative in that State [5]***;

and if neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of the foreign State [4]* * * with the Government of India.

5. Order for magisterial Inquiry.—Where such requisition is made, the Central Government may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had been an offence committed within the local limits of his jurisdiction directing him to inquire into the case.

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1. Subs. by Act 66 of 1993, s. 5, for sub-section (*1*) (w.e.f. 18-12-1993).
2. Ins. by s. 5, *ibid.* (w.e.f. 18-12-1993).
3. The words "AND TO COMMONWEALTH COUNTRIES" omitted by s. 6, *ibid.* (w.e.f. 18-12-1993).
4. The words "or commonwealth country" omitted by s. 3, *ibid.* (w.e.f.18-12-1993).
5. The words "or country" omitted by s. 3, *ibid.* (w.e.f. 18-12-1993).

6. Issue of warrant for arrest.— On receipt of an order of the Central Government under section 5, the magistrate shall issue a warrant for the arrest of the fugitive criminal.

7. Procedure before magistrate.—(*1*) When the fugitive criminal appears or is brought before the magistrate, the magistrate shall inquire into the case in the same manner and shall have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a court of session or High Court.

(*2*) Without prejudice to the generality of the foregoing provisions, the magistrate shall, in particular, take such evidence as may be produced in support of the requisition of the foreign State [1]* * * and on behalf of the fugitive criminal, including any evidence to show that the offence of which the fugitive criminal accused or has been convicted is an offence of political character or is not an extradition offence.

(*3*) If the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition of the foreign State [1]* * *, he shall discharge the fugitive criminal.

(*4*) If the Magistrate is of opinion that a *prima facie* case is made out in support of the requisition of the foreign State [1]* * * he may commit the fugitive criminal to prison to await the orders of the Central Government and shall report the result of his inquiry to the Central Government, and shall forward together with such report, and written statement which the fugitive criminal may desire to submit for the consideration of the Central Government.

8. Surrender of fugitive criminal.—If upon receipt of the report and statement under sub-section (*4*) of section 7, the Central Government is of opinion that the fugitive criminal ought to be surrendered to the foreign State [1]* * *, it may issue a warrant for the custody and removal of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant.

9. Power of magistrate to issue warrant of arrest in certain cases.—(*1*) Where it appears to any magistrate that a person within the local limits of his jurisdiction, is a fugitive criminal of a foreign State [1]* * *, he may, if he thinks fit, issue a warrant for the arrest of that person on such information and on such evidence as would, in his opinion, justify the issue of a warrant if the offence of which the person is accused or has been convicted had been committed within the local limits of his jurisdiction.

(*2*) The magistrate shall forthwith report the issue of a warrant under sub-section (*1*) to the Central Government and shall forward the information, and the evidence or certified copies thereof to that Government.

(*3*) A person arrested on a warrant issued under sub-section (*1*) shall not be detained for more than three months unless within that period the magistrate receives from the Central Government an order made with reference to such person under section 5.

10. Receipt in evidence of exhibits depositions and other documents and authentication thereof.—(*1*) In any proceedings against a fugitive criminal of a foreign State [1]* * * under this chapter, exhibits and depositions (whether received or taken in the presence of the person against whom they are used or not) and copies thereof and official certificates of facts and judicial documents stating facts may, if duly authenticated, be received as evidence.

1. The words "or commonwealth country" omitted by Act 66 of 1993, s. 3 (w.e.f. 18-12-1993).

(*2*) Warrants, depositions or statements on oath, which purport to have been issued or taken by any court of Justice outside India or copies thereof, certificates of, or judicial documents stating the facts of conviction before any such court shall be deemed to be duly authenticated if—

(*a*) the warrant purports to be signed by a judge, magistrate or officer of the State [1]* * * where the same was issued or acting in or of such State [1]* * *;

(*b*) the depositions of statements or copies thereof purport to be certified, under the hand of a judge, magistrate or officer of the State [1]* * * where the same were taken, or acting in or for such State [1]* * *, to be original depositions or statements or to be true copies thereof, as the case may require ;

(*c*) the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a judge, magistrate or officer of the State [1]* * * where the conviction took place or acting in or for such State ;

(*d*) the warrants, depositions, statements, copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a Minister of the State [1]* * * where the same were [2]* * * issued, taken or given.

11. Chapter not to apply to Commonwealth countries to which Chapter III applies.— Nothing contained in this Chapter shall apply to fugitive criminals [3]* * * to which Chapter III applies.

CHAPTER III

RETURN OF FUGITIVE CRIMINALS TO [4][FOREIGN STATES] WITH EXTRADITION ARRANGEMENTS

12. Application of Chapter.— (*1*) This Chapter shall apply only to any such [5][foreign state] to which, by reason of an extradition arrangement entered into with that [6][State], it may seem expedient to the Central Government to apply the same.

(*2*) Every such application shall be by notified order, and the Central Government may, by the same or any subsequent notified order, direct that this Chapter and Chapters I, IV and V shall, in relation to any such [5][foreign State], apply subject to such modifications, exceptions, conditions and qualifications as it may think fit to specify in the order for the purpose of implementing the arrangement.

13. Liability of fugitive criminals from foreign States to be apprehended and returned.—Where a fugitive criminal of any [5][foreign State] to which this Chapter applies is found in India, he shall be liable to be apprehended and returned in the manner provided by this Chapter to that [5][foreign State].

14. Endorsed and provisional warrants.—A fugitive criminal may be apprehended in India under an endorsed warrant or a provisional warrant.

15. Endorsed warrant for apprehension of fugitive criminal.—Where a warrant for the apprehension of a fugitive criminal has been issued in any [5][foreign State] to which this Chapter applies and such fugitive criminal is, or is suspected to be, in India, the Central Government may, if satisfied that the warrant was issued by a person having lawful authority to issue the same, endorse such warrant in the manner prescribed, and the warrant so endorsed shall be sufficient authority to apprehend the person named in the warrant and to bring him before and magistrate in India.

1. The words "or country" omitted by Act 66 of 1993, s. 3 (w.e.f. 18-12-1993).
2. The word "respectively" omitted by s. 7, *ibid*. (w.e.f. 18-12-1993).
3. The words "of a commonwealth country" omitted by s. 8, *ibid*. (w.e.f. 18-12-1993).
4. Subs. by s. 9, *ibid*., for "COMMONWEALTH COUNTRIES" (w.e.f. 18-12-1993).
5. Subs. by s. 3, *ibid*., for "commonwealth country" (w.e.f. 18-12-1993).
6. Subs. by s. 10, *ibid*., for "country" (w.e.f. 18-12-1993).

16. Provisional warrant for apprehension of fugitive criminal.—(*1*) Any magistrate may issue a provisional warrant for the apprehension of a fugitive criminal from any [1][foreign State] to which this Chapter applies who is, or is suspected to be, in or on his way to India, on such information and under such circumstances as would, in his opinion, justify the issue of a warrant, if the offence of which the fugitive criminal is accused or has been convicted had been committed within his jurisdiction and such warrant may be executed accordingly.

(*2*) A magistrate issuing a provisional warrant shall forthwith send a report of the issue of the warrant together with the information or a certified copy thereof to the Central Government, and the Central Government may, if it thinks fit, discharge the person apprehended under such warrant.

(*3*) A fugitive criminal apprehended on a provisional warrant may, from time to time, be remanded for such reasonable time, not exceeding seven days at any one time, as under the circumstances seems requisite for the production of an endorsed warrant.

17. Dealing with fugitive criminal when apprehended.—(*1*) If the magistrate, before whom a person apprehended under this Chapter is brought, is satisfied on inquiry that the endorsed warrant for the apprehension of the fugitive criminal is duly authenticated and that the offence of which the person is accused or has been convicted is an extradition offence, the magistrate shall commit the fugitive criminal to prison to await his return and shall forthwith send to the Central Government a certificate of the committal.

(*2*) If on such inquiry the magistrate is of opinion that the endorsed warrant is not duly authenticated or that the offence of which such person is accused or has been convicted is not an extradition offence, the magistrate may, pending the receipt of the orders of the Central Government, detain such person in custody or release him on bail.

(*3*) The magistrate shall report the result of his inquiry to the Central Government and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of that Government.

18. Return of fugitive criminal by warrant.—The Central Government may, at any time after a fugitive criminal has been committed to prison under this Chapter, issue a warrant for the custody and removal to the [1][foreign State] concerned of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant.

CHAPTER IV

SURRENDER OR RETURN OF ACCUSED OR CONVICTED PERSONS FROM FOREIGN STATES [2]* * *

19. Mode of requisition or form of warrant for the surrender or return to India of accused or convicted person who is in a foreign State [3]* * *.—(*1*) A requisition for the surrender of a person accused or convicted of an extradition offence committed in India and who is or is suspected to be, in any foreign State [4]* * * to which Chapter III does not apply, may be made by the Central Government—

(*a*) to a diplomatic representative of that State [5]* * * at Delhi; or

(*b*) to the Government of that State [5]* * * through the diplomatic representative of India in that State [5]* * *;

and if neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of India with that State [5]* * *.

1. Subs. by Act 66 of 1993, s. 3, for "commonwealth country" (w.e.f. 18-12-1993).
2. The words "OR COMMONWEALTH COUNTRIES" omitted by s. 11, *ibid.* (w.e.f. 18-12-1993).
3. The words "or commonwealth country" omitted by s. 3, *ibid.* (w.e.f. 18-12-1993).
4. The words "or a commonwealth country" omitted by s. 3, *ibid.* (w.e.f. 18-12-1993).
5. The words "or country" omitted by s. 3, *ibid.* (w.e.f.18-12-1993).

(*2*) A warrant issued by a magistrate in India for the apprehension of any person who is, or is suspected to be, in any [1][foreign State] to which Chapter III applies shall be in such form as may be prescribed.

20. Conveyance of accused or convicted person surrendered or returned.—Any person accused or convicted of an extradition offence who is surrendered or returned by a foreign State [2]*** may, under the warrant of arrest for his surrender or return issued in such State or country, be brought into India and delivered to the proper authority to be dealt with according to law.

[3][**21. Accused or convicted person surrendered or returned by foreign State not to be tried for certain offences.**—Whenever any person accused or convicted of an offence, which, if committed in India would be an extradition offence, is surrendered or returned by a foreign State, such person shall not, until he has been restored or has had an opportunity of returning to that State, be tried in India for an offence other than—

(*a*) the extradition offence in relation to which he was surrendered or returned; or

(*b*) any lesser offence disclosed by the facts proved for the purposes of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not be lawfully made; or

(*c*) the offence in respect of which the foreign State has given its consent.]

CHAPTER V

MISCELLANEOUS

22. Liability of fugitive criminals to be arrested and surrendered or returned.—Every fugitive criminal of a foreign State [2]* * * shall, subject to the provisions of this Act, be liable to be arrested and surrendered or returned, whether the offence in respect of which the surrender or return is sought was committed before or after the commencement of this Act, and whether or not a court in India has jurisdiction to try that offence.

23. Jurisdiction as to offences committed at sea or in air.—Where the offence in respect of which the surrender or return of a fugitive criminal is sought was committed on board any vessel on the high seas or any aircraft while in the air outside India or the Indian territorial waters which comes into any port or aerodrome of India, the Central Government and any magistrate having jurisdiction in such port or aerodrome may exercise the powers conferred by this Act.

24. Discharge of person apprehended if not surrendered or returned within two months.—if a fugitive criminal who, in pursuance of this Act, has been committed to prison to await his surrender or return to any foreign State [4]* * * is not conveyed out of India within two months after such committal, the High Court, upon application made to it by or on behalf of the fugitive criminal and upon proof that reasonable notice of the intention to make such application has been given to the Central Government, may order such prisoner to be discharged unless sufficient cause is shown to the contrary.

25. Release of persons arrested on bail.—In the case of a person who is a fugitive criminal arrested or detained under this Act, the provisions of [5][the Code of Criminal Procedure, 1973 (2 of 1974)] relating to bail shall apply in the same manner as they would apply if such person were accused of committing in India the offence of which he is accused or has been convicted, and in relation to such bail, the magistrate before whom the fugitive criminal is brought shall have, as far as may be, the same powers and jurisdiction as a court of session under that Code.

1. Subs. by Act 66 of 1993, s. 3, for "commonwealth country" (w.e.f. 18-12-1993).
2. The words "or commonwealth country" omitted by s. 3, *ibid.* (w.e.f. 18-12-1993).
3. Subs. by s. 12, *ibid.*, for section 21 (w.e.f. 18-12-1993).
4. The words "or country" omitted by s. 3, *ibid.* (w.e.f. 18-12-1993).
5. Subs. by s. 13, *ibid.*, for "the Code of Criminal Procedure, 1898 (5 of 1898)" (w.e.f. 18-12-1993).

26. Abetment of extradition offences.—A fugitive criminal who is accused or convicted of abetting [1][, conspiring, attempting to commit, inciting or participating as an accomplice in the commission of] any extradition offence shall be deemed for the purposes of this Act to be accused or convicted of having committed such offence and shall be liable to be arrested and surrendered accordingly.

27. Lawfulness of, and re-taking on escape from, custody under warrants.—It shall be lawful for any person to whom a warrant is directed for the apprehension of a fugitive criminal to hold in custody and convey the person mentioned in the warrant to the place named in the warrant, and if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of India may be re-taken upon an escape.

28. Property found on fugitive criminal.—Everything found in the possession of a fugitive criminal at the time of his arrest which may be material as evidence in proving the extradition offence may be delivered up with the fugitive criminal on his surrender or return, subject to the rights, if any, of third parties with respect thereto.

29. Power of Central Government to discharge any fugitive criminal.— If it appears to the Central Government that by reason of the trivial nature of the case or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith or in the interests of justice or for political reasons or otherwise, it is unjust or inexpedient to surrender or return the fugitive criminal, it may, by order, at any time stay any proceedings under this Act and direct any warrant issued or endorsed under this Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged.

30. Simultaneous requisitions.—If requisitions for the surrender of a fugitive criminal are received from more than one foreign State [2]***, the Central Government may, having regard to the circumstances of the case, surrender the fugitive criminal to such State or country as that Government thinks fit.

31. Restrictions on surrender.—[3][(*1*)] A fugitive criminal shall not be surrendered or returned to a foreign State [4]***.—

(*a*) if the offence in respect of which his surrender is sought is of a political character or if he proves to the satisfaction of the magistrate or court before whom he may be produced or of the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character;

(*b*) if prosecution for the offence in respect of which his surrender is sought is according to the law of that State [5]*** barred by time;

[6][(*c*) unless provision is made by that law of the foreign State or in the extradition treaty with the foreign State that the fugitive criminal shall not be determined or tried in that State for an offence other than—

(*i*) the extradition offence in relation to which he is to be surrendered or returned;

(*ii*) any lesser offence disclosed by the facts proved for the purposes of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not be lawfully made; or

(*iii*) the offence in respect of which the Central Government has given its consent;]

1. Ins. by Act 66 of 1993, s. 14 (w.e.f 18-12-1993).
2. The words "or commonwealth country or from any foreign State and any commonwealth country" omitted by s. 15, *ibid.* (w.e.f 18-12-1993).
3. Section 31 re-numbered as sub-section (*1*) of that section by s. 16, *ibid.* (w.e.f. 18-12-1993).
4. The words "or commonwealth country" omitted by s. 3, *ibid.* (w.e.f.18-12-1993).
5. The words "or country" omitted by s. 3, *ibid.* (w.e.f. 18-12-1993).
6. Subs. by s. 16, *ibid.*, for clause (*c*) (w.e.f. 18-12-1993).

(*d*) if he has been accused of some offence in India, not being the offence for which his surrender or return is sought, or is undergoing sentence under any conviction in India until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise;

(*e*) until after the expiration of fifteen days from the date of his being committed to prison by the magistrate.

[1][(*2*) For the purposes of sub-section (*1*), the offence specified in the Schedule shall not be regarded as offences of a political character.

(*3*) The Central Government having regard to the extradition treaty made by India with any foreign State may, by notified order, add or omit any offence from the list given in the Schedule.]

32. Sections 29 and 31 to apply without any modification thereof.— Notwithstanding anything to the contrary contained in section 3 or section 12, the provisions of sections 29 and 31 shall apply without any modification to every foreign State [2]***.

33. Act not to affect the Foreigners Act, 1946.—Nothing in this Act shall affect the provisions of the Foreigners Act, 1946 (31 of 1946), or any order made thereunder.

[3][**34. Extra territorial jurisdiction.**—An extradition offence committed by any person in a foreign State shall be deemed to have been committed in India and such person shall be liable to be prosecuted in India for such offence.

34A. Prosecution on refusal to extradition.— Where the Central Government is of the opinion that a fugitive criminal cannot be surrendered or returned pursuant to a request for extradition from a foreign State, it may, as it thinks fit, take steps to prosecute such fugitive criminal in India.

34B. Provisional arrest.—(*1*) On receipt of an urgent request from a foreign State for the immediate arrest of a fugitive criminal, the Central Government may request the Magistrate having competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal.

(*2*) A fugitive criminal arrested under sub-section (*1*) shall be discharged upon the expiration of sixty days from the date of his arrest if no request for his surrender or return is received within the said period.

34C. Provision of life imprisonment for death penalty.—Notwithstanding anything contained in any other law for the time being in force, where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for a death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence.]

35. Notified orders and notifications to be laid before Parliament.—Every notified order made or notification issued under this Act shall, as soon as may be after it is made or issued, be laid before each House of Parliament.

36. Power to make rules.—(*1*) The central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the form in which a requisition for the surrender of a fugitive criminal may be made;

(*b*) the form in which a warrant for the apprehension of any person in a [4][foreign State] to which Chapter III applies may be made;

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1. Ins. by Act 66 of 1993, s. 16 (w.e.f. 18-12-1993).
2. The words "or commonwealth country" omitted by s. 3, *ibid.* (w.e.f. 18-12-1993).
3. Subs. by s. 17, *ibid.*, for section 34 (w.e.f. 18-12-1993).
4. Subs. by s. 3, *ibid.*, for "commonwealth country" (w.e.f. 18-12-1993).

(*c*) the manner in which any warrant may be endorsed or authenticated under this Act;

(*d*) the removal of fugitive criminals accused or in custody under this Act and their control and maintenance until such time as they are handed over to the persons named in the warrant as entitled to receive them;

(*e*) the seizure and disposition of any property which is the subject of, or required for proof of, any alleged offence to which this Act applies;

(*f*) the form and manner in which or the channel through which a magistrate may be required to make his report to the Central Government under this Act;

(*g*) any other matter which has to be, or may be, prescribed.

(*3*) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or [1][in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive session aforesaid], both Houses agree in making any modification in the rule or both Houses agree that the rule should not made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

37. Repeals and savings.—(*1*) The Indian Extradition Act, 1903 (15 of 1903), and any law corresponding thereto in force at the commencement of this Act in the territories which, immediately before the 1st day of November, 1956, were comprised in Part B States and the North East Frontier Agency and Tuensang District (Extradition) Regulation, 1961 (3 of 1961), are hereby repealed.

(*2*) The Extradition Acts, 1870 to 1932 (33 and 34 Vict. c. 52; 36 and 37 Vict. c. 60; 6 Edw. 7, c. 15; 22 and 23 Geo. 5, c. 39, 44 and 45 Vict. c. 69) and the Fugitive Offenders Act, 1881, in so far as they apply to and operate as part of the law of India, are hereby repealed.

1. Subs. by Act 4 of 1986, s. 2 and the Schedule, for certain words (w.e.f 15-5-1986).

[1][THE SCHEDULE

[*See* Section 31(*2*)]

OFFENCES WHICH ARE NOT TO BE REGARDED AS OFFENCES OF A POLITICAL CHARACTER

The following list of offences is to be construed according to the law in force in India on the date of the alleged offence. Wherever the names of the relevant Acts are not given, the sections referred to are the sections of the Indian Penal Code (45 of 1860):—

1. Offences under the Anti-Hijacking Act, 1982 (65 of 1982).

2. Offences under the Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982 (66 of 1982).

3. An offence within the scope of the Convention on the punishment of crimes against Internationally protected persons including diplomatic agents, opened for signature at New York on 14th December, 1973.

4. An offence within the scope of the International Convention against the taking of hostages opened for signature at New York on 18th December, 1979.

5. Culpable homicide, murder (sections 299 to 304).

6. Voluntarily causing hurt or grevious hurt by a dangerous weapon or means (sections 321 to 333).

7. Offences under the Explosive Substances Act, 1908 (6 of 1908).

8. Possession of a fire-arm or ammunition with intention to endanger life [section 27 of the Arms Act, 1959 (54 of 1959)].

9. The use of a fire arm with intention to resist or prevent the arrest or detention [section 28 of the Arms Act, 1959 (54 of 1959)].

10. Causing of loss or damage to property used for public utilities or otherwise with intention to endanger life (section 425 read with section 440).

11. Wrongful restraint and wrongful confinement (sections 339 to 348).

12. Kidnapping and abduction including taking of hostages (sections 359 to 369).

13. Offences related to terrorism and terrorist acts [Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987).

14. Abetting, conspiring or attempting to commit, inciting, participating as an accomplice in the commission of any of the offences listed above.]

1. Subs. by Act 66 of 1993, s. 18, for "The First and Second Schedules" (w.e.f. 18-12-1993).

Annexure 2.

List of Extradition Treaties and Extradition Arrangements made by India as on 30 August 2018

S. No.	Country	Year of Treaty
1	Azerbaijan	2013
2	Australia	2008
3	Bahrain	2004
4	Bangladesh	2013
5	Belarus	2007
6	Belgium	1901
7	Bhutan	1996
8	Brazil	2008
9	Bulgaria	2003
10	Canada	1987
11	Chile	1897
12	Egypt	2008
13	France	2003
14	Germany	2001
15	Hong Kong	1997
16	Indonesia	2011
17	Iran	2008
18	Kuwait	2004
19	Malaysia	2010
20	Mauritius	2003
21	Mexico	2007
22	Mongolia	2001
23	Nepal	1953
24	Netherlands	1898
25	Oman	2004
26	Poland	2003
27	Philippines	2004
28	Russia	1998
29	Saudi Arabia	2010
30	South Africa	2003

31	South Korea	2004
32	Spain	2002
33	Switzerland	1880
34	Tajikistan	2003
35	Thailand	2013
36	Tunisia	2000
37	Turkey	2001
38	UAE	1999
39	UK	1992
40	Ukraine	2002
41	USA	1997
42	Uzbekistan	2000
43	Vietnam	2011

India has Extradition Arrangements with the following Countries:

S. No.	Country	Year of Arrangement
1	Antigua & Barbuda	2001
2	Croatia*	2011
3	Fiji	1979
4	Italy*	2003
5	Papua New Guinea	1978
6	Peru	2011
7	Singapore	1972
8	Sri Lanka	1978
9	Sweden	1963
10	Tanzania	1966

* The Extradition Arrangements with Italy and Croatia confine to Crimes related to Illicit Traffic in Narcotics Drugs and Psychotropic Substances owing to the fact that India, Italy and Croatia are parties to the 1988 UN Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.

Annexure 3:

LIST OF FUGITIVES EXTRADITED BY FOREIGN GOVERNMENTS TO INDIA

SL. NO.	NAME	NATION--ALITY	EXTRADI--ED FROM	OFFENCES	YEAR OF EXTRADI--TION
1	Aftab Ahmed Ansari	Indian	UAE	Terrorism	20.02.2002
2	Rajendra Anadkat	Indian	UAE	Terrorism	20.02.2002
3	Muthappa Rai	Indian	UAE	Organised Crime	29.05.2002
4	Ravinder Kumar Rastogi	Indian	UAE	Economic Offences	Jan-03
5	Iqbal Sheikh Kaskar	Indian	UAE	Mumbai Bomb Blast	19.02.2003
6	Izaz Pathan	Indian	UAE	Mumbai Bomb Blast	19.02.2003
7	Mustafa Ahmed Umar Dosa	Indian	UAE	Mumbai Bomb Blast	20.03.2003
8	Anil Ramachandran Parab	Indian	UAE	Murder	21.04.2003
9	K. Vijay Karunakar	Indian	Nigeria	Criminal Conspiracy and Cheating	05.07.2003
10	Chetan M. Joglekar	Indian	USA	Criminal Conspiracy and Cheating	Nov-03
11	Ashok Tahilram Sadarangani	Indian	Hong Kong	Financial Fraud	06.06.2004
12	Akhtar Husaini	Indian	UAE	Terrorism	12.06.2004
13	Tariq Abdul Karim @ Tariq Parveen	Indian	UAE	Sara Sahara Complex Case	19.07.2004
14	Baldev Singh	Indian	Canada	Murder	Aug-04
15	Sharmila Shanbag	Indian	Germany	Financial Fraud	Sep-04
16	Allan John Waters	British	USA	Child Sex Abuse	Sep-04
17	Umarmiya bukhari @ Mamumiya	Indian	UAE	Murder and Extortion	Dec-04
18	Charan Jeet Singh "Cheema"	Indian	USA	Terrorism	05.02.2005
19	M. Varatharajaloo @ M.V. Raja @ Louis Jaloo	Indian	UAE	Economic Offences	03.03.2005

20	Ashok Kumar Sharma	British	Bulgaria	Cheating	May-05
21	Grant Duncan Alexander	British	Tanzania/Britain	Sex Abuse	30.06.2005
22	Wulf Ingno Werner	Australian	Australia	Sex Abuse	05.08.2005
23	Anil Vaju Bhai Dhanak	Indian	UAE	Criminal Conspiracy and Kidnapping	05.09.2005
24	Monica Bedi	Indian	Portugal	Passport fraud	Nov-05
25	Abu-Salem	Indian	Portugal	Eight Criminal Cases	Nov-05
26	Harpal Singh Cheema	Indian	Canada	TADA/Arms Act.	02.05.2006
27	Kulbir Singh Kulbeera @ Barpind	Indian	USA	Terrorism	16.06.2006
28	Bachan Singh Sogi	Indian	Canada	Criminal Breach of Trust	19.06.2006
29	Kosaraju Venkateswara Rao	Indian	Thailand	Criminal Conspiracy	28.06.2006
30	Govind Srivastava	Indian	Belgium	Cheating & Forgery	10.10.2006
31	Nitin Umeshbhai Yagnik	Indian	Mauritius	Cheating & Criminal Breach of Trust	25.03.2007
32	Malkiat Singh @ Mitta	Canadian	Canada	Kidnapping/ Murder	04.05.2007
33	A.N. Ghosh	Indian	Germany	Bank Fraud	Aug-07
34	Rajesh K. Mehta	Indian	Belgium	Fraud	09.10.2007
35	Baljeet Singh	Indian	South Africa	Murder	06.06.2008
36	Joginder Singh,	Indian	South Africa	Murder	06.06.2008
37	Surender Kumar	Indian	South Africa	Murder	06.06.2008
38	Narendra Rastogi	Indian	USA	Economic Offences	04.07.2008
39	Gurpreet Singh Bhullar	Indian	Thailand	Murder	14.05.2009
40	Gunaranjan Suri	Indian	USA	Criminal Conspiracy and Cheating	03.07.2009
41	Narender Kumar Gudgud	Indian	USA	Financial fraud	Aug-09
42	Prem Suri	Indian	USA	Criminal Conspiracy and Cheating	03.07.2009

43	Malay Sumanchandra Parikh	Indian	USA	Cheating	05.09.2009
44	Vijayan Gabriel	Indian	Oman	Murder	09.05.2010
45	Yaniv Benaim @ Atala	Israeli	Peru	Drug offences, Theft and Financial Fraud	24.08.2011
46	Subash Chandra Kapoor	US national	Germany	Criminal Conspiracy	06.07.2012
47	Faish Mohammad	Indian	Saudi Arabia	Criminal Conspiracy	22.10.2012
48	Nikil Prakash Shetty @ Nishit Prakash Arasa	Indian	UAE	Criminal Conspiracy	14.06.2013 (Deported)
49	Ashok Dharmappa Devadika	Indian	UAE	Criminal Conspiracy	02.08.2013
50	Abdul Sathar @ Manzoor	Indian	UAE	Terrorism	08.08.2013
51	Shammi Kumar	Indian	UAE	Murder	07.01.2014
52	Jaskaran Kalsi	Indian	Australia	Murder	17.09.2014
53	Jagtar Sing Tara	Indian	Thailand	Murder	16.01. 2015 (Deported)
54	Bannaje Raja @ Rajendra Bannaje	Indian	Morocco	Murder	14.08.2015 (Deported)
55	Chhota Rajan @Rajendra Sadashiv Nickhale	Indian	Indonesia	Murder & Kidnapping	06.11.2015 (Deported)
56	Anup Chetia	Indian	Bangladesh	Waging or attempt to wage war against Indian State	11.11. 2015. (Deported)
57	Kollam Gangi Reddy	Indian	Mauritius	Culpable homicide not amounting to murder, Attempt to murder	15.11.2015 (Deported)
58	Wily Naruenartwanich	Thai	Thailand	Waging or attempt to wage war against Indian State	09.12.2015

59	Abdul Wahid Siddibapa @ Khan	Indian	UAE	Waging or attempt to wage war against Indian State	20.05.2016
60	Kumar Krushna Pillai	Indian	Singapore	Attempt to murder among others	27.06.2016
61	Samirbhai Vinubhai Patel	Indian	UK	Murder, criminal conspiracy among others	19.10.2016
62	Abdul Rauf Merchant	Indian	Bangladesh	Murder	08.11.2016
63	Md. Sultan Abubakr Kadir	Indian	Singapore	Job scam racket	23.09.2017
64	Ionut Alexandru Marinoiu	Romanian	Nicaragua	Bank fraud	03.03.2018
65	Md. Farooq Yasin Mansoor/ Farooq Takla	Indian	UAE	Terrorism	08.03.2018 (deported)
66	Vinay Mittal	Indian	Indonesia	Cheating, forgery, criminal conspiracy	20.09.2018
67	Mohammed Yahya	Indian	Bahrain	cheating, forgery, criminal conspiracy	12.10.2018

(As on October 31, 2018)

Annexure 4:

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from

him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable

offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph I of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable

ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for

any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph I of this article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs I to 4 of the is article s hall be confidential , and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference

to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article; (e) Subject to the provisions of subparagraph

(e), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the

facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph I and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned. 5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph I (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States. 2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.

2. Any State Party having made a reservation in accordance with paragraph I of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1 . Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed

amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering an d voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph I of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of- the notification by the Secretary-General .

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

Annexure 5:

UNCAT's General Comments on Article 3

United Nations CAT/C/GC/4

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
4 September 2018

Original: English

Committee against Torture

General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*

I. Introduction

1. On the basis of its experience in considering individual communications under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, addressing allegations of violation by States parties of article 3 of the Convention, the Committee against Torture, at its fifty-fifth to fifty-eighth sessions, in 2015 and 2016, discussed and agreed to revise its general comment No. 1 (1997), entitled "General comment on the implementation of article 3 of the Convention in the context of article 22", adopted at its nineteenth session (see A/53/44 and A/53/44/Corr.1, annex IX).

2. At its fifty-ninth session, held from 7 November to 7 December 2016, the Committee began the drafting process for the revised general comment, taking into account the recommendations for the consultation process in the elaboration of general comments made by the Chairs of the human rights treaty bodies at their twenty-seventh meeting, held in San José from 22 to 26 June 2015 (see A/70/302, para. 91).

3. At the 1614th meeting of the Committee, held on 6 December 2017 during its sixty-second session, the Committee decided that its general comment No. 1 would be superseded by the below text, which it adopted on the same date.

4. For the purposes of the present general comment, the term "deportation" includes, but is not limited to, expulsion, extradition, forcible return, forcible transfer, rendition and rejection at the frontier of, and pushback operations (including at sea) involving, a person or group of individuals from a State party to another State.

II. General principles

5. Article 3 (1) of the Convention provides that no State party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[1]

6. Pursuant to article 22 of the Convention, the Committee receives and considers communications from or on behalf of individuals subject to a State party's jurisdiction who claim to be victims of a violation by a State party of the provisions of the Convention, in

* The present general comment replaces general comment No. 1 (1997) on the implementation of article 3.

[1] Article 3 must be interpreted with reference to the definition of torture set out in article 1 of the Convention; see *G.R.B. v. Sweden* (CAT/C/20/D/83/1997), para. 6.5.

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respect of any State party that has declared that it recognizes the Committee's competence in that regard.

7. Most of the communications received by the Committee refer to alleged violations by States parties of article 3 of the Convention. The present general comment provides guidance to States parties and the complainants and their representatives on the scope of article 3 and on how the Committee assesses the admissibility and the merits of the individual communications submitted to the Committee for its consideration.

8. The Committee recalls that the prohibition of torture, as defined in article 1 of the Convention, is absolute. Article 2 (2) of the Convention provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". The Committee further recalls that other acts of ill-treatment are equally prohibited and that the prohibition of ill-treatment is likewise non-derogable.[2]

9. The principle of "non-refoulement" of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is similarly absolute.[3]

10. Each State party must apply the principle of non-refoulement in any territory under its jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to any person, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law. As the Committee noted in paragraph 7 of its general comment No. 2, the concept of "any territory under its jurisdiction" includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party.[4]

11. The non-refoulement obligation in article 3 of the Convention exists whenever there are "substantial grounds"[5] for believing that the person concerned would be in danger of being subjected to torture in a State to which the person is facing deportation, either as an individual or as a member of a group that may be at risk of being tortured in the State of destination. The Committee's practice has been to determine that "substantial grounds" exist whenever the risk of torture is "foreseeable, personal, present and real".[6]

12. Any person found to be at risk of torture if deported to a given State should be allowed to remain in the territory under the jurisdiction, control or authority of the State party concerned so long as the risk persists.[7] The person in question should not be detained without proper legal justification and safeguards. Detention should always be an exceptional measure based on an individual assessment[8] and subject to regular review.[9] Furthermore, the person at risk should never be deported to another State from which the

[2] See general comment No. 2 (2007) on the implementation of article 2, paras. 3, 6, 19 and 25.

[3] See *Tapia Páez v. Sweden* (CAT/C/18/D/39/1996), para. 14.5; *Núñez Chipana v. Venezuela* (CAT/C/21/D/110/1998), para. 5.6; *Agiza v. Sweden* (CAT/C/34/D/233/2003), para. 13.8; *Singh Sogi v. Canada* (CAT/C/39/D/297/2006), para. 10.2; *Abdussamatov and others v. Kazakhstan* (CAT/C/48/D/444/2010), para. 13.7; and *Nasirov v. Kazakhstan* (CAT/C/52/D/475/2011), para. 11.6.

[4] See also general comment No. 2 (2007), para. 16.

[5] See, for example, *Tapia Páez v. Sweden*, para. 14.5.

[6] See, for example, *Dadar v. Canada* (CAT/C/35/D/258/2004), para. 8.4; *T.A. v. Sweden* (CAT/C/34/D/226/2003), para. 7.2; *N.S. v. Switzerland* (CAT/C/44/D/356/2008), para. 7.3; and *Subakaran R. Thirugnanasampanthar v. Australia* (CAT/C/61/D/614/2014), para. 8.3.

[7] See, for example, *Aemei v. Switzerland* (CAT/C/18/D/34/1995), para. 11.

[8] See, for example, concluding observations on the fourth periodic report of Turkey (CAT/C/TUR/CO/4), para. 26.

[9] See, for example, concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland (CAT/C/GBR/CO/5), para. 30; and concluding observations on the combined sixth and seventh periodic reports of Sweden (CAT/C/SWE/CO/6-7), para. 10.

person may subsequently face deportation to a third State in which there are substantial grounds for believing that the person would be in danger of being subjected to torture.[10]

13. Each case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities,[11] in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and a suspensive effect of the appeal.[12] In each case, the person concerned should be informed of the intended deportation in a timely manner. Collective deportation,[13] without an objective examination of the individual cases with regard to personal risk, should be considered as a violation of the principle of non-refoulement.

14. States parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or prolonging them unduly, or cutting funds for assistance programmes for asylum seekers, which would compel persons in need of protection under article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment there.[14]

15. Article 16 of the Convention provides for the duty of States parties to prevent acts of cruel, inhuman or degrading treatment or punishment (ill-treatment), which do not amount to torture as defined in article 1 of the Convention.[15]

16. States parties should consider whether the nature of the other forms of ill-treatment that a person facing deportation is at risk of experiencing could likely change so as to constitute torture, before making an assessment on each case relating to the principle of "non-refoulement".[16]

17. The Committee considers that severe pain or suffering cannot always be assessed objectively. It depends on the negative physical and/or mental repercussions that the infliction of violent or abusive acts has on each individual, taking into account all relevant circumstances of each case, including the nature of the treatment, the sex, age and state of health and vulnerability of the victim and any other status or factors.[17]

III. Preventive measures to guarantee the principle of non-refoulement

18. For the purpose of fully implementing article 3 of the Convention, States parties should take legislative, administrative, judicial and other preventive measures against possible violations of the principle of "non-refoulement", including:

[10] See, for example, general comment No. 1 (1997) on the implementation of article 3, para. 2; *Avedes Hamayak Korban v. Sweden* (CAT/C/21/D/88/1997), para. 7; and *Z.T. v. Australia* (CAT/C/31/D/153/2000), para. 6.4; concluding observations on the combined fifth and sixth periodic reports of Greece (CAT/C/GRC/CO/5-6), para. 19; and concluding observations on the second periodic report of Serbia (CAT/C/SRB/CO/2), para. 15.

[11] See, for example, *Agiza v. Sweden*, para. 13.8.

[12] See, for example, concluding observations on the combined fifth and sixth periodic reports of Greece (CAT/C/GRC/CO/5-6), para. 19; and concluding observations on the combined fifth and sixth periodic reports of Italy (CAT/C/ITA/CO/5-6), para. 21 (c).

[13] See, for example, *Kwami Mopongo and others v. Morocco* (CAT/C/53/D/321/2007), paras. 6.2–6.3 and 11.3–11.4; Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the International Covenant on Civil and Political Rights, para. 10; and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22 (1).

[14] See, for example, concluding observations on the combined fifth and sixth periodic reports of Greece (CAT/C/GRC/CO/5-6), para. 19.

[15] See general comment No. 2 (2007), paras. 3 and 6.

[16] Other international provisions directly relevant to the application of the principle of non-refoulement in cases of risk of ill-treatment are listed in paragraph 26 below.

[17] See general comment No. 2 (2007), para. 21.

(a) Ensuring the right of each person concerned to have the case examined individually and not collectively and to be fully informed of the reasons why the person is the subject of a procedure that may lead to a decision of deportation and of the rights legally available to appeal such a decision;[18]

(b) Providing the person concerned with access to a lawyer,[19] to free legal aid, when necessary, and to representatives of relevant international organizations of protection;[20]

(c) Developing an administrative or judicial procedure concerning the person in question in a language that the person understands or with the assistance of interpreters and translators;[21]

(d) Referring the person alleging previous torture to an independent medical examination free of charge, in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol);[22]

(e) Ensuring the right of appeal by the person concerned against a deportation order to an independent administrative and/or judicial body within a reasonable period of time from the notification of that order and with the suspensive effect of the appeal on the enforcement of the order;[23]

(f) Providing effective training for all officials who deal with persons under deportation procedures on respect for the provisions of article 3 of the Convention, in order to avoid decisions contrary to the principle of non-refoulement;[24]

(g) Providing effective training for medical and other personnel dealing with detainees, migrants and asylum seekers in identifying and documenting signs of torture, taking into account the Istanbul Protocol.[25]

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[18] See, for example, concluding observations on the combined fifth and sixth periodic reports of Italy (CAT/C/ITA/CO/5-6), para. 21; concluding observations on the seventh periodic report of Finland (CAT/C/FIN/CO/7 and CAT/C/FIN/CO/7/Corr.1), para. 13; concluding observations on the seventh periodic report of Switzerland (CAT/C/CHE/CO/7), para. 14; and concluding observations on the third periodic report of Belgium (CAT/C/BEL/CO/3), para. 22.

[19] See, for example, concluding observations on the seventh periodic report of Finland (CAT/C/FIN/CO/7 and CAT/C/FIN/CO/7/Corr.1), para. 13.

[20] See, for example, concluding observations on the second periodic report of Serbia (CAT/C/SRB/CO/2), para. 15. See also *Kwami Mopongo and others v. Morocco*, paras. 11.3 and 11.4.

[21] See, for example, concluding observations on the combined third to fifth periodic reports of Latvia (CAT/C/LVA/CO/3-5 and CAT/C/LVA/CO/3-5/Corr.1), para. 17.

[22] See, for example, concluding observations on Cabo Verde in the absence of a report (CAT/C/CPV/CO/1), para. 29; concluding observations on the sixth periodic report of New Zealand (CAT/C/NZL/CO/6), para. 18; and concluding observations on the combined sixth and seventh periodic reports of Denmark (CAT/C/DNK/CO/6-7), para. 23. See also *Ali Fadel v. Switzerland* (CAT/C/53/D/450/2011), paras. 7.6 and 7.8; and *M.B. and others v. Denmark* (CAT/C/59/D/634/2014), para. 9.8.

[23] See, for example, concluding observations on the seventh periodic report of Finland (CAT/C/FIN/CO/7 and CAT/C/FIN/CO/7/Corr.1), para. 13; concluding observations on the third periodic report of Slovenia (CAT/C/SVN/CO/3), para. 17; and concluding observations on the second periodic report of Tajikistan (CAT/C/TJK/CO/2), para. 18. See also concluding observations on the combined fifth and sixth periodic reports of Greece (CAT/C/GRC/CO/5-6), para. 19; and concluding observations on the combined fifth and sixth periodic reports of Italy (CAT/C/ITA/CO/5-6), para. 21 (c).

[24] See, for example, concluding observations on the second periodic report of the Plurinational State of Bolivia (CAT/C/BOL/CO/2), para. 17; and concluding observations on the combined fourth and fifth periodic reports of Bulgaria (CAT/C/BGR/CO/4-5), para. 16.

[25] See, for example, concluding observations on the sixth periodic report of New Zealand (CAT/C/NZL/CO/6), para. 18.

IV. Diplomatic assurances

19. The term "diplomatic assurances" as used in the context of the transfer of a person from one State to another, refers to a formal commitment by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State and in accordance with international human rights standards.

20. The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in article 3 of the Convention, where there are substantial grounds for believing that the person would be in danger of being subjected to torture in that State.[26]

V. Redress

21. The Committee recalls that it considers the term "redress" in article 14 of the Convention as encompassing the concepts of "effective remedy" and "reparation". The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention.[27]

22. States parties should recognize that victims of torture or other cruel, inhuman or degrading treatment or punishment suffer physical and psychological harm that may require sustained availability of and access to specialized rehabilitation services. Once such a state of health and the need for treatment have been medically certified, they should not be removed to a State where adequate medical services for their rehabilitation are not available or guaranteed.

VI. Article 3 of the Convention and extradition treaties

23. States parties may find that a conflict arises between the obligations they have undertaken under article 3 of the Convention and the obligations they have undertaken under a multilateral or bilateral extradition treaty, especially when the treaty was concluded before the ratification of the Convention with a State which is not a party to the Convention and, therefore, when not yet bound by the provisions of article 3. In this case, the relevant extradition treaty should be applied in accordance with the principle of non-refoulement.

24. The Committee acknowledges that the time frame for extradition of a person for the purpose of criminal prosecution or serving a sentence, who has submitted a communication under article 22 of the Convention invoking the principle of "non-refoulement", is a crucial factor for the respect by the State of its obligations under both the Convention and an extradition treaty to which it is a party. The Committee, therefore, requests that, should a State party encounter such a situation, it inform the Committee about any possible conflict between its obligations under the Convention and those under an extradition treaty from the beginning of the individual complaint procedure in which the State party is involved so that the Committee may try to give priority to the consideration of that communication before the time limit for the obligatory extradition is reached. The State party concerned, however, should recognize that the Committee can give priority to the consideration of and a decision on such a communication only during its sessions.

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[26] See *Agiza v. Sweden*, para. 13.4; *Tursunov v. Kazakhstan* (CAT/C/54/D/538/2013), para. 9.10; and *H.Y. v. Switzerland* (CAT/C/61/D/747/2016), para. 10.7. See also concluding observations on the combined third to fifth periodic reports of the United States of America (CAT/C/USA/CO/3-5), para. 16; concluding observations on the fourth periodic report of Morocco (CAT/C/MAR/CO/4), para. 9; concluding observations on the fifth periodic report of Germany (CAT/C/DEU/CO/5), para. 25; and concluding observations on the second periodic report of Albania (CAT/C/ALB/CO/2), para. 19.

[27] See general comment No. 3 (2012) on the implementation of article 14, para. 2.

25. Furthermore, those States parties to the Convention that subsequently consider the conclusion of or adherence to an extradition treaty should ensure that there is no conflict between the Convention and that treaty and, if there is, include in the notification of adherence to the extradition treaty the clause that, in case of conflict, the Convention will prevail.

VII. Relationship between article 3 and article 16 of the Convention

26. Article 3 of the Convention, which provides protection against the removal of a person in danger of being subjected to torture in the State to which the person would be deported, should be without prejudice to article 16 (2) of the Convention, in particular where a person to be removed would enjoy additional protection, under international instruments or national law, not to be deported to a State where the person would face the risk of cruel, inhuman or degrading treatment or punishment.[28]

VIII. Duties of States parties to consider specific human rights situations in which the principle of non-refoulement applies

27. Article 3 (2) of the Convention provides that for the purpose of determining whether there are grounds for believing that a person would be in danger of being subjected to torture, if expelled, returned or extradited, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[29]

28. In this regard, the Committee observes that the infliction of cruel, inhuman or degrading treatment or punishment, whether or not it amounts to torture, to which an individual or the individual's family were exposed in their State of origin or would be exposed in the State to which the individual is being deported, constitutes an indication that the person is in danger of being subjected to torture if deported to one of those States. Such an indication should be taken into account by States parties as a basic element justifying the application of the principle of non-refoulement.

29. In this connection, the Committee wishes to draw the attention of the States parties to some non-exhaustive examples of human rights situations that may constitute an indication of risk of torture, to which they should give consideration in their decisions on the removal of a person from their territory and take into account when applying the principle of "non-refoulement". States parties should consider, in particular:

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[28] Examples of other international provisions directly relevant to the application of the principle of "non-refoulement" in cases of risk of torture and other ill-treatment for a person in the country to which the person is being deported may be found by States parties to the Convention that are also parties to other relevant treaties in the following instruments:

(a) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (art. 56 (3));
(b) International Convention for the Protection of All Persons from Enforced Disappearance (art. 16 (1));
(c) Convention relating to the Status of Refugees (art. 33 (1));
(d) Charter of Fundamental Rights of the European Union (art. 19 (2));
(e) Inter-American Convention to Prevent and Punish Torture (final paragraph of article 13);
(f) American Convention on Human Rights (art. 22 (8) and (9));
(g) African Charter on Human and Peoples' Rights (art. 12 (3));
(h) Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (arts. II (3) and V (1)).

[29] See, for example, *G.R.B v. Sweden*, para. 6.3; *H.M.H.I. v. Australia* (CAT/C/28/D/177/2001), para. 6.5; *S.P.A. v. Canada* (CAT/C/37/D/282/2005), para. 7.1; *T.I. v. Canada* (CAT/C/45/D/333/2007), para. 7.3; *A.M.A. v. Switzerland* (CAT/C/45/D/344/2008), para. 7.2; and *E.K.W. v. Finland* (CAT/C/54/D/490/2012), paras. 9.3 and 9.7.

(a) Whether the person concerned had previously been arrested arbitrarily in the person's State of origin without a warrant and/or has been denied fundamental guarantees for a detainee in police custody, such as:[30]

(i) Notification of the reasons of the person's arrest in writing and in a language that the person understands;[31]

(ii) Access to a family member or a person of the concerned individual's choice for informing them of the arrest;[32]

(iii) Access to a lawyer free of charge when necessary and, upon request, access to a lawyer of the person's choice at the person's own expense for the person's defence;[33]

(iv) Access to an independent medical doctor for an examination and treatment of the person's health or, for this purpose, to a medical doctor of the person's choice at the person's own expense;[34]

(v) Access to an independent specialized medical entity to certify the person's allegations of having been subjected to torture;[35]

(vi) Access to a competent and independent judicial institution that is empowered to judge the person's claims for the treatment in detention within the time frame set by law or within a reasonable time frame to be assessed for each particular case;[36]

(b) Whether the person has been a victim of brutality or excessive use of force by public officials on the basis of any form of discrimination in the State of origin or would be exposed to such brutality in the State to which the person is being deported;[37]

(c) Whether, in the State of origin or in the State to which the person is being deported, the person has been or would be a victim of violence, including gender-based or sexual violence, in public or in private, gender-based persecution or genital mutilation, amounting to torture, without the intervention of the competent authorities of the State concerned for the protection of the victim;[38]

(d) Whether the person has been judged in the State of origin or would be judged in the State to which the person is being deported in a judicial system that does not guarantee the right to a fair trial;[39]

(e) Whether the person concerned has previously been detained or imprisoned in the State of origin or would be detained or imprisoned, if deported to a State, in conditions amounting to torture or cruel, inhuman or degrading treatment or punishment;[40]

(f) Whether the person concerned would be exposed to sentences of corporal punishment if deported to a State in which, although corporal punishment is permitted by national law, that punishment would amount to torture or cruel, inhuman or degrading treatment or punishment according to customary international law and the jurisprudence of

[30] See, for example, *Ali Fadel v. Switzerland,* paras. 7.7 and 7.8.
[31] See, for example, *Sylvie Bakatu-Bia v. Sweden* (CAT/C/46/D/379/2009), paras. 2.2 and 10.5; and *Ali Fadel v. Switzerland*, para. 7.7.
[32] See, for example, *Ramiro Ramírez Martínez and others v. Mexico* (CAT/C/55/D/500/2012), para. 17.5; and *Patrice Gahungu v. Burundi* (CAT/C/55/D/522/2012), para. 7.6.
[33] See, for example, *Tony Chahin v. Sweden* (CAT/C/46/D/310/2007), para. 9.4; and *Nasirov v. Kazakhstan*, paras. 2.2, 11.6 and 11.9.
[34] See, for example, *Ramiro Ramírez Martínez and others v. Mexico*, para. 17.5; *Patrice Gahungu v. Burundi*, para. 7.7; and *X. v. Burundi* (CAT/C/55/D/553/2013), para. 7.5.
[35] See, for example, *Combey Brice Magloire Gbadjavi v. Switzerland* (CAT/C/48/D/396/2009), paras. 2.1 and 7.5–7.8; and *Ali Fadel v. Switzerland*, paras. 2.4 and 7.6–7.8.
[36] See, for example, *Ramiro Ramírez Martínez and others v. Mexico*, paras. 17.5 and 17.6; *Patrice Gahungu v. Burundi*, para. 7.7; and *X. v. Burundi*, 7.5 and 7.6.
[37] See, for example, *F.K. v. Denmark* (CAT/C/56/D/580/2014), paras. 7.5 and 7.6.
[38] See, for example, *Sylvie Bakatu-Bia v. Sweden*, paras. 10.5–10.7.
[39] See, for example, *Agiza v. Sweden*, para. 13.4; and *Ali Fadel v. Switzerland*, para. 7.8.
[40] See, for example, *Tony Chahin v. Sweden*, para. 9.5; and *Tursunov v. Kazakhstan*, para. 9.8.

the Committee and of other recognized international and regional mechanisms for the protection of human rights;[41]

(g) Whether the person concerned would be deported to a State in which there are credible allegations or evidence of crimes of genocide, crimes against humanity or war crimes within the meaning of articles 6, 7 and 8 of the Rome Statute of the International Criminal Court that have been submitted to the Court for its consideration;[42]

(h) Whether the person concerned would be deported to a State party to the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto where there are allegations or evidence of its violation of common article 3 of the four Geneva Conventions of 12 August 1949 and/or article 4 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II),[43] and, in particular, of: (i) article 3 (1) (a) of the four Geneva Conventions;[44] and (ii) article 4 (1) and (2) of Protocol II;[45]

(i) Whether the person concerned would be deported to a State where there are allegations or evidence of its violation of article 12 of the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention);[46]

(j) Whether the person concerned would be deported to a State where there are allegations or evidence of its violation of articles 32 or 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention);[47] or article 75 (2) of the Protocol additional to the Geneva Conventions of 12

[41] See, for example, *Rouba Alhaj Ali v. Morocco* (CAT/C/58/D/682/2015), paras. 8.5–8.8.

[42] See, for example, concluding observations on the combined fourth and fifth periodic reports of Croatia (CAT/C/HRV/CO/4-5), para. 11; and concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia (CAT/C/MKD/CO/3), para. 16.

[43] While not quoting directly the provisions of the Geneva Conventions and the Additional Protocols thereto, the Committee has referred in its jurisprudence to situations covered by those provisions, among others, in the concluding observations on the fourth periodic report of Turkey (CAT/C/TUR/CO/4, paras. 12 and 23–26); and the concluding observations on the combined fifth and sixth periodic reports of Italy (CAT/C/ITA/CO/5-6, paras. 20–23).

[44] Article 3 (1) (a) of the four Geneva Conventions stipulates that in the case of armed conflict not of an international character, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture are and shall remain prohibited with respect to persons taking no active part in the hostilities. See, for example, concluding observations on the fourth periodic report of the Russian Federation (CAT/C/RUS/CO/4), para. 24; and concluding observations on the sixth periodic report of Ukraine (CAT/C/UKR/CO/6), para. 11.

[45] Article 4 (1) of Protocol II, adopted on 8 June 1977, stipulates that all persons who do not take a direct part or who have ceased to take part in hostilities (with reference to armed conflicts referred to in article 2 of the Geneva Conventions and article 1 of the Additional Protocols thereto), whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. Article 4 (2) of the Protocol stipulates that the following acts against the persons referred to in article 4 (1) are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; and (h) threats to commit any of the foregoing acts. See, for example, concluding observations on the initial report of Lebanon (CAT/C/LBN/CO/1), para. 11; and concluding observations on the fourth periodic report of Turkey (CAT/C/TUR/CO/4), para. 12.

[46] Article 12 of the Third Geneva Convention provides, inter alia, that prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. See, for example, concluding observations on the initial report of Chad (CAT/C/TCD/CO/1), para. 17.

[47] Article 45 of the Fourth Geneva Convention provides, inter alia, that protected persons may be transferred by the Detaining Power only to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.

August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I);[48]

(k) Whether the person concerned would be deported to a State where the inherent right to life is denied, including the exposure of the person to extrajudicial killings or enforced disappearance, or where the death penalty is in force[49] and considered as a form of torture or cruel, inhuman or degrading treatment or punishment by the deporting State party, in particular:

(i) If the latter has abolished the death penalty or established a moratorium on its execution;[50]

(ii) Where the death penalty would be imposed for crimes that are not considered by the deporting State party as the most serious crimes;[51]

(iii) Where the death penalty is carried out for crimes committed by persons below the age of 18 years[52] or on pregnant women, nursing mothers or persons who have a severe mental disability;

(l) The State party concerned should also evaluate whether the circumstances and the methods of execution of the death penalty and the prolonged period and conditions of the person on death row[53] could amount to torture or cruel, inhuman or degrading treatment or punishment for the purpose of applying the principle of "non-refoulement";[54]

(m) Whether the person concerned would be deported to a State where reprisals amounting to torture have been or would be committed against the person, members of the person's family or witnesses of the person's arrest and detention, such as violent and terrorist acts against them, the disappearance of those family members or witnesses, their killings or their torture;[55]

(n) Whether the person concerned would be deported to a State where the person was subjected to or would run the risk of being subjected to slavery and forced labour[56] or trafficking in human beings;

(o) Whether the person concerned is below the age of 18 years and would be deported to a State where the person's fundamental child rights were previously violated

[48] Article 75 (2) of Additional Protocol I stipulates that the following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) the taking of hostages; (d) collective punishments; and (e) threats to commit any of the foregoing acts. See, for example, concluding observations on the initial report of Chad (CAT/C/TCD/CO/1), para. 34.

[49] See, for example, concluding observations on the second periodic report of Belgium (CAT/C/BEL/CO/2), para. 10.

[50] See, for example, *Rouba Alhaj Ali v. Morocco*, paras. 8.5–8.8.

[51] See, for example, *X. v. Switzerland* (CAT/C/53/D/470/2011), para. 7.8; and *Asghar Tahmuresi v. Switzerland* (CAT/C/53/D/489/2012), para. 7.5.

[52] See, for example, concluding observations on the second periodic report of Afghanistan (CAT/C/AFG/CO/2), para. 34 (c).

[53] See concluding observations on the combined third to fifth periodic reports of the Republic of Korea (CAT/C/KOR/CO/3-5), para. 30 (b).

[54] See, for example, concluding observations on the second periodic report of Afghanistan (CAT/C/AFG/CO/2), para. 34; and concluding observations on the second periodic report of Mongolia (CAT/C/MNG/CO/2), para. 22.

[55] See, for example, *Hussein Khademi and others v. Switzerland* (CAT/C/53/D/473/2011), paras. 7.4–7.6; *Nasirov v. Kazakhstan*, para. 11.9; and *N.A.A. v. Switzerland* (CAT/C/60/D/639/2014), paras. 7.7–7.11.

[56] See, for example, *Tony Chahin v. Sweden*, para. 9.5.

and/or would be violated, creating irreparable harm, such as the person's recruitment as a combatant participating directly or indirectly in hostilities[57] or for providing sexual services.

IX. Non-State actors

30. Equally, States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control, or whose acts it is unable to prevent or whose impunity it is unable to counter.[58]

X. Specific requirements for the submission of individual communications under article 22 of the Convention and interim measures of protection

A. Admissibility

31. The Committee considers that it is the responsibility of the author of a communication to provide exhaustive arguments for the complaint of alleged violation of article 3 of the Convention in such a way that, from the first impression (prima facie) or from subsequent submissions, if necessary, the Committee finds that it is relevant for consideration under article 22 of the Convention and that it fulfils each of the requirements established under rule 113 of the Committee's rules of procedure.

32. A State party's obligations under the Convention apply from the date of the entry into force of the Convention for that State party. However, the Committee will consider communications on alleged violations of the Convention which occurred before a State party's recognition of the Committee's competence under article 22 of the Convention through the declaration provided for in article 22, if the effects of those alleged violations continued after the State party's declaration, and if such effects may constitute in themselves a violation of the Convention.[59]

33. With reference to article 22 (5) (a) of the Convention, which requires that the Committee shall not consider any individual communication under that article unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement, the Committee considers that "the same matter" should be understood as relating to the same parties, the same facts and the same substantive rights.[60]

34. According to article 22 (5) (b) of the Convention, the complainant must have exhausted all available domestic remedies, provided for in law and in practice, that bring effective relief.[61] Article 22 (5) (b) further provides that this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief

[57] See, for example, concluding observations on the initial report of Chad (CAT/C/TCD/CO/1), para. 34.

[58] See, for example, *S.S. Elmi v. Australia* (CAT/C/22/D/120/1998), paras. 6.8 and 6.9; and *M.K.M. v. Australia* (CAT/C/60/D/681/2015), para. 8.9.

[59] See, for example, *N.Z. v. Kazakhstan* (CAT/C/53/D/495/2012), para. 12.3.

[60] See, for example, *A.A. v. Azerbaijan* (CAT/C/35/D/247/2004), para. 6.8; *E.E. v. the Russian Federation* (CAT/C/50/D/479/2011), para. 8.4; *N.B. v. the Russian Federation* (CAT/C/56/D/577/2013), para. 8.2; *M.T. v. Sweden* (CAT/C/55/D/642/2014), para. 8.3; and *Mr. U. v. Sweden* (CAT/C/56/D/643/2014), para. 6.4.

[61] See, for example, *Mr. Y. v. Canada* (CAT/C/55/D/512/2012), para. 7.2; and *Olga Shestakova v. the Russian Federation* (CAT/C/62/D/712/2015), para. 6.4.

to the person who is the victim of the violation of the Convention.[62] In the context of article 3 of the Convention, the Committee considers that exhaustion of domestic remedies means that the complainant has applied for remedies that are directly related to the risk of being subjected to torture in the country to which the person would be deported, not for remedies that might allow the complainant to remain in the sending State party for other reasons.[63]

35. The Committee further considers that an effective remedy in the implementation of the principle of "non-refoulement" should be a recourse able to preclude, in practice, the deportation of the complainant where there are substantial grounds for believing that the complainant would personally be in danger of being subjected to torture if deported to another country. The recourse should be a legally-based right and not an ex gratia concession given by the authorities concerned,[64] and should be accessible in practice without obstacles of any nature.

B. Interim measures of protection

36. When the Committee, or members designated by it, requests the State party concerned, for its urgent consideration, to take such interim measures, once the decision on deportation by the domestic authorities has become enforceable according to the information available, that the Committee considers necessary to avoid irreparable damage to the victim or victims of an alleged violation of article 3 of the Convention, in accordance with rule 114 of the Committee's rules of procedure, the State party should comply with the Committee's request in good faith.

37. Non-compliance by the State party with the Committee's request would constitute serious damage and an obstacle to the effectiveness of the Committee's deliberations and would cast serious doubt on the willingness of the State party to implement article 22 of the Convention in good faith.[65] The Committee has therefore determined that the non-compliance with its request for interim measures constitutes a breach of article 22.[66]

C. Merits

38. With respect to the application of article 3 of the Convention to the merits of a communication submitted under article 22, the burden of proof is upon the author of the communication, who must present an arguable case,[67] that is, submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. However, when complainants are in a situation where they cannot elaborate on their case, such as when they have demonstrated that they have no possibility of obtaining documentation relating to their allegation of torture or have been deprived of their liberty, the burden of proof is reversed[68] and the State party concerned must investigate the allegations and verify the information on which the communication is based.

39. It is the responsibility of the State party, at the national level, to assess, through administrative and/or judicial procedures, whether there are substantial grounds for

[62] See, for example, *A.E. v. Switzerland* (CAT/C/14/D/24/1995), para. 4; *Evloev v. Kazakhstan* (CAT/C/51/D/441/2010), para. 8.6; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4.

[63] See, for example, *W.G.D. v. Canada*, para. 7.4.

[64] See, for example, *W.G.D. v. Canada*, para. 7.4; and *J.K. v. Canada* (CAT/C/56/D/562/2013), para. 9.2.

[65] See *Kalinichenko v. Morocco* (CAT/C/47/D/428/2010), paras. 13.1, 13.2 and 16; *Tursunov v. Kazakhstan*, para. 10; *X. v. the Russian Federation* (CAT/C/54/D/542/2013), paras. 9.2 and 12; and *D.I.S. v. Hungary* (CAT/C/56/D/671/2015), paras. 9.1–9.3.

[66] See, for example, *S.T. v. Australia* (CAT/C/61/D/614/2014), paras. 9 and 10; and *X. v. the Russian Federation*, para. 12.

[67] See *Sivagnanaratnam v. Denmark* (CAT/C/51/D/429/2010), paras. 10.5 and 10.6; *Mr. A.R. v. Netherlands* (CAT/C/31/D/203/2002), para. 7.3; *Arthur Kasombola Kalonzo v. Canada* (CAT/C/48/D/343/2008), para. 9.3; *X. v. Denmark* (CAT/C/53/D/458/2011), para. 9.3; *W.G.D. v. Canada*, para. 8.4; and *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.4.

[68] For comparison, see *S.P.A. v. Canada*, para. 7.5; and *J.K. v. Canada*, para. 10.4.

believing that the complainant faces a foreseeable, present, personal and real risk of being subjected to torture in the State to which the complainant would be deported.

40. In its procedure of assessment, the State party should provide the person concerned with fundamental guarantees and safeguards, especially if the person has been deprived of the person's liberty or is in a particularly vulnerable situation, such as the situation of an asylum seeker, an unaccompanied minor, a woman who has been subjected to violence or a person with disabilities (measures of protection).[69]

41. Guarantees and safeguards should include linguistic, legal, medical, social and, when necessary, financial assistance, as well as the right to recourse against a decision of deportation within a reasonable time frame, for a person in a precarious and stressful situation and with a suspensive effect on the enforcement of the deportation order. In particular, an examination by a qualified medical doctor, including as requested by the complainant to prove the torture that the complainant has suffered, should always be ensured, regardless of the authorities' assessment of the credibility of the allegation,[70] so that the authorities deciding on a given case of deportation are able to complete the assessment of the risk of torture on the basis of the result of the medical and psychological examinations, without any reasonable doubt.[71]

42. Victims of torture and other vulnerable persons frequently suffer from post-traumatic stress disorder, which can result in a broad range of symptoms, including involuntary avoidance and dissociation. These symptoms may affect the ability of the person to disclose all relevant details or to relay a consistent story throughout the proceedings. In order to ensure that victims of torture or other vulnerable persons are afforded an effective remedy, States parties should refrain from following a standardized credibility assessment process to determine the validity of a non-refoulement claim. With regard to potential factual contradictions and inconsistencies in the author's allegations, States parties should appreciate that complete accuracy can seldom be expected from victims of torture.[72]

43. To determine whether there are substantial grounds for believing that a person would be in danger of being subjected to torture if deported, the Committee considers as crucial the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights, referred to in article 3 (2) of the Convention. Such violations include, but are not limited to: (a) widespread use of torture [73] and impunity of its perpetrators; [74] (b) harassment and violence against minority groups; [75] (c) situations conducive to genocide;[76] (d) widespread gender-based violence;[77] (e) widespread use of sentencing and imprisonment of persons exercising fundamental freedoms; [78] and (f) situations of international and non-international armed conflicts.[79]

44. The Committee's assessment will be based primarily on the information provided by or on behalf of the complainant and by the State party concerned. The Committee will also consult United Nations sources of information, as well as any other sources that it considers

[69] See, for example, concluding observations on the fourth periodic report of the Netherlands (CAT/C/NET/CO/4), para. 7; and concluding observations on the fourth periodic report of Cyprus (CAT/C/CYP/CO/4), paras. 13 and 14.

[70] See, for example, *M.B. and others v. Denmark*, para. 9.8.

[71] See also footnotes 23–30 above.

[72] See, for example, *Alan v. Switzerland* (CAT/C/16/D/21/1995), para. 11.3; *Kisoki v. Sweden* (CAT/C/16/D/41/1996), para. 9.3; *Haydin v. Sweden* (CAT/C/21/D/101/1997), paras. 6.6 and 6.7; and *C.T. and K.M. v. Sweden* (CAT/C/37/D/279/2005), para. 7.6; *E.K.W. v. Finland*, para. 9.6; and *M.B. and others v. Denmark*, para. 9.6.

[73] See, for example, *X. v. Kazakhstan* (CAT/C/55/D/554/2013), para. 12.7.

[74] See, for example, *P.S.B. and T.K. v. Canada* (CAT/C/55/D/505/2012), para. 8.3.

[75] See, for example, *Subakaran R. Thirugnanasampanthar v. Australia*, para. 8.7.

[76] See, for example, concluding observations on the initial report of Iraq (CAT/C/IRQ/CO/1 and CAT/C/IRQ/CO/1/Corr.1), paras. 11 and 12.

[77] See, for example, *J.K. v. Canada,* paras. 10.5 and 10.6.

[78] See, for example, *Abed Azizi v. Switzerland* (CAT/C/53/D/492/2012), paras. 8.5–8.8.

[79] See, for example, concluding observations on the initial report of Chad (CAT/C/TCD/CO/1), para. 22.

reliable.[80] In addition, the Committee will take into account any of the indications listed in paragraph 29 above as constituting substantial grounds for believing that a person would be in danger of being subjected to torture if deported.

45. The Committee will assess "substantial grounds" and consider the risk of torture as foreseeable, personal, present and real when the existence of facts relating to the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of the complainant's deportation. Indications of personal risk may include, but are not limited to the complainant's: (a) ethnic background;[81] (b) political affiliation or political activities of the complainant and/or the complainant's family members;[82] (c) arrest and/or detention without guarantee of a fair treatment and trial;[83] (d) sentence in absentia;[84] (e) sexual orientation and gender identity;[85] (f) desertion from the national armed forces or armed groups; (g) previous torture;[86] (h) incommunicado detention or other form of arbitrary and illegal detention in the country of origin; (i) clandestine escape from the country of origin following threats of torture; (j) religious affiliation;[87] (k) violations of the right to freedom of thought, conscience and religion, including violations related to the prohibition of conversion to a religion that is different from the religion proclaimed as State religion and where such a conversion is prohibited and punished in law and in practice;[88] (l) risk of expulsion to a third country where the person may be in danger of being subjected to torture;[89] and (m) violence against women, including rape.[90]

46. When assessing whether "substantial grounds" exist, the Committee will take into account the human rights situation of a State as a whole and not of a particular area of it. The State party is responsible for any territory under its jurisdiction, control or authority. The notion of "local danger" does not provide for measurable criteria and is not sufficient to dissipate totally the personal danger of being tortured.[91]

47. The Committee considers that the so-called "internal flight alternative", that is, the deportation of a person or a victim of torture to an area of a State where the person would not be exposed to torture, unlike in other areas of the same State, is not reliable or effective.[92]

48. When assessing whether "substantial grounds" exist, the Committee considers that a receiving State should have demonstrated certain essential measures to prevent and prohibit torture throughout the entire territory under its jurisdiction, control or authority, such as clear legislative provisions on the absolute prohibition of torture and its punishment with adequate penalties, measures to put an end to impunity for acts of torture, violence and other illegal practices committed by public officials, the prosecution of public officials allegedly responsible for acts of torture and other ill-treatment and their punishment commensurate with the gravity of the crime committed when they are found guilty.[93]

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[80] See rule 118 of the Committee's rules of procedure.

[81] See, for example, *Z. v. Denmark* (CAT/C/55/D/555/2013), paras. 5.2 and 7.8; and *M.B. and others v. Denmark*, paras. 2.1, 2.2 and 9.7.

[82] See, for example, *T.D. v. Switzerland* (CAT/C/46/D/375/2009), para. 7.8.

[83] See, for example, *Nasirov v. Kazakhstan*, paras. 7.6 and 11.9.

[84] See, for example, *Agiza v. Sweden*, para. 13.4; and *Ali Fadel v. Switzerland*, para. 7.8.

[85] See, for example, *Uttam Mondal v. Sweden* (CAT/C/46/D/338/2008), para. 7.7.

[86] See, for example, *Dadar v. Canada*, para. 8.5.

[87] See, for example, *Abdussamatov and others v. Kazakhstan*, para. 13.8.

[88] See, for example, *Abed Azizi v. Switzerland*, paras. 3.2 and 8.8.

[89] See, for example, general comment No. 1 (1997) on the implementation of article 3, para. 2; *Avedes Hamayak Korban v. Sweden* (CAT/C/21/D/88/1997), para. 7; and *Z.T. v. Australia* (CAT/C/31/D/153/2000), para. 6.4; concluding observations on the combined fifth and sixth periodic reports of Greece (CAT/C/GRC/CO/5-6), para. 19; and concluding observations on the second periodic report of Serbia (CAT/C/SRB/CO/2), para. 15.

[90] See, for example, *E.K.W. v. Finland*, paras. 9.6 and 9.7.

[91] See, for example, *Uttam Mondal v. Sweden*, para. 7.4.

[92] See, for example, *M.K.M. v. Australia*, para. 8.9.

[93] See, for example, concluding observations on the combined fifth and sixth periodic reports of Argentina (CAT/C/ARG/CO/5-6), paras. 9 12 and 30; and concluding observations on the sixth periodic report of Bulgaria (CAT/C/BGR/CO/6), paras. 7, 8, 11 and 12.

49. All pertinent information may be introduced by both parties to explain the relevance of their submissions under article 22 of the Convention to the provisions of article 3. The following information, while not exhaustive, would be pertinent:

(a) Whether the State concerned is one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights;

(b) Whether the complainant has been tortured or ill-treated by, at the instigation of or with the consent or the acquiescence (tacit agreement) of a public official or other person acting in an official capacity in the past, and, if so, whether this was in the recent past;

(c) Whether there is medical, psychological or other independent evidence to support a claim by the complainant that the complainant has been tortured or ill-treated in the past, and whether the torture had after-effects;

(d) Whether the State party has ensured that the complainant facing deportation from the territory under its jurisdiction, control or authority has had access to all legal and/or administrative guarantees and safeguards provided by law and, in particular, to an independent medical examination to assess claims that the complainant has previously suffered torture or ill-treatment in the complainant's country of origin;

(e) Whether there is any credible allegation or evidence that the complainant and/or other person's next of kin have been or will be threatened or exposed to reprisals or other forms of sanctions amounting to torture or other cruel, inhuman or degrading treatment or punishment in connection with the communication submitted to the Committee;

(f) Whether the complainant has engaged in political or other activities within or outside the State concerned that would appear to make the complainant vulnerable to the risk of being subjected to torture were the complainant to be expelled, returned or extradited to the State in question;

(g) If returned to the State to which the complainant is being deported, whether the complainant is at risk of further deportation to another State where the complainant would face the risk of being subjected to torture;

(h) Bearing in mind the status of physical and psychological fragility encountered by the majority of complainants, such as asylum seekers, former detainees and victims of torture or sexual violence, which is conducive to some inconsistencies and/or lapses of memory in their submissions, whether there is any evidence concerning the credibility of the complainant;

(i) Taking into account some inconsistencies that may exist in the presentation of the facts, whether the complainant has demonstrated the general veracity of the claims.[94]

XI. Independence of assessment of the Committee

50. The Committee gives considerable weight to findings of fact made by organs of the State party concerned;[95] however, it is not bound by such findings. It follows that the Committee will make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case.[96]

51. The principle of the benefit of the doubt, as a preventive measure against irreparable harm, will also be taken into account by the Committee in adopting decisions on individual communications, where the principle is relevant.

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[94] See, for example, *S.P.A. v. Canada*, para. 7.5.

[95] See, for example, *T.D. v. Switzerland*, para. 7.7; and *Alp v. Denmark* (CAT/C/52/D/466/2011), para. 8.3.

[96] See, for example, *I.E. v. Switzerland* (CAT/C/62/D/683/2015), para. 7.4.

Annexure 6:

Judgment of the European Court of Human Rights in Karamjit Singh Chahal v. United Kingdom (1996)

CASE OF CHAHAL v. THE UNITED KINGDOM

(Application no. 70/1995/576/662)

JUDGMENT

STRASBOURG

11 November 1996

Chahal v. the United Kingdom

In the case of Chahal v. the United Kingdom (1),

The European Court of Human Rights, sitting, in pursuance of Rule 51 of Rules of Court A (2), as a Grand Chamber composed of the following judges:
Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr A. Spielmann,
Mr J. De Meyer,
Mr N. Valticos,
Mr S.K. Martens,
Mrs E. Palm,
Mr J.M. Morenilla,
Sir John Freeland,
Mr A.B. Baka,
Mr G. Mifsud Bonnici,
Mr J. Makarczyk,
Mr D. Gotchev,
Mr P. Jambrek,
Mr U. Lohmus,
Mr E. Levits,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 March, 30 August and 25 October 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 70/1995/576/662. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 23 August 1995 and by the European Commission of Human Rights ("the Commission") on 13 September 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 22414/93) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 27 July 1993 by two Indian nationals, Mr Karamjit Singh Chahal and Mrs Darshan Kaur Chahal, and by two British nationals, Miss Kiranpreet Kaur Chahal and Mr Bikaramjit Singh Chahal.

The Government's application referred to Article 48 (art. 48) and the Commission's request referred to Articles 44 and 48 (art. 46, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the application and the request was to obtain a decision as to whether

the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 5 paras. 1 and 4, 8 and 13 of the Convention (art. 3, art. 5-1, art. 5-4, art. 8, art. 13).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 5 September 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Macdonald, Mr N. Valticos, Mr F. Bigi, Mr D. Gotchev and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. On 24 August 1995 the Government informed the Court that there were no immediate plans to deport the first applicant, and undertook to provide the Court with at least two weeks' notice of any intended deportation of him.

The Government had previously been requested by the Commission on 1 September 1994, pursuant to Rule 36 of its Rules of Procedure, not to deport the applicant pending the outcome of the proceedings before the Commission. In accordance with Rule 36 para. 2 of Rules of Court A, this request remained recommended to the Government.

5. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 15 January 1996.

6. On 28 November 1995, Mr Bernhardt, having consulted the Chamber, granted leave to Amnesty International, Justice and Liberty in conjunction with the Centre for Advice on Individual Rights in Europe ("the AIRE Centre") and the Joint Council for the Welfare of Immigrants ("JCWI"), all London-based non-governmental human rights organisations, to submit observations, pursuant to Rule 37 para. 2. Comments were received from Amnesty International and from Justice on 15 January 1996, and from Liberty together with the AIRE Centre and JCWI on 24 January.

7. On 21 February 1996 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 para. 1).

8. The Grand Chamber to be constituted included ex officio Mr Ryssdal, President of the Court, Mr Bernhardt, Vice-President of the Court, and all the other members and the substitute judges (Mr F. Matscher, Mr A. Spielmann, Mr J.M. Morenilla and Mr E. Levits) of the Chamber which had relinquished jurisdiction (Rule 51 para. 2 (a) and (b)). On 24 February 1996, in the presence of the Registrar, the President drew by lot the names of the seven additional judges called on to complete the Grand Chamber, namely Mr F. Gölcüklü, Mr J. De Meyer, Mr S.K. Martens, Mrs E. Palm, Mr A.B. Baka, Mr G. Mifsud Bonnici and Mr P. Jambrek.

9. Mr Macdonald was unable to take part in the hearing of the case and was replaced by Mr J. Makarczyk.

Subsequent to the hearing, Mr Bigi died. Mr Walsh was also unable to take part in the further consideration of the case.

10. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 March 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government
Mr I. Christie, Foreign and Commonwealth Office, Agent,
Sir Nicholas Lyell QC, MP, Attorney-General,
Mr J. Eadie, Counsel,
Mr C. Whomersley, Legal Secretariat to the Law Officers,
Mr D. Nissen, Home Office,
Mr C. Osborne, Home Office,
Mr D. Cooke, Home Office,
Mr J. Crump, Home Office,
Mr J. Marshall, Foreign and Commonwealth Office, Advisers;

(b) for the Commission
Mr N. Bratza, Delegate;

(c) for the applicants
Mr N. Blake QC, Counsel,
Mr D. Burgess, Solicitor.

The Court heard addresses by Mr Bratza, Mr Blake and Sir Nicholas Lyell.

11. On 29 March 1996, having regard to their late submission and the objections made by the Government, the Grand Chamber decided not to admit to the case file two affidavits filed by the applicants on 21 March 1996.

AS TO THE FACTS

I. The circumstances of the case

A. The applicants

12. The four applicants are members of the same family and are Sikhs.

The first applicant, Karamjit Singh Chahal, is an Indian citizen who was born in 1948. He entered the United Kingdom illegally in 1971 in search of employment. In 1974 he applied to the Home Office to regularise his stay and on 10 December 1974 was granted indefinite leave to remain under the terms of an amnesty for illegal entrants who arrived before 1 January 1973. Since 16 August 1990 he has been detained for the purposes of deportation in Bedford Prison.

The second applicant, Darshan Kaur Chahal, is also an Indian citizen who was born in 1956. She came to England on 12 September 1975 following her marriage to the first applicant in India, and currently lives in Luton with the two children of the family, Kiranpreet Kaur Chahal (born in 1977) and Bikaramjit Singh Chahal (born in 1978), who are the third and fourth applicants. By virtue of their birth in the United Kingdom the two children have British nationality.

13. The first and second applicants applied for British citizenship in December 1987. Mr Chahal's request was refused on 4 April 1989 but that of Mrs Chahal is yet to be determined.

B. Background: the conflict in Punjab

14. Since the partition of India in 1947 many Sikhs have been engaged in a political campaign for an independent homeland, Khalistan, which would approximate to the Indian province of Punjab. In the late 1970s, a prominent group emerged under the leadership of Sant Jarnail Singh Bhindranwale, based at the Golden Temple in Amritsar, the holiest Sikh shrine. The Government submit that Sant Bhindranwale, as well as preaching the tenets of orthodox Sikhism, used the Golden Temple for the accumulation of arms and advocated the use of violence for the establishment of an independent Khalistan.

15. The situation in Punjab deteriorated following the killing of a senior police officer in the Golden Temple in 1983. On 6 June 1984 the Indian army stormed the temple during a religious festival, killing Sant Bhindranwale and approximately 1,000 other Sikhs. Four months later the Indian Prime Minister, Mrs Indira Gandhi, was shot dead by two Sikh members of her bodyguard. The ensuing Hindu backlash included the killing of over 2,000 Sikhs in riots in Delhi.

16. Since 1984, the conflict in Punjab has reportedly claimed over 20,000 lives, peaking in 1992 when, according to Indian press reports collated by the United Kingdom Foreign and Commonwealth Office, approximately 4,000 people were killed in related incidents in Punjab and elsewhere. There is evidence of violence and human rights abuses perpetrated by both Sikh separatists and the security forces (see paragraphs 45-56 below).

C. Mr Chahal's visit to India in 1984

17. On 1 January 1984 Mr Chahal travelled to Punjab with his wife and children to visit relatives. He submits that during this visit he attended at the Golden Temple on many occasions, and saw Sant Bhindranwale preach there approximately ten times. On one occasion he, his wife and son were afforded a personal audience with him. At around this time Mr Chahal was baptised and began to adhere to the tenets of orthodox Sikhism. He also became involved in organising passive resistance in support of autonomy for Punjab.

18. On 30 March 1984 he was arrested by the Punjab police. He was taken into detention and held for twenty-one days, during which time he was, he contended, kept handcuffed in insanitary conditions, beaten to unconsciousness, electrocuted on various parts of his body and subjected to a mock execution. He was subsequently released without charge.

He was able to return to the United Kingdom on 27 May 1984, and has not visited India since.

D. Mr Chahal's political and religious activities in the United Kingdom

19. On his return to the United Kingdom, Mr Chahal became a leading figure in the Sikh community, which reacted with horror to the storming of the Golden Temple. He helped organise a demonstration in London to protest at the Indian Government's actions, became a full-time member of the committee of the "gurdwara" (temple) in Belvedere (Erith, Kent) and travelled around London persuading young Sikhs to be baptised.

20. In August 1984 Mr Jasbir Singh Rode entered the United Kingdom. He was Sant Bhindranwale's nephew, and recognised by Sikhs as his successor as spiritual leader. Mr Chahal contacted him on his arrival and toured the United Kingdom with him, assisting at baptisms performed by him. Mr Rode was instrumental in setting up branches of the International Sikh Youth Federation ("ISYF") in the United Kingdom, and the applicant played an important organisational role in this endeavour. The ISYF was established to be the overseas branch of the All India Sikh Students' Federation. This latter organisation was proscribed by the Indian Government until mid-1985, and is reportedly still perceived as militant by the Indian authorities.

21. In December 1984 Mr Rode was excluded from the United Kingdom on the ground that he publicly advocated violent methods in pursuance of the separatist campaign. On his return to India he was imprisoned without trial until late 1988. Shortly after his release it became apparent that he had changed his political views; he now argued that Sikhs should pursue their cause using constitutional methods, a view which, according to the applicants, was unacceptable to many Sikhs. The former followers of Mr Rode therefore became divided.

22. In the United Kingdom, according to the Government, this led to a split in the ISYF along broadly north/south lines. In the north of England most branches followed Mr Rode, whereas in the south the ISYF became linked with another Punjab political activist, Dr Sohan Singh, who continued to support the campaign for an independent homeland. Mr Chahal and, according to him, all major figures of spiritual and intellectual standing within the United Kingdom Sikh community were in the southern faction.

E. Mr Chahal's alleged criminal activities

23. In October 1985 Mr Chahal was detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 ("PTA") on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister, Mr Rajiv Gandhi, during an official visit to the United Kingdom. He was released for lack of evidence.

In 1986 he was arrested and questioned twice (once under the PTA), because he was believed to be involved in an ISYF conspiracy to murder moderate Sikhs in the United Kingdom. On both occasions he was released without charge.

Mr Chahal denied involvement in any of these conspiracies.

24. In March 1986 he was charged with assault and affray following disturbances at the East Ham gurdwara in London. During the course of his trial on these charges in May 1987 there was a disturbance at the Belvedere gurdwara, which was widely reported in the national press. Mr Chahal was arrested in connection with this incident, and was brought to court in handcuffs on the final day of his trial. He was convicted on both charges arising out of the East Ham incident, and served concurrent sentences of six and nine months.

He was subsequently acquitted of charges arising out of the Belvedere disturbance.

On 27 July 1992 the Court of Appeal quashed the two convictions on the grounds that Mr Chahal's appearance in court in handcuffs had been seriously prejudicial to him.

F. The deportation and asylum proceedings

1. The notice of intention to deport

25. On 14 August 1990 the Home Secretary (Mr Hurd) decided that Mr Chahal ought to be deported because his continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism.

A notice of intention to deport was served on the latter on 16 August 1990. He was then detained for deportation purposes pursuant to paragraph 2 (2) of Schedule III of the Immigration Act 1971 (see paragraph 64 below) and has remained in custody ever since.

2. Mr Chahal's application for asylum

26. Mr Chahal claimed that if returned to India he had a well-founded fear of persecution within the terms of the United Nations 1951 Convention on the Status of Refugees ("the 1951 Convention" - see paragraph 61 below) and applied for political asylum on 16 August 1990. He was interviewed by officials from the Asylum Division of the Home Office on 11 September 1990 and his solicitors submitted written representations on his behalf.

He claimed that he would be subjected to torture and persecution if returned to India, and relied upon the following matters, inter alia:

(a) his detention and torture in Punjab in 1984 (see paragraph 18 above);

(b) his political activities in the United Kingdom and his identification with the regeneration of the Sikh religion and the campaign for a separate Sikh State (see paragraphs 19-22 above);

(c) his links with Sant Bhindranwale and Jasbir Singh Rode; (see paragraphs 17 and 20 above);

(d) evidence that his parents, other relatives and contacts had been detained, tortured and questioned in October 1989 about Mr Chahal's activities in the United Kingdom and that others connected to him had died in police custody;

(e) the interest shown by the Indian national press in his alleged Sikh militancy and proposed expulsion from the United Kingdom;

(f) consistent evidence, including that contained in the reports of Amnesty International, of the torture and murder of those perceived to be Sikh militants by the Indian authorities, particularly the Punjab police (see paragraphs 55-56 below).

27. On 27 March 1991 the Home Secretary refused the request for asylum.

In a letter to the applicant, he expressed the view that the latter's known support of Sikh separatism would be unlikely to attract the interest of the Indian authorities unless that support were to include acts of violence against India. He continued that he was

"not aware of any outstanding charges either in India or elsewhere against [Mr Chahal] and on the account [Mr Chahal] has given of his political activities, the Secretary of State does not accept that there is a reasonable likelihood that he would be persecuted if he were to return to India. The media interest in his case may be known by the Indian authorities and, given his admitted involvement in an extremist faction of the ISYF, it is accepted that the Indian Government may have some current and legitimate interest in his activities".

The Home Secretary did not consider that Mr Chahal's experiences in India in 1984 had any continued relevance, since that had been a time of particularly high tension in Punjab.

28. Mr Chahal's solicitors informed the Home Secretary that he intended to make an application for judicial review of the refusal of asylum, but would wait until the advisory panel had considered the national security case against him.

3. The advisory panel

29. Because of the national security elements of the case, there was no right of appeal against the deportation order (see paragraphs 58 and 60 below). However, on 10 June 1991, the matter was considered by an advisory panel, chaired by a Court of Appeal judge, Lord Justice Lloyd, and including a former president of the Immigration Appeal Tribunal.

30. The Home Office had prepared statements on 5 April and 23 May 1991 containing an outline of the grounds for the notice of intention to deport, which were sent to the applicant. The principal points were as follows:

(a) Mr Chahal had been the central figure in directing the support for terrorism organised by the London-based faction of the ISYF which had close links with Sikh terrorists in the Punjab;

(b) he had played a leading role in the faction's programme of intimidation directed against the members of other groups within the United Kingdom Sikh community;

(c) he had been involved in supplying funds and equipment to terrorists in Punjab since 1985;

(d) he had a public history of violent involvement in Sikh terrorism, as evidenced by his 1986 convictions and involvement in disturbances at the Belvedere gurdwara (see paragraph 24 above). These disturbances were related to the aim of gaining control of gurdwara funds in order to finance support and assistance for terrorist activity in Punjab;

(e) he had been involved in planning and directing terrorist attacks in India, the United Kingdom and elsewhere.

Mr Chahal was not informed of the sources of and the evidence for these views, which were put to the advisory panel.

31. In a letter dated 7 June 1991, Mr Chahal's solicitors set out a written case to be put before the advisory panel, including the following points:

(a) the southern branch of the ISYF had a membership of less than 200 and was non-violent both in terms of its aims and history;

(b) the ISYF did not attempt to gain control of gurdwaras in order to channel funds into terrorism; this was a purely

ideological struggle on the part of young Sikhs to have gurdwaras run according to Sikh religious values;

(c) Mr Chahal denied any involvement in the disturbances at the East Ham and Belvedere gurdwaras (see paragraph 24 above) or in any other violent or terrorist activity in the United Kingdom or elsewhere.

32. He appeared before the panel in person, and was allowed to call witnesses on his behalf, but was not allowed to be represented by a lawyer or to be informed of the advice which the panel gave to the Home Secretary (see paragraph 60 below).

33. On 25 July 1991 the Home Secretary (Mr Baker) signed an order for Mr Chahal's deportation, which was served on 29 July.

4. Judicial review

34. On 9 August 1991 Mr Chahal applied for judicial review of the Home Secretaries' decisions to refuse asylum and to make the deportation order. Leave was granted by the High Court on 2 September 1991.

The asylum refusal was quashed on 2 December 1991 and referred back to the Home Secretary. The court found that the reasoning behind it was inadequate, principally because the Home Secretary had neglected to explain whether he believed the evidence of Amnesty International relating to the situation in Punjab and, if not, the reasons for such disbelief. The court did not decide on the validity of the deportation order. Mr Justice Popplewell expressed "enormous anxiety" about the case.

35. After further consideration, on 1 June 1992 the Home Secretary (Mr Clarke) took a fresh decision to refuse asylum. He considered that the breakdown of law and order in Punjab was due to the activities of Sikh terrorists and was not evidence of persecution within the terms of the 1951 Convention. Furthermore, relying upon Articles 32 and 33 of that Convention (see paragraph 61 below), he expressed the view that, even if Mr Chahal were at risk of persecution, he would not be entitled to the protection of the 1951 Convention because of the threat he posed to national security.

36. Mr Chahal applied for judicial review of this decision, but then requested a postponement on 4 June 1992, which was granted.

37. In a letter dated 2 July 1992, the Home Secretary informed the applicant that he declined to withdraw the deportation proceedings, that

Mr Chahal could be deported to any international airport of his choice within India and that the Home Secretary had sought and received an assurance from the Indian Government (which was subsequently repeated in December 1995) in the following terms:

"We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.

I have the honour to confirm the above."

38. On 16 July 1992 the High Court granted leave to apply for judicial review of the decisions of 1 June 1992 to maintain the refusal of asylum and of 2 July 1992 to proceed with the deportation. An application for bail was rejected on 23 July (the European Court of Human Rights was not provided with details of this ruling).

39. The Court of Appeal (Criminal Division) quashed Mr Chahal's 1987 convictions on 27 July 1992 (see paragraph 24 above). The Home Secretary reviewed the case in the light of this development, but concluded that it was right to proceed with the deportation.

40. The hearing of the application for judicial review took place between 18 and 21 January 1993. It was refused on 12 February 1993 by Mr Justice Potts in the High Court, as was a further application for bail (the European Court of Human Rights was not provided with details of this ruling either).

41. Mr Chahal appealed to the Court of Appeal. The appeal was heard on 28 July 1993 and dismissed on 22 October 1993 (R. v. Secretary of State for the Home Department, ex parte Chahal [1994] Immigration Appeal Reports, p. 107).

The court held that the combined effect of the 1951 Convention and the Immigration Rules (see paragraphs 61-62 below) was to require the Home Secretary to weigh the threat to Mr Chahal's life or freedom if he were deported against the danger to national security if he were permitted to stay. In the words of Lord Justice Nolan:

"The proposition that, in deciding whether the deportation of an individual would be in the public good, the Secretary of State should wholly ignore the fact that the individual has established a well-founded fear of persecution in the country to which he is to be sent seems to me

to be surprising and unacceptable. Of course there may very well be occasions when the individual poses such a threat to this country and its inhabitants that considerations of his personal safety and well-being become virtually irrelevant. Nonetheless one would expect that the Secretary of State would balance the risks to this country against the risks to the individual, albeit that the scales might properly be weighted in favour of the former."

The Home Secretary appeared to have taken into account the evidence that the applicant might be persecuted and it was not possible for the court to judge whether his decision to deport was irrational or perverse because it did not have access to the evidence relating to the national security risk posed by Mr Chahal. As Lord Justice Neill remarked:

"The court has the right to scrutinise a claim that a person should be deported in the interests of national security but in practice this scrutiny may be defective or incomplete if all the relevant facts are not before the court."

In the absence of evidence of irrationality or perversity, it was impossible under English law to set aside the Home Secretary's decision (see paragraph 66 below).

42. The Court of Appeal refused leave to appeal to the House of Lords, and this was also refused by the House of Lords on 3 March 1994.

43. Following the report of the Commission, the applicant applied for temporary release pending the decision of the European Court of Human Rights, by way of habeas corpus and judicial review proceedings in the Divisional Court (see paragraph 65 below). The Secretary of State opposed the application on the following grounds:

"The applicant was detained in August 1990 and served with notice of intention to deport because the then Secretary of State was satisfied that he represented a substantial threat to national security. The Secretary of State remains satisfied that such a threat persists ... Given the reasons for the applicant's deportation, the Secretary of State remains satisfied that his temporary release from detention would not be justified. He has concluded the applicant could not be safely released, subject to restrictions, in view of the nature of the threat posed by him."

Judgment was given on 10 November 1995 (R. v. Secretary of State for the Home Department, ex parte Chahal, unreported). Mr Justice MacPherson in the Divisional Court rejected the application for habeas corpus, on the ground that "the detention per se was plainly lawful because

the Secretary of State [had] the power to detain an individual who [was] the subject of a decision to make a deportation order". In connection with the application for judicial review of the Secretary of State's decision to detain Mr Chahal, the Judge remarked:

"I have to look at the decision of the Secretary of State and judge whether, in all the circumstances, upon the information available, he has acted unlawfully, or with procedural impropriety, or perversely to the point of irrationality. I am wholly unable to say that there is a case for such a decision, particularly bearing in mind that I do not know the full material on which the decisions have been made ...[I]t is obvious and right that in certain circumstances the Executive must be able to keep secret matters which they deem to be necessary to keep secret ... There are no grounds, in my judgment, for saying or even suspecting that there are not matters which are present in the Secretary of State's mind of that kind upon which he was entitled to act ..."

G. Current conditions in India and in Punjab

44. The current position with regard to the protection of human rights in India generally and in Punjab more specifically was a matter of dispute between the parties. A substantial amount of evidence was presented to the Court on this issue, some of which is summarised below.

1. Material submitted by the Government

45. The Government submitted that it appeared from Indian press reports collated by the Foreign and Commonwealth Office that the number of lives lost in Punjab from terrorism had decreased dramatically. In 1992 the figure was 4,000, in 1993 it was 394, and in 1994 it was 51. The former Chief Minister of Punjab, Mr Beant Singh, was assassinated in August 1995; that aside, there was little terrorist activity and only four terrorist-related deaths in the region in 1995.

46. Furthermore, democracy had returned to the State: almost all factions of the Akali Dal, the main Sikh political party, had united and were set to contest the next general election as one entity and the Gidderbaha by-election passed off peacefully, with a turn-out of 88%.

47. The United Kingdom High Commission continued to receive complaints about the Punjab police. However, in recent months these had related mainly to extortion rather than to politically-motivated abuses and they were consistently told that there was now little or no politically-motivated police action in Punjab.

48. Steps had been taken by the Indian authorities to deal with the remaining corruption and misuse of power in Punjab; for example, there had been a number of court judgments against police officers, a "Lok Pal" (ombudsman) had been appointed and the new Chief Minister had promised to "ensure transparency and accountability". The Indian National Human Rights Commission ("NHRC"), which had reported on Punjab (see below) continued to strengthen and develop.

2. The Indian National Human Rights Commission reports

49. The NHRC visited Punjab in April 1994 and reported as follows:

"The complaints of human rights violations made to the Commission fall broadly into three categories. Firstly, there were complaints against the police, of arbitrary arrests, disappearances, custodial deaths and fake encounters resulting in killings ..

There was near unanimity in the views expressed by the public at large that terrorism has been contained ... [A] feeling was now growing that it was time for the police to cease operating under the cover of special laws. There were very strong demands for normalising the role and functioning of the police and for re-establishing the authority of the District Magistrates over the police. The impression that the Commission has gathered is that ... the Magistracy at District level is not at present in a position to inquire into complaints of human rights violations by the police. In the public mind there is a prevailing feeling of the police being above the law, working on its own steam and answerable to none ... The Commission recommends that the Government examine this matter seriously and ensure that normalcy is restored ..."

50. In addition, in its annual report for 1994/1995, the NHRC recommended, as a matter of priority, a systematic reform, retraining and reorganisation of the police throughout India, having commented:

"The issue of custodial death and rape, already high in the priorities of the Commission, was set in the wider context of the widespread mistreatment of prisoners resulting from practices that can only be described as cruel, inhuman or degrading."

3. Reports to the United Nations

51. The reports to the United Nations in 1994 and 1995 of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment and in 1994 of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Working Group on enforced

and involuntary disappearances recounted that human rights violations on the part of the security forces were widespread in India.

For example, in his 1995 report, the Special Rapporteur on torture commented on the practice of torture in police custody:

"It is apparent that few incidents, in what is credibly alleged to be a widespread, if not endemic, phenomenon are prosecuted and even fewer lead to conviction of the perpetrators. It is to be noted that very many cases that come to the attention of the Special Rapporteur are those that result in death, in other words, those where torture may have been applied with the most extreme results. This must be a minority of cases of torture in the country [India]."

4. The United States' Department of State reports

52. The 1995 United States' Department of State report on India told of human rights abuses perpetrated by the Punjab police acting outside their home State:

"Punjab police hit teams again in 1994 pursued Sikh militants into other parts of India. On June 24, Punjab police shot and killed Karnail Singh Kaili, a man they identified as a Sikh terrorist ... in West Bengal. The Government of West Bengal claimed that it had not been informed of the presence of Punjab police in West Bengal, seized Kaili's body and weapons and barred the departure of the police team until the Punjab Chief Minister apologised."

53. In contrast, the most recent Department of State report (March 1996) declared that insurgent violence had largely disappeared in Punjab and that there was visible progress in correcting patterns of abuse by the police. It continued:

"Killings of Sikh militants by police in armed encounters appear to be virtually at an end. During the first eight months of [1995], only two persons were killed in police encounters. Attention was focused on past abuses in Punjab by press reports that hundreds of bodies, many allegedly those of persons who died in unacknowledged police custody, were cremated as 'unclaimed' during 1991-1993 or discovered at the bottom of recently drained canals."

5. The Immigration Appeal Tribunal

54. The United Kingdom Immigration Appeal Tribunal took account of allegations of the extra-territorial activities of the Punjab police in the

case of Charan Singh Gill v. Secretary of State for the Home Department (14 November 1994, unreported), which related to an appeal by a politically active Sikh against the Secretary of State's refusal to grant him political asylum. The appellant drew the attention of the tribunal to a story in the Punjab Times of 10 May 1994, which reported the killing by the Punjab police of two Sikh fighters in West Bengal. The chairman of the tribunal remarked:

"We should say that we do not accept [the representative of the Home Office's] view of this document, that it was more probably based on imaginative journalism than on fact. In our view, it affords valuable retrospective corroboration of the material set out above, demonstrating that the Punjab police are very much a law unto themselves, and are ready to track down anyone they regard as subversive, as and when the mood takes them, anywhere in India."

6. The reports of Amnesty International

55. In its report of May 1995, "Punjab police: beyond the bounds of the law", Amnesty International similarly alleged that the Punjab police were known to have carried out abductions and executions of suspected Sikh militants in other Indian States outside their jurisdiction. The Supreme Court in New Delhi had reportedly taken serious note of the illegal conduct of the Punjab police, publicly accusing them of "highhandedness and tyranny" and had on several occasions between 1993 and 1994 ordered investigations into their activities. Following the killing of a Sikh in Calcutta in May 1994, which provoked an angry reaction from the West Bengal State Government, the Union Home Secretary had convened a meeting of all director generals of police on 5 July 1994 to discuss concerns expressed by certain States following the intrusion by the Punjab police into their territories. One of the stated aims of the meeting was to try to work out a formula whereby the Punjab police would conduct their operations in cooperation with the respective State governments.

56. In its October 1995 report, "India: Determining the fate of the 'disappeared' in Punjab", Amnesty International claimed that high-profile individuals continued to "disappear" in police custody. Among the examples cited were the general secretary of the human rights wing of the Sikh political party, the Akali Dal, who was reportedly arrested on 6 September 1995 and had not been seen since.

II. Relevant domestic and international law and practice

A. Deportation

57. By section 3 (5) (b) of the Immigration Act 1971 ("the 1971 Act"), a person who is not a British citizen is liable to deportation inter alia if the Secretary of State deems this to be "conducive to the public good".

B. Appeal against deportation and the advisory panel procedure

58. There is a right of appeal to an adjudicator, and ultimately to an appeal tribunal, against a decision to make a deportation order (section 15 (1) of the 1971 Act) except in cases where the ground of the decision to deport was that the deportation would be conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature (section 15(3) of the 1971 Act).

59. This exception was maintained in the Asylum and Immigration Appeals Act 1993, which came into force in July 1993.

60. Cases in which a deportation order has been made on national security or political grounds are subject to a non-statutory advisory procedure, set out in paragraph 157 of the Statement of Changes in Immigration Rules (House of Commons Paper 251 of 1990).

The person concerned is given an opportunity to make written and/or oral representations to an advisory panel, to call witnesses on his behalf, and to be assisted by a friend, but he is not permitted to have legal representation before the panel. The Home Secretary decides how much information about the case against him may be communicated to the person concerned. The panel's advice to the Home Secretary is not disclosed, and the latter is not obliged to follow it.

C. The United Nations 1951 Convention on the Status of Refugees

61. The United Kingdom is a party to the United Nations 1951 Convention on the Status of Refugees ("the 1951 Convention"). A "refugee" is defined by Article 1 of the Convention as a person who is outside the country of his nationality due to "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".

Article 32 of the 1951 Convention provides:

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall only be in pursuance of a decision reached in accordance with due process of law ..."

Article 33 provides:

"1. No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

62. Rule 161 of the Immigration Rules (House of Commons Paper 251 of 1990) provides that:

"Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees ..."

63. In a case where a person to be deported for national security reasons claims asylum, the Secretary of State must balance the interest of the individual as a refugee against the risk to national security (R. v. Secretary of State for the Home Department, ex parte Chahal [1994] Immigration Appeal Reports, p. 107 - see paragraph 41 above).

D. Detention pending deportation

64. A person may be detained under the authority of the Secretary of State after the service upon him of a notice of intention to deport and pending the making of a deportation order, and also after the making of an order, pending his removal or departure from the country (paragraphs 2 (2) and (3) of Schedule III to the 1971 Act).

65. Any person in detention is entitled to challenge the lawfulness of his detention by way of a writ of habeas corpus. This is issued by the High Court to procure the production of a person in order that the circumstances of his detention may be inquired into. The detainee must be released if unlawfully detained (Habeas Corpus Act 1679 and Habeas Corpus Act 1816, section 1). Only one application for habeas corpus on the same grounds may be made by an individual in detention, unless

fresh evidence is adduced in support (Administration of Justice Act 1960, section 14 (2)).

In addition, a detainee may apply for judicial review of the decision to detain him (see paragraphs 43 above and 66-67 below).

In conjunction with either an application for habeas corpus or judicial review, it is possible to apply for bail (that is, temporary release) pending the decision of the court.

E. Judicial review

66. Decisions of the Home Secretary to refuse asylum, to make a deportation order or to detain pending deportation are liable to challenge by way of judicial review and may be quashed by reference to the ordinary principles of English public law.

These principles do not permit the court to make findings of fact on matters within the province of the Secretary of State or to substitute its discretion for the Minister's. The court may quash his decision only if he failed to interpret or apply English law correctly, if he failed to take account of issues which he was required by law to address, or if his decision was so irrational or perverse that no reasonable Secretary of State could have made it (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 King's Bench Reports, p. 223).

67. Where national security issues are involved, the courts retain a power of review, but it is a limited one because:

"the decision on whether the requirements of national security outweigh the duty of fairness in a particular case is a matter for the Government to decide, not for the courts; the Government alone has access to the necessary information and in any event the judicial process is unsuitable for reaching decisions on national security" (Council of Civil Service Unions v. Minister for the Civil Service [1985] Appeal Cases, p. 374, at p. 402).

See also R. v. Secretary of State for the Home Department, ex parte Cheblak [1991] 2 All England Reports, p. 9, where a similar approach was taken by the Court of Appeal.

PROCEEDINGS BEFORE THE COMMISSION

68. In the application of 27 July 1993 (no. 22414/93) to the Commission (as declared admissible), the first applicant complained that his deportation to India would expose him to a real risk of torture or inhuman

or degrading treatment in violation of Article 3 of the Convention (art. 3); that his detention had been too long and that the judicial control thereof had been ineffective and slow in breach of Article 5 paras. 1 and 4 (art. 5-1, art. 5-4); and that, contrary to Article 13 (art. 13), he had had no effective domestic remedy for his Convention claims because of the national security elements in his case. All the applicants also complained that the deportation of the first applicant would breach their right to respect for family life under Article 8 (art. 8), for which Convention claim they had no effective domestic remedy, contrary to Article 13 (art. 13).

69. On 1 September 1994 the Commission declared the application admissible. In its report of 27 June 1995 (Article 31) (art. 31) it expressed the unanimous opinion that there would be violations of Articles 3 and 8 (art. 3, art. 8) if the first applicant were deported to India; that there had been a violation of Article 5 para. 1 (art. 5-1) by reason of the length of his detention; and that there had been a violation of Article 13 (art. 13). The Commission also concluded (by sixteen votes to one) that it was not necessary to examine the complaints under Article 5 para. 4 of the Convention (art. 5-4).

The full text of the Commission's opinion and of the partly dissenting opinion contained in the report is reproduced as annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-V), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

70. At the hearing on 25 March 1996 the Government, as they had done in their memorial, invited the Court to hold that the deportation order, if implemented, would not amount to a violation of Articles 3 and 8 of the Convention (art. 3, art. 8), and that there had been no breaches of Articles 5 and 13 (art. 5, art. 13).

71. On the same occasion the applicants reiterated their requests to the Court, set out in their memorial, to find violations of Articles 3, 5, 8 and

13 (art. 3, art. 5, art. 8, art. 13) and to award them just satisfaction under Article 50 (art. 50).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION (art. 3)

72. The first applicant complained that his deportation to India would constitute a violation of Article 3 of the Convention (art. 3), which states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission upheld this complaint, which the Government contested.

A. Applicability of Article 3 (art. 3) in expulsion cases

73. As the Court has observed in the past, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 102).

74. However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country. In these circumstances, Article 3 (art. 3) implies the obligation not to expel the person in question to that country (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70, and the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103).

The Government contested this principle before the Commission but accepted it in their pleadings before the Court.

B. Expulsion cases involving an alleged danger to national security

75. The Court notes that the deportation order against the first applicant was made on the ground that his continued presence in the United Kingdom was unconducive to the public good for reasons of national security, including the fight against terrorism (see paragraph 25 above). The parties differed as to whether, and if so to what extent, the fact that the applicant might represent a danger to the security of the United Kingdom affected that State's obligations under Article 3 (art. 3).

76. Although the Government's primary contention was that no real risk of ill-treatment had been established (see paragraphs 88 and 92 below), they also emphasised that the reason for the intended deportation was national security. In this connection they submitted, first, that the guarantees afforded by Article 3 (art. 3) were not absolute in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases, which required an uncertain prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there was an implied limitation to Article 3 (art. 3) entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. The Government based this submission in the first place on the possibility of implied limitations as recognised in the Court's case-law, particularly paragraphs 88 and 89 of its above-mentioned Soering judgment. In support, they furthermore referred to the principle under international law that the right of an alien to asylum is subject to qualifications, as is provided for, inter alia, by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees (see paragraph 61 above).

In the alternative, the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3 (art. 3). This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community. This was the case here: it was at least open to substantial doubt whether the alleged risk of ill-treatment would materialise; consequently, the fact that Mr Chahal constituted a serious threat to the security of the United Kingdom justified his deportation.

77. The applicant denied that he represented any threat to the national security of the United Kingdom, and contended that, in any case, national security considerations could not justify exposing an individual to the risk of ill-treatment abroad any more than they could justify administering torture to him directly.

78. The Commission, with whom the intervenors (see paragraph 6 above) agreed, rejected the Government's arguments. It referred to the Court's Vilvarajah and Others judgment (cited at paragraph 73 above, p. 36, para. 108) and expressed the opinion that the guarantees afforded by Article 3 (art. 3) were absolute in character, admitting of no exception.

At the hearing before the Court, the Commission's Delegate suggested that the passages in the Court's Soering judgment upon which the Government relied (see paragraph 76 above) might be taken as authority for the view that, in a case where there were serious doubts as to the likelihood of a person being subjected to treatment or punishment contrary to Article 3 (art. 3), the benefit of that doubt could be given to the deporting State whose national interests were threatened by his continued presence. However, the national interests of the State could not be invoked to override the interests of the individual where substantial grounds had been shown for believing that he would be subjected to ill-treatment if expelled.

79. Article 3 (art. 3) enshrines one of the most fundamental values of democratic society (see the above-mentioned Soering judgment, p. 34, para. 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 163, and also the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 42, para. 115).

80. The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard

him or her against such treatment is engaged in the event of expulsion (see the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103). In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Conventionon the Status of Refugees (see paragraph 61 above).

81. Paragraph 88 of the Court's above-mentioned Soering judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 (art. 3) is engaged.

82. It follows from the above that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt bona fide, allegations about the first applicant's terrorist activities and the threat posed by him to national security.

C. Application of Article 3 (art. 3) in the circumstances of the case

1. The point of time for the assessment of the risk

83. Although there were differing views on the situation in India and in Punjab (see paragraphs 87-91 below), it was agreed that the violence and instability in that region reached a peak in 1992 and had been abating ever since. For this reason, the date taken by the Court for its assessment of the risk to Mr Chahal if expelled to India is of importance.

84. The applicant argued that the Court should consider the position in June 1992, at the time when the decision to deport him was made final (see paragraph 35 above). The purpose of the stay on removal requested by the Commission (see paragraph 4 above) was to prevent irremediable damage and not to afford the High Contracting Party with an opportunity to improve its case. Moreover, it was not appropriate that the Strasbourg organs should be involved in a continual fact-finding operation.

85. The Government, with whom the Commission agreed, submitted that because the responsibility of the State under Article 3 of the Convention (art. 3) in expulsion cases lies in the act of exposing an individual to a real risk of ill-treatment, the material date for the assessment of risk was the time of the proposed deportation. Since Mr Chahal had

not yet been expelled, the relevant time was that of the proceedings before the Court.

86. It follows from the considerations in paragraph 74 above that, as far as the applicant's complaint under Article 3 (art. 3) is concerned, the crucial question is whether it has been substantiated that there is a real risk that Mr Chahal, if expelled, would be subjected to treatment prohibited by that Article (art. 3). Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.

2. The assessment of the risk of ill-treatment

(a) The arguments

(i) General conditions

87. It was the applicant's case that the Government's assessment of conditions in India and Punjab had been profoundly mistaken throughout the domestic and Strasbourg proceedings. He referred to a number of reports by governmental bodies and by intergovernmental and non-governmental organisations on the situation in India generally and in Punjab in particular, with emphasis on those reports concerning 1994 and 1995 (see paragraphs 49-56 above) and argued that this material established the contention that human rights abuse in India by the security forces, especially the police, remained endemic.

In response to the Government's offer to return him to the part of India of his choice, he asserted that the Punjab police had abducted and killed militant Sikhs outside their home State in the past.

Although he accepted that there had been some improvements in Punjab since the peak of unrest in 1992, he insisted that there had been no fundamental change of regime. On the contrary, what emerged from the above reports was the continuity of the practices of the security agencies. In this respect he pointed to the fact that the director general of the Punjab police, who had been responsible for many human rights abuses during his term of office between 1992 and 1995, had been replaced upon his retirement by his former deputy and intelligence chief.

88. The Government contended that there would be no real risk of Mr Chahal being ill-treated if the deportation order were to be implemented and emphasised that the latter was to be returned to whichever part of

India he chose, and not necessarily to Punjab. In this context they pointed out that they regularly monitored the situation in India through the United Kingdom High Commission in New Delhi. It appeared from this information that positive concrete steps had been taken and continued to be taken to deal with human rights abuses. Specific legislation had been introduced in this regard; the National Human Rights Commission, which performed an important function, continued to strengthen and develop; and steps had been taken by both the executive and judicial authorities to deal with the remaining misuse of power. The situation in India generally was therefore such as to support their above contention.

Furthermore, with reference to the matters set out in paragraphs 45-48 above, they contended that the situation in Punjab had improved substantially in recent years. They stressed that there was now little or no terrorist activity in that State. An ombudsman had been established to look into complaints of misuse of power and the new Chief Minister had publicly declared the government's intentions to stamp out human rights abuses. Legal proceedings had been brought against police officers alleged to have been involved in unlawful activity.

89. Amnesty International in its written submissions informed the Court that prominent Sikh separatists still faced a serious risk of "disappearance", detention without charge or trial, torture and extrajudicial execution, frequently at the hands of the Punjab police. It referred to its 1995 report which documented a pattern of human rights violations committed by officers of the Punjab police acting in under-cover operations outside their home State (see paragraph 55 above).

90. The Government, however, urged the Court to proceed with caution in relation to the material prepared by Amnesty International, since it was not possible to verify the facts of the cases referred to. Furthermore, when studying these reports it was tempting to lose sight of the broader picture of improvement by concentrating too much on individual cases of alleged serious human rights abuses. Finally, since the situation in Punjab had changed considerably in recent years, earlier reports prepared by Amnesty and other organisations were now of limited use.

91. On the basis of the material before it, the Commission accepted that there had been an improvement in the conditions prevailing in India and, more specifically, in Punjab. However, it was unable to find in the recent material provided by the

Government any solid evidence that the Punjab police were now under democratic control or that the judiciary had been able fully to reassert its own independent authority in the region.

(ii) Factors specific to Mr Chahal

92. Those appearing before the Court also differed in their assessment of the effect which Mr Chahal's notoriety would have on his security in India.

In the Government's view, the Indian Government were likely to be astute to ensure that no ill-treatment befell Mr Chahal, knowing that the eyes of the world would be upon him. Furthermore, in June 1992 and December 1995 they had sought and received assurances from the Indian Government (see paragraph 37 above).

93. The applicant asserted that his high profile would increase the danger of persecution. By taking the decision to deport him on national security grounds the Government had, as was noted by Mr Justice Popplewell in the first judicial review hearing (see paragraph 34 above), in effect publicly branded him a terrorist. Articles in the Indian press since 1990 indicated that he was regarded as such in India, and a number of his relatives and acquaintances had been detained and ill-treated in Punjab because of their connection to him. The assurances of the Indian Government were of little value since that Government had shown themselves unable to control the security forces in Punjab and elsewhere. The applicant also referred to examples of well-known personalities who had recently "disappeared".

94. For the Commission, Mr Chahal, as a leading Sikh militant suspected of involvement in acts of terrorism, was likely to be of special interest to the security forces, irrespective of the part of India to which he was returned.

(b) The Court's approach

95. Under the Convention system, the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 para. 1 and 31) (art. 28-1, art. 31). Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area (see the Cruz Varas and Others judgment mentioned at paragraph 74 above, p. 29, para. 74).

96. However, the Court is not bound by the Commission's findings of fact and is free to make its own assessment. Indeed, in cases such as the

present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 (art. 3) and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe (see the Vilvarajah and Others judgment mentioned at paragraph 73 above, p. 36, para. 108).

97. In determining whether it has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to Article 3 (art. 3), the Court will assess all the material placed before it and, if necessary, material obtained of its own motion (see the above-mentioned Vilvarajah and Others judgment, p. 36, para. 107). Furthermore, since the material point in time for the

assessment of risk is the date of the Court's consideration of the case (see paragraph 86 above), it will be necessary to take account of evidence which has come to light since the Commission's review.

98. In view of the Government's proposal to return Mr Chahal to the airport of his choice in India, it is necessary for the Court to evaluate the risk of his being ill-treated with reference to conditions throughout India rather than in Punjab alone. However, it must be borne in mind that the first applicant is a well-known supporter of Sikh separatism. It follows from these observations that evidence relating to the fate of Sikh militants at the hands of the security forces outside the State of Punjab is of particular relevance.

99. The Court has taken note of the Government's comments relating to the material contained in the reports of Amnesty International (see paragraph 90 above). Nonetheless, it attaches weight to some of the most striking allegations contained in those reports, particularly with regard to extrajudicial killings allegedly perpetrated by the Punjab police outside their home State and the action taken by the Indian Supreme Court, the West Bengal State Government and the Union Home Secretary in response (see paragraph 55 above). Moreover, similar assertions were accepted by the United Kingdom Immigration Appeal Tribunal in Charan Singh Gill v. Secretary of State for the Home Department (see paragraph 54 above) and were included in the 1995 United States' State Department report on India (see paragraph 52 above). The 1994 National Human Rights Commission's report on Punjab substantiated the impression of a police force completely beyond the control of lawful authority (see paragraph 49 above).

100. The Court is persuaded by this evidence, which has been corroborated by material from a number of different objective sources, that, until mid-1994 at least, elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were fully capable of pursuing their targets into areas of India far away from Punjab.

101. The Commission found in paragraph 111 of its report that there had in recent years been an improvement in the protection of human rights in India, especially in Punjab, and evidence produced subsequent to the Commission's consideration of the case indicates that matters continue to advance.

In particular, it would appear that the insurgent violence in Punjab has abated; the Court notes the very substantial reduction in terrorist-related deaths in the region as indicated by the respondent Government (see paragraph 45 above). Furthermore, other encouraging events have reportedly taken place in Punjab in recent years, such as the return of democratic elections, a number of court judgments against police officers, the appointment of an ombudsman to investigate abuses of power and the promise of the new Chief Minister to "ensure transparency and accountability" (see paragraphs 46 and 48 above). In addition, the 1996 United States' State Department report asserts that during 1995 "there was visible progress in correcting patterns of abuse by the [Punjab] police" (see paragraph 53 above).

102. Nonetheless, the evidence demonstrates that problems still persist in connection with the observance of human rights by the security forces in Punjab. As the respondent Government themselves recounted, the United Kingdom High Commission in India continues to receive complaints about the Punjab police, although in recent months these have related mainly to extortion rather than to politically motivated abuses (see paragraph 47 above). Amnesty International alleged that "disappearances" of notable Sikhs at the hands of the Punjab police continued sporadically throughout 1995 (see paragraph 56 above) and the 1996 State Department report referred to the killing of two Sikh militants that year (see paragraph 53 above).

103. Moreover, the Court finds it most significant that no concrete evidence has been produced of any fundamental reform or reorganisation of the Punjab police in recent years. The evidence referred to above (paragraphs 49-56) would indicate that such a process was urgently required, and indeed this was the recommendation of the NHRC (see paragraph 49 above). Although there was a change in the leadership of

the Punjab police in 1995, the director general who presided over some of the worst abuses this decade has only been replaced by his former deputy and intelligence chief (see paragraph 87 above).

Less than two years ago this same police force was carrying out well-documented raids into other Indian States (see paragraph 100 above) and the Court cannot entirely discount the applicant's claims that any recent reduction in activity stems from the fact that key figures in the campaign for Sikh separatism have all either been killed, forced abroad or rendered inactive by torture or the fear of torture. Furthermore, it would appear from press reports that evidence of the full extent of past abuses is only now coming to light (see paragraph 53 above).

104. Although the Court is of the opinion that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside State boundaries, it also attaches significance to the fact that attested allegations of serious human rights violations have been levelled at the police elsewhere in India. In this respect, the Court notes that the United Nations' Special Rapporteur on torture has described the practice of torture upon those in police custody as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice (see paragraph 51 above). The NHRC has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India (see paragraph 50 above).

105. Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above (paragraph 92), it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem (see paragraph 104 above).

Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.

106. The Court further considers that the applicant's high profile would be more likely to increase the risk to him of harm than otherwise. It is not disputed that Mr Chahal is well known in India to support the cause of Sikh separatism and to have had close links with other leading figures in that struggle (see paragraphs 17 and 20 above). The respondent Government have made serious, albeit untested, allegations of his involvement in terrorism which are undoubtedly known to the Indian

authorities. The Court is of the view that these factors would be likely to make him a target of interest for hard-line elements in the security forces who have relentlessly pursued suspected Sikh militants in the past (see paragraphs 49-56 above).

107. For all the reasons outlined above, in particular the attested involvement of the Punjab police in killings and abductions outside their State and the allegations of serious human rights violations which continue to be levelled at members of the Indian security forces elsewhere, the Court finds it substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 (art. 3) if he is returned to India.

Accordingly, the order for his deportation to India would, if executed, give rise to a violation of Article 3 (art. 3).

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION (art. 5)

A. Article 5 para. 1 (art. 5-1)

108. The first applicant complained that his detention pending deportation constituted a violation of Article 5 para. 1 of the Convention (art. 5-1), which provides (so far as is relevant):

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation ..."

109. Mr Chahal has been held in Bedford Prison since 16 August 1990 (see paragraph 25 above). It was not disputed that he had been detained "with a view to deportation" within the meaning of Article 5 para. 1 (f) (art. 5-1-f). However, he maintained that his detention had ceased to be "in accordance with a procedure prescribed by law" for the purposes of Article 5 para. 1 (art. 5-1) because of its excessive duration.

In particular, the applicant complained about the length of time (16 August 1990 - 27 March 1991) taken to consider and reject his application for refugee status; the period (9 August 1991 - 2 December 1991) between his application for judicial review of the decision to refuse asylum and

the national court's decision; and the time required (2 December 1991 - 1 June 1992) for the fresh decision refusing asylum.

110. The Commission agreed, finding that the above proceedings were not pursued with the requisite speed and that the detention therefore ceased to be justified.

111. The Government, however, asserted that the various proceedings brought by Mr Chahal were dealt with as expeditiously as possible.

112. The Court recalls that it is not in dispute that Mr Chahal has been detained "with a view to deportation" within the meaning of Article 5 para. 1 (f) (art. 5-1-f) (see paragraph 109 above). Article 5 para. 1 (f) (art. 5-1-f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 para. 1 (f) (art. 5-1-f) provides a different level of protection from Article 5 para. 1 (c) (art. 5-1-c).

Indeed, all that is required under this provision (art. 5-1-f) is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5 para. 1 (f) (art. 5-1-f), whether the underlying decision to expel can be justified under national or Convention law.

113. The Court recalls, however, that any deprivation of liberty under Article 5 para. 1 (f) (art. 5-1-f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f) (art. 5-1-f) (see the Quinn v. France judgment of 22 March 1995, Series A no. 311, p. 19, para. 48, and also the Kolompar v. Belgium judgment of 24 September 1992, Series A no. 235-C, p. 55, para. 36).

It is thus necessary to determine whether the duration of the deportation proceedings was excessive.

114. The period under consideration commenced on 16 August 1990, when Mr Chahal was first detained with a view to deportation. It terminated on 3 March 1994, when the domestic proceedings came to an end with the refusal of the House of Lords to allow leave to appeal (see paragraphs 25 and 42 above). Although he has remained in custody until the present day, this latter period must be distinguished because during this time the Government have refrained from deporting him in compliance with the request made by the Commission under Rule 36 of its Rules of Procedure (see paragraph 4 above).

115. The Court has had regard to the length of time taken for the various decisions in the domestic proceedings.

As regards the decisions taken by the Secretary of State to refuse asylum, it does not consider that the periods (that is, 16 August 1990 - 27 March 1991 and 2 December 1991 - 1 June 1992) were excessive, bearing in mind the detailed and careful consideration required for the applicant's request for political asylum and the opportunities afforded to the latter to make representations and submit information (see paragraphs 25-27 and 34-35 above).

116. In connection with the judicial review proceedings before the national courts, it is noted that Mr Chahal's first application was made on 9 August 1991 and that a decision was reached on it by Mr Justice Popplewell on 2 December 1991. He made a second application on 16 July 1992, which was heard between 18 and 21 December 1992, judgment being given on 12 February 1993. The Court of Appeal dismissed the appeal against this decision on 22 October 1993 and refused him leave to appeal to the House of Lords. The House of Lords similarly refused leave to appeal on 3 March 1994 (see paragraphs 34, 38 and 40-42 above).

117. As the Court has observed in the context of Article 3 (art. 3), Mr Chahal's case involves considerations of an extremely serious and weighty nature. It is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence.

Against this background, and bearing in mind what was at stake for the applicant and the interest that he had in his claims being thoroughly examined by the courts, none of the periods complained of can be regarded as excessive, taken either individually or in combination. Accordingly, there has been no violation of Article 5 para. 1 (f) of the Convention (art. 5-1-f) on account of the diligence, or lack of it, with which the domestic procedures were conducted.

118. It also falls to the Court to examine whether Mr Chahal's detention was "lawful" for the purposes of Article 5 para. 1 (f) (art. 5-1-f), with particular reference to the safeguards provided by the national system.

Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition

that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness.

119. There is no doubt that Mr Chahal's detention was lawful under national law and was effected "in accordance with a procedure prescribed by law" (see paragraphs 43 and 64 above). However, in view of the extremely long period during which Mr Chahal has been detained, it is also necessary to consider whether there existed sufficient guarantees against arbitrariness.

120. In this context, the Court observes that the applicant has been detained since 16 August 1990 on the ground, essentially, that successive Secretaries of State have maintained that, in view of the threat to national security represented by him, he could not safely be released (see paragraph 43 above). The applicant has, however, consistently denied that he posed any threat whatsoever to national security, and has given reasons in support of this denial (see paragraphs 31 and 77 above).

121. The Court further notes that, since the Secretaries of State asserted that national security was involved, the domestic courts were not in a position effectively to control whether the decisions to keep Mr Chahal in detention were justified, because the full material on which these decisions were based was not made available to them (see paragraph 43 above).

122. However, in the context of Article 5 para. 1 of the Convention (art. 5-1), the advisory panel procedure (see paragraphs 29-32 and 60 above) provided an important safeguard against arbitrariness. This panel, which included experienced judicial figures (see paragraph 29 above) was able fully to review the evidence relating to the national security threat represented by the applicant. Although its report has never been disclosed, at the hearing before the Court the Government indicated that the panel had agreed with the Home Secretary that Mr Chahal ought to be deported on national security grounds. The Court considers that this procedure provided an adequate guarantee that there were at least prima facie grounds for believing that, if Mr Chahal were at liberty, national security would be put at risk and thus that the executive had not acted arbitrarily when it ordered him to be kept in detention.

123. In conclusion, the Court recalls that Mr Chahal has undoubtedly been detained for a length of time which is bound to give rise to serious concern. However, in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were

sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5 para. 1 (f) (art. 5-1-f).

It follows that there has been no violation of Article 5 para. 1 (art. 5-1).

B. Article 5 para. 4 (art. 5-4)

124. The first applicant alleged that he was denied the opportunity to have the lawfulness of his detention decided by a national court, in breach of Article 5 para. 4 of the Convention (art. 5-4), which provides:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

He submitted that the reliance placed on national security grounds as justification for his detention pending deportation prevented the domestic courts from considering whether it was lawful and appropriate. However, he developed this argument more thoroughly in connection with his complaint under Article 13 of the Convention (art. 13) (see paragraphs 140-41 below).

125. The Commission was of the opinion that it was more appropriate to consider this complaint under Article 13 (art. 13) and the Government also followed this approach (see paragraphs 142-43 below).

126. The Court recalls, in the first place, that Article 5 para. 4 (art. 5-4) provides a lex specialis in relation to the more general requirements of Article 13 (art. 13) (see the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, p. 27, para. 60). It follows that, irrespective of the method chosen by Mr Chahal to argue his complaint that he was denied the opportunity to have the lawfulness of his detention reviewed, the Court must first examine it in connection with Article 5 para. 4 (art. 5-4).

127. The Court further recalls that the notion of "lawfulness" under paragraph 4 of Article 5 (art. 5-4) has the same meaning as in paragraph 1 (art. 5-1), so that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (art. 5-1) (see the E. v. Norway judgment of 29 August 1990, Series A no. 181-A, p. 21, para. 49).

The scope of the obligations under Article 5 para. 4 (art. 5-4) is not identical for every kind of deprivation of liberty (see, inter alia, the Bouamar v. Belgium judgment of 29 February 1988, Series A no. 129, p. 24, para. 60); this applies notably to the extent of the judicial review afforded. Nonetheless, it is clear that Article 5 para. 4 (art. 5-4) does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 para. 1 (art. 5-1) (see the above-mentioned E. v. Norway judgment, p. 21, para. 50).

128. The Court refers again to the requirements of Article 5 para. 1 (art. 5-1) in cases of detention with a view to deportation (see paragraph 112 above). It follows from these requirements that Article 5 para. 4 (art. 5-4) does not demand that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law.

129. The notion of "lawfulness" in Article 5 para. 1 (f) (art. 5-1-f) does not refer solely to the obligation to conform to the substantive and procedural rules of national law; it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5) (see paragraph 118 above). The question therefore arises whether the available proceedings to challenge the lawfulness of Mr Chahal's detention and to seek bail provided an adequate control by the domestic courts.

130. The Court recollects that, because national security was involved, the domestic courts were not in a position to review whether the decisions to detain Mr Chahal and to keep him in detention were justified on national security grounds (see paragraph 121 above). Furthermore, although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed (see paragraphs 30, 32 and 60 above), the panel could not be considered as a "court" within the meaning of Article 5 para. 4 (art. 5-4) (see, mutatis mutandis, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 26, para. 61).

131. The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean,

however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved (see, mutatis mutandis, the Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 17, para. 34, and the Murray v. the United Kingdom judgment of 28 October 1994, Series A no. 300-A, p. 27, para. 58). The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13 (art. 13) (see paragraph 144 below), in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.

132. It follows that the Court considers that neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5 para. 4 (art. 5-4). This shortcoming is all the more significant given that Mr Chahal has undoubtedly been deprived of his liberty for a length of time which is bound to give rise to serious concern (see paragraph 123 above).

133. In conclusion, there has been a violation of Article 5 para. 4 of the Convention (art. 5-4).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

134. All four of the applicants complained that if Mr Chahal were deported to India this would amount to a violation of Article 8 of the Convention (art. 8), which states (so far as is relevant):

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security ..."

135. It was not contested by the Government that the deportation would constitute an interference with the Article 8 para. 1 (art. 8-1) rights of the applicants to respect for their family life.

The applicants, for their part, conceded that the interference would be "in accordance with the law" and would pursue a legitimate aim for the purposes of Article 8 para. 2 (art. 8-2).

The only material question in this connection was, therefore, whether the interference (that is, the deportation) would be "necessary in a democratic society in the interests of national security", within the meaning of Article 8 para. 2 (art. 8-2).

136. The Government asserted that Mr Chahal's deportation would be necessary and proportionate in view of the threat he represented to the national security of the United Kingdom and the wide margin of appreciation afforded to States in this type of case.

137. The applicants denied that Mr Chahal's deportation could be justified on national security grounds and emphasised that, if there were cogent evidence that he had been involved in terrorist activity, a criminal prosecution could have been brought against him in the United Kingdom.

138. The Commission acknowledged that States enjoy a wide margin of appreciation under the Convention where matters of national security are in issue, but was not satisfied that the grave recourse of deportation was in all the circumstances necessary and proportionate.

139. The Court recalls its finding that the deportation of the first applicant to India would constitute a violation of Article 3 of the Convention (art. 3) (see paragraph 107 above). Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to India, there would also be a violation of the applicants' rights under Article 8 of the Convention (art. 8).

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION (art. 13)

140. In addition, the applicants alleged that they were not provided with effective remedies before the national courts, in breach of Article 13 of the Convention (art. 13), which reads:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

141. The applicants maintained that the only remedy available to them in respect of their claims under Articles 3, 5 and 8 of the Convention (art. 3, art. 5, art. 8) was judicial review, the advisory panel procedure (see paragraphs 29 and 60 above) being neither a "remedy" nor "effective".

They submitted, first, that the powers of the English courts to put aside an executive decision were inadequate in all Article 3 (art. 3) asylum cases, since the courts could not scrutinise the facts to determine whether substantial grounds had been shown for belief in the existence of a real risk of ill-treatment in the receiving State, but could only determine whether the Secretary of State's decision as to the existence of such a risk was reasonable according to the "Wednesbury" principles (see paragraph 66 above).

This contention had particular weight in cases where the executive relied upon arguments of national security. In the instant case, the assertion that Mr Chahal's deportation was necessary in the interests of national security entailed that there could be no effective judicial evaluation of the risk to him of ill-treatment in India or of the issues under Article 8 (art. 8). That assertion likewise prevented any effective judicial control on the question whether the applicant's continued detention was justified.

142. The Government accepted that the scope of judicial review was more limited where deportation was ordered on national security grounds. However, the Court had held in the past that, where questions of national security were in issue, an "effective remedy" under Article 13 (art. 13) must mean "a remedy that is effective as can be", given the necessity of relying upon secret sources of information (see the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 31, para. 69, and the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 32, para. 84).

Furthermore, it had to be borne in mind that all the relevant material, including the sensitive material, was examined by the advisory panel whose members included two senior judicial figures - a Court of Appeal judge and a former president of the Immigration Appeal Tribunal (see paragraph 29 above). The procedure before the panel was designed, on the one hand, to satisfy the need for an independent review of the totality of the material on which the perceived threat to national security was based and, on the other hand, to ensure that secret information would not be publicly disclosed. It thus provided a form of independent, quasi-judicial scrutiny.

143. For the Commission, the present case could be distinguished from that of Vilvarajah and Others (cited at paragraph 73 above, p. 39, paras. 122-26) where the Court held that judicial review in the English courts amounted to an effective remedy in respect of the applicants' Article 3 (art. 3) claims. Because the Secretary of State invoked national security considerations as grounds for his decisions to deport Mr Chahal and to detain him pending deportation, the English courts' powers of review were limited. They could not themselves consider the evidence on which the Secretary of State had based his decision that the applicant constituted a danger to national security or undertake any evaluation of the Article 3 (art. 3) risks. Instead, they had to confine themselves to examining whether the evidence showed that the Secretary of State had carried out the balancing exercise required by the domestic law (see paragraph 41 above).

144. The intervenors (see paragraph 6 above) were all of the view that judicial review did not constitute an effective remedy in cases involving national security. Article 13 (art. 13) required at least that some independent body should be appraised of all the facts and evidence and entitled to reach a decision which would be binding on the Secretary of State.

In this connection, Amnesty International, Liberty, the AIRE Centre and JCWI (see paragraph 6 above) drew the Court's attention to the procedure applied in such cases in Canada. Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.

145. The Court observes that Article 13 (art. 13) guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article (art. 13) is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although

Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (art. 13) (see the Vilvarajah and Others judgment cited at paragraph 73 above, p. 39, para. 122).

Moreover, it is recalled that in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13 (art. 13) (see, inter alia, the above-mentioned Leander judgment, p. 30, para. 77).

146. The Court does not have to examine the allegation of a breach of Article 13 taken in conjunction with Article 5 para. 1 (art. 13+5-1), in view of its finding of a violation of Article 5 para. 4 (art. 5-4) (see paragraph 133 above). Nor is it necessary for it to examine the complaint under Article 13 in conjunction with Article 8 (art. 13+8), in view of its finding concerning the hypothetical nature of the complaint under the latter provision (art. 8) (see paragraph 139 above).

147. This leaves only the first applicant's claim under Article 3 combined with Article 13 (art. 13+3). It was not disputed that the Article 3 (art. 3) complaint was arguable on the merits and the Court accordingly finds that Article 13 (art. 13) is applicable (see the above-mentioned Vilvarajah and Others judgment, p. 38, para. 121).

148. The Court recalls that in its Vilvarajah and Others judgment (ibid., p. 39, paras. 122-26), it found judicial review proceedings to be an effective remedy in relation to the applicants' complaints under Article 3 (art. 3). It was satisfied that the English courts could review a decision by the Secretary of State to refuse asylum and could rule it unlawful on the grounds that it was tainted with illegality, irrationality or procedural impropriety (see paragraph 66 above). In particular, it was accepted that a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take (ibid., para. 123).

149. The Court further recalls that in assessing whether there exists a real risk of treatment in breach of Article 3 (art. 3) in expulsion cases such as the present, the fact that the person is perceived as a danger to the national security of the respondent State is not a material consideration (see paragraph 80 above).

150. It is true, as the Government have pointed out, that in the cases of Klass and Others and Leander (both cited at paragraph 142 above), the Court held that Article 13 (art. 13) only required a remedy that was "as effective as can be" in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention (art. 8, art. 10) and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3 (art. 3), where the issues concerning national security are immaterial.

151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3 (art. 3), the notion of an effective remedy under Article 13 (art. 13) requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (art. 3). This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.

152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective (see the above-mentioned Leander judgment, p. 29, para. 77).

153. In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security (see paragraph 41 above). It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 (art. 3) complaint for the purposes of Article 13 of the Convention (art. 13).

154. Moreover, the Court notes that in the proceedings before the advisory panel the applicant was not entitled, inter alia, to legal representation, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed (see paragraphs 30, 32 and 60 above). In these circumstances, the advisory panel could

not be considered to offer sufficient procedural safeguards for the purposes of Article 13 (art. 13).

155. Having regard to the extent of the deficiencies of both the judicial review proceedings and the advisory panel, the Court cannot consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3 (art. 13+3).

Accordingly, there has been a violation of Article 13 (art. 13).

V. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

156. The applicants asked the Court to grant them just satisfaction under Article 50 of the Convention (art. 50), which provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

157. The applicants claimed compensation for non-pecuniary damage for the period of detention suffered by Mr Chahal at a rate of £30,000-£50,000 per annum.

The Government submitted that a finding of violation would be sufficient just satisfaction in respect of the claim for non-pecuniary damage.

158. In view of its decision that there has been no violation of Article 5 para. 1 (art. 5-1) (see paragraph 123 above), the Court makes no award for non-pecuniary damage in respect of the period of time Mr Chahal has spent in detention. As to the other complaints, the Court considers that the findings that his deportation, if carried out, would constitute a violation of Article 3 (art. 3) and that there have been breaches of Articles 5 para. 4 and 13 (art. 5-4, art. 13) constitute sufficient just satisfaction.

B. Legal costs and expenses

159. In addition, the applicants claimed the reimbursement of the legal costs of the Strasbourg proceedings, totalling £77,755.97 (inclusive of value-added tax, "VAT").

With regard to the legal costs claimed, the Government observed that a substantial proportion of these were not necessarily incurred because the applicants had produced a large amount of peripheral material before the Court. They proposed instead a sum of £20,000, less legal aid.

160. The Court considers the legal costs claimed by the applicants to be excessive and decides to award £45,000 (inclusive of VAT), less the 21,141 French francs already paid in legal aid by the Council of Europe.

C. Default interest

161. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds by twelve votes to seven that, in the event of the Secretary of State's decision to deport the first applicant to India being implemented, there would be a violation of Article 3 of the Convention (art. 3);

2. Holds by thirteen votes to six that there has been no violation of Article 5 para. 1 of the Convention (art. 5-1);

3. Holds unanimously that there has been a violation of Article 5 para. 4 of the Convention (art. 5-4);

4. Holds by seventeen votes to two that, having regard to its conclusion with regard to Article 3 (art. 3), it is not necessary to consider the applicants' complaint under Article 8 of the Convention (art. 8);

5. Holds unanimously that there has been a violation of Article 13 in conjunction with Article 3 of the Convention (art. 13+3);

6. Holds unanimously that the above findings of violation constitute sufficient just satisfaction as regards the claim for compensation for non-pecuniary damage;

7. Holds unanimously

(a) that the respondent State is to pay the applicants, within three months, in respect of costs and expenses, £45,000 (forty-five thousand pounds sterling) less 21,141 (twenty-one thousand, one hundred and forty-one) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;

(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

8. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French and delivered at a public hearing at the Human Rights Building, Strasbourg, on 15 November 1996.

Signed: Rolv RYSSDAL President

Signed: Herbert PETZOLD Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Valticos;

(b) concurring opinion of Mr Jambrek;

(c) partly concurring, partly dissenting opinion of Mr De Meyer;

(d) joint partly dissenting opinion of Mr Gölcüklü, Mr Matscher, Sir John Freeland, Mr Baka, Mr Mifsud Bonnici, Mr Gotchev and Mr Levits;

(e) joint partly dissenting opinion of Mr Gölcüklü and Mr Makarczyk;

(f) partly dissenting opinion of Mr Pettiti,

(g) joint partly dissenting opinion of Mr Martens and Mrs Palm.

Initialled: R. R.

Initialled: H. P.

CONCURRING OPINION OF JUDGE VALTICOS

(Translation)

This opinion refers to the wording used in paragraph 123 of the Chahal v. the United Kingdom judgment, which concerns Article 5 para. 1 (art. 5-1).

While sharing the opinion of the majority of the Grand Chamber and concurring in their conclusion that there has been no violation of that provision (art. 5-1), I am unable to agree with the statement in the first

sub-paragraph of paragraph 123 that Mr Chahal's detention "complied with the requirements of Article 5 para. 1 (f) (art. 5-1-f)".

Article 5 para. 1 (f) (art. 5-1-f) provides that "... No one shall be deprived of his liberty save [in the case of] ... the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation ...". That provision (art. 5-1-f) must be interpreted in good faith and with common sense, as indeed must any legal provision. I would have qualms about holding here that a period of four or five years could really be regarded as "[complying] with the requirements" of that Article (art. 5-1-f) and as being "lawful" detention for a transitional and, in principle, limited period. Admittedly, there were particular reasons in the present case which prevented the applicant being deported promptly (consideration of his application for judicial review and, above all, the problem of whether it was appropriate to deport him to India). But to go from that to saying that the situation "complied with the requirements" of Article 5 of the Convention (art. 5) seems to me excessive. However, one cannot go to the opposite extreme of holding that there has been a violation of the Convention for the Government were able to point to reasons of some weight. In my view, it would have been preferable to say merely that Mr Chahal's detention "was not contrary" to the requirements of Article 5 (art. 5). That is the reason for my objection to the wording of paragraph 123.

On the other hand, I agree that, as set out in the Court's final decision (point 2 of the operative provisions), there has been no violation of Article 5 para. 1 (art. 5-1).

CONCURRING OPINION OF JUDGE JAMBREK

1. Once more in this case, the Court has had to consider the issue of the use of confidential material in the domestic courts where national security is at stake. I agree with the Court's finding that the domestic proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal did not satisfy the requirements of Article 5 para. 4 (art. 5-4).

I also agree with the Court's reasoning as to the relevant principles and their application, that is:

(a) that the use of confidential material may be unavoidable where national security is at stake,

(b) that the national authorities, however, are not free in this respect from effective control by the domestic courts, and

(c) that there are techniques which can be employed which both accommodate legitimate security concerns and yet accord the individual a substantial measure of procedural justice.

This last point, (c), represents a new development in the Court's case-law and therefore, in my view, deserves special attention.

2. In Fox, Campbell and Hartley v. the United Kingdom (30 August 1990, Series A no. 182, pp. 17-18, paras. 34-35) the Court pointed to the responsibility of the Government to furnish at least some facts or information capable of satisfying it that the arrested person was reasonably suspected of having committed the alleged offence. The fact that Mr Fox and Ms Campbell both had previous convictions for acts of terrorism did not convince the Court that there was "reasonable suspicion", and it therefore held that there had been a breach of Article 5 para. 1 (art. 5-1) (paragraphs 34 and 35).

In the Murray v. the United Kingdom judgment of 28 October 1994 (Series A no. 300-A, pp. 27-29, paras. 58-63, passim) the Court reiterated its Fox, Campbell and Hartley standard, but found that the conviction in the United States of America of two of Mrs Murray's brothers of offences connected with the purchase of arms for the Provisional IRA and her visits to the USA and contacts with her brothers represented sufficient facts or information to meet the above standard, in other words, that they provided a plausible and objective basis for a "reasonable suspicion".

3. I dissented from the majority's view in the Murray judgment previously cited, pp. 45-47, as regards the violation of Article 5 paras. 1, 2 and 5 (art. 5-1, art. 5-2, art. 5-5). In my partly dissenting opinion, I held in relation to the issue of "reasonable suspicion" that the condition of reasonableness was not fulfilled, as the Government had not succeeded in furnishing "at least some facts or information" which would satisfy an objective observer that the person concerned might have committed the offence.

In my opinion in Murray I also anticipated the issue which has arisen in the present case, to which I refer under 1 (c) supra, when I posed the question whether "it was possible for the Court to set some modified standards for 'reasonable suspicion' in the context of emergency laws enacted to combat terrorist crime". By way of a general reply, I advocated treating evidence in different ways depending on the degree of its confidentiality.

4. The Court also referred in the Fox, Campbell and Hartley case to "information which ... cannot ... be revealed to the suspect or produced in court to support the charge" (paragraph 32). This distinction in my view raises two relevant questions: first, is it justifiable to distinguish between revealing information to the suspect and producing it in court? And secondly, is there a difference between information made available to the court and information produced in court which is revealed to the suspect (see also my dissenting opinion in the Murray case)?

In the present case of Chahal, in discussing the alleged violation of Article 13 of the Convention (art. 13), the Court refers to the technique under the Canadian Immigration Act 1976, to which the intervenors drew attention. There, a Federal

Court judge holds an in camera hearing of all the evidence, while the confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court. A summary of the evidence, with necessary deletions, is given to the applicant.

5. In my dissenting opinion in the Murray case, I suggested the following similar approach, couched (partly due to the absence of information about the Canadian technique) in more general terms, as representing a compromise between the wish to preserve the Fox, Campbell and Hartley standard and the need to expand the Court's reasoning in order to adapt it better to other similar cases.

Thus, I questioned "whether otherwise confidential information could not be rephrased, reshaped or tailored in order to protect its source and then be revealed. In this respect the domestic court could seek an alternative, independent expert opinion, without relying solely on the assertions of the arresting authority".

6. The purpose of the present concurring opinion is, therefore, to put this part of the Court's judgment into the context of its evolving case-law.

The Court may indeed be satisfied, in a future similar case, that some sensitive information may be produced in the domestic court, or even during the Strasbourg proceedings, which was and will not be revealed - at least not in its entirety, and in an unmodified form - to the suspect or to the detainee.

It will then remain the task of the Court to reconcile the demands of the adversarial principle with the need to protect confidentiality of information derived from secret sources pertaining to national security.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE

DE MEYER

(Translation)

I. The deportation order

A. Article 3 and Article 13 in conjunction with Article 3 (art. 3, art. 13 + 3)

I entirely agree with the judgment in this respect.

B. Article 8 and Article 13 in conjunction with Article 8 (art. 8, art. 13 + 8)

The Court, having found that the question whether there had been a violation of the rights set forth in Article 8 of the Convention (art. 8) was "hypothetical" (see paragraphs 139 and 146 of the judgment) did not consider it necessary to rule on the Article 8 (art. 8) complaint or on the alleged violation of that provision in conjunction with Article 13 (art. 13 + 8).

I wish to point out that in the instant case the question of the violation of the rights set forth in Article 8 (art. 8) is no more "hypothetical" than that concerning

those under Article 3 (art. 3). Both arise equally "in the event of the Secretary of State's decision to deport the first applicant to India being implemented". Consequently, if we consider one, we must also consider the other.

I agree in substance with the arguments unanimously adopted by the Commission in paragraphs 134 to 139 of its report and share its opinion that if the deportation order were enforced, there would be a violation of the applicants' right to respect for their private and family life.

I likewise consider that, in the instant case, there would also be a violation of the right to an effective remedy under Article 13 (art. 13) in respect of their Article 8 (art. 8) rights. The Court's observations concerning the violation of Article 13 in conjunction with Article 3 (art. 13 + 3) are

equally valid as regards the alleged violation of Article 13 in conjunction with Article 8 (art. 13+8).

In the instant case these two violations are closely connected and virtually inseparable. Deporting the first applicant would constitute a violation of both his personal right not to be subjected to the practices referred to in Article 3 (art. 3) and all the applicants' right to respect for their private and family life. The lack of remedies for challenging the deportation order thus simultaneously affects each of these rights.

II. The first applicant's detention

A. Article 5 para. 1 (art. 5-1)

It is true that the first applicant was deprived of his liberty as part of the deportation proceedings and that initially, in August 1990, his detention could be considered lawful on this ground.

However, he has been held in prison ever since and it is now the end of October 1996.

That is clearly excessive.

The "considerations of an extremely serious and weighty nature" referred to in paragraph 117 of the judgment may be enough to explain the length of the deportation proceedings. They cannot, however, justify the length of the detention, any more than the complexity of criminal proceedings is enough to justify the length of pre-trial detention.

Moreover, what is in issue here is not, as in the Kolompar v. Belgium case (judgment of 24 September 1992, Series A no. 235-C), an instance of extradition requested by another State with respect to a prison sentence of several years, but rather an order made by the respondent State for the deportation of a person who, as is stated in paragraphs 23 and 24 of the judgment, had been convicted there of only two minor offences, convictions that had since been quashed.

B. Article 5 para. 4 and Article 13 in conjunction with Article 5 (art. 5-4, art. 13+5)

Unlike the Commission, which chose to examine the first applicant's complaint concerning the lack of sufficient remedies for challenging his detention from the point of view of Article 13 (art. 13), the Court considered it in the light of Article 5 para. 4 (art. 5-4).

The Court's reasoning is certainly more consistent with both the letter and the spirit of those provisions (art. 13, art. 5-4).

It should be reiterated first of all that Article 5 para. 4 (art. 5-4) provides that "everyone who is deprived of his liberty by arrest or detention" is entitled to take proceedings, whereas Article 13 (art. 13) confers this right upon "everyone whose rights and freedoms as set forth in [the] Convention are violated". This suggests that in order to be able to rely on the first provision (art. 5-4), deprivation of liberty on its own is enough, whereas for the second (art. 13) to be applicable there must have been a violation of a right or freedom.

It is also necessary to point out that Article 5 para. 4 (art. 5-4) states that the proceedings must be before a "court", whereas Article 13 (art. 13) requires more vaguely "an effective remedy before a national authority".

Lastly, it is of interest to note that, except for the right of access to a court, which, as the Court has acknowledged since the Golder v. the United Kingdom judgment of 21 February 1975 (Series A no. 18), is guaranteed by Article 6 of the Convention (art. 6), Article 5 (art. 5) is the only one of the Convention's substantive provisions that specifically provides for a right to bring court proceedings in addition to the right to a trial provided for in paragraph 3 of the same Article (art. 5-3) in the cases referred to in paragraph 1 (c) (art. 5-1-c).

The foregoing is a good illustration of how well those who drafted the Convention understood the need to provide, particularly for those deprived of their liberty, judicial protection that goes well beyond the "effective remedy" guaranteed more generally under Article 13 (art. 13).

It must follow that in cases concerning deprivation of liberty it is not enough to examine whether there has been a violation of Article 13 (art. 13) for it to become unnecessary to consider whether there has been a violation of Article 5 para. 4 (art. 5-4); in such cases it is only an examination of a possible violation of the latter provision (art. 5-4) that is necessary.

That is not all.

Article 13 (art. 13), which guarantees a remedy before a "national authority", must be taken in conjunction with Article 26 (art. 26), which requires "all domestic remedies [to have been] exhausted" before the Commission may deal with the matter. These two provisions (art. 13, art. 26) complement each other and demonstrate that it is first and foremost for the States themselves to punish violations of the rights and

freedoms provided for, the protection afforded by the Convention institutions being merely secondary.

It is from this point of view that the question whether or not there is an "effective remedy" as required by Article 13 (art. 13) is relevant. For the Commission and the Court, the question is of no importance inasmuch as it relates to "rights and freedoms" which they consider were not "violated"; that is indeed what is indicated by the actual wording of the Article (art. 13).

This is certainly not true of the right to a remedy secured by Article 5 para. 4 (art. 5-4) to those deprived of their liberty, who must always be able to "take proceedings by which the lawfulness of [their] detention shall be decided speedily by a court and [their] release ordered if the detention is not lawful". Even if we find their detention as such to be lawful under Article 5 para. 1 (art. 5-1), we are not thereby absolved from the obligation to consider whether the individual concerned was able to avail himself of a remedy that satisfied the requirements of Article 5 para. 4 (art. 5-4).

JOINT PARTLY DISSENTING OPINION OF JUDGES GÖLCÜKLÜ, MATSCHER, Sir John FREELAND, BAKA, MIFSUD BONNICI, GOTCHEV AND LEVITS

1. We agree with the majority that national security considerations could not be invoked to justify ill-treatment at the hands of a Contracting State within its own jurisdiction, and that in that sense the protection afforded by Article 3 (art. 3) is absolute in character. But in our view the situation is different where, as in the present case, only the extra-territorial (or indirect) application of the Article (art. 3) is at stake. There, a Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter State would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat.

2. As to the circumstances of the present case, we differ from the conclusion of the majority on the question whether it has been substantiated that there is a real risk of Mr Chahal being subjected to

treatment contrary to Article 3 (art. 3) if he were to be returned to India. We accordingly disagree (and would do so even if we were to accept the reasoning of the majority as to the point dealt with in paragraph 1 above) with the finding that, in the event of the decision to deport him to that country being implemented, there would be a violation of the Article (art. 3).

3. In the Soering case, the Court was also concerned with the prospective removal of an applicant to another country. In its judgment in that case (first cited at paragraph 74 of the present judgment), the Court stated (p. 35, para. 90) that it "is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art. 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3) ..."

4. In that case, the extradition of the applicant was sought by the requesting State to meet a criminal charge carrying the death penalty, in circumstances which led the Court to conclude that the likelihood of his being exposed to the "death row phenomenon" was such as to bring Article 3 (art. 3) into play. The Court went on to conclude, after an analysis of what in practice the "death row phenomenon" would involve in the applicant's case, that his extradition would expose him to "a real risk of treatment going beyond the threshold set by Article 3 (art. 3)".

5. The applicant in the Soering case (which also differed on the facts in that there was no national security issue to be taken into consideration) was, therefore, in the grip of a legal process involving risks to him which were significantly easier to predict and assess than those which would be run by the first applicant in the present case if he were now to be returned to India. The consequences of the implementation of the deportation order against the latter are of a quite different, and much lower, order of foreseeability.

6. In the present case, the Court has had before it a mass of material about the situation in India and, more specifically, Punjab from 1990 onwards (although, we would note, none more recent than the United States Department of State report on India of March 1996 - see paragraph 53 of the judgment). The Court concludes in paragraph 86 (and we agree) that "... although the historical position is of interest in so far as it

may shed light on the current situation and its likely evolution, it is the present conditions which are decisive".

7. As regards present conditions, it seems clear that there have in recent years been improvements in the protection of human rights in India, especially in Punjab, where violence reached a peak in 1992, and that progress has continued since the Commission's consideration of the case (see paragraph 101 of the judgment). On the other hand, allegations persist of serious acts of misconduct by some members of the Punjab security forces, acting either within or outside the boundaries of that State, and by some members of other security forces acting elsewhere in India (paragraphs 102-04). Although the probative value of some of the material before the Court may be open to question, we are satisfied that there is enough there to make it impossible to conclude that there would be no risk to Mr Chahal if he were to be deported to India, even to a destination outside Punjab if he were to choose one.

8. The essential difficulty lies in quantifying the risk. In reaching their assessment, the majority of the Court say that they are not persuaded that the assurances given by the Indian Government would provide Mr Chahal with an adequate guarantee of safety and consider that his high profile would be more likely to increase the risk to him than otherwise (paragraphs 105 and 106). It is, however, arguable with equal, if not greater, force that his high profile would afford him additional protection. In the light of the Indian Government's assurances and the clear prospect of a domestic and international outcry if harm were to come to him, there would be cogent grounds for expecting that, as a law-abiding citizen in India, he would be treated as none other than that. It could well be that the existence or extent of any potential threat to him would largely depend on his own future conduct.

9. Our overall conclusion is that the assessment of the majority leaves too much room for doubt and that it has not been "substantiated that there is a real risk" of the first applicant's being subjected to treatment contrary to Article 3 (art. 3) if he were now to be deported to India. A higher degree of foreseeability of such treatment than exists in this case should be required to justify the Court in finding a potential violation of that Article (art. 3).

10. Otherwise, and given its conclusions on the Article 3 (art. 3) issue, we agree with the findings of the Court, except Mr Gölcüklü, as appears from his following separate opinion.

JOINT PARTLY DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND MAKARCZYK

(Translation)

We agree with the dissenting opinion of Judge De Meyer as regards Article 5 para. 1 (art. 5-1) (Part II.A).

PARTLY DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted in favour of finding a violation of Article 3, Article 5 para. 4 and Article 13 (art. 3, art. 5-4, art. 13). However, I strongly disagree with the majority in respect of Article 5 para. 1 (art. 5-1) and consider that there has been a clear and serious violation of that provision (art. 5-1).

Some weeks earlier, the Court correctly identified the problem of administrative detention in the case of proceedings covered by the Geneva Convention of 1951, and within the province of the Office of the United Nations High Commissioner for Refugees ("the UNHCR"). The Court held that there had been a violation by France on account of the rules then in force on administrative detention for a period of approximately twenty days without access to lawyers or any effective judicial review (see the Amuur v. France judgment of 15 June 1996, Reports of Judgments and Decisions 1996-III). The second period of detention in the Chahal case gives rise to the same types of problems.

With respect to the decision taken under the general law to deport Mr Chahal, it was not disputed that his detention began on 16 August 1990 and that he applied for judicial review.

After his application for asylum as a political refugee had been refused, a deportation order was made on 25 July 1991 on the basis of the Geneva Convention. Mr Chahal's detention fell to be considered by the Court from that angle. There was therefore a confrontation between the Geneva Convention and the European Convention on Human Rights, which concern the same member States. States may expel persons who are denied political refugee status. If difficulties are encountered (with respect to travel, dangers that might be encountered on returning, or the search for a safe State or third State), the person must be placed in administrative detention and not held in an ordinary prison under a prison regime. In addition, the detention must be reviewed promptly by the courts (see the Amuur judgment cited above).

Mr Chahal was not detained as a result of any conviction.

Where an application is made for review, it must be heard expeditiously, as a matter of urgency. The organisation of review procedures is governed by the Geneva Convention and UNHCR resolutions. It is possible to petition the Commission on Human Rights of the United Nations in that regard. The European Court cannot review the procedures, but it can consider them under Articles 3 and 5 (art. 3, art. 5) when a violation is alleged.

It is almost perverse of the majority to argue, as it does, that since it was the applicant who sought a review, his detention was justified if the proceedings became protracted. Were this reasoning to be transposed, an accused who applied for release from custody pending trial would be told that his detention was justified by the fact that he had made an application that necessitated proceedings. Yet liberty of the person is a fundamental right guaranteed by Article 5 (art. 5). The fact that an application for release is pending cannot be a ground for detention being prolonged where the detention is contrary to the provisions of Article 5 (art. 5).

Five years' detention in prison after the deportation order following the refusal of refugee status: such has been Mr Chahal's lot.

It is obvious that in international law under the Geneva Convention administrative detention differs from detention under the general law and must be enforced by measures such as an order for compulsory residence on administrative premises or in a hotel (see the Amuur judgment cited above) or house arrest. The United Nations Covenants and the recommendations of the United Nations Sub-Committee on questions of human rights of all persons subjected to any form of detention or imprisonment must be heeded.

Where a State is faced with a difficulty arising out of the danger that would be entailed by a return to the country of origin, it may, if it does not wish to continue to detain the person on its territory, negotiate the choice of a third country.

In sensitive political cases such as that of Mr Chahal – for example, those concerning the expulsion of imams and religious leaders whether fundamentalists or not - European States have found alternatives by expelling to certain African countries. The United Kingdom itself has had recourse to such expedients.

The European Convention does not allow States to disregard their obligations under the Geneva Convention. The Court must be attentive to problems of potential conflicts between international inter-State instruments binding the member States of the Council of Europe.

My opinion on this subject is based on the work of the UNHCR and on the European Commission's and Court's own decisions.

In the UNHCR publication "Detention and Asylum" (European Series, vol. 1, no. 4, October 1995) it is stated:

"Article 5 (art. 5) further provides guarantees against undue prolongation of the detention. Neither the Geneva Convention, nor the Committee of Ministers guidelines provide for a maximum duration of the detention of persons seeking asylum. In its Conclusion No. 44 the UNHCR Executive Committee recognises the importance of expeditious procedures in protecting asylum-seekers from unduly prolonged detention. Article 5, para. 1 (f) (art. 5-1-f), as interpreted by the Court, should be understood as containing a safeguard as to the duration of the detention authorised, since the purpose of Article 5 (art. 5) as a whole is to protect the individual from arbitrariness. In its Bozano judgment (18 December 1986, Series A no. 111, p. 23, para. 54), the Court considered that this principle was of particular importance with respect to Article 5, para. 1 (f) of the Convention (art. 5-1-f). This provision (art. 5-1-f) certainly implies - though it is not made explicit - that detention of an alien which is justified by the fact that proceedings concerning him are in progress can cease to be justified if the proceedings concerned are not conducted with due diligence.

...

[And, with reference to paragraph III.10 of Recommendation No. R (94) 5 of the Committee of Ministers on Guidelines to inspire practices of the member States of the Council of Europe concerning the arrival of asylum-seekers at European airports:]

'10. The asylum-seeker can be held in [an appropriate] place only under the conditions and for the maximum duration provided for by law.'

Under Article 5 (art. 5), a measure amounting to a deprivation of liberty will only comply with the requirements of the Convention if it is legal in domestic law. Article 5 para. 1 (art. 5-1) lays down that any arrest or detention must be carried out 'in accordance with a procedure prescribed by law'. On this point the Convention first and foremost requires that any deprivation of liberty must have a legal basis in domestic law.

Deprivation of liberty cannot occur in the absence of a domestic legal provision expressly authorising it. It further refers back to this national law and lays down the obligation to conform to both the substantive and procedural rules thereof."

As regards decisions on Article 5 (art. 5) of the European Convention on Human Rights, in the case of Kolompar v. Belgium (judgment of 24 September 1992, Series A no. 235-C, p. 64, para. 68), the Commission delivered the following opinion on an extradition problem, which can be transposed to deportation cases:

"However, the Commission considers that there is also, in the present case, a problem of State inactivity. The Commission recalls that Article 5 para. 1 of the Convention (art. 5-1) states that there is a 'right to liberty', and that the exceptions to this right, listed in sub-paragraphs (a) to (f) of this provision (art. 5-1-a, art. 5-1-b, art. 5-1-c, art. 5-1-d, art. 5-1-e, art. 5-1-f), have to be narrowly interpreted (Eur. Court H. R., Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, p. 16, para. 37; Guzzardi v. Italy judgment of 6

November 1980, Series A no. 39, p. 36, para. 98). The Commission takes the view that the State from which extradition is requested must ensure that there is a fair balance between deprivation of liberty and the purpose of that measure. Being responsible for the detention of the individual whose extradition has been requested, this State must take particular care to ensure that the prolongation of the extradition procedure does not culminate in a lack of proportionality between the restriction imposed on the right to individual liberty protected by Article 5 (art. 5) and its international obligations in respect of extradition. The Commission therefore considers that, even assuming total inactivity by the applicant in the said proceedings, it was the Government's duty to take particular care to limit the applicant's detention pending extradition ..."

The Court held in the Kolompar case that there had been no violation, but that was because of the applicant's prolonged inactivity and conduct and not because it did not fall within the scope of Article 5 para. 1 (art. 5-1).

It is only in cases where persons who have been refused asylum commit an offence (for instance, by returning illegally) that they may be detained in prison.

It is clear from past cases that if proceedings are not conducted with the requisite diligence, or if detention results from some misuse of authority,

detention ceases to be justifiable under Article 5 para. 1 (f) (art. 5-1-f) (application no. 7317/75, Lynas v. Switzerland, decision of 6 October 1976, Decisions and Reports 6, p. 167; Z. Nedjati, Human Rights under the European Convention, 1978, p. 91).

The European Court's judgment of 1 July 1961 in the case of Lawless v. Ireland (Series A no. 3) also sheds much light on its case-law concerning the scope of Article 5 para. 1 (art. 5-1) – a major Article of the Convention (art. 5-1) as it secures the liberty of person.

Admittedly, the Lawless case had as its background a state of emergency, but that does not alter the philosophy and principles expressed by the Court.

In particular, the Court said in its judgment on the merits:

"Whereas in the first place, the Court must point out that the rules set forth in Article 5, paragraph 1 (b) (art. 5-1-b), and Article 6 (art. 6) respectively are irrelevant to the present proceedings, the former because G.R. Lawless was not detained 'for non-compliance with the ... order of a court' or 'in order to secure the fulfilment of [an] obligation prescribed by law' and the latter because there was no criminal charge against him; whereas, on this point, the Court is required to consider whether or not the detention of G.R. Lawless from 13th July to 11th December 1957 under the 1940 Amendment Act conflicted with the provisions of Article 5, paragraphs 1 (c) and 3 (art. 5-1-c, art. 5-3);

Whereas, in this connection, the question referred to the judgment of the Court is whether or not the provisions of Article 5, paragraphs 1 (c) and 3 (art. 5-1-c, art. 5-3), prescribe that a person arrested or detained 'when it is reasonably considered necessary to prevent his committing an offence' shall be brought before a judge, in other words whether, in Article 5, paragraph 1 (c) (art. 5-1-c),

the expression 'effected for the purpose of bringing him before the competent judicial authority' qualifies only the words 'on reasonable suspicion of having committed an offence' or also the words 'when it is reasonably considered necessary to prevent his committing an offence';

Whereas the wording of Article 5, paragraph 1 (c) (art. 5-1-c), is sufficiently clear to give an answer to this question; whereas it is evident that the expression 'effected for the purpose of bringing him before the competent legal authority' qualifies every category of cases of arrest or detention referred to in that sub-paragraph (art. 5-1-c); whereas it follows that the said clause (art. 5-1-c) permits deprivation of liberty only when

such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from absconding after having committed an offence;

...

Whereas the meaning thus arrived at by grammatical analysis is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest; whereas it must be pointed out in this connexion that, if the construction placed by the Court on the aforementioned provisions (art. 5-1-c, art. 5-3) were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention ..." (pp. 51-52, paras. 12-14)

Under the Geneva Convention, it is for each State to organise its appeal procedures in respect of matters arising under the Convention.

The effectiveness of those procedures is reviewable by the UNHCR and, if necessary, in the event of any shortcomings, may be the subject of the applications mentioned above.

Among the major western European States, Germany provides a right of appeal to the ordinary courts. Other States have a special court or a committee. Such an institution was set up in Belgium only in 1989 (Standing Committee for Refugee Appeals) and in Sweden in January 1992 (Aliens Appeals Committee). In the United Kingdom it was only with the coming into force of the Asylum and Immigration Appeals Act 1993 that applicants whose appeals for asylum had been refused were given a right of appeal (to the Immigration Appeals Authority). In France there is the French Office for the Protection of Refugees and Stateless Persons (the "OFPRA") and the Appeals Committee (commission de recours) (see Bulletin luxembourgeois des droits de l'homme, vol. 5, 1996).

States are not legally bound to grant asylum, but merely not to send a person to a country where he faces persecution or to one from which he risks being sent to such a country. This has prompted most European nations to adopt the practice of returning asylum-seekers either to a

country through which they have transited in order to travel to the country where they are seeking asylum or else to a "safe third country".

The Court has firmly found violations of Article 3 and Article 5 para. 4 (art. 3, art. 5-4). In my opinion, it was equally necessary for it to find a violation of Article 5 para. 1 (art. 5-1), in line with its case-law.

As implemented by the British authorities, Mr Chahal's detention can be likened to an indefinite sentence. In other words, he is being treated more severely than a criminal sentenced to a term of imprisonment in that the authorities have clearly refused to seek a means of expelling him to a third country. The principle contained in Article 5 (art. 5) of immediately bringing a detained person before a court is intended to protect liberty and not to serve as "cover" for detention which has not been justified by a criminal court. Administrative detention under the Geneva Convention cannot be extended beyond a reasonable - brief - period necessary for arranging deportation. The general line taken by the Court in the Amuur case can, in my view, be adopted in the Chahal case. For this reason, I have concluded that there has been a violation of Article 5 para. 1 (art. 5-1).

So far as Article 8 of the Convention (art. 8) is concerned, I share the views of Mr De Meyer.

JOINT PARTLY DISSENTING OPINION OF JUDGES MARTENS AND PALM

1. We fully agree with the Court's findings in respect of Articles 3, 5 para. 4, 8 and 13 (art. 3, art. 5-4, art. 8, art. 13). As to its findings in respect of Article 5 para. 1 (f) (art. 5-1-f) we agree with paragraphs 112 to 121 of the judgment.

We cannot accept, however, the Court's findings:

(a) that the procedure before the advisory panel constituted a sufficient guarantee against arbitrariness; and

(b) that, consequently, the first applicant's detention in this respect too complied with the requirements of Article 5 para. 1 (f) (art. 5-1-f) (paragraphs 122 and 123 of the judgment).

2. As the Court rightly remarks in paragraph 112 of its judgment, Article 5 para. 1 (f) (art. 5-1-f) does not explicitly demand that the detention under this provision (art. 5-1-f) be reasonably considered necessary. This enhances, for this kind of detention, the importance of the object and

purpose of Article 5 para. 1 (art. 5-1) in general, which is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion.

3. In this context we firstly note that the domestic courts were not in a position effectively to control whether the decisions to detain and to keep detained Mr Chahal were justified (see paragraphs 41, 43, 121 and 130 of the Court's judgment). Consequently, the only possible safeguard against arbitrariness under domestic law was the advisory panel procedure.

4. Having analysed the status of and the proceedings before this panel the Court finds that this procedure does not meet the requirements of Article 5 para. 4 (art. 5-4) and of Article 13 (art. 13) (paragraphs 130, 132, 152, 153) of the Convention. We find it difficult to understand why it did not draw the same conclusion in the context of Article 5 para. 1 (f) (art. 5-1-f).

5. However that may be, we note:

(a) that it has not been claimed that the members of the panel are, as such, independent from the Government;

(b) that the proceedings before the panel are not public, nor are its findings, which are not even disclosed to the addressee of the notice of intent to deport;

(c) that in the proceedings before the panel the position of the addressee of the notice of intent to deport is severely restricted: he is not entitled to legal representation, he is only given an outline of the grounds for the notice of intention to deport, he is not informed of the sources of and the evidence for those grounds;

(d) that the panel has no power of decision and that its advice is not binding upon the Home Secretary.

6. Taking into account the importance of guarantees against arbitrariness especially in respect of detention under Article 5 para. 1 (f) (art. 5-1-f) (see paragraph 2 above) as well as the necessity of uniform standards being applied in this respect to all member States, we cannot but conclude that, in view of its features indicated in paragraph 5 above, the panel does not constitute an adequate guarantee against arbitrariness. The fact that it includes "experienced judicial figures" (see paragraph 122 of the judgment) cannot change this conclusion.

7. In sum: the applicant has been deprived of his liberty for more than six years whilst there were not sufficient guarantees against arbitrariness. Article 5 para. 1 (art. 5-1) has therefore been violated.

Annexure 7:

Decision of the UN Committee Against Torture in Bachan Singh Sogi versus Canada (2007)

UNITED NATIONS

CAT

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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COMMITTEE AGAINST TORTURE
Thirty-ninth session
(5-23 November 2007)

DECISION

Communication No. 297/2006

Submitted by:	Bachan Singh Sogi (represented by counsel, Johanne Doyon)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	11 June 2006 (initial submission)
Date of the present decision:	16 November 2007
Subject matter:	Expulsion to his country of origin of complainant, allegedly a member of a Sikh terrorist organization, despite request for interim measures
Substantive issues:	Risk of torture in case of expulsion to country of origin
Procedural issues:	Complaint not compatible with the provisions of the Convention; failure to substantiate allegations
Articles of the Convention:	3, 22

[ANNEX]

GE.07-45624 (E) 181207 211207

Annex

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Thirty-ninth session

concerning

Communication No. 297/2006

Submitted by:	Bachan Singh Sogi (represented by counsel, Johanne Doyon)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	11 June 2006 (initial submission)
Date of the present decision:	16 November 2007

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 16 November 2007,

Having concluded its consideration of complaint No. 297/2006, submitted on behalf of Bachan Singh Sogi under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant and the State party,

Adopts the following:

Decision of the Committee against Torture under article 22 of the Convention

1.1 The complainant, Bachan Singh Sogi, an Indian national born in 1961, was resident in Canada at the time of submission of the present complaint and subject to an order for his removal to India. He claims to be a victim of a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel, Ms. Johanne Doyon.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention by note verbale dated 14 June 2006. At the same time, the Committee, pursuant to rule 108, paragraph 1, of its rules of procedure, **requested the State party not to deport the complainant to India while his complaint was being considered.**

1.3 On 28 June 2006 the Committee was informed by the complainant and the State party that the complainant would be removed despite the Committee's request for a suspension of removal.

1.4 By note verbale of 30 June 2006 the Committee repeated its request to the State party to suspend removal of the complainant.

1.5 The Committee was informed by counsel that the complainant had been expelled on 2 July 2006 and that the Canadian Border Services Agency (CBSA) refused to reveal the destination. The State party confirmed that the complainant had been returned to India and justified the decision by the fact that he had failed to establish that there was a substantial risk of torture in his country of origin.

1.6 On 5 July 2006 counsel informed the Committee that the complainant was in a local prison in Gurdaspur, in Punjab, India, and that, according to police information, he had been beaten and subjected to ill-treatment by the local authorities. She also said that Amnesty International had agreed to monitor the complainant's case.

The facts as presented by the complainant

2.1 The complainant states that he and his family were falsely accused of being Sikh militants and on the basis of that allegation were arrested and tortured several times in India. The complainant was therefore compelled to leave the country.

2.2 According to the pre-removal risk assessment (PRRA) of 26 June 2003, the complainant had told the Canadian authorities that he was a farmer in Punjab in India, and that his home was not far from the border with Pakistan, which meant that he and his family had on several occasions been forced to harbour Sikh militants. In May 1991, February 1993, August 1997, December 1997 and January 2001, the complainant was arrested by the police on suspicion of belonging to the Sikh militant movement. He states that whenever an attack took place that was attributable to the terrorist militants in the region, the police turned up at his home and searched the house. His brother and his uncle had also been accused of being terrorists and his uncle had been killed by the police in 1993; his father, too, had been killed in an exchange of fire between terrorist militants and police in 1995.

2.3 The complainant was in the United Kingdom from July 1995 to February 1997 and applied for refugee status there. His application was turned down in September 1996. He decided to return to India, as the Akali Dal party had just been elected to govern the province in February 1997 and had promised to stop police violence and abuse in Punjab State; on his return he reportedly joined Akali Dal. He says that he continued to be harassed by the police. His brother had earlier left India for Canada and been granted refugee status there. This prompted the complainant to flee the country too, in May 2001.

2.4 On 8 May 2001 the complainant arrived in Toronto and claimed refugee status. In August 2002 the Canadian Security and Intelligence Service (CSIS) issued a report stating that there were reasonable grounds to believe that the complainant was a member of the Babbar Khalsa International (BKI) terrorist group, an alleged Sikh terrorist organization whose objective is to establish an independent Sikh state called Khalistan, taking in the Indian province of Punjab. Based on this report a warrant was issued for his arrest as he was deemed a threat to Canada's national security.

2.5 On 8 October 2002 a hearing was held to consider the report showing the complainant to be a member of a terrorist organization and an order was issued for his removal by the Immigration and Refugee Board.

2.6 The complainant applied for judicial review of the 8 October 2002 removal decision. On 8 December 2003 the Federal Court concluded that the hearing officer had not erred in determining that certain information was relevant but could not be disclosed for reasons of national security, and confirmed that that information should not be disclosed, but could nevertheless be taken into account by the Court. This ruling was upheld on appeal in a Federal Court of Appeal judgement dated 28 May 2004.

2.7 In parallel with this the complainant applied for a pre-removal risk assessment (PRRA). According to the PRRA decision of 26 June 2003, although the complainant had denied any involvement with any militant movement in Punjab, the CSIS report had found that there were substantial grounds for believing that he was a member of BKI and he was suspected under several aliases of having planned attacks on a number of Indian political figures. Given the profile established of the complainant, namely, a suspected member of BKI, the fact that BKI was listed as an international terrorist organization in several countries, and the treatment meted out by the police to suspected terrorists, the decision stated that "the complainant ran a real risk of torture and cruel and unusual punishment and treatment if returned to India".

2.8 In a decision of 2 December 2003, the Minister's delegate rejected the complainant's application for protection. While recognizing that there was a risk of torture in the event of deportation, she decided, after having weighed the interests at stake, that Canada's overall security interests should prevail in this case. She found that there was sufficient evidence of the complainant's membership of BKI and of his intention under various aliases to assassinate Indian public figures, including the Chief Minister of Punjab and the former Chief of Police of Punjab.

2.9 The complainant applied for judicial review of the 2 December 2003 decision of the Minister's delegate. On 11 June 2004, the Federal Court in Toronto noted that, according to Supreme Court case law, in particular **the *Suresh* judgement** cited by the complainant,[1] the prohibition of torture was "an emerging peremptory norm of international law" and international law rejected deportation to torture even where national security interests were at stake. The Court

[1] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1.

nevertheless considered that exceptional circumstances in the present case[2] led to the conclusion that the complainant was a "skilled BKI assassin who will lie to protect himself", for the exceptional circumstances were very different from those prevailing in the *Suresh* case. The Court found that, in the deportation decision, the Minister's delegate had erred in two respects. Firstly, the decision did not address any alternatives to deportation to torture: any such decision must consider, in the balancing exercise, any alternatives proposed to reduce the threat. Secondly, the decision failed to adequately describe and explain the threat posed to national security. Consequently the Court referred the deportation decision back for the Minister's delegate to prepare a revised version of the decision which would consider the alternatives to deportation suggested by the applicant and specifically define and explain the threat.

2.10 On 6 June 2005 the Court of Appeal upheld the appeal and referred the case back for a fresh PRRA. A second PRRA decision was issued on 31 August 2005, again finding that the complainant was at risk of torture in India since he was suspected of being a senior member of BKI.

2.11 On 11 May 2006 another decision on protection was handed down by the Minister's delegate, this time finding that, while the complainant might be prosecuted in India for his alleged part in assassination attempts, new legislation had entered into force protecting accused

[2] According to the Federal Court ruling cited here, the evidence before the Minister's delegate showed the following exceptional circumstances:

- The applicant, on behalf of BKI, used an alias to facilitate his plan to assassinate the Chief Minister of Punjab, his son and the former Chief of Police of Punjab;
- A *Times of India* article dated 9 June 2001 described the assassination plot and said that, had it succeeded, it would have destabilized the Indian Government;
- Information corroborated by reliable sources verified that the applicant is the same person as the Gurnam Singh mentioned in the article;
- BKI is implicated in the bombing of Air India flight 182;
- The secret evidence showed that the applicant has used six aliases including the name Gurnam Singh;
- The applicant is skilled in the use of sophisticated weapons and explosives;
- The letters suggest that, contrary to the applicant's statement in his PRRA application (that he had never claimed refugee status elsewhere), the applicant is a failed refugee claimant in the United Kingdom.

persons from abuses that had been tolerated under the old law.[3] On that basis she had determined that the complainant would run no risk of torture if he was returned to India. She also determined that the complainant posed a threat to national security. The request for protection was therefore denied.

The complaint

3.1 The complainant alleges a violation of article 3 of the Convention. He argues that the 2 December 2003 decision denying him protection was taken on the basis of irrelevant criteria such as the nature and gravity of past actions and the threat he posed to Canada's security, and that it violates the Convention, which allows for no exceptions with respect to return to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. He recalls that, where it is shown that the person would be in danger of torture, it is against the principles proclaimed by the Convention to use irrelevant considerations to justify the denial of protection.[4] He argues that, in the 11 May 2006 decision on protection, the Minister's delegate again applied irrelevant considerations to justify the denial of protection to the applicant, in violation of the Convention and of international law. He also claims that the evidence in the case file shows beyond a doubt that there was a risk of torture if he was returned to India, as established in the three decisions preceding the 11 May 2006 denial of protection.

3.2 The complainant claims that the Minister's delegate had put him in even greater danger in her 11 May 2006 decision by attributing to him crimes he had not personally committed. Furthermore, there were several errors in the decision, for the Minister's delegate had failed to take account of the documents showing that torture was practised in India. According to these documents, torture was commonly used as an interrogation technique and the police were trained in its use, employing sophisticated methods that did not leave visible traces. The complainant argues that, rather than assessing the risk of the police using torture, the Minister's delegate merely asserted that the worst problems in Punjab were rural employment and the lack of food industries. He also points out that the delegate's claim that conditions in Punjab had improved overall in no way proved that a person believed to be a high-profile member of BKI would not be tortured. The delegate had also failed to address his specific situation. She ultimately had rejected out of hand the objective evidence such as Amnesty International's January 2003 report showing that, notwithstanding the legislative reform intended to stamp out torture, Punjab's judicial system remained most unsatisfactory. Lastly, the complainant states that the background documentation submitted clearly shows that torture is practised by the Indian authorities, particularly against militants or suspected terrorists. He claims that he would still be at risk of torture if he was returned to India.

[3] The Minister's delegate stated that the Prevention of Terrorism Act 2001 had been replaced by the LOTA of 2002. The new law apparently established certain safeguards for the accused, such as a prohibition on forced confessions and a guarantee of the accused's right to have complaints of torture considered.

[4] The complainant cites the European Court of Human Rights judgement in *Chahal v. United Kingdom* [1996] 23 ECHR 413.

State party's observations on admissibility and the merits

4.1 The State party transmitted its observations on admissibility and the merits by note verbale dated 12 January 2007. The State party notes that, even though two requests for judicial review are still pending before the Federal Court, it will not at this stage challenge the admissibility of the communication for non-exhaustion of domestic remedies, though it reserves the right to do so once the proceedings in the Canadian courts are concluded.

4.2 The State party maintains that the complaint should be rejected on the merits because the complainant has failed to establish that he personally would run a real and foreseeable risk of torture in India. The State party notes that the human rights situation in Punjab has improved considerably since the end of the Sikh insurrection.

4.3 The State party further argues that the delegate of the Minister of Citizenship and Immigration has given careful consideration to the complainant's claims and determined that he was not in danger of being subjected to torture in India. The Committee should not substitute its own findings for those of the Minister's delegate except in case of manifest error, abuse of process, bad faith, bias or serious procedural irregularities. In the State party's view the complainant's claims to the Committee call into question the delegate's decision to reject his request for protection, and indirectly invite the Committee to conduct a judicial review of the decision. The State party recalls that the Committee's role is to establish a violation of article 3 of the Convention, not to carry out a judicial review of the delegate's decision.

Further observations by the State party

5. On 28 February 2007 the State party informed the Committee that the complainant's two requests for judicial review, one in respect of the decision of the Minister's delegate rejecting his application for protection and the other in respect of the decision to enforce the removal order, had been rejected by the Federal Court of Canada on 1 February 2007. The Court had found that the applications were now moot and that there were no grounds for it to exercise its discretion to consider the cases on the merits. The Court's judgement may be appealed in the Federal Appeal Court if the judge certifies that the matter raises a serious question of general importance. Since neither the complainant nor the Canadian Government requested certification of such a question within the time set by the Court, and since the Court itself has not certified that there is such a question, the Federal Court ruling has become enforceable.

Counsel's comments on the State party's observations

6.1 On 6 April 2007 counsel contested the State party's observations and communicated to the Committee certain new facts that had arisen since the complaint was submitted to the Committee.

New facts arising since submission of the complaint to the Committee

6.2 Counsel states that an application for judicial review of the decision to enforce the removal of the complainant had been made on 11 June 2006. Another application, for judicial review of the 11 May decision on protection, was still pending before the Federal Court at the time.

Counsel states that she was notified on 12 June 2006 that the complainant's removal had been set for 16 June 2006. She claims that, despite several requests for the exact time and destination of removal, she was given no information.

6.3 A provisional application for a stay was then made to the Federal Court, together with a request for an emergency hearing by telephone conference. The Canadian Government agreed to a temporary stay of removal pending a Federal Court hearing on the application for a stay, to be held on or around 16 June 2006. On 23 June 2006 the Federal Court rejected the application for a stay and the removal order then became enforceable.

6.4 On 30 June 2006 counsel filed a notice of appeal against the decision on the application for a stay with the Federal Court of Appeal, which rejected it the same day.

6.5 **The Canadian Government deported the complainant to India on 2 July 2006, despite the Committee's request for interim measures**. Counsel repeats that she was not informed of the destination, but notes that after the deportation she was told, on or about 5 July 2006, that the complainant had been arrested by the local police on arrival at the airport and taken to the Gurdaspur police station, where he remained in detention until 10 July 2006 on a number of serious criminal charges. She also says she was told that the complainant had been beaten and ill-treated by the Indian authorities while in detention at the Gurdaspur police station. Counsel states that the complainant was then taken from the police detention centre to the Chief Judicial Magistrate.

6.6 After the complainant had been deported, the two applications for leave and judicial review of the 11 May 2006 protection decision and of the removal order were granted. On 29 August 2006 the judge found that the case raised serious questions and the applications were accordingly heard in the Federal Court on 22 January 2007.

6.7 On 1 February 2007 the applications for leave and judicial review were rejected by the Federal Court, which found that they had become moot by virtue of the enforcement of the removal order against the complainant. His removal despite the fact that those requests were still before the Court deprived the complainant of the remedies available to him in Canada and he has therefore exhausted all domestic remedies.

6.8 Counsel contacted the complainant in India on 13 March 2007. He told her that he was charged with having supplied explosives to a person who had been convicted under Canadian arms and explosives legislation. He also told her he had been beaten by the police while in prison and threatened with further beatings if he reported that ill-treatment.

Comments on the merits

6.9 Counsel notes that, by sending the complainant back to India, the State party violated his rights under the procedure for determining the risks of torture and article 3 of the Convention. She recalls that the Canadian authorities denied that the complainant ran any risk of torture in order to be able to send him back legally. The Canadian Government erred in its assessment of the risk of torture in the event of return, in part by having recourse to secret evidence that the complainant did not have access to and could not challenge.

6.10 Counsel further claims that the Canadian Government was a party in the decision on protection for the complainant, thereby violating his right to be judged by an independent, impartial decision maker. She notes that it is clear from an e-mail sent to CBSA on 10 May 2006 by an official of the Government's Security and War Crimes Unit that CBSA was already aware that the protection decision would be negative and that the removal procedure had been set in motion, even though the decision had not yet appeared in the immigration computer files (FOSS). Yet the complainant was only notified of the negative decision on his case on 15 May 2006. The enforcement of the complainant's removal had thus already begun, despite the fact that he himself had not yet been informed of the decision and at this stage still had several remedies available to him against the decision. In counsel's view, the Minister's delegate responsible for taking the decision on protection failed to act in an independent and impartial manner.

6.11 Counsel argues that the 23 June 2006 decision rejecting the application for a stay was unlawful and incorrect in fact and in law since the evidence showed that there was a probable risk of torture were the complainant to be returned, in violation of article 3 of the Convention. Counsel argues that the application for a stay had to be presented in provisional fashion because she had been given only very short notice of the date of removal, leaving little time to prepare an application in such a complex case. However, the presiding judge at the hearing had refused to hold an interim hearing on the application and instructed the counsels to present their arguments on the merits. This procedure, she says, violated the complainant's right to proper representation. The judge at first instance had erred in the decision on the stay insofar as he had ignored the evidence of the three PRRAs pointing to probable risk of torture or persecution in the event of return to India.

6.12 Counsel notes that the complainant had been arrested and held for nearly four years on the basis of secret evidence and was never allowed to know the charges or evidence against him. In its recent *Charkaoui* decision,[5] the Supreme Court of Canada had found that the holding of in camera proceedings to consider evidence withheld from the applicant and with no public hearing on the admissibility of that evidence violated the rights to life, liberty and security of person under section 7 of the Canadian Charter of Rights and Freedoms.

6.13 During his four years in detention, the complainant was under constant threat of removal to a country where he risked torture, a situation that was in itself a form of torture and a violation of article 3 of the Convention.[6] As certified in the psychologist's report submitted in 2003, he suffered from serious psychological distress and showed symptoms of insomnia and stress, which made for additional risk in the event of return.

[5] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.

[6] Counsel cites a report by Physicians for Human Rights entitled "Break them down - Systematic use of psychological torture by US forces" (20 May 2005), which defines the use of threats to return someone to a country where torture is practised as a form of torture in itself.

6.14 Counsel recalls the absolute prohibition in international law on return of a person at risk of torture[7] and claims that the return of the complainant is a deliberate and direct violation of the State party's international obligations and of article 3 of the Convention.

6.15 In counsel's view, therefore, the return of the complainant notwithstanding the decisions establishing a risk of torture and persecution, the absence of any new circumstances, the Committee's request for interim measures, the complainant's state of health and the evidence that there is a current risk of torture is unconstitutional and a direct violation of article 3 of the Convention. This conclusion is borne out by the fact that the complainant was arrested on arrival in India, had serious charges brought against him and was beaten and threatened by the Indian authorities.

Further comments by the parties

7.1 On 26 July 2007 the State party asserted that the only relevant point the Committee had to determine was whether, at the time of the complainant's return, there were substantial reasons to believe that he would personally be at risk of torture in India. Counsel's contentions in respect of various stages of the pre-removal procedure are incompatible ratione materiae with article 3 of the Convention. The State party recalls that article 3 does not recognize the right to be heard by an independent and impartial tribunal, the right to be properly represented by counsel or the right to know the evidence against one. The claims that the decisions rejecting the complainant's applications for protection and a stay of removal were arbitrary and unlawful cannot point to a violation of article 3. The State party considers that counsel is effectively asking the Committee to hear an appeal against the Canadian courts' decisions.

7.2 As to the claim that the State party had "been a party" to the decision of the Minister's delegate, the State party argues that it too is inadmissible, on grounds of non-exhaustion of domestic remedies, insofar as the complainant raised it for the first time before the Committee, whereas he should have raised it first with the Federal Court of Canada.

7.3 The State party argues that counsel's claims in respect of the pre-removal procedure are inadmissible because they do not demonstrate the minimum justification needed to meet the requirements of article 22 of the Convention. In the alternative, the claims in respect of the pre-removal procedure do not constitute a violation of article 3 of the Convention. The State party points out that the complainant's claims with regard to the Federal Court's refusal to grant the parties an interim hearing and his right to be heard by an independent and impartial court were in fact raised in the Federal Court, which found that the time limit for submitting an application for a stay was normal and noted that the complainant had known since 15 May 2006 that his request for protection had been denied and the removal procedure was to be set in motion. The State party argues that the complainant could have prepared his application for a stay well before 12 June 2006. As to the second claim, the presiding judge at the stay hearing

[7] In this context counsel cites the European Court of Human Rights decision in *Aksoy v. Turkey* (100/1995/606/694).

noted that the mere fact that the same case had come before him in earlier proceedings did not in itself give rise to a reasonable apprehension of bias. The State party is therefore of the view that the complainant's claims have been considered by the national courts in accordance with the law and have been rejected.

7.4 As to the claim that the decision rejecting the application for a stay was unlawful and incorrect, the State party argues that the Federal Court examined all the documentary evidence, including the fresh evidence submitted by the complainant, and declared itself not convinced that the complainant would be in danger of being subjected to torture in the event of return.

7.5 As to the claim that the State party was involved in the 11 May 2006 decision by the Minister's delegate rejecting the complainant's request for protection, the State party notes that this allegation is based on an e-mail to a CBSA staff member. It states that CBSA had had no say in the delegate's decision and the delegate had acted quite impartially. The State party further points out that there had not been three "preceding decisions" in the complainant's favour but one decision, dated 2 December 2003, which had been annulled, and two torture risk assessments carried out by PRRA officials (dated 26 June 2003 and 31 August 2005). The State party notes that, while delegates should take such assessments into account, they are not bound by them and it is they who must take the final decision on the request for protection.

7.6 As to the "secret" evidence, the State party asserts that there is no connection between the risk assessment conducted by the Canadian authorities and the examination of evidence not disclosed to the complainant for security reasons. In considering the question of risk of torture, the delegate did not consider the threat to Canada's security posed by the complainant. Her conclusion was thus not based on undisclosed evidence. The State party further points out that, under Canada's Immigration and Refugee Protection Act, in any inquiry to determine whether a foreigner is inadmissible, a judge may consider relevant information without disclosing it to the applicant if disclosure would be injurious to national security, although a summary of the information must be provided to the applicant, and that was done in this case.

7.7 The State party notes that the allegations regarding failure to apply the Committee's interim measures and regarding the threats to return the complainant to a country where he would be at risk of torture were never raised before the domestic courts. Canada takes its international obligations under the Convention seriously, but considers that requests for interim measures are not legally binding. **As a result, contrary to the Committee's decision in *Tebourski v. France*,[8] the State party contends that non-compliance with such a request cannot in itself entail a violation of articles 3 and 22 of the Convention**. It notes that, **in *T.P.S. v. Canada*,[9]** while the Committee expressed concern at the fact that the State party did not accede to its request for interim measures, it nevertheless found that Canada had not violated article 3 of the Convention in returning the complainant to India.

[8] Communication No. 300/2006, Views of 1 May 2007, paras. 8.6 and 8.7.

[9] Communication No. 99/1997, Views of 16 May 2000, para. 16.1.

7.8 As to the assertion that the "threat of return to torture" in itself constitutes a violation of article 3, in the State party's view this claim should be declared incompatible ratione materiae with article 3. It is in any case inadmissible because it fails to demonstrate the minimum justification. The State party denies having subjected the complainant to psychological torture and argues that the progress of legal proceedings to determine a person's admissibility to a country and the mere possibility of being returned to a country where there was an alleged risk of torture could not constitute "torture" within the meaning of article 1 of the Convention.

7.9 The State party points out that it always looks very closely at the Committee's requests for interim measures and usually complies with them. In this case, after considering the file, and based in part on the negative findings of the Minister's delegate regarding the risks involved in returning to India and on the Federal Court's denial of the complainant's application for a stay, the State party considered that the complainant had not established that there was a substantial risk of torture in India.

7.10 As regards the allegation of a violation of article 3 of the Convention based on the complainant's return to India, the State party recalls that the matter must be weighed in the light of all the information the Canadian authorities were, or should have been, aware of at the time of expulsion. The State party recalls that, while torture is still occasionally practised in India, including in Punjab, the complainant failed to establish that he personally ran a real and foreseeable risk of torture. It notes that counsel reports having been told by the complainant's brother-in-law that the complainant had been beaten and ill-treated by the Indian authorities while in detention. The State party recalls that the complainant had not been considered credible by the Canadian authorities and the Committee should accordingly attach little weight to these claims. Furthermore, article 3 applies only to torture and does not provide protection against ill-treatment as covered by article 16 of the Convention.

8. In a letter of 24 September 2007 counsel repeats her earlier arguments.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering a claim contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement and that all available domestic remedies have been exhausted.

9.2 The Committee takes note of the State party's argument that the complainant's claims with regard to the pre-removal process, i.e. the allegedly incorrect and unlawful decisions of the Canadian authorities, the non-disclosure of certain evidence, the Federal Court's refusal to grant an interim hearing and its alleged bias, are incompatible ratione materiae with article 3 of the Convention. However, the Committee considers that such irregularities must be considered in order to ascertain whether there has been a violation of article 3 of the Convention.

9.3 As to counsel's claim that the constant threat of being returned to a country where he would be in danger of torture, which hung over the complainant for four years, causing him "serious psychological distress", in itself constituted a form of torture, the Committee recalls its case law to the effect the aggravation of a complainant's state of health following expulsion - or, as in this case, by the threat of return while proceedings are ongoing - does not in itself constitute a form of torture or of cruel, inhuman or degrading treatment within the meaning of articles 1 and 16 of the Convention.[10]

9.4 With regard to the State party's contention that the complaint of a violation of article 3 of the Convention based on the return of the complainant to India is insufficiently substantiated for the purposes of admissibility, the Committee considers that the complainant has provided sufficient evidence to permit it to consider the case on the merits.

9.5 Accordingly, the Committee decides that the complaint is admissible in respect of the alleged violation of article 3 of the Convention based on the return of the complainant to India. The claim relating to non-compliance with the Committee's request to suspend removal also requires consideration on the merits under articles 3 and 22 of the Convention.

Consideration on the merits

10.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 22, paragraph 4, of the Convention.

10.2 The Committee notes the complainant's contention that the Minister's delegate, in her decision of 2 December 2003, used irrelevant criteria as grounds for refusing protection, namely that the person constituted a threat to Canada's security. The Committee recalls that article 3 affords absolute protection to anyone in the territory of a State party, regardless of the person's character or the danger the person may pose to society.[11] The Committee notes that the Minister's delegate concluded in her decision that the complainant personally ran a real risk of torture if he were returned. However, she considered that the general interest of Canada's security should prevail over the complainant's risk of torture, and refused the protection on this basis.

[10] See *M.B.S.S. v. Canada*, communication No. 183/2001, Views of 12 May 2004, para. 10.2; and *G.R.B. v. Sweden*, communication No. 83/1997, Views of 15 May 1998, para. 6.7.

[11] See *Tebourski v. France*, communication No. 300/2006, Views of 1 May 2007, para. 8.2. Similarly, the European Court of Human Rights has considered the protection from torture to be absolute in the event of removal, as set out in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, recalling that neither the behaviour of the victim nor the threat they might pose to national security should be taken into account when considering a claim (see decision in *Chahal v. United Kingdom*).

10.3 The Committee also takes note of the complainant's argument that, in the decision of 11 May 2006, the Minister's delegate did not take into account the complainant's particular situation, and in denying protection merely cited a supposed improvement in the general conditions in the Punjab. The State party replied to this argument by stating that it is not for the Committee to conduct a judicial review of the decisions of the Canadian courts, and that the Committee should not substitute its own findings for those of the Minister's delegate, except in case of manifest error, abuse of process, bad faith, bias or serious procedural irregularities. The Committee recalls that, while it gives considerable weight to the findings of fact of the State party's bodies, it is entitled to freely assess the facts of each case.[12] In this case, the Committee notes that, in her protection decision of 11 May 2006, the Minister's delegate denied the real, personal threat of torture based on the fresh assessment, and merely accepted that a new law had been adopted in India apparently protecting accused persons from torture, without regard to whether the law would effectively be implemented or how it would affect the complainant's specific situation.

10.4 As for the Canadian authorities' use of evidence that for security reasons was not divulged to the complainant, the Committee notes the State party's argument that this practice is authorized by the Immigration and Refugee Protection Act, and that in any event such evidence did not serve as a basis for the decision by the Minister's delegate, as she did not consider the threat the complainant posed to Canadian security in her assessment of the risks. However, the Committee notes that, in both her decisions, the delegate considered the threat to national security.

10.5 On the basis of the above, the Committee considers that the complainant did not enjoy the necessary guarantees in the pre-removal procedure. The State party is obliged, in determining whether there is a risk of torture under article 3, to give a fair hearing to persons subject to expulsion orders.

10.6 As to the risk of torture at the time the complainant was removed, the Committee must determine whether, in sending the complainant back to India, the State party failed to meet its obligation under article 3 of the Convention not to expel or return anyone to another State where there are substantial reasons for believing that they would be in danger of being subjected to torture. In order to determine whether, at the time of removal, there were substantial reasons for believing that the complainant would be in danger of being subjected to torture if he was returned to India, the Committee must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which they were returned.

10.7 **The Committee recalls its general comment on the implementation of article 3, in which it states that the risk of torture "must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable"** (A/53/44, annex IX, para. 6).

[12] See *Dadar v. Canada*, communication No. 258/2004, Views of 23 November 2005, para. 8.8.

10.8 The **Committee must determine whether there were substantial grounds to believe torture would occur in the light of the information the authorities of the State party were, or should have been, aware of at the time of removal**. In this case, the Committee notes that all the information before it, in particular the Canadian Security and Intelligence Service (CSIS) report and the two pre-removal risk assessments (PRRA), showed that the complainant was suspected of being a member of BKI, an alleged terrorist organization, and that a number of attacks on Indian political leaders were attributed to him. The information obtained after removal, i.e., his detention and the ill-treatment to which he was allegedly subjected during his detention in Gurdaspur, is relevant only to assess what the State party actually knew, or could have deduced, about the risk of torture at the time the complainant was expelled.[13]

10.9 The Committee also notes that, according to various sources and the reports provided by the complainant, the Indian security and police forces continue to use torture, notably during questioning and in detention centres, especially against suspected terrorists.

10.10 In the light of the foregoing, and taking account in particular of the fact that the complainant is allegedly a member of what is regarded as a terrorist organization, and that he was wanted in his country for attacks on several public figures in Punjab, the Committee considers that, by the time he was returned, the complainant had provided sufficient evidence to show that he personally ran a real and foreseeable risk of being subjected to torture were he to be returned to his country of origin. The Committee therefore concludes that, under the circumstances, the complainant's removal to India constituted a violation of article 3 of the Convention.

10.11 As regards non-compliance with the Committee's requests of 14 and 30 June 2006 to suspend removal, the Committee recalls that the State party, by ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with the Committee in good faith in applying and giving full effect to the procedure of individual complaints established thereunder. The Committee also notes that the State party's obligations include observance of the rules adopted by the Committee, which are inseparable from the Convention, including rule 108 of the rules of procedure, which is specifically intended to give meaning and scope to articles 3 and 22 of the Convention.[14] Consequently the Committee considers that, by sending the complainant back to India despite the Committee's repeated requests for interim measures, the State party has committed a breach of its obligations under articles 3 and 22 of the Convention.

[13] See *Agiza v. Sweden*, communication No. 233/2003, Views of 20 May 2005, para. 13.2; and *Tebourski v. France*, communication No. 300/2006, Views of 1 May 2007, para. 8.1.

[14] See *Dar v. Norway*, communication No. 249/2004, Views of 11 May 2007, para. 16.3; and *Tebourski v. France*, communication No. 300/2006, Views of 1 May 2007, para. 8.6.

11. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, **concludes that the expulsion of the complainant to India on 2 July 2006 was a violation of articles 3 and 22 of the Convention.**

12. In conformity with article 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps taken by the State party to respond to these Views, to make reparation for the breach of article 3 of the Convention, and to determine, in consultation with the country to which he was deported, the complainant's current whereabouts and the state of his well-being.

[Adopted in English, French, Russian and Spanish, the French text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

Annexure 8:

Decision of the UN Committee Against Torture in Harminder Singh Khalsa et al. v. Switzerland (2011)

United Nations
CAT/C/46/D/336/2008

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture
Forty-sixth Session
9 May – 3 June 2011

Decision

Communication No. 336/2008

Submitted by:	Harminder Singh Khalsa et al. (represented by counsel, Werner Spirig)
Alleged victims:	The complainants
State party:	Switzerland
Date of complaint:	18 February 2008 (initial submission)
Date of present decision:	26 May 2011
Subject matter:	Deportation of the complainants from Switzerland to India
Substantive issue:	Risk of torture upon return to country of origin.
Procedural issue:	None
Article of the Convention:	3

[Annex]

* Made public by decision of the Committee against Torture.

CAT/C/46/D/336/2008

Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-sixth session)

concerning

Communication No. 336/2008

Submitted by:	Harminder Singh Khalsa et al. (represented by counsel, Werner Spirig)
Alleged victims:	The complainants
State party:	Switzerland
Date of complaint:	18 February 2008 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 26 May 2011,

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having concluded its consideration of complaint No. 336/2008, submitted to the Committee against Torture by Werner Spirig on behalf of Harminder Singh Khalsa et al. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainants, their counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

1.1 The complainants are Mr. Harminder Singh Khalsa and his family, Mr. Karan Singh and his family, Mr. Jasvir Singh and Mr. Dalip Singh Khalsa.[1] They are Indian citizens

[1] Mr. Harminder Singh Khalsa, born on 14 December 1963, lives with Mrs. Navpreet Kour, born on 5 January 2007, and their common children Kour Harmehar and Singh Harbaaz, both born in Switzerland. They are not married but consider each other as spouses. They could not marry due to the fact they could not get the necessary identity documents from the Indian authorities. Mr. Karan Singh, born on 19 April 1961, lives with Mrs. Kour Tarvinder, born on 2 April 1969 and their common children Singh Kanttegh and Kour Keeratwaan, both born in Switzerland. They are not married but consider each other as spouses. They could not marry due to the fact they could not get the necessary identity documents from the Indian authorities. Mr. Jasvir Singh, born on 15 August

belonging to the ethnic group of Sikhs. At the time of submission of the present complaint they were residing in Switzerland and were subject to orders to leave to India.[2] They claim that their deportation from Switzerland to India would constitute a violation of article 3 of the Convention against Torture. They are represented by counsel, Mr. Werner Spirig.[3]

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention by Note Verbale, dated 25 February 2008. At the same time, the Rapporteur on new complaints and interim measures **requested the State party not to deport the complainants to India while their case is under consideration by the Committee,** in accordance with rule 114, paragraph 1 (previously rule 108, paragraph 1), of the Committee's Rules of procedure. On 4 March 2008, the State party informed the Committee that the complainants will not be deported while their case is being examined by the Committee.

The facts as presented by the complainants

2.1 On 29 September 1981, Karan Singh and Jasvir Singh were among a group of five persons who high jacked an airplane of the Indian Airlines on its flight between New Dehli and Srinagar (Kashmir) to Lahore in Pakistan. With this action, they protested against the arrest of Mr. Sant Jarnail Singh Bhindranwala, the leader of the movement fighting to have a separate Sikh state, and the killing of 36 Sikhs by the Indian security forces. At the time of this event, Karan Singh and Jasvir Singh were both members of groups which wanted a separate Sikh state, respectively the All India Sikh Students' Federation and Dal Khalsa.

2.2 In 1984, Dalip Singh Khalsa and Harminder Singh Khalsa were among a group of nine persons who high jacked an airplane of the Indian Airlines to Pakistan to respond to the attack of the Indian army on the Sikh Holy City of Amritsar and to draw the attention of the international community to the killings of thousands of innocents. The group belonged to the All India Sikh Students' Federation.

2.3 None of the passengers in either airplane were injured. The complainants were arrested by the Pakistan police. They were tried before a special court in Lahore. In January 1986, Dalip Singh Khalsa and Harminder Singh Khalsa were sentenced to death but their sentences were commuted into life imprisonments based on a general amnesty following the accession of Mrs. Benazir Bhutto to the post of Prime Minister. Karan Singh and Jasvir Singh were sentenced to life imprisonment. All complainants were released from prison at the end of 1994 and were ordered to leave the country. They left Pakistan and went to Switzerland where they applied for asylum immediately upon arrival in 1995.

2.4 In Switzerland, the complainants were heard by the Swiss Federal Office for Refugees, which rejected their asylum claims on 10 July 1998. The complainants filed appeals, which the Swiss Asylum Board rejected on 7 March 2003. From 7 March 2003 to 19 December 2007, the complainants filed several petitions for the negative asylum decisions to be reconsidered, which were all rejected. On 19 December 2007, the Federal Administrative Tribunal gave its final decision, confirming the refusal to grant them

1943, lives apart from the rest of his family, which is in India. Mr. Dalip Singh Khalsa, born on 20 April 1953, lives apart from the rest of his family, which is in India.

[2] The first, second and third complainants were ordered to leave by 22 February 2008 and the fourth by 31 January 2008. The counsel submits that, according to the law in force as of 1 January 2008, after those dates the complainants could have been arrested and deported at any moment.

[3] The complainants submitted four separate communications but indicated that the communications are identical because they follow the same reasoning. Accordingly the communications were registered as one case.

asylum, reasoning that it could not find any good reasons to believe that the Indian security forces would consider the complainants as dangerous enemies of the Indian State.

2.5 The complainants have been living peacefully in Switzerland since 1995. Two of the complainants have founded families. They are very active in the Sikh community. Karan Singh is the President of the first Sikh temple built in Switzerland. Mr. Harminder Singh Khalsa is the Vice-President of the Sikh temple. The complainants submit that they continued to be involved in political activities during their stay in Switzerland and that the Indian authorities are well aware of that. Karan Singh participated as observer in the 56th session of the Commission on Human Rights in Geneva, but was forced to leave early, because Indian Security Service people followed and harassed him. At the same time his relatives in India were harassed by the police. In 1998 Harminder Singh Khalsa participated in a conference which was opposed by the Indian government and reports of that appeared in a newspaper. In 2003, at a demonstration against the Indian Government in Bern, Karan Singh gave an anti-governmental speech. In 2007 a human rights conference was held in the new Sikh temple in which two of the complainants participated. The participants held a demonstration in front of the UN building in Geneva. Afterwards the parents of the complainants were harassed by the police and were warned of "dire consequences" if they did not stop their sons from organising anti- Indian rallies.

The complaint

3.1 The complainants submit that their deportation from Switzerland to India would constitute a violation of article 3 of the Convention against Torture because they would face serious threats to their health and lives. They claim that the Indian security forces still want to prosecute them for having hijacked two Indian planes. To support this allegation, the complainants submit that on 22 June 1995, the Indian Central Bureau of Investigation wrote a letter to the Canadian immigration authorities, requesting their assistance in capturing two of the participants in the 1984 airplane's hijacking.

3.2 The complainants also indicate that two members of the group who participated in the 1984 hijacking, and who had been acquitted by the Pakistan Special Court in 1986 and released from prison, were killed by the Indian Security Forces in mysterious circumstances when they returned to India in 1990. They provide affidavits of relatives of the two members killed and refer to the 7 March 2007 judgment of the Swiss Asylum Appeal Commission in the case of Harminder Singh Khalsa, which allegedly recognizes the death of those two former hijackers.

3.3 The complainants also refer to the case of Mr. K.S. who had also participated in the hijacking of a civilian Indian aircraft in 1984. After having served a 12 years' imprisonment sentence in India, a month after being released from prison, his dead body which showed marks of injuries was found in a canal in a village in Rajasthan and a magistrate inquiry concluded that he had been tortured prior to being thrown in the canal. The inquiry did not, however, indentify the perpetrator(s) and the death of Mr. K.S.was considered irrelevant by the Swiss asylum authorities.

3.4 The complainants submit that Indian security forces are actively searching for them because they have a high profile and their names appear constantly in newspapers reporting that their asylum claims had been rejected in Switzerland and that they would be soon deported to India.[4] They maintain that they submitted to the Swiss authorities copies of a

[4] The complainants submit copies of articles (in translation) in the newspaper Daily Ajit Jalandbar dated 23 April 1003 and 18 May 2003; the first quotes the complainants' names and report that the Swiss government ordered their deportation; the second reports that the complainants have gone

poster with pictures of individuals wanted for terrorist activities, among which were the pictures of two of the complainants and which was distributed in the region where they originated from (Jammu). They also submit that the houses in which they used to live in Jammu had been raided by the police. Further, they submit that the Head of the Indian Anti-Terrorist Cell in a television interview on 25 August 2005 called for the Government to press for their extradition to India.

3.5 The complainants submit that, because of their past involvement in the hijackings and their current political activities, they have high profiles as men who want a separate Sikh state. They maintain that the Indian authorities consider them a threat and are actively searching for them and that in case of their forced return to India they would be immediately arrested, subjected to torture or even killed. The complainants refer to a 28 April 2003 letter of the Human Rights Watch, which describes how the new anti-terror legislation could be used against them. They also refer to a 7 May 2003 letter of Amnesty International expressing concerns regarding their safety if returned to India.

State party's observations

4.1 On 21 April 2008, the State party submitted that it does not object to the admissibility of the complaint.

4.2 On 20 August 2008, the State party reiterates the facts related to the complainants' membership in the All India Sikh Student Federation and Dal Khalsa, their participation in the hijackings of airplanes, the criminal trials and sentences against them. The State party also confirms the dates of the complainants' asylum applications and of the subsequent unsuccessful appeals and requests for review of the asylum applications.

4.3 In relation to the existence in India of a consistent pattern of gross, flagrant or mass violations of human rights, the State party submits that, according to a decision of the Swiss Federal Council, dated 18 March 1991, India is considered as a country of origin without persecution. It notes that this creates a presumption which can be refuted in the course of an asylum application or of a demand to stay deportation.

4.4 The State party notes that the complainants do not allege that they had been tortured or maltreated in India, but rather use as evidence treatment to which other individuals had been subjected in similar situations. The State party refers to the example, presented by the complainants, of two members of their group, who had been arrested upon return by the security forces and killed. It maintains that these facts had been examined by the Swiss asylum authorities, which established that neither the moment, nor the precise circumstances of the deaths of these persons had been identified clearly and that the above events took place 18 years ago. It also maintains that the current situation of Sikhs in India and in particular of other participants in the hijackings of airplanes demonstrated that there is no risk of torture for the complainants if they are to return to India. In relation to the case of Mr. K.S., the State party maintains that the submitted report does not provide information on the motivation of his killing or on the perpetrators and therefore the responsibility for it, which the complainants attribute to the Indian authorities is only their supposition. In addition, the above events took place twelve years ago and can not be used to assess the possible risk existing at present.

4.5 The State party submits that, as of 1993, the situation in Punjab has become more stable and that a government had been elected following free elections. It notes that the Terrorist and Other Disruptive Activities Act was abolished eight years after its

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underground and escaped to Pakistan. They also submit a copy of an article mentioning the participation of one of the complainants in a demonstration in front of the United Nations office.

promulgation. Even after the assassination of the Prime Minister Beant Singh on 31 August 1995, the situation remained calm. As of 1995, the police in Punjab had been under scrutiny and, following an order of the Supreme Court, a Central Bureau of Investigation had started more than 1000 procedures against police officers. The newly elected government in 1997 announced that it would take measures against police officers at fault and that it would compensate the victims.

4.6 Concerning the poster with pictures of wanted terrorists, allegedly issued by the Indian police, the State party submits that the complainants did not deliver the original to the Swiss authorities, but presented a copy, on which it was not possible to identify whether any of the complainants' photos were present. Additionally the poster was not dated and it seemed improbable that the authorities would be looking for the complainants in that manner twenty years after the airplanes' hijackings.

4.7 Concerning the copies of the articles submitted by the complainants in support of the allegation that their names and activities were known to the Indian authorities, the State party submits that such copies have no evidentiary value and that the complainants could have easily obtained the originals and submitted them to the Swiss authorities at an earlier stage of the proceedings.

4.8 The State party submits that, even if the Indian criminal justice authorities were still looking for the complainants at present, that in itself would not be sufficient to conclude that they would be subjected to treatment contrary to the Convention. The Indian justice system is based on the British model and can be qualified as independent. Therefore, the complainants could hire attorneys and defend themselves. There is no evidence that they would be at a disadvantage because of their political activities. The State party also submits that seven individuals, who had participated in an airplane hijacking in 1984, had been deported to India, sentenced to life imprisonment, but had been liberated after 12 years and were never persecuted.[5] It maintains that numerous Sikh militants are back in India, that the Sikh movement has been "largely normalized" and that today Sikhs are a recognized religious minority, benefitting from effective constitutional protection. In addition, Sikhs live in great numbers in different states and therefore they have the option to relocate to an Indian state other than their state of origin. The State party notes that the current Prime Minister of India is Sikh.[6]

4.9 Regarding the political activities of the complainants in Switzerland, the State party submits that they did not demonstrate that they have participated in activities aiming to overthrow by force the democratic institutions, but rather that they were involved in non-violent political activities. It maintains that such activities are protected by the Indian Constitution and tolerated in practice and that they can not constitute grounds to fear treatment which is contrary to the Convention.

4.10 The State party maintains that there are no serious reasons to fear that the complainants would be exposed to real, concrete and personal risk of being tortured if returned to India. It submits that the Committee should find that the deportation of the complainants to India would not amount to a violation of article 3 of the Convention.

Complainants' comments

5.1 On 28 October 2008, the complainants note that the State party does not dispute the facts as submitted by them and that it accepts that the Indian anti-terror police might be

[5] The State party refers to an article in BBC News dated 3 July 2007.

[6] The State party makes reference to the Country of Origin Information Report India of the British Home Office, Border and Immigration Agency, dated 31 January 2008, p. 87.

searching for them. They, however, disagree with the State party's assessment that: India has an effective penal justice system, which prosecutes police personnel committing human rights violations; that since 1993 the political dissent in India is no different from the same phenomenon in western democracies; that if the complainants are wanted by the police, there is no good reason to believe they might be tortured; and that the complainants are only low level Sikh activists abroad.

5.2 The complainants reiterate that three Sikh men involved in hijackings were killed upon their return to India by the Indian police, which was recognized by the Swiss Asylum Appeal Commission in its decision of 7 March 2003. They further submit that between 1999 and 2004 the Swiss authorities have granted asylum to at least six Sikhs, who had cases similar to theirs. They maintain that even the Pakistan authorities, after releasing them from prison, did not expel them to India, since they believe that the Indian security forces would torture and kill them.

5.3 The complainants reiterate that they are wanted by the police and that the Head of the Anti-terror Cell announced it in a television interview. They maintain that the poster presented to the Swiss authorities is genuine and that it has pictures of two of them at the age when they participated in the hijackings. They further submit that several Sikhs, who had returned from Europe between 2006 and 2008, had been questioned by the police about them.

5.4 The complainants maintain that they are very prominent figures in the radical Sikh Community. They reiterate that on numerous occasions reports about their activities had appeared in the Indian media. They submit that, in March 2007, 27 Sikh organizations met in Switzerland and prepared a memorandum to the United Nations and that one of the complainants appeared as the spokesman of the assembly. On 10 April 2007, two of the complainants were among the Sikh representatives who participated in a meeting with the Special Rapporteur on human rights while countering terrorism. The complainants maintain that the Indian authorities want to apprehend all "Sikh militants" and "hardcore terrorists", such as themselves, and refer to a publication on the Pioneer website, dated 2 October 2006, which states that wanted Sikh terrorists have taken shelter in many countries, including Switzerland, and quotes the Head of the police in Punjab, who expressed hope that western governments will revise "their earlier stand of granting asylum to such people".

5.5 The complainants maintain that torture and mistreatment in police custody and extrajudicial killings continue to be widespread and quote the U.S. Country Report on Human Rights Violations 2007 in India,[7] which states that: "authorities often used torture during interrogations to extort money and as summary punishment […]"; "human rights groups asserted that the new law had not decreased the prevalence of custodial abuse or killings"; "Security forces often staged encounter killings to cover up the deaths of captured non-Kashmiri insurgents and terrorists from Pakistan or other countries. […] Most police stations failed to comply with a 2002 Supreme Court order requiring the central government and local authorities to conduct regular checks on police stations to monitor custodial violence."

State party's additional observations

[7] Report available at http://www.state.gov/g/drl/rls/hrrpt/2007/100614.htm, Section 1, *Respect for the Integrity of the Person, Including Freedom From,* para (c) Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and para (f) Arbitrary Interference with Privacy, Family, Home, or Correspondence.

6. On 17 February 2009, the State party submits that the allegations made by the complainants do not lead to the conclusion that they would be exposed to a real, personal and serious risk of torture in case they were deported to India. Even if the Indian authorities were interested in apprehending the complainants that would not necessarily mean that they would be tortured. The State party refers to the complainants' argument that several Sikhs, who had returned to India from Europe between 2006 and 2008, had been questioned by the police about them. It submits that, according to the written statement from one of these individuals that was provided by the complainants themselves, he did not allege having been tortured.

Complainants' additional comments

7. On 17 February 2010, the complainants submit additional documents on the case of a certain Mr. P.S. in support of their claims.[8] They maintain that, similarly to them, Mr. P.S. participated in the 1984 hijackings, served a 10 year sentence in Pakistan, led a peaceful life in Canada for 15 years, but was immediately arrested following his deportation to India on 26 January 2010 and placed in a high security jail, where he was detained in appalling conditions. He is said to be facing charges under the National Security Act. On 7 April 2010, the complainants submitted a copy of the *Grounds of Detention against Mr. P.S. under the 1980 National Security Act,* by the Commissioner of the Delhi Police, which states that the former "is, obviously, a person of danger to Indian citizens", that "he is enemical to the nation which was demonstrably proved by the fact that he took the hijacked plane to Lahore", that he is "a desperate and hardened criminal whose activities are prejudicial to the Security of the State as well as maintenance of public order" and that "there is every possibility that […] he will indulge again in similar types of criminal activities." The report mentions the names of two of the complainants as accomplices (Dalip Singh Khalsa and Harminder Singh Khalsa). The complainants submit that it is obvious that the Indian police would accuse them of working against the government.

State party's additional observations

8. On 19 October 2010, the State party submits that the new documents submitted by the complainants do not lead to the conclusion that they would be exposed to a real, personal and serious risk of torture in case they are deported to India. It maintains that the complainants do not indicate whether the detention described in it was confirmed by the competent authorities. The State party further refers to the Committee's decision in case 99/1997, *T.P.S. v. Canada,* where it did not find a violation of article 3 of the Convention.

Complainants' additional comments

9. On 7 December 2010, one of the complainants, Dalip Singh Khalsa, submitted that on 25 November 2010, he was granted a regular stay permit. Accordingly the complainant has withdrawn his complaint. According to information from the State party's authorities, submitted on 18 February 2011, he had been granted a humanitarian permit, based on the fact that he has well integrated into the Swiss society. On 23 March 2011, the complainants submit that Mr. P.S. is still kept in custody and his plea to release him was dismissed by the court on 9 February 2011 on the ground that he was a threat to public security.

[8] The complainants submit: articles from The Star, dated 3 February 2010, and from SikhSiyasat.net, dated 2 February 2010, describing the immediate arrest and incarceration without trial of Mr. P.S., a Sikh, who participate in the 1984 hijacking after his deportation to India; a letter describing the harsh conditions in which the arrested individual was held in the Tihar jail, dated 5 February 2010, signed by a lawyer, Mr. N.S., who visited him in that jail; a report on Mr. P.S.'s arrest and conditions of detention by the SikhSiyasat.net, dated 29 January 2010.

Issues and proceedings before the Committee

Admissibility considerations

10.1 Before considering a claim contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a) and (b), that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement and that all available domestic remedied have been exhausted.

10.2 The Committee takes note that the State party does not contest the admissibility of the communication and decides that it is admissible in respect of the alleged violation of article 3 of the Convention based on the return of the complainants to India.

Consideration of the merits

11.1 The Committee takes note of the fact that, on 25 November 2010, Dalip Singh Khalsa, received a regular residence permit from the State party. Therefore, the Committee decides to discontinue the part of the communication relating to Dalip Singh Khalsa.

11.2 The issue before the Committee is whether the forced return of the three remaining complainants to India would violate the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. In order to determine whether, at the time of removal, there were substantial reasons for believing that the complainants would be in danger of being subjected to torture if they were returned to India, the Committee must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individuals concerned would be personally at risk of being subjected to torture in the country to which they were returned.

11.3 The Committee notes the State party's submission that, as of 1993, the situation in Punjab has become more stable, a government had been elected following free elections, which announced that it shall take measures against police officers; the Terrorist and Other Disruptive Activities Act has been abolished; and the Central Bureau of Investigation has started more than 1000 procedures against police officers accused of inappropriate conduct. The Committee, however, observes that according to the available information, **such as recent reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on extrajudicial, summary or arbitrary executions, ill-treatment[9] and torture**[10] of individuals held in detention, as well as deaths in custody[11] or following detention[12] continue to be a problem in India. Special Rapporteurs also expressed their concerns relating to reports of alleged impunity for criminal acts committed by officials. In some cases relating to reports of death or ill-treatment while in detention, it was alleged that the authorities had attempted to block

[9] A/HRC/4/33/Add.1, paras. 78 and 80-82; E/CN.4/2006/6/Add.1, para. 87; E/CN.4/2005/62/Add.1, paras. 729, 730, 732, 734, 735, 744, 745, 761.
[10] E/CN.4/2005/62/Add.1, paras. 758, 759, 760.
[11] A/HRC/4/33/Add.1, paras. 76 and 83; E/CN.4/2005/62/Add.1, paras. 727, 733, 736, 762; E/CN.4/2005/7/Add.1, para. 298.
[12] E/CN.4/2006/6/Add.1, para. 84 and E/CN.4/2005/62/Add.1, paras. 724, 725, 726, 737, 756.

the investigation,[13] to destroy evidence,[14] or had taken no steps to investigate the allegations.[15]

11.4 The Committee notes the State party's submission that the complainants do not allege that they had been tortured or maltreated in India, and that he current situation of Sikhs in India and in particular of other participants in airplanes' hijackings demonstrated that there is no risk of torture for the complainants if they are to return. **The Committee, however, recalls that whether the complainant has been subjected to torture in the past, is but one of the factors that it finds pertinent in assessing the merits of a case**.[16] It observes that the complainants have submitted information regarding cases, similar to theirs, where individuals who had participated in hijackings had been arrested, detained in inhuman conditions, tortured and/or killed. The Committee recalls its **general comment** on the implementation of article 3, in which it states that **the risk of torture "must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable".**[17]

11.5 The Committee notes that the State party questions whether the criminal justice authorities in India are still looking for the complainants and argues that, even if they were, that in itself would not be sufficient to conclude that they would be subjected to treatment contrary to the Convention. The Committee, however, observes that the complainants are clearly known to the authorities as Sikh militants and that they have submitted to the Swiss authorities and to the Committee several statements from public officials in India indicating them by name, which demonstrate that the criminal justice authorities were looking for them as late as in 2005. The Committee also notes that the complainants are **well known** to the Indian authorities because of their political activities in Switzerland and their leadership roles in the Sikh community abroad**. The Committee accordingly considers that the complainants have provided sufficient evidence that their profile is sufficiently high to put them at risk of torture if arrested.**

11.6 The Committee notes the State party's submission that that numerous Sikh militants are back in India, that Sikhs live in great numbers in different states and therefore the complainants have the option to relocate to another Indian state from their state of origin. The Committee, however, observes that some Sikhs, alleged to have been involved in terrorist activities have been arrested by the authorities upon arrival at the airport and immediately taken to prisons and charged with various offences.[18] The Committee also takes note of the evidence submitted that the Indian police continued to look for the complainants and to question their families about their whereabouts long after they had fled to Switzerland**. In light of these considerations, the Committee does not consider that they would be able to lead a life free of torture in other parts of India.**

[13] E/CN.4/2005/62/Add.1, para. 726 and E/CN.4/2005/7/Add.1, para. 300.

[14] E/CN.4/2005/62/Add.1, para. 727.

[15] Ibid., paras. 724, 725, 729 and 730. See also E/CN.4/2006/6/Add.1, para. 85 and A/HRC/4/33/Add.1, para. 77.

[16] See, General Comment No 1: Implementation of article 3 of the Convention in the context of article 22 (Refoulement and communications), A/53/44, annex IX, paragraph 8.

[17] Ibid, paragraph 6.

[18] See also Communication No. 297/2006, *Bachan Singh Sogi v. Canada*, decision adopted on 16 November 2007.

11.7 Moreover, **the Committee considers that, in view of the fact that India is not a party to the Convention, the complainants would be in danger, in the event of expulsion to India, not only of being subjected to torture but of no longer having the legal possibility of applying to the Committee for protection.** [19]

11.8 In the light of the foregoing, **the Committee concludes that the complainants have established a personal, present and foreseeable risk of being tortured if they were to be returned to India**. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, therefore concludes that, **under the circumstances, the complainants' removal to India would constitute a violation of article 3 of the Convention.**

11.9 As the cases of the families of the first and second named complainants are dependent upon the cases of the latter, the Committee does not find it necessary to consider these cases separately.

12. In conformity with article 118, paragraph 5, of its Rules of procedure, the Committee wishes to be informed, within 90 days, on the steps taken by the State party to respond to these Views.

[Adopted in English, French, and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[19] See also Communication No. 13/1993, *Mutombo v. Switzerland*, decision adopted on 27 April 2994, paragraph 9.6.

Annexure 9:

Decision of the UN Committee Against Torture in Nirmal Singh versus Canada (2011)

United Nations CAT/C/46/D/319/2007

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture
Forty-sixth Session
9 May – 3 June 2011

Decision

Communication No. 319/2007

Submitted by:	Nirmal Singh, (represented by counsel Stewart Istvanffy)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	20 June 2007 (initial submission)
Date of present decision:	30 May 2011
Subject matter:	Deportation of complainant to India
Substantive issue:	prohibition of refoulement
Procedural issue:	None
Article of the Convention:	3

[Annex]

* Made public by decision of the Committee against Torture.

CAT/C/46/D/319/2007

Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-sixth session)

concerning

Communication No. 319/2007

Submitted by:	Nirmal Singh (represented by counsel Stewart Istvanffy)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	20 June 2007 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 30 May 2011,

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having concluded its consideration of complaint No. 319/2007, submitted to the Committee against Torture by Stewart Istvanffy on behalf of Nirmal Singh under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, his counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The complainant, Mr. Nirmal Singh, an Indian national born in 1963, was residing in Canada at the time of submission of the present complaint and subject to an order for his deportation to India. He claims that his return to India would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant alleges lack of judicial control required by the international human rights law on the administrative deportation decision and that he did not have an effective remedy to challenge the deportation decision. The complainant is represented by counsel, Mr. Stewart Istvanffy.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention by Note Verbale, dated 21 June 2007. At the same time, the Rapporteur for new complaints and interim measures requested the State party not to deport the complainant to India while his case is under consideration by the Committee, in accordance with rule 108, paragraph 1, of the Committee's *Rules of*

procedure. The State party subsequently informed the Committee that the complainant had not been deported.

The facts as presented by the complainant

2.1 The complainant is a baptized Sikh and was a part-time Sikh priest in the Indian provinces of Punjab and Haryana. Because of his preaching activities, frequent travel in the region and well-built body, he was questioned and harassed by the Indian police on several occasions. The Indian police suspected him of being a terrorist or a sympathiser of the militant organization Khalistan Liberation Force (KLF) in India, as well as having helped militants by sheltering them. He was detained twice on false accusations, the first time for over three years from 1988 to 1991, and the second time in 1995.

2.2 On 10 April 1988, officers of the Shahbad police station (Haryana province) arrested the complainant, his brother and three other individuals without explaining the reasons for their arrest. At the police station the brothers were separated. The complainant was accused of involvement in a murder in the city of Shahbad and of being associated with one Daya Singh. The complainant denied the allegations. While in detention, the complainant was severely beaten and humiliated by the investigating officers and was forced to confess his guilt. After three years of detention, the complainant and his brother were bailed out on 14 March 1991 with a lawyer's help. On 19 February 1998, the complainant was acquitted of all charges related to the first accusation, but police officers continued to harass him under the pretext of visiting his home and place of religious services.

2.3 On 14 September 1995, an inspector of the Kotwali police station (Punjab province) accompanied by police officers, raided the complainant's house and arrested him. The complainant was handcuffed and his house was searched but no illegal items were discovered. The complainant was taken to the interrogation room at the police station and questioned by the inspector about one Paramjit Singh, who allegedly was involved in the assassination of the Punjab Chief Minister. The inspector alleged that the complainant had sheltered Paramjit Singh at his house before the Chief Minister's assassination. The inspector also stated that he had received secret information from the Haryana police that the complainant was associated with KLF and that another militant had reported to the police having sent Paramjit Singh to stay with the complainant. To make him confess his links with Paramjit Singh, the police subjected the complainant to the following forms of torture: a heavy wooden roller was rolled over his thighs with the legs spread apart; he was hung upside down and administered electric shocks; his soles were beaten with wooden rods, and he was not allowed to sleep. He was charged with harbouring a dangerous offender but released on bail on 30 September 1995, with a lawyer's help. The Patiala court acquitted him of the above charges on 19 March 1997.

2.4 After his acquittal in both cases, the complainant became a member of the Sarab Hind Shiromani Akali Dal (Akali Dal), the main Punjabi nationalist party, and on 4 July 1999, he was appointed as a Secretary-General of Akali Dal in Haryana province.

2.5 Although acquitted, the police still wanted the complainant to identify Paramjit Singh and two other individuals, who at that time were detained pending trial at the Burali jail. In 2000, he received three court summons, but the hearings were postponed each time. All this time the complainant was under police surveillance; he bribed the inspector to further avoid it and moved to Muzaffarnagar in Uttar Pradesh province. There, he applied for a passport, which was subsequently issued by the Ghaziabad Passport Office in September 2002.

2.6 On 13 January 2003, the complainant was arrested in Uttar Pradesh province and questioned about his domicile and activities. He admitted to having a residence in two places. Upon the request of Haryana police, he was transferred to Karnal on 15 January

2003, where he again suffered torture before being released on 20 January 2003, with the help of his parents and a prominent Akali Dal member.

2.7 On an unspecified date, after a Sikh function, the complainant was approached by an individual who was impressed by the service in the temple, in which the complainant was preaching at that time, and invited him to come to Canada. On the basis on an invitation of a Sikh temple in British Columbia, the complainant received a Canadian visa on 16 September 2003 and arrived in Vancouver, Canada on 24 September 2003. While the complainant was already in Canada, his father was arrested for three days, following the escape of killers of the Punjab's Chief Minister. Afterwards the complainant's family was constantly harassed by police, in attempts to establish his whereabouts.

2.8 After his arrival in Canada the complainant preached in two Sikh temples for a year and a half on voluntary basis. He was promised by the management of the Canada based Gurudwara society that they will arrange his immigration status, but they failed to do so.

2.9 The complainant travelled to Montreal where, on 28 March 2005, he filed an application for refugee status and protection. The complainant's refugee claim was heard by the Immigration and Refugee Board ("the Board") on 3 October 2005. On 16 November 2005, the Board determined that he was not a Convention refugee. The Board concluded that the applicant was not credible, that his behaviour was not remonstrative of a person fearing for his life and that his departure related to the invitation by the Sikh religious community to work in Canada.

2.10 The complainant applied to the Federal Court for leave to apply for judicial review of the Board's Decision, which was granted on 16 March 2006. The request for judicial review of this decision was heard on 7 June 2006 and it was denied by the Federal Court on 13 June 2006. The standard that the Federal Court applied to the credibility of the findings of the Board was that of "patent reasonableness". The Court concluded that the decision was not patently unreasonable, largely on grounds of the delay in claiming refugee status after arrival to the country and failure to provide credible or trustworthy evidence as to the complainant's background information in India.

2.11 After the refusal of refugee status and the decision from the Federal Court, on 27 December 2006, the complainant filed an application for stay for humanitarian reasons, (so called H&C application), submitting additional evidence under article 25(2) of the Immigration and Refugee Protection Act. The application was refused on 27 March 2007 by a Pre-Removal Risk Assessment (PRRA) Officer who concluded that the applicant did not establish that he would be at risk should he return to India. The complainant applied to the Federal Court for leave to apply for judicial review of the H&C decision, which was dismissed without reasons on 6 September 2007.

2.12 On 12 December 2006, the complainant submitted an application for protection from Canada under the PRRA programme. On 27 March 2007, the latter was rejected by the same PRRA Officer who refused the H&C application. The motivation was that the documentary evidence submitted by the complainant did not demonstrate that he might be listed or wanted by the Indian authorities; that the complainant had never claimed that he was a Sikh militant or a supporter of the militants; that he had not established that he held a high profile, nor that he was a person of interest for the Indian authorities. Therefore, the evidence submitted by the complainant did not corroborate that he might face a personal and objectively identifiable risk should he return to India.

2.13 After the PRRA application was refused, the complainant applied to the Federal Court for leave to apply for judicial review of the PRRA decision. The Federal Court dismissed his application without reasons on 14 August 2007.

2.14 On an unspecified date, the complainant applied to the Federal Court for a stay of execution of his removal order. A detailed affidavit about the present level of danger was submitted with a motion for stay of deportation that was heard on 18 June 2007 and refused on 20 June 2007. The deportation of the complainant was scheduled for 21 June 2007.

The complaint

3.1 The complainant contends that he has exhausted all available and effective domestic remedies.

3.2 The complainant claims a violation of article 3 of the Convention against Torture by Canada if he is to be deported to India in the light of the treatment suffered by him in police custody the past and continuing interest in him by the police in India.

3.3 The complainant submits that Sikhs in India who are suspected of militant activities are routinely arrested, tortured and murdered by police with impunity. He refers to the report on the situation of impunity published in the Harvard Human Rights Journal in 2002 "A Judicial Blackout:

Judicial Impunity for Disappearances in Punjab", which is claimed to be a leading authority on the current situation in Punjab. He further submits that as a result of being subjected to torture in the past, he suffers from post-traumatic stress disorder, the diagnosis which is corroborated by medical reports from India and from Montreal. At the time of the scheduled deportation there was an ongoing crisis in the Punjab and Haryana provinces. This crisis is said to have caused the central government to send large numbers of paramilitaries to these two provinces. There had been a general strike and widespread violence in May and June 2007 among Sikhs and another religious sect. The complainant claims that individuals such as himself are routinely targeted by the police at the slightest sign of political upheaval or disturbance.

3.4 The complainant also states that he did not have an effective remedy to challenge the deportation decision as guaranteed in article 2 of the International Covenant for Civil and Political Rights (ICCPR). He explains that the judicial review of the Immigration Board decision, denying him Convention refugee status, is not an appeal on the merits, but rather a very narrow review for gross errors of law. In the context of deportation these proceedings have no suspensive effect. The complainant also submits that the PRRA procedure of risk analysis is implemented by immigration agents who are not competent in matters of international human rights and are not independent, impartial and do not possess recognised competence in the matter. He claims that in the immigration department there is an extremely negative attitude towards refugee claimants and that its decisions do not undergo independent scrutiny as required by the international human rights law.

State party's observations on admissibility and the merits

4.1 On 18 January 2008, the State party submitted observations on the admissibility and the merits of the communication.

4.2 With regard to the allegation of violations of article 3 of the Convention, the State party maintains that the complaint is inadmissible pursuant to article 22, paragraph 2 of the Convention and pursuant to Rule 107 (1)(b) and (d)of he Committee's *Rules of procedure,* as it is manifestly unfounded and incompatible with the Convention. The State party submits that the complainant has failed to substantiate on a *prima facie* basis that there are substantial grounds to believe that he personally faces a risk of torture on return to India.

The State party refers to the Committee's General Comment No.1, which states that it is the complainant's responsibility to establish a *prima facie* case for the purpose of admissibility of his or her communication.

4.3 The State party maintains that the communication is based on the same facts and evidence as presented to the competent and impartial domestic tribunals and decision makers and emphasizes that it is not the role of the Committee to weigh evidence or reassess findings of fact and credibility made by competent domestic decision-makers. The State party submits that the complainant's refugee claim was heard by the Immigration and Refugee Board, which is an independent, quasi-judicial, specialized tribunal that hears refugee applications. The Board determined whether the person is a refugee based on an oral hearing and consideration of documentary evidence. The Board members are specialists in refugee law, who receive comprehensive, ongoing training and develop expertise on the human rights conditions in countries of alleged persecution. The State party submits that the Board's decision was subject to judicial review by the Federal Court.

4.4 The State party also submits that the complainant's case was reviewed under the PRRA programme, which is founded in Canada's domestic and international commitments to the principle of *non-refoulement*. Under this procedure an applicant whose claim to refugee protection has been rejected by the Board may present for consideration only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected to have presented, at the time of the rejection. PRRA applications are considered by officers specially trained to assess risk and to consider the Canadian Charter of Rights and Freedoms as well as Canada's international obligations, including those under the Convention against Torture. The State party also makes reference to the complainant's unsuccessful H&C application. The State party makes reference to previous decisions of the Committee and other United Nation treaty bodies, which have considered the judicial review[1] and PRRA process[2] to be effective remedies.

4.5 The State party refers to the Committee's constant view that it can not review credibility findings unless it can be demonstrated that such findings are arbitrary or unreasonable; that the complainant has made no such allegations nor does the submitted material support a finding that the Board's decision suffered from such defects.

4.6 The State party refers to the complainant's claims that the Canadian refugee determination and post-determination process were insufficient and did not meet international human rights standards. The State party submits that these allegations fail to describe in sufficient detail how the above procedure violates article 3 or any other provision of the Convention or fail to provide for an effective remedy. It also notes that it is not within the scope of review of the Committee to consider the Canadian system in general, but only to examine whether, in the present case, the State party complied with its obligations under the Convention. The State Party maintains that the allegation of lack of effective remedy should be found inadmissible since it constitutes an allegation for violation of article 2 (3) of ICCPR and therefore it is not within the Committee's jurisdiction under article 22, paragraph 1 of the Convention.

[1] P.S.S v. Canada, Communication 66/1997, para 6.2, R.K. v. Canada, Communication 42/1996 para 7.2, L. O. v. Canada, Communication 95/1997, para 6.5, M.A. v. Canada, Communication 22/1995, paras 3-4, Adu v. Canada, Communication 603/1994, para 6.2, Nartey v. Canada, Communication 604/1994, para 6.2.

[2] The State party refers to T.A. v. Canada, Communication 273/2005, para 6.4, Nartey v. Canada, Communication 604/1994, para 6.2, Badu v. Canada, Communication 603/1994, para 6.2, Khan v. Canada, Communication 1302/2004, para 5.5.

4.7 The State party maintains that the complainant has failed to show that he is personally at substantial risk of torture if returned to India. The State party submits that the complainant's credibility is highly suspect, that his overall behaviour was not demonstrative of someone who fears persecution or serious harm; that there are no credible reasons to consider that he fits the personal profile of someone who would be of interest to the Indian authorities; that the general human rights situation in the country cannot by itself be sufficient to establish that the complainant would be personally at risk if returned; and that the current human rights situation in India does not support the complainant's allegations of risk.

4.8 Should the Committee be inclined to assess the complainant's credibility, the State party submits that a number of key issues clearly supports a finding that the complainant's story can not be believed: the complainant's one year and a half delay in making a refugee claim and the reasons cited for it significantly detract from his credibility; the complainant's allegation that he feared harm is not plausible since he waited many months after receiving a passport before leaving India; there were inconsistencies in the author's allegations of political involvement- namely he was unable to provide details of Akali Dal party's ideology and failed to explain how he could continue to act as General Secretary of the Haryana Unit after leaving the geographic area.

4.9 The State party also submits that objective evidence does not corroborate the complainant's allegations with regard to the human right situation in India. It states that the human rights situation for Sikhs in Punjab and India has improved to the extent that there is not a significant risk of torture or other ill-treatment on the part of the police, and that only those considered to be high-profile militants may still be at risk and refers to several reports in support of that view.

4.10 The State party maintains that the complainant has failed to show in his submissions that he would be unable to lead a life free of torture in another part of India and makes reference to the previous practice of the Committee that while the complainant may face hardship should he not be able to return to his home, such hardship would not amount to torture or ill-treatment. [3]

4.11 In the event the Committee determines that the complainant's communication is admissible, the State party requests that the communication be found without merit.

Complainant's comments on the State party's observations on the admissibility and the merits

5.1 The complainant submits in support of his communication a report prepared by the Punjab Human Rights Organization, regarding his case. He also notes that the State party does not seriously question that he had been targeted and subjected to torture in the past.

5.2 In a separate submission, the complainant underlines that the Federal Court of Canada is not effecting a real control over the immigration authorities when they look at stays of deportation, since the Court has established jurisprudence that if the Board decided a refugee claimant is not credible, than their story can not be a base for stopping their deportation, even when there is substantial evidence of an error in judgment. The complainant quotes cases where the Federal Court has consistently decided that the decisions of the Immigration Board are discretionary and that the Court should not intervene except if the immigration officer exercises his discretion pursuant to "improper

[3] B.S.S v. Canada, Communication 183/ 2001 (2004), para11.5; S.S.S. v. Canada, Communication 245/2004 (2005), para 8.5.

purposes, irrelevant considerations, with bad faith, or in a patently unreasonable manner."[4] He maintains that when the judicial recourse is futile and in cases where there are substantial grounds to intervene the Court does not even hear the case and that this is not a recourse that is effective and efficient following the recognized principles of the international law. The complainant claims that no human rights organizations dealing with refugees have any confidence in the PRRA as an effective recourse to protect victims of violations and refers to several documents in support of his view.

5.3 The complainant maintains that the State party's authorities are following a political line of refusing asylum to Sikh victims of torture from India. He states that the rate of acceptance of PRRA cases is 3% for Canada and only 1% in Quebec, where his case was reviewed. He further submits that most applicants are refused with identical motivation.

5.4 The complainant further submits that, even though Sikhs are not a targeted group, there are Sikhs who are targeted because of their political activities or their efforts to get justice for human rights abuses. He maintains that, according to Indian human rights groups, arbitrary arrests are happening all the time and individuals who were at risk in the past are still at risk. He maintains that there are no valid legal recourses for victims of human rights abuses in India and refers to the submitted article in the Harvard Human Rights Law Journal.

5.5 The complainant contests the suggestion that he could relocate and live in safety elsewhere in India, again refers to the article in the Harvard Human Rights Law Journal and states that individuals have been detained for not reporting to the police. He also contests the State party's assertion that there would be no immediate danger for him upon arrival in India and states that there have been cases of individuals detained upon arrival at the airport and taken to prison, where they were tortured. Further, he contests that only high profile individuals are at risk of torture and refers to a 2003 Amnesty International report which demonstrates how deeply ingrained is the system of torture and abuse. He is also referring to pages 25-28 of the Danish Immigration Service *Report on Fact- finding Mission to Punjab, India, 21 March to 5 April 2000*, where widespread torture and deaths in police custody are described.

5.6 The complainant submits that he is personally at risk of torture if returned to India because: he had previously been accused of participation in militant activities in 1988 and in 1995; he was detained for three and a half years between 1988 and 1991 and subjected to torture while in detention and previous detainees for militant activities are one of the main risk groups according to human rights reports; he was a prominent Sikh priest at some of the most important Sikh temples in Punjab and Haryana and therefore is a high-profile figure, since prominent Sikh religious figures are among the most targeted figures by the security services; he was a prominent figure in the Akai Dal in Haryana; he has personal family links with well known militants, as confirmed by the submitted report of the Punjab Human Rights Organization.

5.7 The complainant contests the State party's assertion that the torture with impunity in India has ended and in support describes several cases where human rights defenders or activists of Akali Dal have been detained and tortured by the police. He also maintains that after the 2008 Mumbai attacks there was a great wave of detentions, false accusations and torture taking place against large parts of the political class. The complainant also refers to the 2005 report of the Organization ENSAAF, entitled *Punjab Police: Fabricating Terrorism through Illegal Detention and Torture*, which talks about large quantity of

[4] Case of Amir Shahin Sokhan, Imm-3067-96, 7 July 1997. Similar jurisprudence quoted from the case of Rahmatollah Khayambashi, Imm-1246-98, 7 January 1999.

arbitrary detentions in the period June-August 2005, including a leader of Akali Dal. He submits that his political activities would make him particularly vulnerable to detention and torture if he were to be returned.

6.1 By Note Verbale of 17 July 2009, the State party submits that the *Fact-Finding Report Regarding Nirmal Singh,* presented by the complainant, contains no new evidence demonstrating that there were substantial grounds to believe that the latter would personally be at risk of torture if returned to India.

6.2 Should it be determined that the report contains new evidence, the State party submits that the complainant should present it first to Canadian immigration authorities, that the complainant has not exhausted domestic remedies as required by article 22 (5)(b) of the Convention and therefore it is inadmissible. The State party notes that it remains open to the complainant to request a new PRRA or file a new H&C application for permanent residence based on the new report.

6.3 In conclusion, the State party continues to rely on their original submission of 17 January 2007 and asks the Committee to find the communication inadmissible and lacking in merits.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement and that all available domestic remedies have been exhausted.

7.2 The Committee notes the State party's contention that the complaint of a violation of article 3 of the Convention, based on the return of the complainant to India is manifestly unfounded and therefore inadmissible. The Committee, however, considers that the complainant has provided sufficient substantiation to permit it to consider the case on the merits.

7.3 The Committee notes the State party's submission that the allegation of lack of effective remedy should be found inadmissible since it constitutes an allegation for violation of article 2 (3) of ICCPR and therefore it is not within the Committee's jurisdiction under article 22, paragraph 1 of the Convention. The Committee, however, recalls its jurisprudence that the prohibition on refoulement should be interpreted to encompass a remedy for its breach.[5]

[5] See *Ahmed Hussein Mustafa*, complaint No. 233/2003, Views of 20 of May 2005, para. 13.6 and 13.7.

7.4 Accordingly, the Committee decides that the complaint is admissible as pleaded in respect of the alleged violations of article 3 of the Convention.

Consideration of the merits

8.1 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to India.

8.2 The Committee notes the State party's argument that the human rights situation in the Punjab and in India has improved and stabilized in recent years. It observes, however, that reports submitted both by the complainant and the State party, confirm *inter alia* that numerous incidents of torture in police custody continue to take place, and that there is widespread impunity for perpetrators. The Committee observes that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person was in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned was personally at risk.[6]

8.3 The Committee notes that State party's submission that it is not the role of the Committee to weigh evidence or reassess findings of fact and credibility made by competent domestic decision-makers. According to the General Comment No. 1, paragraph 9, the Committee gives "considerable weight (…) to findings of fact that are made by organs of the State party concerned (…) but the Committee is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case". The Committee notes that in the case under analysis, most of the facts are undisputed by the parties, however the assessment of the legal consequences of the relevant facts are challenged. In this situation, the Committee should assess the facts in light of the State party's obligations under the Convention.

8.4 The Committee observes that the complainant submitted evidence in support of his claims that he was tortured during detention on at least three occasions, in 1988, 1995 and 2003, including medical reports, as well as written testimony corroborating these allegations. It also notes the medical reports from clinics in India and Canada, which conclude that there is sufficient objective physical and psychological evidence corroborating his subjective account of torture and that the State party has not contested the complainant's allegations that he had been subjected to torture in the past.

8.5 The Committee notes the State party's submission that the complainant has failed to demonstrate that he is a "high profile" person and therefore that he would be of interest for the Indian authorities. However, the Committee notes that the complainant contends he was detained and tortured because he was accused of being a militant, that despite his formal acquittal by the courts, the police continued to harass him, that he is well known to the authorities because of his activities as a Sikh priest, his political involvement with Akali Dal party and his leadership role in the local structures of the party. The Committee observes that the complainant has provided documentary evidence that he has a history of being investigated and prosecuted as an alleged Sikh militant, that he was appointed as Secretary General of the Haryana unit of the Akali Dal party and that he served as a Sikh priest. The Committee accordingly considers that the complainant has provided sufficient evidence that his profile is sufficiently high to put him at risk of torture if arrested.

[6] See *A.M. v. France*, complaint No. 302/2006, Views of 5 May 2010, para 13.2; *S.P.A. v. Canada*, complaint No. 282/2005, Views of 7 November 2006, para 7.1.

8.6 The Committee notes the State party's submission that the complainant has failed to show in his submissions that he would be unable to lead a life free of torture in another part of India. The Committee, however, observes that the complainant has submitted evidence that he had been arrested in three different provinces - Haryana, Punjab and Uttar Pradesh. The Committee also takes note of the evidence submitted that the Indian police continued to look for the complainant and to question his family about his whereabouts long after he had fled to Canada. In light of these considerations, the Committee does not consider that he would be able to lead a life free of torture in other parts of India.

8.7 In the light of the foregoing, the Committee concludes that the complainant has established a personal, present and foreseeable risk of being tortured if he were to be returned to India.

8.8 The complaint states that he did not have an effective remedy to challenge the decision on deportation and that the judicial review of the Immigration Board decision, denying him Convention refugee status, was not an appeal on the merits, but rather a very narrow review for gross errors of law. The State party in response submits that the Board's decision was subject to judicial review by the Federal Court. The Committee notes that according to Section 18.1(4) of the Canadian *Federal Courts Act*, the Federal Court may quash a decision of the Immigration Refugee Board if satisfied that: the tribunal acted without jurisdiction; failed to observe a principle of natural justice or procedural fairness; erred in law in making a decision; based its decision on an erroneous finding of fact; acted, or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law. The Committee observes that none of the grounds above include a review on the merits of the complainant's claim that he would be tortured if returned to India.

8.9 With regard to the PRPA procedure of risk analysis, to which the complainant also subjected his claim, the Committee notes that according to the State party's submission, PRRA submissions may only include new evidence that arose after the rejection of the refugee protection claim; further, the PRRA decisions are subject to a discretionary leave to appeal, which was denied in the case of the complainant. The Committee refers to its Concluding observations (CAT/C/CR/34/CAN of 7 July 2005, para 5 (c)), that the State party should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture[7]. The Committee accordingly concludes that in the instant case the complainant did not have access to an effective remedy against his deportation to India, in violation of article 22 of the Convention against Torture.

9. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, **considers that the State party's decision to return the complainant to India, if implemented would constitute a breach of article 3 of the Convention. The Committee also considers that in the instant case the lack of an effective remedy against the deportation decision constitutes a breach of article 22 of the Convention.**

10. In conformity with article 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, on the steps taken by the State party to respond to these Views.

[Adopted in English, French, and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Russian and Chinese as part of the Committee's annual report to the General Assembly.]

[7] See T.I. v. Canada, complaint No. 333/2004, Views of 15 November 2010, para. 6.3.

Annexure 10:

Judgment of the UK Court on extradition of Tiger Hanif

B e f o r e :

LORD JUSTICE MOSES

MR JUSTICE KENNETH PARKER

Between:

HANIF MOHAMMED UMERJI PATEL **Appellant**

- and -

(1) THE GOVERNMENT OF INDIA

(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondents**

Edward Fitzgerald QC and Ben Cooper (instructed by Birnberg Peirce and Partners) for the Appellant

Julian Knowles QC and Aaron Watkins (instructed by The Crown Prosecution Service) for the First Respondent

Jonathan Glasson (instructed by the Treasury Solicitor) for the Second Respondent

Hearing dates: 28 February 2013 and 1 March 2013

HTML VERSION OF JUDGMENT

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Mr Justice Kenneth Parker:

Introduction

1. The Government of India ("the requesting State") has submitted an extradition request for the surrender of Hanif Patel ("the Appellant")

so that he may face trial in relation to terrorist offences committed in India during 1993 which, if committed in the UK, would constitute offences of conspiracy to murder, conspiracy to cause explosions, conspiracy to possess firearms and ammunition, and possession of explosives with intent to endanger life. The Appellant is accused of being involved in two bombings which led to loss of life and extensive property damage. Extradition between the United Kingdom and India is governed by the provisions of Part 2 of the Extradition Act 2003 ("the EA 2003") and the Extradition Act 2003 (Designation of Part 2 Territories) Order (S.I. No 3334/2003) as amended.

Factual Background

2. The information provided in the request describes how, following an attack on a mosque in December 1992, internecine hostilities broke out between the Muslim and Hindu communities in Gujarat. The requesting State's case is that the Appellant was part of a Muslim group which obtained explosives, guns and other weapons and then carried out revenge terrorist attacks on the Hindu community, including two explosions which resulted in loss of life, injury and damage.

3. The first explosion occurred on 28 January 1993 in a market on the Varacha Road in Surat and killed an eight year old girl and caused many injuries. The second explosion took place on 22 April 1993 at Surat railway station and caused many injuries and significant property damage. The Appellant is alleged to have been a principal conspirator in relation to these two bomb attacks, and to have been part of the Muslim group which acquired firearms and ammunition.

4. A number of those alleged to have been involved as co-conspirators with the Appellant have been convicted and sentenced in India to long terms of imprisonment.

5. The Appellant is wanted for trial in India for the offences set out on two warrants. The offences include murder, attempted murder, causing grievous bodily harm, attempting to cause an explosion and possessing firearms and ammunition.

Procedural Background

6. Following receipt and certification of the request by the Secretary of State, the Appellant was arrested in the United Kingdom on 16 February 2010. Extradition proceedings then commenced before District Judge Evans at the City of Westminster Magistrates' Court.

7. The request itself is lengthy because India is within the class of requesting States which is required to supply evidence of a *prima facie* case against any requested person before extradition may be ordered.

8. The Appellant advanced a number of grounds in opposition to extradition.

9. The District Judge rejected the arguments in a decision dated 2 May 2012 and sent the request to the Secretary of State for her decision as to whether the Appellant should be extradited. On 9 July 2012 the Appellant appealed against that decision.

10. The Secretary of State ordered the Appellant's extradition on 26 June 2012. The Appellant now seeks also to appeal, well out of time, the decision of the Secretary of State (the Second Respondent)

The Appeal Against the Decision of the District Judge

11. During the course of these proceedings the Appellant refined the grounds of appeal to the following:

i) The continuing pursuit of extradition by the requesting State "for the purpose of an unviable prosecution" in India is an abuse of the process of the Court.

ii) For the same reason, the Appellant's liability to detention is arbitrary and a violation of Article 5 ECHR.

iii) The District Judge wrongly held that there was a case to answer under section 84(1) of the EA 2003.

iv) Extradition is barred by the lapse of time.

v) There is a real risk that the Appellant's trial would constitute a flagrant denial of justice and his extradition would violate his rights under Article 6 ECHR.

vi) There is a real risk of torture contrary to Article 3 ECHR in the light of new evidence not available to the District Judge.

12. I shall consider each of these grounds in turn.

The First Ground: Abuse of Process

13. There is a strong presumption that a requesting State, in making the extradition request, is acting in good faith. In *Serbeh v Governor of HM*

Prison Brixton 31 October 2002, CO/2853/2002 at paragraph 40 Kennedy LJ stated:

"There is (still) a fundamental assumption that the requesting state is acting in good faith."

In *R(Ahmad) v Secretary of State* [2006] EWHC 2927 (Admin) at paragraph 101, Laws LJ restated this important principle in the following terms:

"But when the requesting State is one in which the United Kingdom has for many years reposed the confidence not only of general good relations, but also of successive bilateral treaties consistently honoured, the evidence required to displace good faith must possess special force… It is a general rule of the common law that the graver the allegation, the stronger must be the evidence to prove it. In this case it has been submitted that the United States will violate, at least may violate, its undertakings given to the United Kingdom. That would require proof of a quality entirely lacking here."

14. India and the United Kingdom have had extradition relations for many years through the Commonwealth Scheme for Extradition. There is an extradition treaty between the UK and India, signed in 1992, intended specifically to "make more effective the co-operation of the two countries in the suppression of crime by making further provision for the reciprocal extradition of offenders". This relationship supports the presumption of good faith which is the starting point in considering any ground based upon abuse of process.

15. One form of lack of good faith would be knowledge on the part of the requesting State that it had no sustainable case against the requested person, in other words, that it either knew that it could not prosecute him or, if it did prosecute, that such a prosecution would be doomed to fail. This proposition is supported by recent authority. In *R(Bermingham) v USA* [2007] QB 727 at paragraph 100 Laws LJ said:

"The prosecutor must act in good faith. Thus if he knew he had no real case, but was pressing the extradition request for some collateral motive and accordingly tailored the choice of documents accompanying the request, there might be a good submission of no case." (emphasis added)

16. In *Symeou v Public Prosecutor's Office, Patras, Greece* [2009] 1 WLR 2384, Laws LJ re-iterated:

"The residual abuse jurisdiction identified in R (Bermingham) v Director of Serious Fraud Office (2007) QB 727 and the Tollman case (2007) 1 WLR 1157 concerns abuse of the extradition process by the prosecuting authority. We emphasise those latter two words. That is the language of these two cases. It is the good faith of the requesting authorities which is at issue because it is their request coupled with their perverted intent and purpose which constitutes the abuse. If the authorities of the requesting state seek the extradition of someone for a collateral purpose, or when they know the trial cannot succeed, they abuse the extradition processes of the requested state." (emphasis added)

17. In this instance the requesting State founds its case upon statements made by individuals to police officers in which the makers of the statements incriminate both themselves and the Appellant. The Appellant does not contend that the contents of the statements, as such, would not tend to establish a *prima facie* case against him. As an example, Iqbal Wadiwala made a statement in which he said that, after riots in 1992, a camp was established to help Muslims who had been made homeless in the riots, and that the Appellant was one of the main leaders of the camp. Following an atrocious attack on a Muslim woman, the desire for revenge against the Hindu community increased. Wadiwala stated that he was at a meeting, attended also by the Appellant, when it was decided to plant a bomb at the bazaar in Varacha Road. The bomb was exploded three or four days after the meeting.

18. The individuals in question were all arrested, charged and tried under the Terrorist and Disruptive Activities (Prevention) Act 1987 ("TADA"). TADA was controversial legislation and was allowed to lapse in 1995. The statements that these individuals had made to police officers were admitted in evidence at their trials, although they had maintained that the statements had been obtained by coercive methods, including torture, that they should not be admitted and that they were in any event untrue. After what appears to have been lengthy proceedings, the trial Court, by an order of 4 October 2008, convicted and sentenced to imprisonment these individuals ("the co-defendants").

19. For the purpose of the present extradition proceedings the requesting State does not rely upon evidence other than the statements of the co-defendants. It does not suggest for that purpose that, if the Appellant were returned to India and were put on trial for the relevant extradition offences, the State would, or might, have other evidence that would be capable of sustaining convictions for those offences.

20. Mr Edward Fitzgerald QC, on behalf of the Appellant, submitted that, as a matter of the law of India, the statements of the co-defendants would not be admissible in evidence in criminal proceedings in India against the Appellant in respect of any of the extradition offences, and that the requesting State well knows that that is the position and that, therefore, there is no sustainable case against the Appellant. If that were the real situation, it would be sufficient to establish abuse of process, as Mr Julian Knowles QC, appearing for the requesting State, rightly concedes.

21. For the proposition that the statements of the co-defendants would not be admissible in evidence in the relevant criminal proceedings in India against the Appellant, reliance was placed before the District Judge on two expert reports of Sanjay Jain, an experienced advocate on record in the Supreme Court of India and the representative of the co-defendants in the proceedings referred to above, and on two reports of Dr Martin Lau, Reader in Law at the Law Department of the School of Oriental and African Studies at the University of London. Dr Lau also gave oral evidence at the hearing before the District Judge, and was cross-examined by Miss Claire Montgomery QC (then appearing for the requesting State). Following his oral evidence and before the District Judge made his decision, Dr Lau produced a third opinion.

22. The written expert opinions, excluding supporting exhibits and the oral evidence, run to over 30 pages, but I believe that the thrust can fairly be summarised as follows. It is common ground that the statements made by the co-defendants could be admitted in evidence against the Appellant only under section 15 of TADA. That section creates an exception to the general rule in the law of India (and indeed of England) that an out-of-court statement made by one defendant is not admissible in evidence against a co-defendant. The statement is, of course, hearsay, but it is a particularly suspect form of hearsay because a person under investigation for a criminal offence has an obvious incentive to deny or minimise his own involvement and to cast responsibility on others. Section 15, however, exceptionally renders such statements admissible, subject to certain formal requirements (which appear to have been satisfied in the present case), and with an important proviso (that was added by a later amendment to the legislation in order to create a further safeguard), in the following terms:

"… that co-accused, abettor or conspirator is <u>charged and tried in the same case together with the accused</u>." ("the relevant proviso", emphasis added)

23. Mr Jain and Dr Lau give as their expert opinion that, in the hypothesised circumstances, the Appellant would not be "charged and tried in the same case". They refer to chapter XVII of the relevant Criminal Code which defines "charge" as the formal framing of the accusation by the court, and to the decision of the Supreme Court in *Esher Singh v State of Andhra Pradesh* [2004] 2 SCR 1180, in which it was held that such a formal framing of the charge was necessary for the application of the relevant proviso. It does not appear that any charge has yet been formally framed against the Appellant. Mr Jain and Dr Lau also give their opinion that, even if a charge or charges had been formally framed against the Appellant, or are so framed in the future, he can no longer be "tried in the same case together with the accused", within the meaning of the relevant proviso. In that context they rely upon two decisions of the Supreme Court of India in *Hardip Singh Sohal* 2004 (11) SCC 612, and in *Esher Singh* 2004 (11) SCC 585, where, referring to the earlier decision, the Supreme Court stated at paragraph 22:

"Unless a person who is charged faces trial along with the co-accused the confessional statement of the maker of the confession cannot be of any assistance and has no evidentiary value as confession when he dies before completion of the trial. Merely because at some stage there was some accusation, unless the charge has been framed and he has faced trial till its completion, the confessional statement if any is of no assistance to the prosecution so far as the co-accused is concerned."

24. On this evidence the District Judge "unhesitatingly" found that the statements would not be admissible under the law of India, although, in the spirit of Sir George Jessel MR, he accepted that he might be wrong on the point. Speaking for myself, I do not find this matter so clear cut. In an affidavit sworn in these proceedings Mr Sukadwala, the Public Prosecutor in Surat, India, states his belief that the evidence would be admissible under section 15. As I understand it, Mr Sukadwala considers that (even if no charges were formally framed against him), the Appellant, as an absconder, was being tried along with the co-defendants in the relevant criminal proceedings, and the trial judge made findings, set out in some detail in the affidavit, against not only the co-defendants but also the Appellant. Section 14(5) of TADA contemplates that a Designated Court may proceed with the trial in the absence of the accused and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination. Mr Sukadwala also relies on the position of one co-defendant, Yusuf Dadu, who, like the Appellant, was an absconder and who was likewise apparently not at the outset the subject of formally framed charges in the proceedings. He was arrested in

2000, a supplementary formal charge was then framed against him, and he was brought physically before the court for the remainder of the proceedings. The Designated Judge admitted in evidence the statements of the co-defendants against Dadu under section 15, when plainly he had not been physically present throughout the proceedings. It is correct that Dadu physically was present with the co-defendants before proceedings terminated against them. But Mr Sukadwala does not believe that such physical presence is necessary, because the real question under section 15 is whether on his return the Appellant would be tried in what was in substance a continuation of the same case.

25. Mr Sukadwala also seeks to distinguish *Hardip Singh* and *Esher Singh* (see above), on the ground that in these cases it was the maker of the statement that was absent from the trial (in one case because he had died, in the other because he had absconded); and the ratio of the decisions, in his view, does not necessarily extend to circumstances in which the target of the statement has chosen to abscond. On the contrary, he argued that there could be policy reasons against such an extension. The clear purpose of section 15 was to enable the statement of one defendant to be admitted in evidence against a co-defendant, provided that the co-defendant had a fair opportunity to respond to it. According to the policy argument, the Parliament of India could not have contemplated that a co-defendant who chose to abscond (and so deliberately to deprive himself of the opportunity of physically confronting his co-defendants) should be able to shut out evidence that would be admissible against him if in accordance with the law he had been present at his trial. It might also be noted that whether an absconding co-defendant was, like Dadu, apprehended in time to include him physically in the proceedings could be somewhat fortuitous, and Dr Lau's reading of section 15 would encourage absconders to lie low until co-defendants had been dealt with.

26. Unlike the District Judge, and with great respect to the opinions of the learned experts deployed by the Appellant and to Mr Fitzgerald's typically forceful presentation, I am not able confidently to predict, on the material before this Court, that the relevant statements would not be admissible in evidence against the Appellant under section 15 of TADA. The question raises difficult points of criminal procedure in India and there are competing arguments on each side. As a matter of language, the concept found in section 15 of "the same case" would appear to be a broad one, and the requesting State contends that, taking account of what has already happened in the proceedings, this Appellant, under the applicable rules of criminal procedure in India, can be charged and tried jointly with the co-defendants in "the same case", even if the co-defendants

have been convicted in his absence. The Appellant argues that the decision in *Mustafa Dossa* forecloses that possibility. But in that case it appears to have been accepted that the case of the absconder had been separated from the cases of the putative co-defendants, which Mr Sukadwala does not accept to be the position in the Appellant's case. There is also obvious force in the policy argument relied on by the requesting State. Dr Lau, in cross examination, accepted that it had force. His answer appeared to be that, although his interpretation might ordinarily not be regarded as advancing the purpose of Section 15, the Supreme Court had expressed disquiet about TADA generally, and would, therefore, be likely to read down section 15 so that its application was restricted. I understand from the evidence that the related case of *Dadu* is to be considered by the Supreme Court, who may well give further guidance on the meaning and scope of section 15, in a way that would resolve any doubts in the Appellant's case.

27. I should also mention that Mr Chaliawala, Assistant Government Pleader, Surat, on 29 February 2012 made a statement that was at odds with that given by Mr Sukadwala and with the general position advanced by the requesting State. In my view, that does no more than show that, even within the prosecutor's office, different views may have been expressed. The ultimate position of the requesting State, put before the District Judge and this Court, is that it believes that the statements of the co-defendants will be admissible, and that it believes that it has good grounds to support that position.

28. Fortunately, I do not have to resolve these difficult questions about the correct interpretation and application of section 15 of TADA. I have to be satisfied that the requesting State honestly believes that it has a sustainable case against the Appellant. This is not an instance of a requesting State claiming to have such a belief but offering no explanation for its belief. The requesting State has here squarely addressed the argument advanced by the Appellant that the only evidence against him would be inadmissible at his trial in India. In my view, it cannot be concluded that its reasoned position, as I have set it out above, has plainly no merit and that the requesting State knows that it has no merit, so as to found an abuse of process. I do not say that the Appellant's arguments will inevitably fail, or even that they are likely to fail. But on the authorities that is not the relevant test for determining whether there has been an abuse of process.

29. For these reasons, I reject the first ground of challenge.

The Second Ground: Article 5 ECHR

30. In my view, this ground is parasitic on the first ground and can be dealt with shortly. I am prepared to accept, without deciding, for present purposes that Article 5 ECHR is engaged in respect of the Appellant's detention in pursuance of his requested extradition and that, as Mr Fitzgerald submits, the detention must be for a legitimate purpose, in good faith and not disproportionate. However, in the present context, the detention would not be for a legitimate purpose and/or disproportionate, only if the requesting State did not honestly believe that it had a sustainable case. For the reasons already given, the requesting state in the present instance honestly believes that the relevant evidence is admissible and that the case against the Appellant is a sustainable one. Furthermore, even if *quod non* it were necessary to show that the case had a realistic prospect of success, the requesting State has also discharged that burden for the reasons given above.

The Third Ground: No *Prima Facie* Case

31. On this ground the relevant provision of the EA 2003 is section 84(1):

"If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him."

32. In this case, as already explained, the Government of India relies, for the purposes of satisfying section 84(1), exclusively on the out of court statements of the Appellant's alleged co-defendants. Mr Fitzgerald QC submits that such statements would not be admissible in evidence at a summary trial of an information against the Appellant and that, therefore, there would not be sufficient evidence to make a case requiring an answer. Section 82(1) of the Police and Criminal Evidence Act 1984 states that a confession made by an accused is admissible "against him", reflecting the common law rule that a confession is admissible only against its maker and not against anyone else such as a co-accused who may be named in it (see, for example, *R v Gunewardene* (1951) Cr. App. R 80 CCA; *R v Spinks* [1982] 1 All ER 587). A trial judge who admits a confession made by one defendant must give the jury a formal direction that the confession may only be used in considering the guilt of that defendant, and may not be used in considering the case against another

defendant, even if the jury knows that the other defendant has been incriminated: *R v Jefferson* [1994] 1 All ER 270, which also allows the statement to be edited at the trial judge's discretion to reduce prejudice to a co-defendant. The co-defendant will have had no opportunity to challenge a confession made out of court in his absence, and the parts of the confession that incriminate the other defendant are not against his interest. On the contrary, there is a real risk that the maker of the statement will have had a motive for casting blame on the other defendant (see *R v Hayter*[2005] UKHL 6; [2005] 2 Cr. App. R 3 at [85]). In certain circumstances, however, the guilt of one defendant, proved or substantially supported by an out of court confession made by him, may be treated as evidence tending to show that another person committed an offence, at least if the individuals are tried jointly for an offence or offences (*Hayter; Persad v Trinidad and Tobago* [2007] UKPC 51; [2008] 1 Cr. App. R, 9 (page 140)). Furthermore, the provisions for admissibility of hearsay evidence of the Criminal Justice Act 2003, that apply to domestic criminal proceedings in the strict sense, enable a hearsay statement to be admitted under section 114(1)(d) "in the interests of justice". In *R v Y*[2008] EWCA Crim 10; [2008] 2 All ER 484, explaining *R v McLean* [2007] EWCA Crim 219; [2008] 1 Cr App R 11, the Court of Appeal confirmed that this is a general provision capable of applying to a confession by a co-defendant. However, the Court held that the application of the factors listed in section 114(2) would "in the great majority of cases" exclude the admission of such statements.

33. However, as Mr Knowles QC submitted on behalf of the Government of India, this ground of challenge rests upon a fundamental misappreciation of long and well established principles governing the reception of evidence in extradition proceedings. Section 14 of the Extradition Act 1870 long ago provided:

"Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act."

34. There is now a much simpler provision in section 202(3) of the EA 2003:

"A document issued in a category 2 territory may be received in evidence in proceedings under this Act if it is duly authenticated."

35. Section 202(4) sets out how a document may be authenticated.

36. The effect of authenticating statements is that they can be received by the Court as evidence of what the makers of the statements would say if they gave oral evidence in the extradition proceedings. In *Douse v Governor of Pentonville Prison* [1983] 2 AC 464 at 470, Lord Diplock explained the position as follows:

"Section 14 of the Extradition Act where it speaks of 'affirmations' and 'depositions' and 'statements on oath' is dealing with documentary evidence. It makes admissible in evidence in extradition proceedings written statements of fact which fall within any of those descriptions and are duly authenticated in manner provided for in s15, notwithstanding that under English laws of evidence what appears in the statement would only be admissible in the form of oral testimony given on oath by the maker of the statement. The manifest purpose of the section, as has frequently been stated, is to obviate the necessity of bringing witnesses from one country that is a party to an extradition treaty to give oral evidence in the other."

37. This point had been emphasised also in *R v Governor of Pentonville Prison ex parte Kirby* [1979] IWLR 541, where at 544 Croom-Johnson J said:

"What section 11 [of the Fugitive Offenders Act 1967] is dealing with is the way of presenting evidence to the committing court. Since witnesses in proceedings of this type cannot be expected to travel all the way from a foreign country to the place of committal, and documentary evidence of what they would say and exhibit is therefore to be allowed, safeguards have to be imposed to make sure that only authenticated evidence as provided for by section 11 is to be allowed in and not documents or exhibits in any form. This section is dealing with procedure and method but not with admissibility.

The right view of the expression at the end, for example, of section 11 (1) (a) that the documents shall be admissible as evidence of the matter stated therein is that this is an enabling provision allowing documents with due authentication to be put before the magistrate so that he may receive them knowing that they are vouched for by the country from which they purport to come, and he may therefore have regard to them for the purposes of the committal proceedings. But it does not mean that anything which is in that document, regardless of whether or not it complies with the ordinary rules of evidence which would be applied in the committing court, shall be considered by the magistrate.

Having got thus far, one asks next what rule of evidence could or should be applied to the evidence of Mr Lord in similar committal proceedings in England in the ordinary way. Would Mr Lord's evidence be admissible?"

(See also *R v Governor of Pentonville ex part Osman* [1990] IWLR 277 at 306-309; *R v Stipendiary Magistrate ex parte Dokleja*, 31 January 1984 (unreported) CO/523/93 at page 73; and *Fernandez v Governor of HMP Brixton* [2004] EWHC 2207 (Admin) at para 47).

38. In short, the process of authenticating witness evidence in extradition proceedings allows statements taken abroad to be submitted as evidence in place of the witness giving live evidence against the subject of the extradition request. In this case the correct characterisation of the co-defendants' statements is not as out-of-court hearsay evidence but as statements of evidence which the witnesses would give on oath if they were called to do so.

39. There are in fact a number of reported authorities where the out-of-court statements of accomplices or co-defendants have been admitted in evidence in extradition proceedings in order to found a *prima facie* case. In *R v Pentonville Prison Governor, ex parte Schneider* (1981) 73 Cr App R 200, DC (Lord Chief Justice and Boreham J), the Government of Canada sought to rely upon out of court statements of a female co-conspirator in an alleged conspiracy to import cannabis into Canada. As to the admissibility of the statements as such, Boreham J, giving the judgment of the Court, simply stated in accordance with the general position explained above, that

"…it was common ground in the proceedings before us that, by virtue of section 11 of the Fugitive Offenders Act 1967 [another forerunner of what is now section 202 of the EA 2003], the evidence is properly admitted, despite the absence of the witness herself."

40. However, in *Schneider* the appellant contended with some force that the general position was not sufficient because, even if the co-conspirator were before the court giving live evidence, she would not be a competent witness, and without her (incompetent) testimony there would be no *prima facie* case to answer. That contention led the court to consider the extent, if any, to which an accomplice could be a competent witness in domestic criminal proceedings, concluding, after a learned and exhaustive examination of the somewhat uncertain position then prevailing in domestic law, that as a strict matter of English law (as distinct from practice) an accomplice was a competent witness, save, perhaps, when he was both indicted and tried with the defendant. The co-

conspirator in the case before the court was being dealt with in separate criminal proceedings in Canada. She was a competent witness, and her out-of-court statements incriminating the appellant were on any view admissible to show a *prima facie* case against him.

41. Similarly, in *R (on the application of the Government of the United States of America) v Bow Street Magistrates' Court*; *Lemieux v Governor of Belmarsh Prison* [2002] EWHC 1144 (Admin), the requesting State relied, in connection with proceedings in Florida, on the evidence of accomplices in an alleged drug running conspiracy, given in criminal proceedings in the United States District Court, Southern District of Florida. Although the evidence had been given on oath, before a Federal District Judge, it appears that the appellant had had no opportunity to cross-examine the witnesses and, from his point of view, the evidence in substance amounted to out-of-court statements. The only issue in the case was whether the evidence, otherwise admissible under the general rule, satisfied the formal requirements of the then applicable provision, namely, paragraph 12 of schedule 1 to the Extradition Act 1989. As to the Florida proceedings, the sworn evidence was held to be a "deposition" within paragraph 12 and was thus admissible. It might also be observed that an accomplice, on trial in the absence of a potential co-defendant, has just as great, if not greater, incentive to minimise his role and to incriminate others who are not present.

42. Finally, in *Tudor v United Arab Emirates* [2012] EWHC 1098 (Admin), the appellant, in a late reprise of *Schneider* (see above), contended that statements of accomplices were not admissible to found a *prima facie* case. Kenneth Parker J, with whom Richards LJ agreed, said:

"18. Mr Vullo also submits that the statement of Marin could not under s 84(2b) be treated as admissible evidence of any relevant fact because he says direct oral evidence by Marin of any relevant fact would not be admissible if the proceedings were the summary trial of an information against him. Mr Vullo contends that Marin is a co-accused and that in the putative summary trial referred to in s 84(1) he would not be able to give admissible evidence. Therefore direct oral evidence of Marin would not be admissible at such a trial.

19. That is undoubtedly the position in domestic law so far as co-accused are concerned: see the Youth Justice and Criminal Evidence Act 1999, s 53(4) and (5) which is set out in Archbold at para 853. This preserves the long-standing restriction imposed by the Common Law and illustrated by *R v Payne* [1950] 1 All ER 102, 48 LGR 187, 114 JP 68. However, prosecutors have long been able to circumvent this restriction in practice

either by terminating the proceedings against the accused, for example through a *nolle prosequi* by the Attorney General or by first completing the accused's trial before prosecuting his co-accused. In either case, the accused ceases to be a co-accused within the meaning of the Youth Justice and Criminal Evidence Act and the legal restriction on the competency of an accused no longer pertains. If it had been the case that Mr Marin was simply an incompetent witness, I can see that an argument could properly be advanced under s 84(2) that direct evidence from Mr Marin would not have been admissible at a summary trial.

20. That, in my judgment, is the only criterion that needs to be satisfied. Mr Vullo suggested that it was necessary to go further, that a further criterion should be read into s 84 whereby domestic rules about admissibility of interviews made at a time when an accused is a co-accused may not be admitted in evidence. However, there is no such reference at all in s 84 to any such further matters. The only matter that has to be considered is whether Marin would have been a competent witness.

21. In this case it is not disputed that Marin had already been sentenced and dealt with by the time of any putative summary trial. At the putative summary trial he would be competent to give evidence on behalf of the prosecution and his evidence that the Appellant had confessed to the robbery would be admissible evidence of the fact that the Appellant had indeed committed the robbery, under the relevant Common Law exception to the exclusionary hearsay rule, specifically preserved by s 118 of the Criminal Justice Act 2003."

43. Mr Fitzgerald QC sought to circumvent the effect of such earlier authorities by submitting that the out-of-court statements of accomplices or co-defendants could be admitted in evidence only if the makers of the statements had, for the express purpose of the extradition proceedings, "re-affirmed" the truth of the contents of the statements. However, that submission is entirely inconsistent with the long line of cases which establish that evidence is in principle admissible in extradition proceedings so long as the requesting state satisfies the formal requirements laid down from time to time by Parliament. The relevant formal requirements are now contained in section 202 EA 2003, and there is simply no scope in this context for any judicial gloss of the kind suggested by Mr Fitzgerald on the clear and simplified statutory criteria. It might be noted that in neither *Schneider* nor *Lemieux* had the evidence relied on by the requesting state been initially given or subsequently "re-affirmed" for the purposes of the extradition proceedings.

44. Mr Fitzgerald also pointed out that the Government of India appeared to accept that the co-defendants would not be competent witnesses for the prosecution under the rules of criminal evidence in India. That would seem to be so if, for the purposes of section 15 of TADA (see above), the co-defendants were properly treated as accomplices who were being dealt with "in the same case" as the Appellant. However, section 84 of the EA 2003 is concerned only with what evidence is necessary to show a *prima facie* case under the principles of English criminal law, and the competence of the co-defendants to give evidence for the prosecution in India is not relevant in this context: see *R(Abdullah) v Secretary of State* [2001] EWHC 263, para 43; *R(Ramda) v Secretary of State* [2002] EWHC 1278 (Admin), para 22; *R v Home Secretary, ex parte Elliot* [2001] (Admin) 559, para 11.

45. For completeness, I should perhaps mention that at an earlier stage in the proceedings the Appellant contended that section 84(2)-(4) of the EA 2003 was relevant, in other words that the out-of-court statements of the co-defendants would be hearsay evidence in domestic criminal proceedings and could, therefore, be admissible in extradition proceedings only if the criteria in that section were satisfied. However, as explained at length above, certified statements as such are not treated as hearsay. Such statements may, of course, contain hearsay material, and such material was not previously admissible (unless there was a relevant domestic exception), so that, for example, in *R v Governor of Pentonville Prison, ex parte Kirby* [1979] IWLR 541, the out-of-court statement of an accountant witness was inadmissible to the extent only that it referred to, but did not properly exhibit, primary company reports whose accuracy could be supported only by the evidence of other persons. Section 84(2)-(4) would now render such material admissible in principle, thus extending (not limiting, as the Appellant's initial contention implied) the scope of admissible evidence under section 84, in line with the modern domestic approach to the admissibility of hearsay evidence, as expressed in the applicable provisions of the Criminal Justice Act 2003. Anyone seeking a fuller explanation of this development can consult *Nicholls, Montgomery and Knowles, The Law of Extradition and Mutual Assistance (2nd edition, OUP)* at paragraphs 6.55-6.56.

46. The upshot of this somewhat lengthy exposition is that the co-defendants in this case, having been dealt with, would be competent witnesses for the prosecution in domestic criminal proceedings, their statements satisfy the requirements of section 202 EA, and the evidence in them is sufficient to establish a *prima facie* case under section 84.

The Fourth Ground: Extradition Would Infringe the Appellant's Rights Under Article 6 ECHR

47. As mentioned above, it appears that the prosecution cannot call as competent witnesses the co-defendants who have made statements incriminating the Appellant. Mr Fitzgerald QC submits that in these circumstances the Appellant cannot receive a fair trial in India and his extradition to stand trial would be a clear breach of Article 6 ECHR.

48. I do not accept that submission. First, the Appellant may call evidence in his own defence. Apart from any other evidence upon which he may seek to rely, he has at least the opportunity of calling to give evidence one or more of the co-defendants who have made incriminating statements. Those co-defendants have maintained that the relevant statements were not made voluntarily and were in any event untrue. In principle at least it would appear that one or more of them could potentially give evidence that would be helpful to the Appellant. It may be that in their own interests they would not be willing to do so, and it may also be that the Appellant would not wish to run the risk of calling them as witnesses, lest their evidence, which has not been believed in previous proceedings and would again be exposed to cross-examination, should tend to undermine the defence. However, decisions of this kind may turn out to depend on a number of future contingencies which are not necessarily easy to predict at this stage.

49. Secondly, there are indications in the expert evidence given on the Appellant's behalf that the court in India itself is likely to be fully alive to the needs of a fair trial in the present context. In *The State v Sandhu* (judgment 4 August 2005), the Supreme Court emphasised the importance of corroborating evidence where the prosecution relied upon statements admitted in evidence under section 15 of TADA. This Appellant will be able to contend at his trial that it would be unsafe and unfair to convict him of what are indisputably serious criminal offences solely on the statements of alleged co-conspirators. I have no reason to doubt, on the material that I have seen, that the court in India would carefully consider any such submission, and would ensure that the Appellant received a fair trial. However, I am not prepared sitting in this Court to prejudge that issue and to conclude in advance that a fair trial would simply not be possible, on the hypothesis that a conviction founded on hearsay statements of alleged co-conspirators must inevitably be unsafe and unjust. Such an inevitable conclusion is not in any event supported by domestic principles of criminal evidence, where it is now established that a conviction based solely or to a decisive extent on the

statement of a witness whom the defendant has had no chance of cross-examining does not necessarily infringe the right to a fair trial: *R v Horncastle and Others* [2009] UKSC 14. Whether the right to a fair trial would be infringed depends crucially on the circumstances of each particular case.

The Fifth Ground: Extradition is Barred by Passage of Time

50. Section 82 of the EA 2003 provides as follows:

"82 Passage of time

A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have –

(a) committed the extradition offence (where he is accused of its commission), or

(b) become unlawfully at large (where he is alleged to have been convicted of it)."

51. In *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 Lord Diplock stated:

"'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied on as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of delay due to such causes are of his own choice and making. Save in most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them."

52. In *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21, the Court stated:

"26. This is an area of the law where a substantial measure of clarity and certainty is required. If an accused like Goodyer deliberately flees the

jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part, whether this be, as in his case, losing the file, or dilatoriness, or, as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused's own conduct. Only a deliberate decision by the requesting state communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from justice, could allow him properly to assert that the effects of further delay were not 'of his own choice and making'.

27. There are sound reasons for such an approach. Foremost amongst them is to minimise the incentive on the accused to flee. There is always the possibility, often a strong possibility, that the requesting state, for want of resources or whatever other reason, may be dilatory in seeking a fugitive's return. If it were then open to the fugitive to pray in aid such events as occurred during the ensuing years—for example the disappearance of witnesses or the establishment of close-knit relationships—it would tend rather to encourage flight than, as must be the policy of the law, discourage it. Secondly, as was pointed out in Diplock para 2, deciding whether 'mere inaction' on the part of the requesting state 'was blameworthy or otherwise' could be 'an invidious task'. And undoubtedly it creates practical problems. Generally it will be clear one way or the other whether the accused has deliberately fled the country and in any event, as was held in *Krzyzowski*'s case, given that flight will in all save the most exceptional circumstances operate as an almost automatic bar to reliance on delay, it will have to be proved beyond reasonable doubt (just as the issue whether a defendant has deliberately absented himself from trial in an inquiry under s 85(3) of the 2003 Act)."

At para 29, the Court continued:

"We are accordingly in no doubt that it is *Krzyzowski*'s case, rather than the Divisional Court's judgment in the present case, which correctly states the law on the passage of time bar to extradition. The rule contained in Diplock para 1 should be strictly adhered to. As the rule itself recognises, of course, there may be 'most exceptional circumstances' in which, despite the accused's responsibility for the delay, the court will nevertheless find the s 82 bar established. The decision of the Divisional Court (Hobhouse

LJ and Moses J) in *Re Davies* (30 July 1997, unreported), discharging a defendant who had become unfit to plead notwithstanding his responsibility for the relevant lapse of time, may well be one such case. In the great majority of cases where the accused has sought to escape justice, however, he will be unable to rely upon the risk of prejudice to his trial or a change in his circumstances, brought about by the passing years, to defeat his extradition."

53. In the present case the District Judge found:

"Before leaving India he [the Appellant] was aware of police interest in him for the offences with which his extradition is sought. He was evading arrest. It is accepted he fled India in breach of his bail condition and to avoid arrest on these terrorism charges. He travelled to England arriving on 16 February 1996. On 8 May 1996 he claimed asylum … On the face of it that brief historical account renders any submission under section 82 of the Act quite hopeless."

54. The District Judge then considered whether the circumstances advanced on behalf of the Appellant amounted to exceptional circumstances such that he might nonetheless rely on the passage of time. The Appellant alleged that he was the victim of torture and had learnt that others had also been tortured. Under duress of circumstances he fled to protect himself and his family from further similar conduct. The Appellant did not give evidence.

55. The District Judge rejected the Appellant's case as follows:

"I am not satisfied the Appellant was tortured. I consider it more likely than not that he has invented this false claim. Most probably the claim is only advanced in an attempt to defeat this extradition request. His credibility is therefore seriously compromised."

56. There is no arguable basis for challenging the findings of the District Judge. The Appellant is a classic fugitive, there are no exceptional circumstances and he cannot rely on the passage of time to avoid extradition. In any event, the evidence falls well short of establishing that the delay in this case would cause oppression or injustice. There is nothing to suggest that the Appellant is now no longer able to recall the events in question, or that the court in India would be unwilling or unable to consider the extent, if any, of any prejudice to the fairness of the criminal trial by reason of the passage of time.

Sixth Ground: there is a real risk that the Appellant would be tortured or otherwise suffer treatment that would violate Article 3 ECHR

57. As already mentioned, Mr Geloo in his most recent statement refers, among other matters, to allegations made by, or on behalf of, Ansari that he was tortured following his extradition to India from Portugal.

58. The District Judge found, on the material before him, that there was no real risk that the Appellant would suffer torture, or other treatment falling within Article 3 ECHR, if extradited. In his asylum claims and interview the Appellant did not say that he had been subject to such treatment after his arrest in India and before he absconded. The Appellant did not give evidence before the District Judge and did not submit to a medical examination that might verify his allegations. The District Judge considered that the allegations were a recent fabrication developed for the purpose of resisting extradition. The Appellant no longer seeks to challenge the conclusion reached by the District Judge on the material before him.

59. The allegations now made by Ansari must be treated with extreme caution. He has powerful incentives to make such allegations. For the proceedings before the District Judge Mr Maninder Pawar, Deputy Commissioner of Police, Crime Branch in Surat and the supervisory officer regarding the investigations into the bombings in Surat in 1993 made a statement. He pointed out that other co-defendants had made allegations of torture. However at their trial the police officers gave evidence and were cross-examined at length. The court, having heard the evidence, admitted the statements of the co-defendants in evidence, and rejected the allegations of ill-treatment made by the co-defendants. Mr Pawar also explained how the Appellant would be dealt with on return to India. On arrival, if he wished to see a lawyer, that would be permitted. He would be remanded into the custody of the prison service. If the police wished to interrogate him they would have to apply to the court for permission. Any interrogation would be conducted in prison in the presence of prison staff and the defendant's lawyer if he so chose. Mr Pawar referred to *Basu v State of WB* (1997) AIR Supreme Court 3017 (II/2) where the Supreme Court specified the procedure following arrest of a criminal suspect, which includes regular medical examination and the keeping of appropriate records.

60. Furthermore, on 5 February 2013 the Commissioner of Police, Surat, provided a detailed response to the various matters in this context raised by the Appellant, including issues relating to police custody and prison custody. For example, in response to claims that terrorist suspects had been ill-treated by specialised units of state police, the Commissioner pointed out that the defendant was being extradited for two specific

criminal cases, and he would not at any time come under the control of such specialised units. I am satisfied that the Commissioner has responded comprehensively and adequately to the matters raised by the Appellant.

61. In my view, there is nothing, therefore, in the further material relied upon by the Appellant that would tend to undermine the conclusion reached by the District Judge that the Appellant has failed to provide substantial evidence that he would be at real risk of torture or other treatment falling within Article 3 ECHR if extradited.

62. For these reasons I conclude that the appeal against the challenged decision of the District Judge must be dismissed.

The Appeal Against the Decision of the Secretary of State

Introduction

63. On 2 May 2012 District Judge Evans sent the Appellant's case to the Secretary of State.

64. On 3 May 2012, the Home Office wrote to the Appellant's solicitors and to the Appellant himself to inform them that, if the Appellant wished to make representations to the Secretary of State about specialty or various other matters, they should send them to the Home Office by 29 May 2012.

65. The Appellant did not make any representations to the Secretary of State.

66. On 25 June 2012 the Secretary of State ordered the Appellant's extradition to India. In deciding to do so, she determined that extradition was not prohibited by section 95 of the 2003 Act, which requires her to consider whether there are specialty arrangements with the requesting state.

67. On 26 June 2012 the Home Office, in a letter sent to the Appellant's solicitors by fax and by post, informed the Appellant of the extradition order, enclosing a copy of the order itself. The letter also informed the Appellant that he had the right to appeal by both filing and serving an appellant's notice within 14 days (see section 108(4) of the EA 2003), and that any appeal would need to be served on both the Home Office and the CPS.

68. On 12 December 2012, the Appellant served the Secretary of State with an unsealed appeal notice.

69. On 13 December 2012, that is, more than 5 months after the decision, the Appellant filed its notice of appeal against the Secretary of State's decision with the Court, and served the Secretary of State with a sealed copy of the Appellant's appeal notice.

Applicable Provisions Regarding Specialty

70. Section 95 of the 2003 Act deals with specialty. It states:

"(1) The Secretary of State must not order a person's extradition to a category 2 territory if there are no speciality arrangements with the category 2 territory.

(2) But subsection (1) does not apply if the person consented to his extradition under section 127 before his case was sent to the Secretary of State.

(3) There are speciality arrangements with a category 2 territory if (and only if) under the law of that territory or arrangements made between it and the United Kingdom a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if—

(a) the offence is one falling within subsection (4), or

(b) he is first given an opportunity to leave the territory.

(4) The offences are—

(a) the offence in respect of which the person is extradited;

(b) an extradition offence disclosed by the same facts as that offence, other than one in respect of which a sentence of death could be imposed;

(c) an extradition offence in respect of which the Secretary of State consents to the person being dealt with;

(d) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

(5) Arrangements made with a category 2 territory which is a Commonwealth country or a British overseas territory may be made for a particular case or more generally.

(6) A certificate issued by or under the authority of the Secretary of State confirming the existence of arrangements with a category 2 territory which

is a Commonwealth country or a British overseas territory and stating the terms of the arrangements is conclusive evidence of those matters."

71. The United Kingdom has had for a very long time extradition arrangements with India. The arrangements are now set out in the 1992 Extradition Treaty between India and the UK. It is to be presumed that the Indian authorities will act in good faith and comply with their obligations under the Treaty unless there is "compelling evidence to the contrary" (Dyson LJ in *Ruiz v Central Court of Criminal Proceedings No 5 of the National Court, Madrid* [2008] 1 WLR 2798 at paragraph 67).

72. Article 13 of the Extradition Treaty obliges both States to comply with the rule of specialty:

"(1) Any person who is returned to the territory of the Requesting State under this Treaty shall not, during the period described in paragraph (2) of this Article, be dealt with in the territory of the Requesting State for or in respect of any offence committed before he was returned to that territory other than:

(a) the offence in respect of which he was returned;

(b) any lesser offence disclosed by the facts proved for the purposes of securing his return other than an offence in relation to which an order for his return could not lawfully be made; or

(c) any other offence in respect of which the Requested Party may consent to his being dealt with other than an offence in relation to which an order for his return could not lawfully be made or would not in fact be made.

(2) The period referred to in paragraph (I) of this Article is the period beginning with the day of his arrival in the territory of the Requesting State or his return under this Treaty and ending forty-five days after the first subsequent day on which he has the opportunity to leave the territory of the Requesting State.

(3) The provisions of paragraph (1) of this Article shall not apply to offences committed after the return of a person under this Treaty or matters arising in relation to such offences.

(4) A person shall not be re-extradited to a third State, except when, having had an opportunity to leave the territory of the State to which he has been surrendered, he has not done so within sixty days of his final discharge, or has returned to that territory after having left it."

73. On 19 November 2010 the Government of Gujarat gave an undertaking in respect of the Appellant in which, *inter alia*, they undertook that

"Patel will not be dealt within India for an offence committed prior to his extradition but for those for which his extradition is sought, or any lesser offence disclosed by the facts on which his extradition is sought, in accordance with article 13 of the Extradition Treaty between the Government of the United Kingdom and the Government of India 1992."

74. It is notable that Article 13(1)(c) of the Treaty is practically a mirror image of section 95(4)(b) of the EA 2003, in that the subject of extradition may be dealt with for an extradition offence disclosed by the same facts, save that under Article 13(1)(c) such an offence must be a "lesser offence". That qualification in fact is a mirror image of the applicable domestic provision regarding specialty in India, namely, section 21(1)(b) of the Extradition Act 1962 which refers to:

"any lesser offence disclosed by the facts proved for the purpose of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not lawfully be made."

75. There is, therefore, near perfect symmetry between the domestic law of specialty in the UK and India, reflected in the Treaty between the two States and buttressed in this case by a specific undertaking by the Government of Gujarat that the Appellant will be dealt with in accordance with the Treaty.

The Appellant's Case on Specialty

76. It is convenient to consider first the merits of the case advanced against the Secretary of State.

77. On 18 September 2002 Abu Ansari, wanted in India, in respect of, among other things, the "Bombay Bomb Blast Cases" of 12 March 1993 was detained in Lisbon, Portugal. The Government of India requested his extradition. Unlike the tight arrangements between the UK and India, there is no extradition treaty between India and Portugal which would harmonise and reconcile the national systems regarding extradition. Any request rests upon the principle of "reciprocity", which unfortunately leaves the door open for misalignment and misunderstanding.

78. The request for Ansari's extradition was made in 9 criminal cases (three of Central Bureau of Investigation, four of Delhi Police and two of

Mumbai Police). The Government of India undertook that Ansari would not receive the death penalty for any case and that, should he receive a sentence of life imprisonment, he would not be detained for more than 25 years. The courts in Portugal, after lengthy proceedings, ordered Ansari's extradition and he was handed over to Indian authorities on 10 November 2005. On Ansari's return to India the prosecutor in respect of the Bombay Bomb Blast Cases brought charges not only in respect of the specific offences for which Ansari was extradited from Portugal, but also for other lesser offences, founded on the same facts upon which the request was made, and falling within the terms of section 21(1)(b) of the Extradition Act 1962.

79. However, that step brought India and Portugal into conflict. In proceedings in Portugal brought by Ansari the courts have held that India violated specialty by seeking to prosecute Ansari for any offence other than a specific offence contained in the extradition request. The High Court of Portugal so held on 14 September 2011, affirmed by the Supreme Court of Portugal on 11 January 2012. On 5 July 2012 the Constitutional Court in Portugal, not adjudicating upon the substantive issue in the case, ruled that the Government of India had properly been excluded from the appeal in the Supreme Court of Portugal in which the Government had been held by the Portuguese Courts to have violated specialty.

80. Ansari also brought proceedings in India claiming that the additional charges brought against him in respect of the Bombay Bomb Blast Cases violated specialty. In a comprehensive and careful judgment the Supreme Court of India rejected that claim. The Supreme Court had before it all the relevant material concerning Ansari's extradition, including the extradition request, the assurances given on behalf of the Government of India and the orders of the Portuguese courts authorising extradition. Having regard to that material, and to the applicable legal framework, namely, the International Convention for the Suppression of Terrorist Bombings, the principle of reciprocity in international extradition and Section 21(1)(b) of the Extradition Act 1962, the Supreme Court unequivocally held that there had been no violation of specialty. In the view of the Supreme Court, there was nothing in the International Convention or in the orders authorising extradition that precluded the Government from adding lesser charges that fell within section 21(1)(b).

81. In a witness statement dated 26 February 2013 Mr Omer Geloo, a solicitor in the firm acting on behalf of the Appellant, states that the conflict has wider ramifications because Ansari was extradited from

Portugal in respect of 8 other cases, in respect of which the Government has also added further alleged offences beyond those specifically authorised by the extradition order. In one of these (CR52/2001) it appears that the Government has accepted that certain additional charges would violate specialty in any event and that it has taken appropriate steps to rectify the position. In the light of the manner in which the challenge to the decision of the Secretary of State has arisen, the Government of India has not had a proper opportunity to reply in detail to Mr Geloo's statement. However, after the hearing before us, on 14 March 2013, Mr Pritam Lal, First Secretary (Co-ordination) at the High Commission of India, gave further information in an e-mail to the effect that in two cases additional charges had been framed by the trial Courts, but these charges had been subsequently withdrawn because they were not "lesser offences" permitted by section 21(1)(b). Mr Lal stated that in the other cases the charges were framed in accordance with the extradition order or were properly "lesser offences". That further information simply confirms that the Government of India is diligently seeking to comply with its obligations regarding specialty as laid down by the Supreme Court of India.

82. It appears that Ansari, relying on the judgments of the Courts in Portugal, to which I have referred, has filed a further appeal in the Supreme Court of India. The successful respondent in the original Ansari appeal has now also made an application to the Supreme Court, referring to the "impasse" that has arisen between India and Portugal regarding Ansari's extradition, and requesting that the original order of the Supreme Court should be varied so that Ansari would be tried only for the specified extradition offences and not for any lesser offence founded on the same facts.

83. Mr Fitzgerald QC puts this material regarding Ansari's extradition before this Court to support a submission that there is a real risk that the Government of India would violate specialty in the Appellant's case. I regard that submission as wholly without merit. It is plain that there is a genuine disagreement in Ansari's case as to what specialty required. The courts in Portugal believe that Ansari can lawfully be tried in India only for the offences specified in the request. The Supreme Court of India, taking account of precisely the same facts and matters, has concluded, in a carefully reasoned judgment, that India has not violated specialty by adding offences that fall within Section 21(1)(b). This unfortunate disagreement arises essentially because there is no specific extradition treaty between India and Portugal, and the respective domestic legal provisions regarding specialty are not apparently in accord with each other. That is not the position between the UK and India. As previously explained,

there is a Treaty which clearly states the reciprocal obligations in respect of specialty and the domestic provisions in each State are almost mirror images of each other. The circumstances of the Ansari extradition, when closely analysed, give no support at all for the proposition that the Government of India might violate specialty in the present case. On the contrary, they show that the courts in India, particularly the Supreme Court, will rigorously scrutinise any claim that specialty has been violated and will ensure that a fugitive is tried only for offences falling within the express terms of the applicable Treaty and section 21(1)(b) of the Extradition Act 1962.

84. Finally, on 22 February 2013 the Secretary of State received a letter of Assurance from the Government of India. In that letter of Assurance the Under Secretary of State at the Ministry of Home Affairs has undertaken:

"That in seeking extradition of Mohd. Hanif Umarji Patel @ Mr. Hanif Tiger, for facing criminal trial as requested by Surat City Police, Gujarat State in 2 criminal cases namely Varachha Police Station Crime Register No. 0032/1993 and Surat Government Railway Police Station Crime Register No. 0070/1993, Ministry of Home Affairs, Government of India hereby undertakes on behalf of the Surat City Police, Gujarat State to United Kingdom regarding compliance of Principle of Speciality as defined in Article 13 — Rule of Speciality of the Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland

....

It is further assured that Mohd. Hanif Umarji Patel @ Mr. Hanif Tiger, if extradited to India, will be dealt with in accordance with Article 13 and other provisions of the Extradition Treaty between Government of the Republic of India and Government of the United Kingdom of Great Britain and Northern Ireland."

85. For these reasons I reject the substantive challenge to the decision of the Secretary of State. I also believe that there are no sufficient grounds for extending in this case the time for appealing. Representations about, among other matters, specialty were invited on 3 May 2012. The Appellant was given until 29 May 2012 to respond. That was the time when the Appellant and his representatives had to focus their mind on the issue of specialty. The Supreme Court of Portugal gave its judgment holding that India had violated specialty in the Ansari extradition on 11 January 2012, that is, nearly 5 months before the invitation to make representations.

The Ansari case must have been very high profile in India, given, in particular, the general background, Ansari's extradition from Portugal and the judgment of the Supreme Court of India. The finding by a supreme court of an EU member state that India had violated its international obligations regarding extradition in such a case would appear to be newsworthy and of considerable potential interest to anyone concerned with extradition to India. I am not able to accept that the matters now relied on in this context could not, with reasonable diligence, have been discovered in May 2012. They were not discovered at that time, nor were they discovered until about 5 months after the challenged decision was made in June 2012. It seems to me that the Appellant had a fair opportunity to raise the issue of specialty well before December 2012, and I therefore do not find that there are here "exceptional circumstances" justifying such a lengthy extension of time (*Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20; [2012] 1WLR).

86. Furthermore, an appeal under section 108 and 109 (4) of the 2003 Act which is based on new information may succeed only if that information was "not available" when the matter was considered by the Secretary of State.

87. The meaning of "not available" was considered by Sir Anthony May in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin). *Fenyvesi* concerned section 29(4) of the 2003 Act, which deals with Part 1 appeals, but the critical wording of section 29(4) ("not available") is the same as that in section 109(4).

88. At paragraph 32 Sir Anthony May said:

"In our judgment, evidence which was 'not available at the extradition hearing' means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have been obtained. If it was at the party's disposal or could have been so obtained, it was available."

89. For the same reasons I do not accept that the relevant information could not have been obtained with reasonable diligence well before December 2012.

Lord Justice Moses:

90. I agree that the appeal against the decision of the District Judge should be dismissed for the reasons given so comprehensively by Kenneth Parker J. I also agree with his views as to specialty which he gives in

relation to the appeal against the decision of the Secretary of State. I would dismiss that appeal also for the reasons given by Kenneth Parker J. I would also refuse permission to extend the time for appeal; the material now relied upon could and should have been deployed before December 2012.

http://www.bailii.org/ew/cases/EWHC/Admin/2013/819.html

Annexure 11:

Decision of the UN Committee Against Torture in 'A' versus Canada (2016)

United Nations CAT/C/57/D/583/2014

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
14 June 2016

Original: English

Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 583/2014*,**

Communication submitted by:	A (represented by counsel, Raj S. Bhambi)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	16 December 2014 (initial submission)
Date of present decision:	9 May 2016
Subject matter:	Deportation of the complainant to India
Procedural issues:	Admissibility — exhaustion of domestic remedies; admissibility — manifestly unfounded
Substantive issues:	Non-refoulement; refugeestatus; torture
Articles of the Convention:	3 and 22 (5) (b)

1.1 The complainant is A, a national of India born on 5 January 1988, who at the time of submission of the present communication was subject to removal to India. He claims that his removal to India would constitute a violation by Canada of article 3 of the Convention.

1.2 Under rule 114 (1) of its rules of procedure, on 17 January 2014, the Committee requested the State party to refrain from removing the complainant to India while his complaint was under consideration by the Committee. On 12 August 2014, the Committee granted the State party's request to lift interim measures. On 23 April 2015, the State party informed the Committee that the complainant had been removed to New Delhi on 23 March 2015.

* Adopted by the Committee at its fifty-seventhsession (18 April-13 May 2016).

** The following members of the Committee participated in the examination of the present communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani,Jens Modvig, Sapana Pradhan-Malla,Ana Racu, Sébastien Touzé and Kening Zhang.

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Facts as presented by the complainant

2.1 The complainant is of the Sikh faith and was born in Jalandhar, Punjab, India. He worked in his family's pharmacy in Phagwara. He was targeted by local authorities because his cousin M. was accused of assisting militants.

2.2 On 3 November 2008, the police raided and searched the complainant's home, where M. was staying and arrested them both. The police accused the complainant of assisting militants and detained him for four days. During this period, the complainant was stripped naked. Police officers beat his buttocks and the soles of his feet with leather belts and wooden sticks. His legs were pulled apart and a police officer kicked his genitals. He fainted as a result of this ill-treatment. On 7 November 2008, he was released after his family paid a substantial bribe and secured the intervention of local officials. The complainant sought treatment in a hospital for his injuries.[1]

2.3 In July 2009, the police came to the complainant's house to arrest him again, but he was not present. Fearing for his life, he left his village and went to stay with relatives, first in the village of Nadha Sahib, in the Ambala District, then in Chandigarh.

2.4 On 8 December 2009, the complainant was arrested in Chandigarh and beaten by police officers. He was then taken to Phagwara, where he was tortured by police officers. The officers accused him of helping militants and planning with M. to kill unspecified leaders.[2] The complainant was again released on 10 December 2009, after his family paid another substantial bribe and obtained the intervention of influential individuals. He was instructed to provide more information about M. and was told not to leave Phagwara without notifying the police. Specifically, the police threatened him and instructed him to produce his cousin within two months and provide information about unspecified militants. If he did not comply, he would be killed. He again had to seek treatment in a hospital, and realized that the police had been able to find him in Chandigarh by wiretapping his family's home phone. Out of fear for his life, he fled India and arrived in Canada on a student visa on 18 January 2010.

2.5 The complainant claims that he has exhausted domestic remedies. On 20 December 2011, he filed a refugee claim in Canada. In June 2013, the Immigration and Refugee Board, a division of the Refugee Protection Division (RPD), rejected his claim. Thereafter, he applied to the Federal Court of Canada for leave to file for judicial review of the Board's decision; this application was rejected on 18 October 2013. The complainant alleges that he is unable to submit an application for a pre-removal risk assessment (PRRA), as individuals whose refugee claims have been denied must wait at least one year before filing such an application. The complainant became subject to a removal order and, on 13 January 2014, he was detained in an immigration facility in Montreal. He was released on bail on 15 January 2014.

[1] The complainant provides a statement from a doctor in Phagwara, Punjab, dated 28 February 2013, which states that he was treated at a hospital (from 7 to 15 November 2008 and from 10 to 24 December 2009) and received further outpatient care for "multiple injuries, bruises, swelling and pain all over his body due to police beatings".

[2] The complainant provides an affidavit from S., dated 28 February 2013. S. identifies himself as a member of the Municipal Committee of Phagwara. In the affidavit, S. states that the complainant is a member of his constituency who encountered problems with the police owing to his cousin. After his cousin went into hiding, the complainant was targeted by the police. He also went into hiding, but the police found and arrested him in Chandigarh, because they suspected him of helping his cousin and other militants. The police illegally detained and tortured the complainant. Fearing further problems with the police, the complainant left India and went to Canada. His father and mother were beaten by the police owing to his departure. The rest of his family members live in hiding. The complainant will not be able to live in peace if he returns to India because the police believe he has joined militants and sends funds to them from abroad.

2.6 The complainant has been repeatedly advised by family members and others in his village in India that, for his own protection, he should not return to India. The Indian police and security forces are actively searching for him and have been harassing and threatening his parents since he left India. Police agents have gone to his family's home and have mentally and physically tortured his family members in order to obtain information on his whereabouts. The police took his family members to the police station on numerous occasions and also interrogated his parents for this purpose. His parents were able to escape because an influential and respectable person paid a substantial bribe.

The complaint

3. The complainant asserts that the State party would violate his rights under article 3 of the Convention by forcibly removing him to India, where he would risk being subjected to torture and cruel treatment due to his imputed affiliation with Sikh terrorism in Punjab. The complainant was twice arrested and subjected to brutal torture by agents of the Indian police force, which continues to actively search for him and harass and torture his family members. The State party's domestic authorities erred in their assessment of the risk faced by the complainant in India. The complainant maintains that according to credible reports, India faces serious human rights problems, including abuse by police, extrajudicial killings and torture.[3]

State party's observations on admissibility and the merits

4.1 In its submissions dated 5 June 2014, 11 July 2014 and 8 July 2015, the State party highlights that the complainant arrived in Canada on a student visa and did not file a refugee claim in Canada until after he had completed a diploma in Management and Health Care Technology, over two years after his arrival. This indicates a lack of subjective fear of returning to India.

4.2 The State party indicates that the complainant's application for a pre-removal risk assessment was denied and that his application for leave and for judicial review of the negative risk assessmentdecision was also denied. Nevertheless, the State party considers that the complainant had not exhausted all domestic remedies because he did not file an application for permanent residence on humanitarian and compassionate (H&C) grounds.

4.3 The State party further considers that the communication is inadmissible as manifestly ill-founded. The complainant did not provide any evidence to the Committee or to the Canadian decision makers indicating that he was perceived as being a high-profile militant or a terrorist suspect and therefore failed to establish any prospect of irreparable harm if returned to India. The determinations of the Refugee Protection Division and the pre-removal risk assessment officer were based on a full and impartial consideration of both the complainant's allegations and the situation in India, as described in objective reports. The Refugee Protection Division rejected the complainant's claims on the basis that they were not credible. The Division found that the complainant did not provide a reasonable explanation as to why he did not leave Phagwara soon after being tortured by the police for four days and narrowly escaping death. When asked why he waited until June 2009 to leave, the complainant responded that his parents felt that the situation had become more serious in 2009. The Division referred to a judgment of the Federal Court of Canada, in which it is stated that the Division may draw negative inferences about subjective fear in cases where a person alleging fear of persecution by local agents remains in the same location.[4] The Division also found the complainant's claims with respect to the alleged arrest and torture

[3] The complainant cites United States, Department of State, *Country Reports on Human Rights Practices for 2012, India*; and *International Religious Freedom Report for 2012: India*.

[4] The State party cites *Singh Mathon v. Canada (Citizenship and Immigration)*, 2012 FC 230.

in 2009 not credible. The Division reasoned that if the police had, as alleged, sent 12 police officers hundreds of kilometres away to arrest the complainant in Chandigarh, brought him back to Punjab under police escort and accused him of conspiring to murder an important leader, it was neither logical nor plausible that he would be released two days later and permitted to keep his passport. Nor was it logical that 12 police officers would have located the complainant, given that he was regularly moved by his agent (who did not provide his real name to landlords), that the complainant lived in hiding and did not go out and that he did not know the addresses of the places to which he was taken. The Division found the complainant's only explanation — that his parent's telephone may have been wiretapped — to be unsatisfactory, as there is no credible evidence that the police in Punjab have the means or resources to do this.

4.4 The Division also noted that the complainant had no difficulty leaving India on a valid passport and with a Canadian student visa, despite being allegedly suspected by police of conspiring to assassinate a leader. The Division referred to a decision of the Federal Court of Canada, in which it is stated that the fact that a refugee protection claimant is able to leave his country using a legal passport, without any evidence that officials were bribed to permit his departure, is a factor indicating that the claimant is not being sought by the authorities.[5] During his hearing before the Division, the complainant was represented by counsel, had access to the assistance of an accredited interpreter, was able to provide oral testimony and respond to questions asked. The complainant's actions demonstrate a complete lack of subjective fear and, rather, as noted by the Division, the preparations he made over a three-year period are evidence of his intention to study abroad as he had been doing in Canada. The complainant took English courses in 2009 and applied for a Canadian student visa after enrolling in the Management and Health Care Technology programme in a Canadian university.

4.5 The complainant has not substantiated his allegations of past torture. He has not provided contemporaneous documents or official documents of any kind to corroborate his account that he was detained by the local police. Nor has he provided credible contemporaneous evidence to support his allegations of torture. He relies on an affidavit from S. that does not suggest that S. has any personal knowledge of the alleged torture. The statements in the affidavit are also vague. S. does not indicate how he learned of the information provided in his statement, he does not refer to any dates when asserting that the complainant was tortured, he is vague as to the number of occasions he believes the torture occurred and he does not provide any specific details regarding the events. Moreover, the affidavit is not contemporaneous — it is dated 28 February 2013, more than three years after the complainant's alleged encounter with the police. As such, the affidavit has little probative value. The letter that the complainant submitted from a medical doctor was prepared more than a year and a half after the complainant alleges that the last event involving the police occurred. It is neither a contemporaneously prepared medical record nor a notarized affidavit. The description of the complainant's injuries is very general and no reason is given for the conclusion that common injuries such as these would be attributable to police beatings. Furthermore, the letter does not state — nor is there any reason to conclude — that the complainant was subjected to torture. This document is also of little probative value.

4.6 Even if the complainant's allegations that he was tortured in the past are accepted as proven, the complainant has not provided sufficient evidence to substantiate that he would be at a personal risk of torture in the future upon return to India. The complainant left Punjab several years ago; he has not claimed to be a high-profile Sikh militant, nor does he even claim to have any association with or knowledge of Sikh militants. In fact, at no time

[5] The State party cites *Ma v. Canada (Citizenship and Immigration)*, 2011 FC 417.

has he claimed that the Indian police believe that he personally actually engaged in militant activities. On the basis of these facts, it is highly unlikely that any risk that might have once existed for him in northern India would still exist upon his return.

4.7 Moreover, based on objective reports regarding the current situation of Sikhs in India, the complainant has a viable internal relocation alternative.[6] These reports indicate that there is no general risk of ill-treatment if the complainant is returned to India solely on the basis of his real or perceived political opinion. Given his personal profile, as understood from his own allegations in the present communication regarding his difficulties with the local Punjab police, he is unlikely to be sought by authorities outside of the Punjab region upon return to India. India is a secular republic in which citizens are not required to register their faith. Sikhs are able to practice their religion without restriction in every state in India. While the majority of Sikhs live in Punjab, there are also sizeable Sikh minorities in other states. Sikh communities, which are present throughout the country, are thriving, and many persons of the Sikh faith hold prominent official positions. From 2004 to 2014, India had a Sikh prime minister. The head of the Indian army is a Sikh. Country reports make it clear that only the highest-profile Sikh militants are at risk of arrest or of being pursued outside of Punjab. These include individuals who, unlike the complainant, are either perceived as leaders of a militant group or suspects in a terrorist attack. An individual would not normally be considered to be a high-profile militant simply because he or she has strong political views, is politically active or has a family member who is believed to be a high-profile militant. Country reports indicate that the actions of the local police in Punjab are most often not politically or religiously motivated toward a particular group or cause. The reports confirm, rather, that police in Punjab fabricate charges under the guise of suppressing threats, political or otherwise, in order to extract bribes. Based on country reports, it is reasonable to conclude that where an individual's fear is based on treatment at the hands of the local police and the individual does not have any profile of interest to the central Indian authorities, internal relocation to other areas of India is a feasible option for managing alleged risk of future harm. Furthermore, there is no general risk of ill-treatment for Sikhs in India. Sikhs are free to move to any state in the country and do not face legal or procedural difficulties in relocating. Sikhs outside of Punjab are able to practise their religion and have access to education, employment, health care and housing; they are not viewed with heightened suspicion nor harassed by the local police simply because of their religion or the region from which they come. Nothing suggests that the complainant could not live without difficulty outside of Punjab in India. The State party notes that the Committee has considered in certain cases that an individual with a high profile as a Sikh militant may be unable to relocate to another state within India; however, the State party considers that it is clear, in the light of current conditions in India and upon a careful reading of the present communication and the decisions of the Canadian authorities, that nothing suggests that the central authorities in India would have any interest in the complainant.

[6] To support its allegations in this paragraph, the State party cites several authorities on internal relocation possibilities for Sikhs in India, including United Kingdom: Home Office, *Operational Guidance Note: India* (May 2013), section 3.9.13; also *Operational Guidance Note: India* (20 February 2007), sections 3.6.10-3.6.17; Canada, Immigration and Refugee Board of Canada, "India: Situation of Sikhs outside the state of Punjab, including treatment by authorities; ability of Sikhs to relocate within India, including challenges they may encounter (2009-April 2013)" (13 May 2013), IND104369.E and "India: Freedom of movement, in particular, the ability to relocate freely from Punjab to other parts of India" (12 January 1999), IND30757.E; United States Department of State, *International Religious Freedom Report for 2012: India*; and United States Bureau of Citizenship and Immigration Services, "India: Information on relocation of Sikhs from Punjab to other parts of India" (16 May 2013), IND03003.ZSF.

Complainant's comments on the State party's observations

5.1 In his submissions dated 30 August 2014 and 16 December 2014, the complainant reiterates his claims concerning a risk of harm. He argues that he has established a strong prima facie case that he was subjected to torture in the past and faces a substantial risk of torture if he returns to India. The decision to deny his asylum application is arbitrary and unfair because it disregards the evidence he submitted.

5.2 The complainant maintains that he would not be safe in India because the Prime Minister was involved in the premeditated killing of thousands of Muslims in Gujarat in 2002, and because the head of the ruling Bharatiya Janata Party is facing prosecution for killing many innocent Muslims in India. There is a "systematic pattern of surveillance and control" over persons arriving in India, especially if they speak Punjabi or are Sikh or Punjabi. He cites a United States Department of State report,[7] in which it is stated that, "there were reports that the government and its agents committed arbitrary or unlawful killings, including extrajudicial killings of suspected criminals and insurgents". The complainant asserts that Sikhs in India are forced to live under a constant threat of being tortured by State agents. It is therefore extremely difficult, if not impossible for the complainant and his family to find a safe haven in India. Concerning domestic remedies, the complainant asserts that there is no other effective recourse available to him.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 In accordance with article 22 (5) (b) of the Convention, the Committee shall not consider any communication unless it has ascertained that the complainant has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of said remedies has been unreasonably prolonged or is unlikely to bring effective relief.[8] The Committee notes the State party's observation that the complainant did not file an application for permanent residence on humanitarian and compassionate grounds. The Committee recalls its jurisprudence concerning the discretionary and non-judicial nature of this remedy[9] and considers that the complainant's failure to exhaust it does not constitute an obstacle to the admissibility of the complaint.

6.3 The Committee further recalls that for a claim to be admissible under article 22 of the Convention and rule 113 (b) of its rules of procedure, it must rise to the basic level of substantiation required for purposes of admissibility.[10] The Committee notes the State party's argument that the communication is manifestly ill-founded owing to a lack of substantiation. The Committee considers, however, that the arguments put forward by the complainant raise substantive issues under article 3 of the Convention, and that the merits

[7] See United States Department of State, *Country Reports on Human Rights Practices for 2013: India*.

[8] See, inter alia, communication No. 307/2006, *E.Y. v. Canada*, decision adopted on 4 November 2009, para. 9.2.

[9] See,inter alia, communication No. 520/2012, *W.G.D. v. Canada*, decision adopted on 26 November 2014, para. 7.4.

[10] See,inter alia, communication No. 555/2013, *Z. v. Denmark*, decision adopted on 10 August 2015, para. 6.3.

of those arguments should be addressed. Accordingly, the Committee declares the communication admissible.

Consideration of the merits

7.1 In accordance with article 22 (4) of the Convention, the Committee has considered the present communication in the light of all information made available to it by the parties.

7.2 With regard to the complainant's claim under article 3 of the Convention, the Committee must determine whether there are substantial grounds for believing that he would be personally in danger of being subjected to torture, should he be returned to India. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned.[11] It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

7.3 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22 (refoulement and communications), according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable, the Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk.[12] The Committee further recalls that, in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,[13] while at the same time it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

7.4 In assessing the risk of torture in the present case, the Committee notes the complainant's contention that there is a foreseeable, real and personal risk that he will be tortured and possibly killed if returned to India because the authorities in Punjab suspect him of helping militants and planning with his cousin M. to assassinate leaders. The Committee notes that the complainant has not provided sufficient detailed information to substantiate these claims. For instance, he has not indicated the specific activities in which the police suspected that he was involved nor the persons with whom he was suspected of collaborating in carrying out these activities. The Committee also notes the State party's observation that its domestic authorities found that the complainant lacked credibility because, inter alia, he prepared for three years to leave India and his actions evinced an intention to pursue studies in Canada: he obtained a passport in 2008; he took various English courses in 2009; he applied for a Canadian student visa after enrolling in a

[11] See,inter alia, communication No. 470/2011, *X. v. Switzerland*, decision adopted on 24 November 2014, para. 7.2.

[12] See, inter alia, communications No. 203/2002, *A.R. v.Netherlands*, decision adopted on 14 November 2003 and No. 258/2004, *Dadarv. Canada*, decision adopted on 23 November 2005.

[13] See,inter alia, communication No. 356/2008, *N.S. v.Switzerland*, decision adopted on 6 May 2010, para. 7.3.

management and health-care technology programme; he never alleged that he had been affiliated with any political or militant activities; and he had no difficulty leaving India on a valid passport and with a Canadian student visa, despite allegedly being suspected by police of conspiring to assassinate a leader.

7.5 The Committee takes note of the documentation provided by the complainant to substantiate that he was subjected to torture. However, the Committee notes that the State party's competent authorities thoroughly evaluated the evidence presented by the complainant and found it to be of limited probative value due to its content and timing.[14] In addition, the Committee observes that the complainant did not present any documentary evidence that there are any criminal proceedings pending against him or that the Indian authorities have issued a warrant for his arrest.[15] The Committee considers that the State party's authorities adequately explored the fundamental aspects of the complainant's claims before drawing an adverse conclusion as to his credibility. The Committee therefore does not attribute material weight to the complainant's assertion that, although he left India in January 2010, the authorities in Punjab continue to harass and interrogate his family members in order to ascertain his whereabouts. The Committee recalls paragraph 5 of its general comment No. 1, according to which the burden of presenting an arguable case is on the author of a communication; it considers that the complainant has not fulfilled this burden of proof.

8. In the light of the considerations above, and on the basis of all the information submitted by the parties, the Committee considers that the complainant has not provided sufficient evidence to enable it to conclude that his forcible removal to India would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention.

9. The Committee, acting under article 22 (7) of the Convention, therefore concludes that the complainant's removal to India would not constitute a breach of article 3 of the Convention.

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[14] See para. 4.5 above.
[15] See communication No. 555/2013, *Z. v. Denmark*, decision adopted on 10 August 2015, para. 7.7.

Annexure 12:

Decision of the Supreme Court of Canada in the extradition of Surjit Badesha and Mrs. Malkit Kaur Sidhu

JUDICIARY OF

ENGLAND AND WALES

IN THE WESTMINSTER MAGISTRATES' COURT

BETWEEN

INDIA

Requesting Judicial Authority

-v-

SANJEEV KUMAR CHAWLA

Requested Person

JUDGMENT

Issues raised:

- Section 79 and 82 - Passage of time
- Section 87 - Human Rights:
  - Article 3 - Prison Conditions;
  - Article 8 - Right to Family Life.

Representation at the final hearing:

- JA-Mr Watkins
- RP - Mr Weekes

Introduction and History of Proceedings

1. This is a request by India [Judicial Authority, 'JA'] for the extradition of Sanjeev Kumar Chawla [Requested Person, 'RP'] [date of birth 19.04.67], in order to prosecute him for his role in the fixing of cricket matches played between India and South Africa during the tour of the South African Cricket Team to India under the captainship of Hansie Cronje in February-March 2000.

2. The detail of the alleged conspiracy is that the RP was introduced to Hansie Cronje, the South African cricket team captain, in January/February 2000. It was suggested to Hansie Cronje, by the RP and another, that he could make significant amounts of money if he agreed to lose cricket matches. Money was paid to Hansie Cronje at the time of the pending South African tour to India. The tour took place in February / March 2000, with the RP, Hansie Cronje and others conspiring to fix cricket matches in exchange for payment, with the RP playing a central role, including direct contact with Hansie Cronje.

3. On 18.05.15 Bhisham Singh, Deputy Commissioner of Police, Crime Branch (South), Delhi Police, swore an affidavit setting out the details of the allegation and the extradition request. The request was made by the Indian authorities on 01.02.16 and certified by the Secretary of State on 11.03.16. A warrant was issued at Westminster Magistrates' Court on 17.05.17. The RP was arrested on the warrant on 14.06.16 and first appeared before Westminster Magistrates' Court on 14.06.16 and was granted bail. The RP did not consent to his extradition and proceedings were formally opened.

4. The matter was originally listed for final hearing before another judge in November 2016 and March 2017 but the judge was unable to deliver judgment due to ill health. The matter was listed before me on 19.05.17 for directions and for final hearing on 25-27.09.17.

5. India is a designated country for the purposes of Part 2 of the Extradition Act 2003. The Evidence of the RP.

6. The RP provided a proof of evidence dated 16.09.16 but chose not to give evidence. His proof can be summarised as follows:

   a) He was born in Delhi, India, and lived in India until 1996, when he moved to the UK on a business visa. He has lived

in the UK since then with trips back to India. His Indian passport was revoked in 2000. He was granted indefinite leave to remain in the UK in 2003 and obtained a UK passport in 2005. He is now a British citizen. He has family in Indian and the UK.

b) He lives with his wife and their two sons, Ayman (12yrs) and Abir (9yrs). Both children are UK citizens.

c) His wife has thyroid problems. She has medication for this and it can affect her ability to leave the house. Her memory has deteriorated. She has been diagnosed with arthritis.

d) Ayman had a stomach operation in 2008 to remove a tumour, which was benign. His health is good now. He has seen an educational psychologist and has some problems with speech and hand writing.

e) His wife has a company ISK Caterers Ltd which runs a restaurant and she owns the lease to another restaurant. He does the accounts for one of the restaurants.

f) He has occasional neck and back pain.

g) He was aware his name was linked with the allegations and that the Delhi police had named him as a suspect in 2000. The only formal request made of him was a request for a voice sample which he declined to give. He assumed that the investigation and case had ended after the death of Hansie Cronje in 2002. Via the media, he became aware that charges had been filed against him in 2013 and in 2015 that an extradition request had been made but understood that it had been refused as it had been made in the wrong name.

7. I accept the RP's evidence regarding his personal circumstances. However, as he has not given evidence and there is no supporting evidence, I cannot make any findings in relation to his own health, his wife's health or any additional needs of his son Ayman. For the same reason, I am unable to make any findings about his knowledge of the proceedings in India.

Section 78 - Initial Stages of Extradition Hearing

8. Section 78(2) requires the judge to decide whether the documents sent to him by the Secretary of State consist of (or include):

a) The documents referred to in section 70(9) - the request and the certificate issued by the Secretary of State;

b) Particulars of the person whose extradition is requested;

c) Particulars of the offence specified in the request;

d) In the case of a person accused of an offence,

a warrant for his arrest issued in the category 2 territory.

9. No issue is taken in relation to section 78(2) and I am satisfied that the conditions are met:

a) The request and the certificate have been provided.

b) Particulars of the RP are provided in the affidavit of Bhisham Singh at paragraphs 1 and 2.

c) Details of the offence have been provided in the affidavit of Bhisham Singh, which includes the background to the events leading to the expose of match fixing in cricket, details of telephone conversations between the accused persons, the investigation and analysis of the call details of the accused persons, investigation of the venues where the teams stayed, details of evidence provided by South African and the UK, summary of the role played by each accused and the evidence against them, forensic analysis of the voices of the recorded conversations and a conclusion.

d) A warrant for the RP's arrest was issued on 27.02.17 by Sanjay Khanagwal, Chief Metropolitan Magistrate, New Delhi, and was provided with the extradition request.

10. Section 78(4) requires the judge to decide whether:

a) The person appearing or brought before him is the person whose extradition is requested;

b) The offence specified in the request is an extradition offence;

c) Copies of the documents sent to the judge by the Secretary of State have been served on the person.

11. Again, no issue is taken in relation to section 78(4) and I am satisfied on the balance of probabilities;

a) The RP is the person whose extradition is requested. No issue has been taken regarding his identity.

b) The offence specified in the request is an extradition offence, as defined in section 137. The conduct occurred in India. The conduct would constitute an offence in the UK of: conspiracy to give, or to agree to give, corrupt payments, contrary to section 1(1) of the prevention of Corruption Act 1906. The conduct would be punishable with imprisonment for a term of 12 months or greater.

c) Copies of the documents were sent to the judge by the Secretary of State and served on the RP at the time of his arrest.

Section 79 and 82 - Passage of Time

12. Section 79(l)(c) requires the judge to decide whether the RP's extradition is barred by reason of the passage of time. Section 82 provides that a person's extradition is barred by reason of the passage of time if (and only if) it appears it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence.

13. In Karkis v Government of the Republic of Cyprus [1978] 1 WLR 779, HL, Lord Diplock defined 'unjust' as the risk of prejudice to the accused in the conduct of the trial itself and 'oppressive' as the hardship to the accused resulting from changes in circumstances that have occurred, but there is room for overlap. Delay in the commencement or conduct of proceedings brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot be relied upon as a ground for it being either unjust or oppressive.

Gomes and Goodyer [2009] UKHL 21, HL, clarified that the test in *Karkis* applies even if the requesting state has contributed to the delay. The burden is on the requesting state to prove beyond reasonable doubt that the RP deliberately fled the jurisdiction. The test of oppression will not be easily satisfied: hardship, a comparatively commonplace consequence of extradition, is not enough.

14. History of the investigation:

a) 13.11.1999 - Complaint by Ramakant Gupta to police concerning phone calls made to him by a man in Dubai seeking to extort money from him.

This resulted in an investigation into various calls between certain telephone numbers. This revealed the alleged cricket match fixing conspiracy, involving Hansie Cronje and the RP.

b) 06.04.2000 - A 'Rukka' was filed by Inspector Sing to register the investigation under the Indian Procedural Code.

c) The criminal investigation continued, with requests made by the Indian authorities for assistance from the UK and South Africa.

d) 14.11.2001 - The RP refused a request by the Indian authorities to voluntarily provide a voice sample.

e) 02.09.2004 - Warrant for arrest of RP issued in India.

f) Further investigation with assistance sought by the Indian authorities from South Africa.

g) 16.04.2008 - Letter from Interpol to the Assistant Commissioner of Police in New Delhi confirming that the RP has been located in the UK and requesting extradition documentation.

h) 2009 - Recorded telephone conversations sent for voice analysis, with a report produced in 2013.

i) 22.07.13 - Final Report into the investigation submitted, with the Magistrate taking cognisance of the case on 23.07.13.

j) 18.05.15 - Affidavit of Bhisham Singh, Deputy Commissioner of Police, Delhi Police, in support of the extradition request.

k) 01.02.16 - Extradition request by India.

l) 11.03.16 - Certified by the Secretary of State.

m) 17.05.17 - Warrant issued by Westminster Magistrates' Court.

15. The JA submits that the RP is a fugitive and cannot rely on the passage of time. In the case of *Wisniewski & Others v Poland [2016] EWHC 386 (Admin)*, at para 59, the court said that 'where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar to extradition. Rather than seeking to provide a comprehensive definition of a fugitive for this purpose, it is likely to be more fruitful to consider the applicability of this principle on a case by case basis.' The JA submits that the RP knew of the ongoing investigation and that a warrant had been issued and has not engaged with the Indian authorities so is a fugitive.

16. There is no suggestion on the part of the JA that the RP was informed of the ongoing investigation, the final report to the court, any charges against the RP, any warrant by the Indian courts or the extradition request. The only formal knowledge the RP had was a request to provide a voice sample. Without any formal notification, it cannot be said that the RP was properly aware of any proceedings. He was under no obligation to cooperate with the Indian investigation, or to surrender himself to the Indian authorities and was not subject to any bail conditions. He has not sought to evade arrest and has lived openly in the UK. Therefore, the JA has failed to prove that the RP is a fugitive.

17. There has been substantial delay in this case. Initially, this may partly be due to the complexity of the investigation, involving liaison with the South African and British authorities. No extradition request was made in 2008 despite the Indian authorities being informed that the RP was in the UK and an Indian warrant having been issued in 2004. It is unclear why voice analysis would take 4 years. There was a delay of nearly 2 years from the final report to the swearing of the affidavit and a further delay of a year until the extradition request.

18. However, the issue is whether the delay of over 17 years from the time of the alleged offence means that extradition would be unjust or oppressive.

19. Professor Lau provided a report, dated 12.01.17, and gave evidence to the court in relation to the Indian legal system. His qualifications are extensive and there is no question that he was eminently qualified to provide this evidence. His evidence can be summarised as follows:

a) The police investigate criminal offences. There is provision that information given to the police is recorded in writing and signed by the person, which is called a First Information report or sometimes referred to as a 'rukka'. Upon completion of the investigation the police submit a report to the magistrate. The court can take cognizance of an offence upon receipt of the report. If there is sufficient ground for proceeding, a magistrate can issue a summons or warrant for an accused. He detailed how warrants of arrested are issued. There is a system for appeals after a trial. In exceptional cases the Supreme Court has monitored an investigation, but there is no indication that occurred in this case.

b) The proceedings require all co-accused to be present in court and, therefore, unless all are arrested, the case cannot proceed. There is provision for splitting the trial of co-accused either of the court's own motion or on application by the accused. Case law has determined a trial can be split if not doing so would prejudice the right of co-defendants to have their cases determined within a reasonable time frame.

c) In this case, the police investigation has been concluded and the matter is before the Indian courts. Delay in the trial of criminal offences in India is well documented and a constant refrain, both from NGOs, official commissions and the Indian courts.

d) He did not consider that there would be significant delay in the hearing of the RP's case after his extradition given the high profile nature of the case. However, as Mr Khatter, a co-defendant, has not yet been arrested, this could delay the matter until he is brought before the court. The RP could apply to have the proceedings split.

e) Although there is provision for applying for a stay for an abuse of process due to the delay, the RP is unlikely to succeed as the Indian courts will consider that he is an absconder from justice.

f) Concerns have been raised about corruption in the Indian judiciary but this is less likely given the high profile nature of the case.

g) The confessions of any co-defendants would not be admissible in court, unless the witness statement was recorded by a magistrate. This has not yet been done in this case.

h) The RP will have a right to apply for bail. Though Professor Lau considered that any application would be unsuccessful.

i) The RP will be entitled to legal aid, depending on his income.

20. There is nothing to indicate that extradition would be unjust. Despite the delay evidence is still available. The RP will have the right to legal representation and be able to challenge any evidence and cross examine witnesses. The RP will have the right to make an application to the court for a stay as an abuse of process. He can apply to split the trial if any of his co-defendants are not before the court. The RP has not identified any specific piece of evidence that he would have difficulty challenging due to the time that has elapsed or any evidence that is now missing because of the delay. The RP has not identified any other factor that would make it unjust.

21. There is nothing to indicate that the delay would make it oppressive to extradite the RP. Although some hardship may occur for his family, which includes his two sons, there is no evidence that it amounts to oppression.

Section 84 - Prima Facie Case

22. For Indian requests, the judge is required to decide where there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him, section 84.

23. On behalf of the RP it is conceded that there is a prima facie case, in light of the case of *RV Governor of Pentonville, ex parte Schneider (1981) 73 Cr.App.R. 2000.*

24. I am satisfied that there is a prima facie case, based on the evidence provided by the JA, in 4 bundles labelled Requests 1-4 with annexures A-W2. The affidavit of Bhisham Singh, the Deputy Commissioner of Police, dated 18.05.15, also contains a very detailed summary of the evidence.

a) Evidence of the RP shadowing Hansie Cronje, the South African cricket captain, during South Africa's cricket tour, by staying in the same hotels.

b) Telephone evidence of multiple conversations between the RP and Hansie Cronje in which match fixing discussions are taking place.

c) Telephone evidence demonstrating the RP's frequent phone contact with other identified conspirators/co-accused, particularly around match times.

d) The testimony of other co-conspirators; Rajesh Kalra, Krishan Kumar and Sunil Dara, which names the RP and details his involvement in match fixing.

e) Evidence from Shiri Arun Gonbare who worked at the Taj Mahal Hotel in Mumbai, where both the South African cricket team and the RP were staying. He observed Hanste Cronje going into the RP's room empty handed and leaving the room with a bag.

f) Other evidence of the South African investigation into the match-fixing allegations provided in Annex T, demonstrating the RP's involvement in the match fixing.

25. There is clear evidence sufficient to make a case requiring an answer that the RP acted with others to fix the outcome of cricket matches by provided money to members of the South African cricket team.

Section 87 - Human Rights

Article 3 - Prohibition of Torture and Inhuman or Degrading Treatment

26. Article 3 states: 'No one shall be subjected to torture or inhuman or degrading treatment or punishment.' It is for the RP to show that there are substantial grounds for believing that there is a real risk that if extradited he would be subject to treatment prohibited by Article 3 of the ECHR.

27. The RP submits that his Article 3 rights would be infringed if he was extradited due to the prison conditions he would be subjected to.

28. A Letter of Assurance, dated 28.02.17, has been provided by V.Vishwanathan, Under Secretary to the Government of India, which details that the RP is likely to be held at the Tihar jail complex in New Delhi if extradited. In this regard it is stated that:

a) As per the Delhi Prison Rules', 1988 the prisoners are kept in a dormitory (barracks) or cell subject to the circumstances of the case and keeping in mind the safe custody, health and comfort of the prisoners.

b) All the prisoners are supplied necessary blankets and bed sheet for the purpose of using it as a mattress and bedding. In case there is medical requirement for a prisoner, mattress and bedding is provided to him/her as per the recommendation of the Medical Officer.

c) Every prisoner is provided with adequate quantity of clean potable drinking water to meet his daily requirement. It may be mentioned that in Jail canteen bottled drinking water is also available for the prisoners on reasonable price.

d) Every ward of Delhi Prisons has sufficient number of toilets to meet the daily requirement of prisoners. Moreover, barracks/cells also have toilets to cater to the need at the time of lock-up.

e) In Delhi Prisons almost every ward has sufficient space/yard attached therewith, where the prisoners can have benefit of sunlight, fresh air and other recreation activities.

f) As per Delhi Prison Rules, every prisoner is provided three time meals/adequate food throughout his detention period. It may be mentioned here that only vegetarian food is provided to the prisoners. From the prison canteen inmate can purchase eatables, snacks etc.

The assurance goes on to provide that if the RP is extradited, the Government of India, 'solemnly assures that all such facilities available in Delhi Prisons shall be provided to him without any discrimination as per lodging policy in vogue.'

29. The parties accepted that the court should proceed on the basis that the RP will be held in the Tihar prison complex in the event of his extradition.

30. The case of *Elashmawy & Others [201S] EWHC 28 (Admin)*, Lord Justice Atkin (paras 49 & 50) summarised the general propositions established by ECtHR in relation to prison conditions:

a) The extradition of a RP to a contracting state or another state where a person will be held in detention, either awaiting trial or serving a lawfully imposed sentence, can give rise to Article 3 issues.

b) If it is shown that there are substantial grounds for believing the RP would face a 'real risk' of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country then Article 3 implies an obligation not to extradite the RP.

c) Article 3 imposes absolute rights but in order to fall within the scope of Article 3 the ill-treatment must attain a level of severity. The test is a stringent one and not easily satisfied.

d) Whether the minimum level is attained in a particular case depends on all the circumstances, such as the nature of the treatment, its duration, its physical or mental effects and, possibly, the age, sex and health of a person. In that sense the test of breach in a particular case is 'relative'.

e) The detention of a person in prison as a lawfully imposed punishment inevitably involved a deprivation of liberty and brings with it certain disadvantages and a level of suffering that is unavoidable because that is inherent in detention. But lawful detention does not deprive a person of his Article 3 rights. Article 3 imposes on the relevant authorities a positive obligation to ensure that all prisoners are held under conditions compatible with respect for human dignity, that they are not subject to distress or testing of an intensity that exceeds the level of unavoidable suffering concomitant to detention. The health and welfare of prisoners must be adequately assured.

f) If it is alleged that the conditions of detention infringe Article 3, it is necessary to make findings about the actual conditions suffered and the cumulative effect during the relevant time and on the specific claims.

g) Where prison overcrowding reaches a certain level, lack of space in a prison may constitute the central element to be taken into account when assessing conformity with Article 3. As a general rule, if the area for a person is less than $3m^2$, the overcrowding must be so severe as to violate Article 3.

h) If overcrowding is not sufficient to engage Article 3, other aspects of the conditions of detention, such as the availability of lavatories, adequate ventilation, natural light and air, heating and other basic health requirements, will be taken into account to determine if there has been a breach.

31. The Indian authorities have provided with the assurance the following documents:

a) Requisite information/Report/Response on 'Advice' dated 24.11.16 of UKCPS, with an annex 'Best Practice in Delhi Prisons'.

b) Response to UKCPS's advice dated 24.11.16 with regard to Dr.Alan Mitchell's report dated 13.11.16.

32. This information provided can be summarised as follows:

a) In Delhi Prisons every aspect is being taken for ensuring Human Rights and UN minimum standards among the prisons.

b) There are details of various monitoring systems.

c) There is a Grievance Redressal Mechanism in Delhi prisons.

d) In Delhi jails there is a 150 bedded hospital. But it later says there is a 120 bed hospital.

e) In Delhi prisons there are 110 sanctioned posts of doctors, of which 57 are filled, and 189 paramedical staff, of which 94 are filled.

f) Round the clock medical doctors are available.

g) There are 16 central jails in Delhi prisons; 9 at Tihar, 1 at Rohini and 6 at Madoli. There have a combined sanctioned capacity of 10,026. On 31.11.16 there are 14,027 prisoners in Delhi jails. A new prison complex is being developed at Mandoli, but this is not yet fully operational.

h) There are 491 cameras in Tihar and more CCTV are being installed.

i) A serious view is taken if any jail official is found conniving with inmates/indulge in any illegal activity which is otherwise also prohibited by the Delhi Prison Rules.

j) 'It may not be less than true to state there are have no instances of scuffle inside Delhi prisons. But almost all such incidents are on trivial inter personal issues and not because of overcrowding.'

k) 'It can be safely concluded that no case of torture and mistreatment has been reported and proved. Delhi prions are not denying the fact that certain prisoners have moved frivolous complaints but the allegations are examined minutely and disposed off after perusal of higher authorities.'

Although reference has been made to the Delhi Prison Rules, a copy has not been provided to the court.

33. In *Patel v India [2013] EWHC 819 (Admin),* Parker J., at paragraph 14, said 'Indian and the United Kingdom have had extradition relations for many years through the Commonwealth Scheme for Extradition. There is an extradition treaty between the UK and India, signed in 1992, intended specifically to "make more effective the co-operation of the two countries in the suppression of crime by making further provision for the reciprocal extradition of offenders". This relationship supports the presumption of good faith which is the starting point in considering any ground based upon abuse of process.'

34. Dr Alan Mitchell gave evidence in relation to Indian prison conditions:

a) He is a licenced medical practitioner, medical officer at a Scottish prisons 1996-1998, Medical Advisor and Head of Healthcare within the Scottish Prison Service 1998-2002, Clinical Director at NHS Great Glasgow & Clyde until his retirement in January 2017, Visiting General Medical Practitioner at an Immigration Removal Centre, Member of the Scottish Human Rights Commission since 2015, expert with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ['CPT'] since 2002 for whom he has visited numerous prisons in Europe, instructed on behalf of the United Arab Emirates to inspect a prison, and inspected prisons in Russian and Kuwait. Any suggestion by the Indian authorities that he is not suitably qualified or unaware of his responsibilities as an expert to the court are completely without merit, given his extensive experience and the way he gave evidence.

b) He prepared two reports, dated 13.11.16 and 26.02.17.

c) The Indian authorities refused a request for him to visit the Tahir prison complex. He was therefore unable to inspect Tahir and has not spoken to any current or former staff or detainees.

d) He considered the following documentation:

i) 'Torture in India' - report by Asian Centre for Human Rights - 2011.

ii) Report of Judge Senthikumaresan, City Civil Court (Chennai) - 14.08.15;

iii) Supreme Court of India, Writ Petition (Civil), Re; Inhuman Conditions in 1382 Prisons - order of Madan B. LokurJ. -05.02.16;

iv) The following articles from The Times of India:

(1) 'Tahir jail: the chamber of horrors'-28.01.14;

(2) 'Inside Story: The Gangs of Tihar Jail' - article from The Times of India - 09.06.15;

(3) 'Rampant sexual abuse is a real nightmare in Tihar[1] - 11.06.15;

(4) 'Rapes in Tihar: Silence is the key' - 11.06.15;

(5) 'Nirbhaya gang-rape convict tells court he was beaten by inmates in Tihar Jail' - 20.08.15;

(6) '2 killed as gang war erupts again in Tihar' - 08.10.15;

(7) 'Tihar overcrowded' - 09.10.15;

(8) 'Drug overdose kills 1 in Tihar' - 29.12.15;

(9) 'Tihar inmate killed in fresh jail van violence' - 02.01.16

v) 'Tihar violence shows how our prisons ruin inmates' - article from Hindustan times - 11.10.15;

vi) 'Lawlessness reigns inside high-security Tihar jail' - article from the Deccan Herald -11.11.15;

vii) 'Make conditions for jail inmates more human says SC Amicus Curiae' - article from The Wire -11.04.16.

e) He also drew on his own experience of visiting Alipore Central Correctional Home in Kolkata on 10.02.15.

35. Dr Mitchell's evidence can be summarised as follows:

a) There are no monitoring systems, such as the CPT in Europe, in India. India has not ratified the UN Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment. There is no national Indian prison inspectorate. He accepted that India has ratified the International Covenant on Civil and Political Rights which includes protection from 'cruel, inhuman or degrading punishment.'

b) The local government website in Delhi details that the Tihar prison complex comprises of 9 jails, of which eight hold males. At 31.12.15, although the capacity of the complex Is 6250 prisoners, 14,183 person were held there, resulting in 227% overcrowding. Though it ranged from 169% to 395% in the individual jails. The level of overcrowding alone is sufficient to consider that there is a real risk of the RP's article 3 rights being breached.

c) At Alipore Central Correctional Home, although he was not given free access to the prison, he found no sleeping platforms or mattresses, the hospital accommodated over twice its capacity, there was no proper medical screening on arrival, the conditions in which those with mental health problems were kept were inhuman and degrading and overall conditions were deplorable and unsafe, inhumane and degrading. He met retired senior officials of various law enforcement agencies. He formed the view that torture is accepted as being necessary within the implementation of justice within India and police and prison staff are able to act with impunity. He accepted that this prison was in a different area of India. However, he formed the view that the situation in Alipore was not unique and reflected what he read in the 2011 Asian Centre for Human Rights Report.

d) The 2011 Asian Centre for Human Rights Report looks at Indian prisons from 2011-2011. It details the levels of deaths

in custody with a huge number the result of torture. It says 'torture remains endemic, institutionalised and central to the administration of justice. India has demonstrated no political will to end torture...It would be hard to find any police station or jail where the inmates are not subjected to torture and other cruel, common, inhuman or degrading treatment or punishment.' It details incidents of torture, including in Delhi and specifically Tihar. The report details the role of the Indian judiciary in ruling against torture, ordering investigation and prosecutions and awarding compensation. The report spans 10 years of ill treatment, which was no less a problem in 2011 than in 2001. In his experience cultural changes in prison are very slow. There are too many media articles suggestive of torture in Indian prisons indicating that it is still problematic.

e) Alarming number of deaths in custody, particularly unnatural deaths.

f) The report of Judge Senthikumaresan, City Civil Court (Chennai), dated 14.08.15, found that named individuals had been the subject of violence inflicted by police and jail officers at a prison in Chennai.

g) The Supreme Court of India, Writ Petition (Civil), Re: Inhuman Conditions in 1382 Prisons, order of Madan B. Lokur J,, dated 05.02.16, detailed that although prison reforms have been the subject of decisions by the court over the last 35 years and the constitution requires a life of dignity for all persons, 'little appears to have changed on the ground as far as prisoners are concerned', including in Delhi. Overcrowding remains a problem.

h) He was not reassured by the Indian government's response to the allegations of violence and torture in Tihar, which denies any violence due to overcrowding and any torture. This was because there have been judicial findings regarding the ill treatment of prisoners in Tihar.

i) The newspaper articles detail commonplace sexual assault in prisons, torture, corruption, drug trafficking, connivance of jail officials in this respect. The newspaper articles paint a picture of violence, torture, sexual abuse, gang war and collusion by prison officials.

j) He was unable to say on the information provided if there would be access to a doctor if needed.

36. The RP also provided to the court:

a) Home Office report - Country Policy and Information Note: India: Prison Conditions - dated November 2016, which details:

i. There are 28 states, each has its own prison department with its own rules and regulations. Prison conditions vary widely from state to state. Overall conditions are severe and overcrowding is a particular problem. There are also reports of lack of medical facilities, torture, other physical mistreatment and custodial deaths.

ii. Remand prisoners are held for long periods due to delays in the overburdened and under resourced judicial system and a lack of legal safeguards.

iii. Although prison conditions are in general not so systematically inhuman and life-threatening as to meet the high threshold of Article 3 ECHR, the particular circumstances of some persons may place them at risk of suffering treatment contrary to Article 3 ECHR.'

iv. There is confirmation of the overcrowding in Tihar and that medical facilities are non-existent and reference to 'sub-human conditions' from an Inter Press Service report in August 2016.

b) Commonwealth Human Rights Initiative - Rights Behind Bars - 2009:

i. Whilst the constitution of India guarantees fundamental human rights, which have been emphasized by the Supreme Court of India, there is a huge gap between constitutional promises and the reality of the lives of prison inmates. They do not have access to adequate medical care and are likely to be tortured or exploited.

ii. ii) The closed nature of the penal system makes it easier for any kind of abuse to go unnoticed or unattended.

Monitoring systems are perfunctory and do not comply with the law. There are high incidents of abuse.

iii. The report refers to the following documents and these were provided to the court:

(1) United States Department of State - 2015 Country Reports on Human Rights Practices - India - 13.04.16:

(a) 'Prison conditions were frequently life threatening and did not meet international standards...Prisons were often severely overcrowded, and food, medical care, sanitation, and environmental conditions often were inadequate. Potable water was only occasionally available. Prisons and detention centres remain underfunded, understaffed, and lacking sufficient infrastructure. Prisoners were physically mistreated.'

(b) Prisoners often did not file complaints due to fear of retribution from prison guards and officials.

The court was also provided with the US State Department India 2016 Human Rights Report - Executive Summary.

iv) '1,700 die in overcrowded prisons in 2014' - Firstpost India - 15.09.16.

v) British High Commission Information pack for British prisoners in India - 03.05.16;

vi) 'Indian jails slammed as purgatory for the poor' - Inter Press Service - 09.08.16.

c) Amnesty Annual Report on India - 2015/2016:

i) 'The criminal justice system remained flawed, violating the fair trial rights and failing to ensure justice for abuses. Extrajudicial executions and torture and other ill treatment persisted.'

ii) Detailed prolonged pre-trial detention.

Two further Amnesty International Reports dated 15.11.16 and 12.07.16 have been provided.

d) Human Rights Watch - 'India: Killings in police custody go unpunished' -19.12.16.

Further Human Rights Watch Reports dated 19.12.16, 21.12.16, 20.08.17 and 'Bound by Brotherhood: India's failure to end killings in police custody' dated 19.12.16, have been provided.

e) Other media articles as detailed in Part 4 of the Defence Bundle 1 and other media reports in Defence Bundle 2 Tabs 8-21, from various media sources, detailing abuses in Delhi and specifically Tihar jail.

37. I make the following findings in relation to the material and evidence provided:

a) The nature of Dr Mitchell's evidence is limited by the refusal for allow him access to Tihar prison. However, drawing on his extensive expertise and experience, he is able to provide an objective analysis of the other information available.

b) The level of occupation at Tihar prison shows severe overcrowding. Given Dr Mitchell's expertise, I accept his opinion that the level of overcrowding alone is sufficient to consider that there is a real risk of the RP's article 3 rights being breached if he is held in the Tihar complex.

c) The NGO reports [Asian Centre for Human Rights Report 2011, Commonwealth Report 2009, Amnesty International Report 2015/2016, Human Rights Watch Report 19.12.16] paint a picture of a prison system where ill treatment and torture are widespread. There is a failure to reform the system and a lack of accountability. The problems have persisted for many years and there is no sign of improvement. Although different areas have their own rules, there is nothing to indicate that Delhi differs from the rest of the country.

d) In the recent reports from the Home Office and the US Department of State 2016 both reported severe overcrowding and poor conditions. The Home Office report makes reference to sub-human conditions in Tihar, including the overcrowding and lack of medical facilities. The US report says that conditions are 'frequently life threatening' and details the very poor conditions. Prisoners are also physically mistreated.

e) India's own Supreme Court in 2016 has detailed that overcrowding remains a problem and that prison reforms have led to little change in practice.

f) Dr Mitchell's experience at Alipore prison has limited significance, given that prisons within the same country can vary. However, his findings support the general picture painted by the other evidence in this case of very poor conditions within Indian prisons and a culture of officials acting with impunity in relation to the common place use of torture on detainees.

g) Dr Mitchell was unable to say if the current medical staffing level in Tihar would be sufficient. However, it is of concern that around half of the medical posts are vacant and other sources of material indicate that medical facilities are inadequate.

h) Whilst there are monitoring systems for the prisons in India, these are ineffective in ensuring that prisoners article 3 rights are not breached and that any ill treatment is investigated.

i) The overwhelming picture from the newspaper articles provided is of severe overcrowding and that sexual assaults and other violence are common place in the Tihar prison complex. Whilst there are limits to the amount of weight that can be attached to media reports, the quantity of them and the fact that they detail problems that are mirrored in NGO, other government reports and the Supreme Court of India report adds to their veracity. The reports are mainly from 2015. However, Dr Mitchell indicated that prison cultures tend to be slow to change. The information indicates that problems in the Indian prison system have been long standing and that the problems persist, including in Tihar.

j) There are suspiciously high levels of deaths in custody, often attributed to suicide, which raise concerns about both the conditions in the Indian prison system, including Tihar, and the levels of violence and the lack of robust investigation into the cause of death.

k) The information provided by the Indian authorities is general in nature. Mattresses are not provided unless there is a medical requirement. No details are given of the quantity of water

provided, the number of toilets or the space in any yard or the amount of time with access to the yard. Therefore, the court is unable to make an assessment of whether the Indian authorities are correct to assert that there is adequate drinking water, sufficient toilets and sufficient space/yard.

l) The Indian authorities have asserted that:

- 'It may not be less than true to state there are hare no instances of scuffle inside Delhi prisons.

But almost all such incidents are on trivial inter personal issues and not because of overcrowding.'

- 'It can be safely concluded that no case of torture and mistreatment has been reported and proved. Delhi prions are not denying the fact that certain prisoners have moved frivolous complaints but the allegations are examined minutely and disposed of after perusal of higher authorities.'

These assertions seriously undermine the credibility of the information provided by the Indian authorities, as there is no acknowledgement of any violence or torture or mistreatment in Tihar despite the overwhelming evidence to the contrary, including by the Supreme Court of India.

m) The JA has not provided any independent evidence regarding Tihar prison. They have refused access for Dr Mitchell and not instructed their own independent expert. There is no evidence from any other independent international monitoring.

38. The combination of the evidence provided by the RP provides strong grounds for believing that the RP would be subjected to torture or inhuman or degrading treatment or punishment in the Tihar prison complex, due to the overcrowding, lack of medical provision, risk of being subjected to torture and violence either from other inmates or prison staff which is endemic in Tihar.

Assurance

39. Given the finding that there are substantial grounds for believing that the RP's article 3 rights would be breached if the RP is detained in the Tihar prison complex, the court must consider if the assurance

provided by the Indian authorities is sufficient to meet those concerns.

40. The case of Othman (Abu Qotada) v UK [2012J ECtHR 56 sets out the matters to be considered in relation to assurances:

a) The preliminary question is whether the general human rights situation in the receiving states excludes accepting assurances whatsoever. However, only in rare cases where no weight at all can be given to assurances.

b) Usually the court will assess the quality of the assurances given and whether in light of the receiving states' practices they can be relied upon. The factors to consider are:

i) Whether the terms of the assurance have been disclosed to the court.

ii) Whether the assurances are specific or are general and vague.

iii) Who has given the assurance and whether that person can bind the receiving state.

iv) If the assurance has been issued by central government of the receiving state can local authorities be expected to abide by them.

v) Whether the assurance concerns treatment that is legal or illegal in the receiving state.

vi) Whether they have been given by a contracting state.

vii) The length and strength of bilateral arrangements between the sending and receiving states, including the state's record of abiding by similar assurances.

viii) Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including unfettered access to the applicant's lawyers.

ix) Whether there is an effective system of protection against torture in the receiving state, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs) and whether

it is willing to investigate allegations of torture and punish those responsible.

x) Whether the applicant has previously been ill-treated in the receiving state.

xi) Whether the reliability of the assurances has been examined by the domestic courts of the sending state.

41. Given the long standing relations between this country and India, including extradition arrangements, there is no reason to exclude an assurance from India.

42. In consideration of the *Othman factors*:

a) The terms of the assurance have been disclosed to the court in the letter dated 28.02.17.

b) The assurance is general in its terms. It details that the RP is likely to be held in the Tihar prison complex in New Delhi. However, the further information given is general in nature as it details the general conditions in Delhi prisons and that the RP will be provided with those facilities and not discriminated against. In light of the findings that being held in the Tihar prison complex poses a real risk of breach of the RP's article 3 rights, this assurance is insufficient and does not detail how the RP's rights would be protected.

c) The assurance has been given by V.Vishwanathan, Under Secretary to the Government of India, and I accept that he could bind the receiving state.

d) There is nothing to indicate that the local authority will not abide by the assurance, given that it is no more than a description of the facilities provided in Delhi jails.

e) The assurance concerns legal treatment in the receiving state.

f) There have been long standing relations between the Indian and British authorities.

g) The RP will be allowed access to his lawyers and consular visits, which would allow monitoring of the assurance.

h) I am not satisfied that there is an effective system of protection against torture in the receiving state. Whilst the Supreme

Court in India has raised concerns about prison conditions in a number of decisions, the court has found that little has changed in practice and overcrowding remains a problem. The evidence from the NGO reports, Home Office report and US report is that the monitoring systems which exist in India are not effective in practice. There is no international independent monitoring of the prisons.

i) The RP has not previously been ill-treated in India.

j) The assurance has not been examined by the domestic courts in India.

43. Given the findings in relation to the general nature of the assurance and the lack of an effective system of protection, the assurance is insufficient in its current form to ensure that the risk to the Article 3 rights of the RP are mitigated.

Article 8 - Right to Respect for Private and Family Life

44. Article 8 provides:

a) Everyone has the right to respect for his private and family life, his home and his correspondence.

b) There shall be no interference by a public authority with the exercise of this right except in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of crime or disorder, for the protection of public morals or for the protection of the rights and freedoms of others.

45. The general principles in relation to the application of Article 8 in the context of extradition proceedings are set out in: *Norris v Government of USA (No2) [2010] UKSC 9, HH [2012] UKSC 25 and Celinski & Others v Slovakian Judicial Authority [2015] EWHC1274 (Admin).*

46. Factors favouring extradition being granted:

a) The public interest in this country complying with its international extradition obligations and not being regarded as a haven for those seeking to avoid criminal proceedings in other countries.

b) The mutual confidence and respect that should be given to a request from the judicial authority of India, given our long standing relations with them.

c) The allegation is serious and high profile in India, involving a large scale conspiracy in relation to fixing international cricket matches.

d) The RP would be likely to receive a substantial custodial sentence.

47. Factors against extradition being granted:

a) The RP is a British National with an established family life in the UK with his wife and two children.

b) He works and provides financially for his family. Though it appears his wife also has an income. No details have been provided of either of their incomes.

c) There has been delay in this case, as detailed above. Although the Indian authorities have provided details of the history of the investigation and the court proceedings, there are unexplained periods of delay. The RP did not have any obligation to surrender to the Indian authorities and was not informed of any charges or warrants. The RP is not a fugitive. However, there is nothing to indicate that the RP cannot receive a fair trial.

48. Conclusions on Article 8:

I am satisfied that the Article 8 rights of the RP, his wife and the children are engaged. On the evidence before me, there is nothing to suggest that the negative impact of extradition of the RP on him and his family is of such a level that the court ought not to uphold this country's extradition obligations, in light of the serious nature of the allegations.

Conclusions

49. I have carefully considered all the live and documentary evidence placed before me, along with the submissions made on behalf of both parties. I have considered all the available bars to extradition. I do not consider that any of the bars apply save for section 87 in respect of the RP's article 3 rights.

50. I discharge the RP under section 87 of the Extradition Act 2003.

District Judge (MC) Rebecca Crane

16.10.17

Annexure 13:

Judgments of the UK Courts on the extradition of Sanjeev Chawla (2017)

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16771/index.do

SUPREME COURT OF CANADA

CITATION: India *v.* Badesha, 2017 SCC 44, [2017] 2 S.C.R. 127
APPEAL HEARD: March 20, 2017**JUDGMENT RENDERED:** September 8, 2017**DOCKET:** 36981

Between:

Attorney General of Canada on behalf of the Republic of India
Appellant

and

Surjit Singh Badesha and Malkit Kaur Sidhu
Respondents

- and -

David Asper Centre for Constitutional Rights, South Asian Legal Clinic of Ontario, Canadian Lawyers for International Human Rights, Canadian Centre for Victims of Torture and Canadian Council for Refugees
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

REASONS FOR JUDGMENT:(paras. 1 to 67) Moldaver J. (McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ. concurring)

INDIA *v.* BADESHA, 2017 SCC 44, [2017] 2 S.C.R. 127

Attorney General of Canada on behalf of the Republic of India
Appellant

v.

Surjit Singh Badesha and
Malkit Kaur Sidhu *Respondents*

and

David Asper Centre for Constitutional Rights,
South Asian Legal Clinic of Ontario,
Canadian Lawyers for International Human Rights,
Canadian Centre for Victims of Torture and
Canadian Council for Refugees ***Interveners***

Indexed as: India *v.* Badesha

2017 SCC 44

File No.: 36981.

2017: March 20; 2017: September 8.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Charter of Rights — Fundamental justice — Extradition — Surrender order — Judicial review — Minister of Justice ordering surrender of Canadian citizens for extradition — Whether it was reasonable for Minister to conclude that there was no substantial risk of torture or mistreatment that would offend principles of fundamental justice or that surrenders would not otherwise be unjust or oppressive — Contextual factors in assessing reliability of diplomatic assurances — Canadian Charter of Rights and Freedoms, s. 7 — Extradition Act, S.C. 1999, c. 18, s. 44(1)(a).

B and S were charged in India for allegedly arranging an honour killing that occurred there. B is the victim's uncle, and S is her mother. Both are Canadian citizens residing in Canada. India sought the extradition of B and S for the offence of conspiracy to commit murder. The Minister of Justice ordered their surrenders, after receiving assurances from India regarding their treatment if incarcerated, including health, safety and consular access, and determining, in accordance with s. 44(1)(a) of the *Extradition Act*, that their surrenders would not

be unjust or oppressive. A majority of the Court of Appeal concluded that the Minister's orders were unreasonable and set them aside.

Held: The appeal should be allowed and the surrender orders of the Minister restored.

The Minister's surrender orders are subject to review on a standard of reasonableness. In this case, it was reasonable for the Minister to conclude that, on the basis of the assurances he received from India, there was no substantial risk of torture or mistreatment of B and S that would offend the principles of fundamental justice protected by s. 7 of the *Charter*, and that their surrenders were not otherwise unjust or oppressive.

Where a person sought for extradition faces a substantial risk of torture or mistreatment in the receiving state, their surrender will violate the principles of fundamental justice and the Minister must refuse surrender under s. 44(1) (a) of the *Extradition Act*. Where there is no substantial risk of torture or mistreatment and the surrender is *Charter* compliant, the Minister must nonetheless refuse the surrender if he is satisfied that, in the whole of the circumstances, it would be otherwise unjust or oppressive. In this regard, the Minister may take into account the circumstances alleged to make the surrender inconsistent with the *Charter*, the seriousness of the alleged offence and the importance of Canada meeting its international obligations.

In assessing whether there is a substantial risk of torture or mistreatment, diplomatic assurances regarding the treatment of the person may be taken into account by the Minister. Where the Minister has determined that such a risk exists and that assurances are therefore needed, the reviewing court must consider whether the Minister has reasonably concluded that, based on the assurances provided, there is no substantial risk. However, diplomatic assurances need not eliminate any possibility of torture or mistreatment; they must simply form a reasonable basis for the Minister's finding that there is no substantial risk of torture or mistreatment. The reliability of diplomatic assurances depends on the circumstances of the particular case and involves the consideration of multiple factors.

In this case, the Minister was satisfied that, based on the assurances he received from India regarding their treatment, B and S would not face a substantial risk of torture or mistreatment. The Minister took into account relevant factors in assessing the reliability of the assurances, which formed a reasonable basis for the Minister's conclusion that their

surrenders would not violate the principles of fundamental justice. The inquiry for the reviewing court is not whether there is no possibility of torture or mistreatment, but whether it was reasonable for the Minister to conclude that there was no substantial risk of torture or mistreatment. Given the circumstances, the Minister's decision to order the surrenders of B and S fell within a range of reasonable outcomes.

Cases Cited

Adopted: *Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09, ECHR 2012 I; **considered:** *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; **referred to:** *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *M.M. v. United States of America*, 2015 SCC 62, [2015] 3 S.C.R. 973; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413; *Said v. the Netherlands*, July 5, 2005, *Reports* 2005 VI; *Thailand (Kingdom) v. Saxena*, 2006 BCCA 98, 265 D.L.R. (4th) 55; *Bonamie, Re*,2001 ABCA 267, 293 A.R. 201.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 6(1), 7.

Code of Criminal Procedure (India).

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Treaties and Other International Instruments

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Can. T.S. 1987 No. 36, art. 3(1).

Extradition Treaty between the Government of Canada and the Government of India, Can. T.S. 1987 No. 14.

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47.

Vienna Convention on Consular Relations, Can. T.S. 1974 No. 25.

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Newbury and Goepel JJ.A.), 2016 BCCA 88, 4 Admin. L.R. (6th) 280, 383 B.C.A.C. 220, 661 W.A.C. 220, [2016] B.C.J. No. 365 (QL), 2016 CarswellBC 468 (WL Can.), allowing an application for judicial review of surrender orders made by the Minister of Justice, setting the orders aside and remitting the matter to the Minister for further consideration. Appeal allowed.

Janet Henchey and *Diba B. Majzub*, for the appellant.

Michael Klein, *Q.C.*, and *Michael Sobkin*, for the respondent Surjit Singh Badesha.

E. David Crossin, *Q.C.*, *Elizabeth France* and *Miriam Isman*, for the respondent Malkit Kaur Sidhu.

John Norris and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Ranjan K. Agarwal and *Preet Bell*, for the intervener the South Asian Legal Clinic of Ontario.

Adriel Weaver and *Louis Century*, for the interveners the Canadian Lawyers for International Human Rights, the Canadian Centre for Victims of Torture and the Canadian Council for Refugees.

The judgment of the Court was delivered by

Moldaver J. —

I. Overview

[1 On June 9, 2000, the body of Jaswinder Kaur Sidhu was discovered in a village in the Indian state of Punjab. It is the theory of the Indian government that she was the victim of an honour killing arranged by the respondents, Surjit Singh Badesha, her uncle, and Malkit Kaur Sidhu, her mother, both of whom are Canadian citizens residing in Canada.

[2] India requested that Mr. Badesha and Ms. Sidhu be extradited on a charge of conspiracy to commit murder contrary to the Indian *Penal Code*. After an extradition hearing, Mr. Badesha and Ms. Sidhu were committed for surrender. The Minister of Justice then ordered their surrenders to India after determining, in accordance with s. 44(1)(a) of the *Extradition Act*, S.C. 1999, c. 18 ("Act"), that it would not be unjust or oppressive to do so.

[3] Mr. Badesha and Ms. Sidhu applied for judicial review of the Minister's decision to the British Columbia Court of Appeal. A majority of the court concluded that it was unreasonable for the Minister to find that surrendering Mr. Badesha and Ms. Sidhu would not be unjust or oppressive in the circumstances. Accordingly, the majority ordered that the Minister's decision be set aside and that the matter be remitted to the Minister for further consideration. The Attorney General of Canada appeals from that order.

[4] Central to the appeal is whether Mr. Badesha and Ms. Sidhu face a substantial risk of torture or other forms of mistreatment if they are incarcerated in India. To surrender them in such circumstances would violate their rights under s. 7 of the *Canadian Charter of Rights and Freedoms* and render their surrenders unjust or oppressive under s. 44(1)(a) of the Act.[1]

[5] In assessing whether to surrender Mr. Badesha and Ms. Sidhu, the Minister was cognizant of the health and safety risks they might face if incarcerated in India and treated them seriously. In the end, however, upon seeking and receiving assurances from the Indian government designed to address his concerns about Mr. Badesha and Ms. Sidhu's health and safety while in custody, the Minister concluded that they did not face a substantial risk of torture or mistreatment.

[6] For reasons that follow, I am respectfully of the view that the Minister's conclusion in this regard was reasonable. I take a similar view of his related conclusion that the surrenders were not otherwise unjust or oppressive. In this respect, the Minister considered the case as a whole, and determined that there was no justifiable basis for Canada not to extradite according to its extradition treaty with India. The alleged crime for which India was seeking Mr. Badesha's and Ms. Sidhu's extradition was extremely serious, and in the Minister's view, it was important that Canada comply with its treaty obligations to India so that India could see "justice done on [its] territory": see Minister's reasons at A.R., vol. I, at pp. 85 and 105. In short, the Minister considered the relevant facts and reached a defensible conclusion on the basis of those facts: *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41.

[7] Accordingly, I would allow the appeal and restore the surrender orders.

II. Background Facts

[8] On June 8, 2000, Jaswinder Kaur Sidhu and her husband, Sukhwinder Singh Sidhu, were travelling by scooter in the Punjab region in India when they were attacked by a group of armed men. Sukhwinder was seriously injured in the assault. The assailants forced Jaswinder into a car and drove away. The next day, Jaswinder's body was discovered on the bank of a canal in a village close to where the attack had taken place. Her throat had been cut.

[9] Almost a year earlier, the couple had married in India without the knowledge of Jaswinder's family. Jaswinder's family was from a high socio-economic class. Her husband was from a low socio-economic class: he was a rickshaw driver from a poor family. It is alleged by the Indian government that Mr. Badesha and Ms. Sidhu strongly opposed the marriage of Jaswinder and Sukhwinder, took steps to try to end it, and when those efforts failed, arranged for a number of persons in India to attack and kill the couple.

[10] Thirteen people, including Mr. Badesha and Ms. Sidhu, were charged in India in connection with the killing of Jaswinder and the attack on Sukhwinder. Eleven of those charged were tried together in India. Seven were convicted and four were acquitted of offences arising out of the attack, including murder, attempted murder, and conspiracy to commit murder. Four of the seven who were convicted were later acquitted on appeal. Mr. Badesha and Ms. Sidhu are the only accused persons who remain to be tried in this matter.

[11] By a diplomatic note, India sought their extradition for the offence of conspiracy to commit murder under the Indian *Penal Code*: the *Extradition Treaty between the Government of Canada and the Government of India*, Can. T.S. 1987 No. 14. The Minister of Justice issued an Authority to Proceed, authorizing extradition proceedings against Mr. Badesha and Ms. Sidhu on the corresponding Canadian offences of conspiracy to commit murder, attempt to commit murder and murder.[2]

[12] The extradition judge found that there was a substantial body of circumstantial evidence implicating Mr. Badesha and Ms. Sidhu in the alleged crime, including evidence that: they viewed the marriage between Jaswinder and Sukhwinder as bringing dishonour to their family; they issued death threats to Jaswinder and Sukhwinder; and phone calls were placed from Mr. Badesha's home phone in British Columbia to some of the Indian perpetrators around the

time the couple was attacked. The extradition judge concluded that on this evidence, a reasonable jury, properly instructed, could find that Mr. Badesha and Ms. Sidhu hired the Indian perpetrators to kill Jaswinder. Accordingly, he committed Mr. Badesha and Ms. Sidhu on charges of conspiracy to commit murder and murder.

III. Decisions Below

A. *The Minister's Surrender Decisions*

(1) Mr. Badesha's Surrender Order

[13] In his submissions to the Minister, Mr. Badesha argued that his surrender was unjust or oppressive under s. 44(1) (a) of the Act because (1) there was no guarantee India would honour a death penalty assurance, (2) he would not have a fair trial in India, (3) prison conditions in India rendered his surrender contrary to principles of fundamental justice, given his advanced age and health problems, and (4) there were significant weaknesses in the evidence.

[14] Commencing with the death penalty concern, the Minister stated that absent evidence of bad faith on the part of India, he was entitled to presume that the Indian authorities would honour any assurances they provided, including an assurance regarding the death penalty — and he made the surrender order contingent on receiving such an assurance.

[15] As for Mr. Badesha's right to a fair trial, the Minister was satisfied that, while there were ongoing concerns with respect to corruption and intimidation in India, there was no information before him to suggest that Mr. Badesha would be subjected to these abuses. Absent evidence to the contrary, he was entitled to assume that Mr. Badesha would receive a fair trial in India and that his surrender would not violate the principles of fundamental justice on this basis. However, as a precautionary measure, the Minister made his surrender order conditional upon India providing an assurance that it would allow Canadian officials to attend the court proceedings on request.

[16] With respect to prison conditions in India, the Minister noted that the Ministry of External Affairs of India ("MEA") had advised Canada that the treatment and safety of inmates in prisons in Punjab, the region in which Mr. Badesha would be incarcerated, was governed by the *Punjab Jail Manual*. Under the terms of the *Manual*, medical officers are required to make frequent visits to the prisons, are on-call 24 hours a day, and are obliged to take

such measures as are necessary for the maintenance of the prison and the health of inmates. The MEA further indicated to the Minister that prisons have modern equipment to provide medical treatment and that specialist doctors visit the jails to see and treat inmates.

[17] With a view to confirming this information, the Minister took the additional step of having his officials consult with the Canadian Department of Foreign Affairs on medical care in prisons located in Punjab. Based on information received from the Canadian High Commission in India, the Department of Foreign Affairs confirmed that prisons in that area had medical facilities for the basic medical care of inmates and advised that inmates requiring more specialized care were referred to hospitals and institutes.

[18] Even with this feedback, other information identifying substandard conditions in Indian prisons left the Minister concerned about Mr. Badesha's health and safety while in prison. In view of this, he made Mr. Badesha's surrender conditional on receipt of an assurance that India would provide Mr. Badesha with required medical care and medications, and make every reasonable effort to ensure his safety while in custody in India. He also made Mr. Badesha's surrender conditional on receipt of an assurance that India would provide immediate and unrestricted consular access to Mr. Badesha while in custody. While the assurance he received from India in this regard did not provide for "immediate and unrestricted consular access", it did provide that consular access "shall be provided as per India's obligations" under the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25.

[19] In the end, the Minister was confident that these assurances would be respected by the Indian authorities, because India had an interest in maintaining its extradition treaty and its "positive political relationship" with Canada. He also noted that there were tools to enforce the assurances. According to the Department of Foreign Affairs, if an extradition treaty partner were to act contrary to diplomatic assurances given to Canada, Canada could protest and take steps, including at a political level, to ensure compliance with the assurances. Other measures were also available, including the possible termination of Canada's extradition treaty with India. As well, India had a diplomatic incentive to comply with the assurances. Any failure by India in this regard could have negative implications on India's relationships with other treaty partners.

[20] The Minister found that there was abundant evidence to support India's allegations against Mr. Badesha and that there were adequate procedural and legal avenues through which Mr. Badesha could adduce defence evidence in India.

[21] The Minister also determined that Mr. Badesha's extradition was a reasonable limit on his s. 6(1) right to remain in Canada under the *Charter*. He noted that "much, if not all" of the evidence needed to prosecute Mr. Badesha was available in India. Furthermore, it was in India's interests to prosecute Mr. Badesha for the alleged crime — an honour killing — and the impact of the crime was felt most acutely in India.

[22] In sum, the Minister concluded that Mr. Badesha's surrender would not violate the principles of fundamental justice contrary to s. 7 of the *Charter* or unjustifiably infringe s. 6(1) of the *Charter*. Further, considering the case as a whole, which included the serious nature of the alleged crime and India's strong interest in pursuing it on Indian soil, Mr. Badesha's surrender would not otherwise be unjust or oppressive.

(2) Ms. Sidhu's Surrender Order

[23] Ms. Sidhu argued that her surrender was unjust or oppressive under s. 44(1) (a) of the Act because (1) there was no guarantee India would honour a death penalty assurance, (2) there were reports of custodial violence and torture in India, (3) Ms. Sidhu's personal situation, including her health problems, would render her surrender contrary to s. 7 of the *Charter*, (4) there were significant weaknesses in the evidence, and (5) there was a delay on the part of India in seeking Ms. Sidhu's extradition.

[24] The Minister stated that in the absence of evidence of bad faith on the part of India, he was entitled to presume that the Indian authorities would honour any assurances they provided, including an assurance regarding the death penalty — and he made the surrender order conditional on receiving such an assurance.

[25] As for Ms. Sidhu's safety concerns, the Minister was satisfied that the Indian government was committed to addressing the problem of violence and torture in its prisons. Nonetheless, he acknowledged that the reports of torture and mistreatment in Indian prisons submitted by Ms. Sidhu raised serious concerns with respect to the safety of inmates in Indian custody, particularly female inmates.

In the end, however, he determined that Ms. Sidhu's surrender would not be unjust or oppressive provided that it was made conditional on assurances that India would make reasonable efforts to ensure her safety while in Indian custody and that India would provide immediate and unrestricted consular access to her upon request. As regards consular access, the Minister received the same assurance from India that he received in respect of Mr. Badesha.

[26] The Minister also made Ms. Sidhu's surrender conditional on receipt of an assurance from India that Ms. Sidhu would receive needed medical care and medications while she remained in custody. He was satisfied that India had the ability to comply with that assurance on the basis of information provided by the MEA and the Canadian Department of Foreign Affairs. The Minister further noted that the same tools which were available to enforce the assurances provided for Mr. Badesha were available for Ms. Sidhu.

[27] As for the strength of the case against Ms. Sidhu, the Minister determined that there was sufficient evidence to support India's allegations against Ms. Sidhu and that there were adequate procedural and legal avenues through which Ms. Sidhu could adduce evidence in India.

[28] With respect to the delay in seeking Ms. Sidhu's surrender, the Minister found that the Indian authorities pursued Ms. Sidhu's extradition in good faith and with reasonable diligence.

[29] The Minister also determined that Ms. Sidhu's extradition was a reasonable limit on her s. 6(1) right to remain in Canada under the *Charter* essentially for the same reasons he adopted in Mr. Badesha's case.

[30] In the end, the Minister concluded that Ms. Sidhu's surrender would not violate the principles of fundamental justice contrary to s. 7 of the *Charter* or unjustifiably infringe s. 6(1) of the *Charter*. Further, considering the case as a whole, which included the serious nature of the alleged crime and India's strong interest in pursuing it on Indian soil, Ms. Sidhu's surrender would not otherwise be unjust or oppressive.

B. *The Court of Appeal for British Columbia, 2016 BCCA 88, 4 Admin. L.R. (6th) 280*

(1) The Majority Judgment (Donald J.A., Newbury J.A. Concurring)

[31] A majority of the Court of Appeal concluded that it was unreasonable for the Minister to find that surrendering Mr. Badesha and Ms. Sidhu would not be unjust or oppressive in the circumstances. While recognizing that the Minister's decision was subject to a standard of reasonableness, the majority maintained that for the Minister to reasonably accept diplomatic assurances from a requesting state, the assurances had to "address meaningfully the risks that they are intended to mitigate": para. 37.

[32] The majority noted that there was a "valid basis for concern" that Mr. Badesha and Ms. Sidhu would be subjected to violence, torture or neglect in India if surrendered (para. 50). In the opinion of the majority, the Minister failed to consider whether the assurances regarding Mr. Badesha's and Ms. Sidhu's health and safety meaningfully responded to this concern. The assurances amounted to promises that the laws protecting prisoners in India would protect Mr. Badesha and Ms. Sidhu from mistreatment. However, the reports submitted by Mr. Badesha and Ms. Sidhu documented human rights abuses that had occurred under these same laws. The Minister did not consider what steps India was planning to take to mitigate the risk of violence and neglect that Mr. Badesha and Ms. Sidhu would accordingly face despite the existence of these laws. He therefore failed to take into account India's capacity to fulfill the assurances regarding Mr. Badesha's and Ms. Sidhu's health and safety. The only realistic protection the assurances gave against the risk of torture or mistreatment was consular monitoring, which the majority dismissed as an inadequate safeguard. In the final analysis, the majority concluded that "the assurances in this case regarding health and safety could not be reasonably accepted" and that the Minister's decision was therefore unreasonable in the circumstances: para. 69.

(2) The Minority Judgment (Goepel J.A.)

[33] Goepel J.A., writing in dissent, held that the Minister's decision to order the surrenders of Mr. Badesha and Ms. Sidhu was not unreasonable given the assurances provided by India.

[34] Goepel J.A. disagreed with the majority that the Minister erred in failing to appreciate that India's assurances did not meaningfully address the health and safety risks faced by Mr. Badesha and Ms. Sidhu. The Minister reviewed information provided by India's MEA and the Canadian Department of Foreign Affairs, which detailed the availability of medical treatment in India's prisons. In his reasons

for Ms. Sidhu's surrender, the Minister concluded that based on this information, India had the ability to comply with its assurances. The Minister was satisfied that India was committed to addressing the problem of violence and torture in Indian prisons. He also considered the diplomatic incentive for India to comply with the assurances and that India and Canada's relationship as extradition partners had value to both parties. Given these considerations, it could not be said that the Minister failed to address India's capacity to fulfill its assurances regarding Mr. Badesha and Ms. Sidhu's health and safety.

IV. Analysis

A. *General Principles of Extradition Law*

[35] It is a basic principle of extradition law that when a person is alleged to have committed a crime in another country, he or she should expect to be answerable to that country's justice system: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 72. As Cromwell J. stated in *M.M. v. United States of America*, 2015 SCC 62, [2015] 3 S.C.R. 973, extradition is "the process by which one state assists another in putting that principle into practice": para. 14. The Act implements Canada's international obligations under extradition treaties to surrender persons for prosecution, or to serve sentences imposed, in another country: *M.M.*, at para. 14. The extradition process is founded on principles of "reciprocity, comity and respect for differences in other jurisdictions": *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170, at para. 51, quoting *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 844.

[36] The Act does not merely fulfill Canada's international obligations. It also serves pressing and substantial domestic objectives. It protects the public against crime through its investigation, it brings fugitives to justice for the proper determination of their criminal liability, and it ensures — through international cooperation — "that national boundaries do not serve as a means of escape from the rule of law": *M.M.*, at para. 15, citing *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 10.

[37] That being said, the extradition process also protects the rights of the person sought. At each stage of the process, including the Minister's decision to order the person's surrender to its treaty partner, there is a careful balancing of the broader purposes of

the Act with the individual's rights and interests: *M.M.*, at para. 16.

[38] Where a person's surrender offends the principles of fundamental justice enshrined in s. 7 of the *Charter*, the Minister must refuse the person's extradition. In extradition cases, s. 7 of the *Charter* should be presumed to provide at least as great a level of protection as found in Canada's international commitments regarding non-*refoulement* to torture or other gross human rights violations: see *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 23. Extraditing a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is prohibited under art. 3(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36 ("*CAT*"). It follows that in the extradition context, surrendering a person to face a substantial risk of torture or mistreatment in the requesting state will violate the principles of fundamental justice.

B. *Standard of Review*

[39] The Minister's decision to order the surrender of a person falls "at the extreme legislative end of the *continuum* of administrative decision-making" and is seen as "largely political in nature": *Lake*, at para. 22, quoting *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659; *Sriskandarajah*, at para. 11. Given the Minister's superior expertise in Canada's international relations and foreign affairs, he or she is in the best position to determine whether the factors weigh in favour of or against extradition: *Lake*, at para. 41. The Minister's decision to order surrender is therefore subject to review on a standard of reasonableness. As this Court noted in *Lake*:

> The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. [para. 41]

C. *Section 44(1)(a) of the Act*

[40] The Minister's discretion to order a person's surrender is subject to restrictions set out in the Act. Section 44(1) (a) reads as follows:

> The Minister shall refuse to make a surrender order if the Minister is satisfied that
>
> **(a)** the surrender would be unjust or oppressive having regard to all the relevant circumstances;

[41] Given the mandatory nature of s. 44(1) (a), the Minister must balance all the relevant circumstances to determine whether the surrender is unjust or oppressive: *Fischbacher*, at para. 37. The circumstances that will be relevant will vary depending on the facts and context of each case: para. 38. Although it is the Minister who considers and weighs all the relevant circumstances to determine whether the surrender would be "unjust or oppressive", the person sought for extradition bears the burden of demonstrating that such circumstances exist: *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 72. If the Minister is satisfied that a person's surrender would be unjust or oppressive, he must refuse the surrender and has "no discretion" to give effect to a treaty obligation to extradite the person: para. 69.

[42] Where a person sought for extradition faces a substantial risk of torture or mistreatment in the receiving state, his or her surrender will violate the principles of fundamental justice and the Minister must refuse surrender under s. 44(1) (a). But where there is no substantial risk of torture or mistreatment and where the surrender is *Charter* compliant, the Minister must nonetheless refuse the surrender if he or she is satisfied that, in the whole of the circumstances, it would be otherwise unjust or oppressive.

(1) Section 44(1) (a) of the Act and Section 7 of the *Charter*

[43] The s. 44(1) (a) inquiry may require the Minister to consider whether the surrender would violate s. 7 of the *Charter*. Under s. 7, "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Where the surrender is found to be contrary to the principles of fundamental justice protected by s. 7, it will also be unjust or oppressive under s. 44(1) (a) and the Minister must refuse to make a surrender

order: *Lake*, at para. 24; *M.M.*, at para. 115. Central to this appeal is whether Mr. Badesha and Ms. Sidhu face a substantial risk of torture or mistreatment in India that would render their surrenders unjust or oppressive under s. 44(1) (a). The question for this Court is whether it was reasonable for the Minister, in the circumstances, to conclude that, on the basis of the assurances he received from the Indian government, there was no substantial risk of torture or mistreatment which would offend the principles of fundamental justice.

[44] In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, the Court stated that the Minister's assessment of whether the potential deportee faces a substantial risk of torture is a "fact-driven inquiry", which requires consideration of the human rights record of the receiving state, among other factors: para. 39. In the extradition context, when evaluating whether there is a substantial risk of torture or mistreatment in the requesting state, it logically follows that the Minister can consider evidence of the general human rights situation in that state, which may include reports from reputable government and non-governmental organizations: see, e.g., *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413, at paras. 99-100; *Said v. the Netherlands*, July 5, 2005, *Reports* 2005-VI, at para. 54. Accordingly, I am unable to accept Goepel J.A.'s statement in his dissenting reasons that evidence of systemic human rights abuses in a receiving state amounts to a general indictment of that state's justice system and is thus an "unsatisfactory underpinning for finding that an individual's s. 7 *Charter* rights will be violated if surrendered": C.A. reasons, at para. 125. With respect, I believe this statement is too sweeping in nature.

[45] The Attorney General of Canada contends that "generic evidence" of human rights conditions in the receiving state cannot establish, on its own, that the person sought faces a substantial risk of torture or mistreatment. With respect, I disagree. The assessment of substantial risk decidedly requires that the Minister consider the "personal risk" faced by an individual: *Suresh*, at para. 39. But I would not foreclose the possibility that there may be cases in which general evidence of pervasive and systemic human rights abuses in the receiving state can form the basis for a finding that the person sought faces a substantial risk of torture or mistreatment.

(2) Diplomatic Assurances

[46] In assessing whether there is a substantial risk of torture or mistreatment, diplomatic assurances regarding the treatment of the person sought may be taken into account by the Minister: *Suresh*,at para. 39. In certain cases, the Minister may be satisfied that assurances are required so that the person sought for extradition does not face a substantial risk of torture or mistreatment, which would offend the principles of fundamental justice. Where the Minister has determined that such a risk of torture or mistreatment exists and that assurances are therefore needed, the reviewing court must consider whether the Minister has reasonably concluded that, based on the assurances provided, there is no substantial risk of torture or mistreatment. In this regard, I would emphasize that diplomatic assurances need not eliminate any possibility of torture or mistreatment; they must simply form a reasonable basis for the Minister's finding that there is no substantial risk of torture or mistreatment.

[47] In *Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09, ECHR 2012-I, the European Court of Human Rights ("ECHR") examined whether the deportation of Mr. Qatada, which was made conditional on diplomatic assurances, was consistent with art. 3(1) of the *CAT*, which prevents expulsion where substantial grounds have been shown for believing that the person, if deported, faces a "real risk" of being subjected to ill-treatment: para. 185. The ECHR found that the proper inquiry to be conducted to determine whether the deportation is consistent with art. 3(1) is "whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment": para. 186.

[48] The reliability of diplomatic assurances depends crucially on the circumstances of the particular case. In *Suresh*, this Court stressed that a contextual approach should be taken when determining the reliability of assurances. The Court cautioned that assurances regarding the death penalty are easier to monitor and more reliable than those regarding torture: "We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past" (para. 124). Ultimately, however, the weight to be given to assurances involves the consideration of multiple factors. In evaluating the reliability of assurances, the Minister may take into account

the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces. [*Suresh*, at para. 125]

[49] In *Othman*, the ECHR took a similar contextual approach to determining the reliability of assurances:

> . . . assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time . . . . [Emphasis added; para. 187.]

[50] The ECHR noted in *Othman* that the threshold question when evaluating the weight to be given to assurances is

> whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances . . . .
>
> More usually, the Court will assess, firstly, the quality of the assurances given and, secondly, whether, in light of the receiving State's practices, they can be relied upon. [paras. 188-89]

[51] The ECHR set out a detailed list of contextual factors to be examined when assessing the reliability of diplomatic assurances. Many of these factors may be considered by Canadian courts. To be clear, these factors are not exhaustive and their relevance will depend on the circumstances of the particular case:

> 1. Whether the assurances are specific or are general and vague;
>
> 2. Who has given the assurances and whether that person can bind the receiving state;
>
> 3. If the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;

4. Whether the assurances concern treatment which is legal or illegal in the receiving state;

5. The length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;

6. Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the individual's lawyers;

7. Whether there is an effective system of protection against torture in the receiving state, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs) and whether it is willing to investigate allegations of torture and to punish those responsible; and

8. Whether the individual has previously been ill-treated in the receiving state.

(See *Othman*, at para. 189.)

[52] I pause here to note that assurances may fulfill different purposes in relation to a person's surrender. They are not always requested where the Minister has determined that there is a substantial or indeed *any* risk of torture or mistreatment in the requesting state. Therefore, they cannot be treated as proof that such a risk exists. For example, they may be requested by the Minister simply out of an abundance of caution: see, e.g., *Thailand (Kingdom) v. Saxena*, 2006 BCCA 98, 265 D.L.R. (4th) 55, at para. 56.

(3) Where the Surrender Has Been Found to Be Compliant With the *Charter* , the Minister Must Nonetheless Refuse the Surrender if He or She Is Satisfied That It Would Be Otherwise Unjust or Oppressive

[53] Where the Minister is satisfied that the person sought for extradition does not face a substantial risk of torture or mistreatment and that his or her surrender is compliant with the *Charter* , the Minister must nonetheless refuse the surrender if he or she is satisfied that it would be otherwise unjust or oppressive: see *Németh*, at para. 56. As this Court observed in *Fischbacher*, where the surrender is constitutional, the Minister retains a "residual discretion to refuse surrender as being unjust or oppressive in view of the totality of

the relevant circumstances, including, but not limited to, the circumstances alleged to make surrender inconsistent with the principles of the *Charter* ": at para. 39, quoting *Bonamie, Re*, 2001 ABCA 267, 293 A.R. 201, at para. 47. In this regard, the Minister may take into account the circumstances he considered when determining whether there was a s. 7 infringement or other *Charter* violation, including the circumstances of the person sought and the consequences of extradition. The Minister may also consider the seriousness of the alleged offence and the importance of Canada meeting its international obligations and not becoming a safe haven for fugitives from justice.

D. *The Reasonableness of the Minister's Decision to Order the Surrenders of Mr. Badesha and Ms. Sidhu*

[54] In his reasons for ordering Mr. Badesha's surrender, the Minister took note of the U.S. Department of State's *India 2013 Human Rights Report* in which Indian prisons were described as being "severely overcrowded", that medical care was often inadequate and that inmates were "physically mistreated" (see A.R., vol. IV, at p. 25). Given the findings in this report, the Minister found that Mr. Badesha's surrender should be made conditional on assurances from India that: (1) Mr. Badesha would receive needed medical care and medications while in custody; and (2) India would "make every reasonable effort to ensure his safety while in custody in the Republic of India". The Minister also made his surrender conditional on an assurance that India would provide immediate and unrestricted consular access to Mr. Badesha upon request.

[55] With respect to Ms. Sidhu's surrender, the Minister stated that reports before him raised "serious concerns with regard to the safety of inmates in Indian custody, particularly female inmates". He also noted Ms. Sidhu's health problems, including her heart condition. Accordingly, he made Ms. Sidhu's surrender conditional on the same assurances that he requested India provide for Mr. Badesha.

[56] The Minister was satisfied that, based on the assurances he received from India, Mr. Badesha and Ms. Sidhu would not face a substantial risk of torture or mistreatment. India provided an assurance which stated that "every reasonable effort will be made to meet the safety and medical needs" of Mr. Badesha and Ms. Sidhu, as required under India's *Code of Criminal Procedure*. India also assured that consular access would be provided in accordance with India's obligations under the *Vienna Convention on Consular Relations*.

While this assurance did not explicitly provide for "immediate and unrestricted consular access" as requested by the Minister, he was satisfied that the assurance was sufficient to meet that condition.

[57] As indicated, the central question in this case is whether it was reasonable for the Minister to find that, based on the assurances provided by India, surrendering Mr. Badesha and Ms. Sidhu would not violate s. 7 of the *Charter* or be otherwise unjust or oppressive. The role of a reviewing court in these circumstances is not to re-assess the relevant factors and substitute its own view for that of the Minister: *Lake*, at para. 41. Rather, the court must examine whether the decision falls within a range of reasonable outcomes. The question to be asked is: did the Minister consider the relevant facts and reach a defensible conclusion based on those facts (*Lake*, at para. 41)? In my respectful view, the answer in this case is yes.

(1) The Minister's Reliance on the Assurances Regarding Health and Safety

[58] The majority of the Court of Appeal held that the Minister failed to consider whether the assurances regarding health and safety meaningfully responded to the concerns they were intended to address. In the opinion of the majority, the assurances amounted to promises that the laws protecting prisoners in India would ensure that Mr. Badesha and Ms. Sidhu would not be mistreated. However, the reports submitted by Mr. Badesha and Ms. Sidhu documented human rights abuses that had occurred under these same laws. The only "realistic protection" the assurances gave against the risk of torture or mistreatment was consular monitoring, which the majority of the Court found was an inadequate safeguard to redress this risk. The Minister's decision to order the surrenders of Mr. Badesha and Ms. Sidhu was therefore unreasonable.

[59] Respectfully, in reaching this conclusion, the majority did not consider many of the relevant factors the Minister considered in assessing the reliability of the assurances. These factors formed a reasonable basis for the Minister's conclusion that the surrenders of Mr. Badesha and Ms. Sidhu would not violate the principles of fundamental justice.

[60] As discussed, the reliability of diplomatic assurances crucially depends on the context of the particular case. Along with consular monitoring, the Minister took into account the following factors

in assessing the risk of torture or mistreatment faced by Mr. Badesha or Ms. Sidhu in this case:

- The Indian MEA provided information which confirmed that there were medical professionals and facilities available to inmates in prisons in the state of Punjab.
- The Canadian Department of Foreign Affairs received information from the Canadian High Commission in India that prisons in the state of Punjab have medical facilities for the basic medical care of inmates. Inmates requiring more specialized care are referred to outside hospitals.
- India's efforts to enact domestic legislation that would permit them to ratify the *CAT*, the fact that they were party to the *International Covenant on Civil and Political* Rights, Can. T.S. 1976 No. 47, and efforts made by the Indian judiciary to address incidents of custodial violence demonstrated that India was committed to addressing the problem of violence and torture in Indian prisons.
- India would want to maintain its positive political relationship with Canada and the integrity of the extradition treaty with Canada.
- There were tools available to enforce the assurances. According to the Department of Foreign Affairs, if an extradition treaty partner were to act contrary to diplomatic assurances given to Canada, Canada could protest and take steps, including at a political level, to ensure compliance with the assurances. Canada could also take further measures including immediate notification of the termination of the agreement that was violated.
- The Department of Foreign Affairs informed the Minister that because treaties and agreements are a reflection of mutual confidence and trust between nations, a failure to honour diplomatic assurances could have negative implications on India's relationships with other treaty partners.

Several of the above factors were endorsed in *Suresh* and *Othman* as indicators of the weight to be given to diplomatic assurances.

[61] Furthermore, the Minister noted that there was no history of India not complying with assurances given to its treaty partners. He

further observed there was no evidence of any corruption, intimidation or torture involved in India's investigation of Mr. Badesha, Ms. Sidhu or any of the eleven co-accused in this matter. Nor was there any evidence that the seven co-accused found guilty at trial were mistreated while in prison in India. There was also no evidence that Ms. Sidhu and Mr. Badesha had personal characteristics that would make them part of a category of individuals who would be particular targets of ill-treatment in India because of their political or religious affiliations. This specific evidence of a personal risk to Mr. Badesha and Ms. Sidhu was not *required* for the Minister to find a substantial risk of torture. However, if such evidence had been presented, it would have militated in favour of a finding of substantial risk. In this case, no such evidence was presented. This is to be contrasted with the situation in *Othman* where the ECHR found it relevant that Mr. Qatada, a "high profile Islamist", belonged to a group of prisoners who were frequently ill-treated in Jordan, and had claimed to have been previously tortured there: para. 192. Similarly, in *Chahal*, the ECHR noted that Mr. Chahal, a "well-known supporter of Sikh separatism" would be "a target of interest" for "hard-line elements in the security forces who have relentlessly pursued suspected Sikh militants in the past" in India: paras. 98 and 106.

[62] Considered as a whole, the factors upon which the Minister relied provided a reasonable basis for his conclusion that the health and safety assurances would meaningfully respond to the concerns they were intended to address, such that the surrenders of Mr. Badesha and Ms. Sidhu would not violate principles of fundamental justice and would not be otherwise unjust or oppressive. The inquiry for the reviewing court is not whether there is no possibility of torture or mistreatment, but whether it was reasonable for the Minister to conclude that there was no substantial risk of torture or mistreatment.

[63] In my respectful opinion, the majority of the Court of Appeal did not consider the numerous factors that, as a whole, provided reasonable support for the Minister's conclusion that Mr. Badesha and Ms. Sidhu would not face a substantial risk of torture or mistreatment in India, having regard to the assurances provided by India. In concluding otherwise, the majority effectively substituted its view for that of the Minister.

(2) The Minister's Reliance on Consular Monitoring

[64] With respect, the majority of the Court of Appeal also did not consider whether, in the particular circumstances of this case, it was reasonable for the Minister to take into account consular monitoring in concluding that there was no substantial risk of torture or mistreatment. The majority stated that consular monitoring "has its limits in mitigating the risks" of torture or mistreatment, because torture or mistreatment often takes place covertly and those who administer it are adept at concealing its visible signs and ensuring that authorities are not alerted.

[65] I do not dispute this observation. However, the real question is not whether consular monitoring could eliminate any possibility of torture or mistreatment, but whether consular monitoring could be a factor in the Minister's conclusion that Mr. Badesha and Ms. Sidhu would not face a substantial risk of torture or mistreatment. In certain cases, to be effective, monitoring may need to be carried out by a third-party organization, or provide for other protections, such as private and without notice interviews conducted by experts trained to detect physical and psychological signs of torture and ill-treatment (see, e.g., the monitoring agreed to by Jordan and the United Kingdom in *Othman*, at paras. 77 and 81). But given the circumstances in this case, which included India's desire to maintain its extradition relationship with Canada and its relationships with other treaty partners, the fact there was no evidence of a history of India not complying with assurances given to partner nations, and the absence of evidence that Mr. Badesha and Ms. Sidhu had religious or political affiliations that would make them particular targets of torture or mistreatment, it was reasonable for the Minister to take into account consular monitoring in concluding that there was no substantial risk of torture or mistreatment.

V. Conclusion

[66] Having regard to the factors the Minister considered and the contextual circumstances of this case, the Minister's conclusion that Mr. Badesha and Ms. Sidhu would not face a substantial risk of torture or mistreatment while incarcerated in India was reasonable. The Minister's further finding, based on the totality of the circumstances, that the surrender would not be otherwise unjust or oppressive was also reasonable. In the Minister's view, there was no justifiable basis for Canada not to extradite according to its

extradition treaty with India. The gravity of the alleged offence in this case was particularly relevant to the Minister. Mr. Badesha and Ms. Sidhu are wanted in India for alleged criminal conduct of the most horrific nature — namely, participation in a conspiracy to commit the honour killing of a family member. The Minister noted that the alleged offence "engages, first and foremost, the interests of the Republic of India to prosecute" Mr. Badesha and Ms. Sidhu and stressed the "importance of seeing justice done on India's territory".

[67] In my opinion, the Minister considered the relevant facts and reached a defensible conclusion on the basis of those facts: *Lake*, at para. 41. The Minister's decision to order the surrenders of Mr. Badesha and Ms. Sidhu therefore fell within a range of reasonable outcomes: para. 41. Accordingly, I would allow the appeal and restore the Minister's surrender orders for Mr. Badesha and Ms. Sidhu.

Appeal allowed.

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent Surjit Singh Badesha: Michael Klein Law Corporation, Vancouver; Michael Sobkin, Ottawa.

Solicitors for the respondent Malkit Kaur Sidhu: Sugden, McFee & Roos, Vancouver.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: Simcoe Chambers, Toronto; David Asper Centre for Constitutional Rights, Toronto.

Solicitors for the intervener the South Asian Legal Clinic of Ontario: Bennett Jones, Toronto.

Solicitors for the interveners Canadian Lawyers for International Human Rights, the Canadian Centre for Victims of Torture and the Canadian Council for Refugees: Goldblatt Partners, Toronto.

[1] By "mistreatment", I mean forms of ill-treatment or abuse that offend against the principles of fundamental justice under s. 7 of the *Charter*.

[2] In an Authority to Proceed, the Minister of Justice identifies the Canadian offences that make the conduct criminal in Canada. Extradition is permitted when the conduct underlying the alleged foreign offence, if it occurred in Canada, would constitute an offence in Canadian law, however named or characterized: s. 3(2) of the Act; see also *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170, at para. 4.

Extradition of fugitives has become one of the critical national issues considering the flight of the economic fugitives like Vijay Mallya, Nirav Modi, Mehul Choksi etc to foreign countries.

Out of the 68 fugitives extradited to India from 2002 to 4 December 2018, 20 fugitives or 29% of the total fugitives were extradited from the United Arab Emirates (UAE) alone. Since 1992, India secured extradition of only Samirbhai Vinubhai Patel out of the 60 fugitives from the UK, that too, after Patel had voluntarily agreed to return without challenging India's extradition request.

This report examines India's Extradition Act, Extradition Treaties and status of extradition requests; grounds for refusal of India's extradition requests by the foreign national courts, the European Court of Human Rights and the UN Committee Against Torture; jurisprudence on India's extradition requests, and status of the ground situations for continuous rejection of India's extradition requests. Unless India ratifies the UN Convention Against Torture which prohibits refoulement where there are grounds to believe that the requested person will be subjected to torture, India may manage extradition of fugitives from countries like the UAE but the economic fugitives who manage to flee to Europe and North America will remain out of the bounds of India.

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