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Part VI

Understandings of Fundamental Justice

Extradition, Assurances and Human Rights: Guidance from the Supreme Court of Canada in *India v. Badesha*

Joanna Harrington*

I. INTRODUCTION

In recent years, the Supreme Court of Canada has granted leave to appeal in a surprising number of extradition cases concerning individuals in Canada who are wanted for trial elsewhere. Leave has been granted in 18 cases since the 2001 unanimous decision of “The Court” in *United States v. Burns*,¹ which made extradition from Canada conditional on the receipt of assurances from a foreign state that a death penalty will not be imposed and thus, in substance, overturned the position taken by a divided Court 10 years earlier.² Many intuitively connect extradition with criminal law, with extradition being a process of request and surrender that is available only in relation to a serious criminal charge.³ However, the judicial proceedings in an extradition case are not criminal trials, and in Canada, these cases typically involve challenges on either constitutional or administrative law grounds, or a combination of both, to the decisions of committal and/or

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¹ [2001] S.C.J. No. 8, 2001 SCC 7, [2001] 1 S.C.R. 283 (S.C.C.) [hereinafter “*Burns*”].

² *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.) [hereinafter “*Kindler*”]; *Reference re Ng Extradition (Can.)*, [1991] S.C.J. No. 64, [1991] 2 S.C.R. 858 (S.C.C.). Canada was later found in violation of the prohibition on cruel and inhuman treatment for surrendering Ng to California to face execution by gas asphyxiation, a death that does not occur with the least physical and mental suffering: *Ng v. Canada*, Communication No 469/1991, U.N. Doc. CCPR/C/49/469/1991, (1993) 1-2 IHRR 161 (Hum. Rts. Cttee.).

³ Including extradition requests to secure a fugitive’s post-conviction return to prison.

surrender that pave the way for an individual's forced departure from Canada. Indeed, many an extradition case is in fact a judicial review application, put forward to challenge the exercise of state power in circumstances where an individual's liberty is at stake.

Inherent within these legal challenges are also arguments of public international law, given the state-to-state nature of almost all extradition requests,⁴ and the respect to be accorded to the legal system of a foreign state that has been deemed worthy of an extradition partnership by Canada's federal executive branch. It is presumed that the Executive makes an assessment of the standards of law and justice in the foreign state before concluding an extradition agreement, but such assessments are not made public.⁵ Nevertheless, because of this desired respect, there was traditionally a rule or doctrine of non-inquiry that was applied by courts to bar the judicial authorities in one state from inquiring into the standards of law and justice in another. Although still relevant within the United States,⁶ any obligatory rule of non-inquiry has long been dead in Europe,⁷ and suspected as such in Canada, given the application of the *Canadian Charter of Rights and Freedoms*⁸ to executive decision-making.⁹ Under Canadian law, the final decision on the surrender of a requested individual is made not by a court, but at the discretion of a federal Cabinet minister, specifically the Minister of Justice.¹⁰

⁴ One can also have state-to-international-criminal-tribunal requests under Canada's *Extradition Act*, S.C. 1999, c. 18, s. 9(1), as amended and Schedule [hereinafter "*Extradition Act*"].

⁵ This presumption does not account for the roll-over designation of a number of Commonwealth states as extradition partners upon the repeal of the old *Foreign Offenders Act* with the enactment of a new *Extradition Act* in 1999, nor does it account for subsequent changes in the foreign state, including a revolution or *coup d'état*. Zimbabwe, for example, remains a designated extradition partner under Canada's *Extradition Act*, *id.*, s. 9(1) and Schedule, despite the events leading to its 2002 suspension, and then 2003 withdrawal, from the Commonwealth.

⁶ See, for example, John T. Parry, "International Extradition, the Rule of Non-inquiry, and the Problem of Sovereignty" (2010) 90:5 B.U.L. Rev. 1973. For an earlier oft-cited work, see Jacques Semmelman, "Federal Courts, the Constitution and the Rule of Non-inquiry in International Extradition Proceedings" (1991) 76 Cornell L. Rev. 1198. For a student note on the rule's origins, see Matthew Murchison, "Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-inquiry" (2007) 43 Stan. J. Int'l L. 295.

⁷ As confirmed by the landmark judgment of the European Court of Human Rights in *Soering v. United Kingdom*, Ser A No 161, (1989) 11 EHRR 439.

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "*Charter*"].

⁹ *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.).

¹⁰ *Extradition Act*, s. 40(1).

In *India v. Badesha*,¹¹ an appeal heard in March 2017 and decided in September of that year, a unanimous Supreme Court of Canada confirmed that yes, there is a role for inquiry in matters of extradition from Canada, with the Charter requiring a human rights appraisal of the record and practices of the foreign state making the extradition request. However, the impact of that inquiry with respect to a challenge to a surrender decision is likely to be tempered by considerations of reasonableness and the high degree of deference accorded to ministers of the Crown in matters of foreign affairs and international cooperation,¹² with cooperation referring to that in support of the prevention and prosecution of serious crime, rather than cooperation in the protection of human rights.¹³ In other words, while the Charter requires a human rights inquiry in matters of extradition, principles of administrative law will limit its impact.

At issue in *Badesha* was an extradition request made by India to Canada for the surrender of two Canadian citizens who are wanted for trial in India on a charge of conspiracy to commit murder. Upon their arrest, the two individuals raised concerns as to the nature of the treatment they would face after surrender, focusing in particular on the likelihood of violence and custodial mistreatment in India, as well as an alleged lack of access to adequate medical treatment given their advanced ages and states of ill-health. The Minister of Justice then requested and received diplomatic assurances from India to address these concerns, leading the legal challenge to focus on whether, in light of such promises not to mistreat, it was reasonable for the Minister to conclude that there was no substantial risk of mistreatment that would offend the principles of fundamental justice under section 7 of the Charter, or be otherwise unjust or oppressive under section 44(1)(a) of Canada's *Extradition Act*. By a 2-1 decision, the Court of Appeal for British Columbia found the Minister's decision to be unreasonable in the circumstances,¹⁴ but the Supreme Court of Canada disagreed.

¹¹ [2017] S.C.J. No. 44, 2017 SCC 44, [2017] 2 S.C.R. 127 (S.C.C.) [hereinafter "*Badesha*"].

¹² The Court attributes "superior expertise in Canada's international relations and foreign affairs" to the Minister, but fails to note that the office-holder under discussion is the Minister of Justice, and not the Minister of Foreign Affairs: *Badesha*, *id.*, at para. 39. By statute, it is the Minister of Foreign Affairs who has the responsibility to "conduct all diplomatic and consular relations on behalf of Canada" and "conduct and manage international negotiations as they relate to Canada": *Department of Foreign Affairs, Trade and Development Act*, S.C. 2013, c. 33, s. 10(2).

¹³ I have long argued that principles of comity and respect for international relations should be interpreted to include respect for both a state's extradition treaty obligations *and* its human rights treaty obligations: Joanna Harrington, "The Role for Human Rights Obligations in Canadian Extradition Law" [2005] 43 Can. Y.B. Int'l L. 45.

¹⁴ *India v. Badesha*, [2016] B.C.J. No. 365, 2016 BCCA 88 (B.C.C.A.) [hereinafter "*Badesha* (BCCA)"].

In this paper, I review the facts of the *Badesha* case, before examining what one may term the “other facts” of relevance, namely the nature of Canada’s extradition relationship with India and India’s record on human rights observance. I then focus attention on Canada’s human rights obligations, since it is Canada, not India, that must decide whether to surrender in circumstances where there is a risk of future mistreatment, leading to an analysis of whether assurances from the foreign state can be relied upon so as to remove or mitigate any basis for finding Canada in violation of its human rights obligations. In doing so, I refer to the judicial use of various contextual factors to assess the reliability of a diplomatic assurance, with Canada’s highest court having borrowed heavily from the “deportation with assurances” jurisprudence of the European Court of Human Rights, albeit a jurisprudential position that is not without a particular context, nor criticism. Lastly, I consider the territorial aspects of the crime underpinning the extradition request at issue in *Badesha*, suggesting that Canada could, and should, have prosecuted long ago the alleged orchestration of a contract killing by two Canadians operating on Canadian soil, with Canada and India both sharing in the desire and obligation to demonstrate that honour killings will not be tolerated in a just and fair society. There is truth in the aphorism that justice delayed is justice denied.

II. THE MURDER OF JASSI SIDHU AND THE EXTRADITION REQUEST

The facts of this case take the reader back a startling 18 years. On June 8, 2000, Jaswinder (Jassi) Kaur Sidhu, a 25-year-old beautician from Maple Ridge, British Columbia, was murdered in a rural area in Punjab, India. She was abducted, and later assaulted and stabbed, with her body left in a ditch.¹⁵ Her husband, Sukhwinder (Mithu) Singh Sidhu, was also seriously injured in the attack. An investigation by the Indian police led to the prosecution before an Indian court of 11 individuals on charges of murder, attempted murder and kidnapping to commit murder, resulting in seven convictions, although four of the seven were later acquitted on appeal.¹⁶ Through their investigation, the Indian police also obtained evidence indicating that two members of Jassi Sidhu’s family in Canada were involved in her murder, evidence that led to cooperation between the Indian

¹⁵ *Badesha*, *supra*, note 11, at para. 8. See further “Timeline of events surrounding so-called ‘honour killing’ of Jassi Sidhu” *The Canadian Press* (May 9, 2014) [hereinafter “Timeline of events”].

¹⁶ *Badesha*, *id.*, at para. 10.

authorities and the division of the Royal Canadian Mounted Police that provides federal, provincial and municipal policing services throughout British Columbia.

Eleven plus years after the murder on June 8, 2000, warrants were issued under Canada's *Extradition Act* authorizing the arrest on January 6, 2012 of Jassi Sidhu's mother, Malkit Kaur Sidhu, and her maternal uncle, Surjit Singh Badesha.¹⁷ Of Punjabi descent, both individuals have long been Canadian citizens. They resided in a large family compound in the city of Maple Ridge, and were aged 63 and 67 respectively at the time of their arrest. It is not alleged that they played any physical role in the attack that took place in India. Their extradition was sought on a charge of conspiracy to commit murder, it being alleged by the Indian authorities that the mother and uncle, having prospered in Canada through farming, had disapproved of Jassi Sidhu's secret marriage in India to a rickshaw driver from a poor family, and arranged an honour killing by hiring hit-men to carry out the attack.¹⁸ It has also been reported that the uncle as patriarch and lead decision-maker for the family had made plans for an arranged marriage for Jassi Sidhu with a much older businessman.¹⁹

This case has attracted much public interest, particularly in the Lower Mainland region of British Columbia. Media coverage helped spawn a petition website and a book, both entitled "Justice for Jassi",²⁰ as well as several documentaries,²¹ a made-for-TV movie²² and a self-described "angry" rebuke of a judicial decision barring extradition, absent stronger safeguards, by a former British Columbia attorney general and premier, also

¹⁷ Royal Canadian Mounted Police, Media Release, "Arrests Made in Jassi Sidhu Homicide" (January 6, 2012); Kim Bolan, "Charges at Last Against Mother and Uncle of Jassi Sidhu" *Vancouver Sun* (January 7, 2012); Andrea Woo, "B.C. police arrest mother, uncle linked to cold case murder" *Vancouver Sun* (January 9, 2012). See also Fabian Dawson, "Jassi Sidhu: The tragedy of a forbidden love" *The Province* (September 10, 2017).

¹⁸ *Badesha*, *supra*, note 11, at paras. 1-2, 8-9.

¹⁹ "B.C. victim of alleged honour killing was hit, threatened, friend testifies" *The Canadian Press* (May 29, 2013); "Mother and uncle in alleged 'honour killing' trial threatened daughter's secret husband with death: Crown" *The Canadian Press* (January 15, 2014); "Timeline of events", *supra*, note 15.

²⁰ See further <<http://justiceforjassi.com/>>. The 2002 book was co-authored by journalists with strong ties with the South Asian community in the Lower Mainland, including Fabian Dawson, the now-retired deputy editor of *The Province* newspaper, and Harbinder Singh Sewak, the publisher of the *South Asian Post*, described as Canada's premier English-language Indo-Canadian newspaper.

²¹ CBC, "The Fifth Estate: Murdered Bride", aired November 1, 2001; CBC, "The Fifth Estate: Escape from Justice", aired January 6, 2012.

²² *Murder Unveiled* (2005), directed by Vic Sarin, online: Internet Movie Database (IMDb) <<http://www.imdb.com/title/tt0758922/>>.

of Indian descent.²³ As for the timeline of the judicial proceedings, on May 9, 2014, an extradition judge found the evidence to be sufficient to commit Badesha and Sidhu to await surrender, with that evidence including extensive telephone records as well as testimony from Jassi Sidhu's friends and co-workers.²⁴ On November 14, 2014, the Minister of Justice made the orders for surrender, advising that these orders were conditional on the receipt of assurances from India regarding the treatment of Badesha and Sidhu. On January 18, 2015, the Minister advised that the desired assurances had been received.

Badesha and Sidhu then applied to the British Columbia Court of Appeal to quash the orders for surrender, arguing that the assurances were "insufficient to protect them from the death penalty, a corrupt trial, or from violence, torture and neglect of their medical care while they are in custody".²⁵ Both were suffering from age-related health conditions that required medical care not available in prison, with both having been detained in custody since their arrest in 2012 to ensure the safety of witnesses.²⁶ A majority of the Court of Appeal ruled that the Minister's decision to accept the assurances was not reasonable, suggesting a need for more meaningful ways to "transform India's good intentions into realistic protection."²⁷ Leave to appeal was then granted by the Supreme Court of Canada in August 2016, with the Attorney General of Canada acting on behalf of the Republic of India as the appellant, leading eventually to the Court's restoration of the surrender orders on September 8, 2017.

Badesha and Sidhu, however, remained in Canada. On September 21, 2017, the British Columbia Court of Appeal agreed to hear a judicial review application in relation to the Minister's refusal to reconsider the decision to surrender, with counsel alleging that new information of relevance had been provided while the case was on appeal.²⁸ It is further alleged that the Minister committed an abuse of process by way of an attempt to whisk Badesha and Sidhu out of the country, moving them from Vancouver to

²³ Ujjal Dosanjh, "Extradition rejection for accused in Jassi Sidhu case denies justice to this murdered woman" *The Province* (February 27, 2016).

²⁴ *India v. Badesha*, [2014] B.C.J. No. 910, 2014 BCSC 807 (B.C.S.C.) [hereinafter "*Badesha* (BCSC)"].

²⁵ *Badesha* (BCCA), *supra*, note 14, at para. 4.

²⁶ See further the application for bail in *India v. Badesha*, [2014] B.C.J. No. 2882, 2014 BCCA 452, at para. 10 (B.C.C.A.).

²⁷ *Badesha* (BCCA), *supra*, note 14, at para. 65.

²⁸ *India v. Sidhu*, [2017] B.C.J. No. 1876, 2017 BCCA 333 (B.C.C.A.).

Toronto without advance notice to their counsel.²⁹ (Under the terms of the extradition treaty, advance notice is provided to India).³⁰ A hearing of this application was scheduled for April 2018, but it has been delayed due to demands for disclosure.³¹ Meanwhile, in March 2018, in a decision concerning the sponsored immigration to Canada of one of the perpetrators of the 2000 attack, who was eventually acquitted by the Indian Supreme Court, we find further confirmation that the murder of Jassi Sidhu was orchestrated by telephone calls to and from her family in Canada.³²

III. THE OTHER FACTS

There are, however, other facts of relevance, most notably the facts of India's human rights record given the nature of the concerns raised in the appeal by Badesha and Sidhu. In the section below, I examine the facts of that record as found in the reports of several international human rights monitoring mechanisms established by states. One could also draw on reports by reputable non-governmental organizations, but given the judicial respect to be accorded to comity in international relations, assessments from bodies created by governments may carry greater weight. I also examine the nature of Canada's extradition treaty with India given that there is always judicial interest in any extradition case in the maintenance of Canada's extradition relationships, with the courts having long accepted that extradition "is founded on the concepts of 'reciprocity, comity and respect for differences in other jurisdictions'".³³ In truth, both aspects involve matters of fact and law, with extradition treaties, like human rights treaties, imposing legally binding international obligations that are transformed into domestic law obligations through the *Extradition Act* and the Charter.

²⁹ See further Jason Proctor, "One last, last chance: Accused in honour killing case appeal for clemency" *CBC News* (January 17, 2018). See also Douglas Quan, "Canada worked with India in attempt to 'secretly' extradite honour killing suspects: Defence lawyers" *National Post* (January 10, 2018).

³⁰ *Extradition Treaty Between the Government of Canada and the Government of India*, February 6, 1987, Can T.S. 1987 No. 14 (entered into force February 10, 1987), art. 12(2) [hereinafter "Canada-India Extradition Treaty"].

³¹ *India v. Sidhu*, [2018] B.C.J. No. 107, 2018 BCCA 25 (B.C.C.A.).

³² *Canada (Minister of Citizenship and Immigration) v. Singh Sidhu*, [2018] F.C.J. No. 298, 2018 FC 306, at paras. 4-14 (F.C.) [hereinafter "*Singh Sidhu*"]. See also Douglas Quan, "Man mistakenly got permanent residency" *National Post* (March 21, 2018).

³³ *Kindler*, *supra*, note 2, at 844, cited in *Badesha*, *supra*, note 11, at para. 35.

1. The Canada-India Extradition Treaty

Canada and India entered into formal extradition relations in 1987,³⁴ although Canada had extradited an individual to India in 1985 without a treaty in place.³⁵ The conclusion of a treaty to secure reciprocal extradition obligations was motivated by a desire, to quote the treaty's preamble, "to make more effective the cooperation of the two countries in the suppression of crime." It was also described as one of several "concrete steps ... necessary to combat terrorism,"³⁶ with both governments keen to enable Indian extradition requests for Canadian-based "Sikh extremists" seeking an independent homeland in India's northern state of Punjab.³⁷ To explain further, India had been seeking such a treaty with both Canada and the United Kingdom in light of their large Sikh diaspora populations,³⁸ with the Air India bombing of 1985 contributing to Canada's desire to comply. Confirmation that this focus was the motivation for the treaty's conclusion can be found in the writings of the Right Honourable Joe Clark, who served as Canada's foreign minister at the time.³⁹

Given its link to counter-terrorism efforts, it is unlikely that the breach of an assurance from India concerning either Badesha or Sidhu would lead to "the possible termination of Canada's extradition treaty with India".⁴⁰ This is not to say, however, that the treaty cannot be used for non-terroristic crimes. Indeed, India's public posting of a list of the individuals it has extradited to foreign countries indicating a total of six extraditions to Canada, three for drug offences, two for murder and one for sexual abuse of children, with these extraditions taking place between 2002 and 2007.⁴¹ No equivalent record is made publicly available by Canada.

As for India's efforts *vis-à-vis* the United Kingdom, these eventually led to the adoption of an India-United Kingdom extradition treaty in

³⁴ Canada-India Extradition Treaty, *supra*, note 30.

³⁵ SI/85-190, *Canada Gazette*, Part II, vol. 119:23, November 13, 1985.

³⁶ Canada-India Extradition Treaty, *supra*, note 30, Preamble.

³⁷ Joe Clark, *How We Lead: Canada in a Century of Change* (Toronto: Random House Canada, 2013), at 61 [hereinafter "Clark"]; Darsham Singh Tatia, *The Sikh Diaspora: The Search for Statehood* (London: UCL Press, 1999), at 189 [hereinafter "Tatia"].

³⁸ See further Tatia, *id.*, esp. 159-64, 171-76, 189-90.

³⁹ Clark, *supra*, note 37, at 61. Press reports confirm that Joe Clark, as Secretary of State for External Affairs, had visited India in December 1985 to express Canadian interest in negotiating an extradition treaty: "Canadian Official in New Delhi" *The New York Times* (December 15, 1985).

⁴⁰ A measure suggested by the Court in *Badesha*, *supra*, note 11, at para. 19.

⁴¹ Government of India, Ministry of External Affairs, "List of Fugitives Extradited to Foreign Countries" (updated as of March 5, 2018), online: <<http://www.mea.gov.in/byindia.htm>>.

1992.⁴² However, in contrast with Canada, which made its treaty with India by executive action and without review by Parliament, parliamentary action was required to enable the United Kingdom to ratify its extradition treaty with India. The points raised during the parliamentary debate prompted the minister responsible to make repeated reference to the “firm assurances” provided by the Indian Government to address concerns about India’s respect for human rights.⁴³

An extradition treaty imposes on its parties a “duty to extradite” upon request, provided the request meets the treaty’s conditions. The Canada-India Extradition Treaty is no different in this respect,⁴⁴ with a double-criminality provision requiring the extradition offence to be punishable by the laws in both countries by at least one year’s imprisonment.⁴⁵ Various grounds for refusing a request are then included in the Treaty. However, the terms of India’s extradition treaties with both Canada and the United Kingdom weaken the role for an exception to extradition for political offences⁴⁶ — an exception found in many extradition treaties⁴⁷ — with the Canada-India Extradition Treaty including an additional safeguard to secure timely trials.⁴⁸ The other notable feature found in each of the two extradition treaties with India concerns the use of extraterritorial jurisdiction, with provision made to extend the treaty’s application, on a reciprocal basis, to offences “committed outside the territory but within the jurisdiction” of the state making the extradition request.⁴⁹ As explained by

⁴² *Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India*, September 22, 1992, UKTS 1994 No. 13 (entered into force November 15, 1993) [hereinafter “India-UK Extradition Treaty”]. To date, only one extradition from the United Kingdom to India has taken place, and that occurred with the consent of the individual concerned, while other extradition requests have been barred by the British courts on human rights grounds; a situation that has attracted comment in the Indian Parliament and press. See, for example, Press Trust of India, “UK rejects 2 Indian extradition requests” *The Economic Times (Times of India)* (November 5, 2017).

⁴³ United Kingdom, *House of Commons Debates*, July 21, 1993, vol. 229, cc. 445-69. The order giving legal effect to the treaty was adopted by a divided House by a vote of 123 to 38: United Kingdom, *House of Commons Debates*, July 21, 1993, vol. 229, cc. 468.

⁴⁴ Canada-India Extradition Treaty, *supra*, note 30, art. 1.

⁴⁵ *Id.*, art. 3.

⁴⁶ *Id.*, art. 5; India-UK Extradition Treaty, *supra*, note 42, art. 5.

⁴⁷ See, e.g., *Model Treaty on Extradition*, GA Res 45/116, U.N. Doc. A/RES/45/116 (1990), art. 3 [hereinafter “*Model Treaty on Extradition*”].

⁴⁸ Canada-India Extradition Treaty, *supra*, note 30, art. 4(4) (“the requesting state shall ensure that the person extradited is brought to trial within 6 months of the extradition”). But see art. 4(5), which provides for bail to be considered and the setting of a trial date “where trial has not commenced within 6 months”.

⁴⁹ Canada-India Extradition Treaty, *supra*, note 30, art. 2. See also India-UK Extradition Treaty, *supra*, note 42, arts. 3 and 6.

the Minister of State for the Home Office to the British Parliament, this extension of jurisdiction meant that “[t]hose who organize crimes from this country cannot be allowed to escape the consequences, simply because their intention was to see a very serious crime committed in another country.”⁵⁰ Both treaties also contain the usual direction that an extradition request may be refused if the person sought is being proceeded against in the requested state,⁵¹ an exception of relevance if Canada had opted to prosecute the conspiracy that took place on a transnational basis in both Canada and India, allegedly orchestrated by two Canadian citizens from their home in Canada, that resulted in the kidnapping, assault and murder of a third Canadian citizen, while she was in India.

2. India’s Human Rights Record

The human rights record of the state making an extradition request is also a relevant consideration, with the Supreme Court of Canada having made clear that when evaluating whether an individual will face a substantial risk of ill-treatment 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-government organizations”.⁵² (Presumably, reports by *inter-governmental* organizations, such as the United Nations, may also be considered.) While the focus of this “fact-driven inquiry” remains on the “personal risk” faced by an individual,⁵³ “general evidence of pervasive and systematic human rights abuses in a receiving state can form the basis for a finding that the person faces a substantial risk”.⁵⁴ The Court found support for this proposition in the famous case of *Chahal v. United Kingdom*,⁵⁵ albeit that in that case, a Grand Chamber of the European Court of Human Rights had barred the deportation of a Sikh separatist leader from Britain to India on the basis of a serious risk of future ill-treatment having been established by reference to reports of persistent problems of human rights abuses by the Indian police and security

⁵⁰ United Kingdom, *House of Commons Debates* (July 21, 1993), vol. 229, cc. 449-50 (David Maclean).

⁵¹ Canada-India Extradition Treaty, *supra*, note 30, art. 5(2)(2); India-UK Extradition Treaty, *supra*, note 42, art. 8; *Model Treaty on Extradition*, *supra*, note 47, art. 4(c).

⁵² *Badesha*, *supra*, note 11, at para. 44.

⁵³ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39 (S.C.C.) [hereinafter “*Suresh*”].

⁵⁴ *Badesha*, *supra*, note 11, at para. 45.

⁵⁵ App. No. 22414/93, (1997), 23 E.H.R.R. 413 (G.C.).

forces.⁵⁶ The Grand Chamber was also “not persuaded” that an assurance provided by the Indian Government “would provide Mr Chahal with an adequate guarantee of safety.”⁵⁷

India is a party to the two leading international human rights treaties of general application, the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁸ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁵⁹ as well as human rights treaties of specific application to matters of racial discrimination, women’s rights, children’s rights and the rights of persons with disabilities. As a state party, India is bound to respect the ICCPR’s prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment,⁶⁰ as well as the provisions on the rights to life and a fair trial.⁶¹ India is also bound by the ICESCR’s recognition of “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁶² In its judgment in *Badesha*, the Supreme Court of Canada recognized that India was a party to the ICCPR as a factor relevant to the assessment of the risk of torture or mistreatment faced by Badesha and Sidhu.⁶³ But the Court failed to note that these treaties also entail state acceptance of an international monitoring process, and that India had long stopped reporting on the performance of its ICCPR obligations to that treaty’s monitoring body, known as the Human Rights Committee.⁶⁴ Indeed, India’s last report to this independent international body was made in November 1995, with the Committee ordering the next report to be submitted by the end of 2001.⁶⁵ The desired report has yet to materialize 18 years later, with such disregard hardly a sign of an Indian commitment to respecting its treaty obligations.

An even more worrisome sign is India’s long-standing inability to secure the domestic change it needs to be in a position to become a party to the 1984 *Convention Against Torture and Other Cruel, Inhuman or*

⁵⁶ *Id.*, at para. 102.

⁵⁷ *Id.*, at para. 105.

⁵⁸ December 19, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force March 23, 1976), accession by India April 10, 1979 [hereinafter “ICCPR”], 172 states parties.

⁵⁹ December 19, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force January 3, 1976), accession by India April 10, 1979 [hereinafter “ICESCR”], 169 states parties.

⁶⁰ ICCPR, *supra*, note 58, art. 7.

⁶¹ *Id.*, arts. 6 and 14.

⁶² ICESCR, *supra*, note 59, art. 12.

⁶³ *Supra*, note 11, at para. 60.

⁶⁴ ICCPR, *supra*, note 58, art. 28 *et seq.*

⁶⁵ *Concluding Observations of the Human Rights Committee: India*, U.N. Doc. CCPR/C/79/Add.81 (August 4, 1997).

Degrading Treatment or Punishment,⁶⁶ with India aware that its failure to ratify this treaty has provided a ground for the judicial refusal of a desired extradition from Denmark.⁶⁷ As a non-party to this widely ratified treaty setting universal minimum standards, India stands with Angola, Iran, Malaysia, North Korea, Sudan and Zimbabwe, as well as several small states such as Haiti, Papua New Guinea, and Suriname. India signed this treaty in 1997, 10 years after the treaty's international entry into force and in fulfilment of an election commitment made by a coalition government in 1996.⁶⁸ However, as a legal matter, signature is not the same as ratification for many multilateral treaties, with a mere signatory not being bound by the treaty's provisions, absent a general obligation to refrain from acts which would defeat the object and purpose of the treaty.⁶⁹ While disagreement may arise as to what is a treaty's object and purpose, as a signatory, rather than a party, India is not bound by the treaty's express extension of its prohibitions and protections to "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture",⁷⁰ and nor is India subject to the international scrutiny of its actions by an independent treaty-monitoring body, in this case, the Committee Against Torture.⁷¹

"India's efforts to enact domestic legislation that would enable them to ratify the CAT," (referring to the Treaty rather than the Committee), receive a brief mention in *Badesha*,⁷² but without further context. As noted above, the wait for action has been for some 20 years, with the insufficiency of India's efforts documented in India's own reports to the United Nations Human Rights Council, prepared for the examination of its human rights record by other states as part of what is called the "universal periodic review". In its 2008 report, India identified itself as a signatory to

⁶⁶ December 10, 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 14 (entered into force June 26, 1987), signed by India October 14, 1997 [hereinafter "Convention Against Torture"], 165 states parties.

⁶⁷ See further the *Answer of the Minister of State in the Ministry of External Affairs* (August 10, 2011) to a parliamentary question concerning the requested extradition to India from Denmark of the alleged arms provider Niels Holck, aka Kim Davy, posted online by India's Ministry of External Affairs, at: <<http://www.mea.gov.in/lok-sabha.htm?dtl/16830/q1651+extradition+of+kim+davy>>.

⁶⁸ As India noted when appearing before the Human Rights Committee in mid-1997: *Summary Record of the 1603rd Meeting*, U.N. Doc. CCPR/C/SR.1603 (July 29, 1997), para. 5.

⁶⁹ A customary international law rule found codified in art. 18 of the *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 (entered into force January 27, 1980), to which India is also not a party.

⁷⁰ Convention Against Torture, *supra*, note 66, art. 16.

⁷¹ *Id.*, art. 17 *et seq.*

⁷² *Supra*, note 11, at para. 60.

the treaty, but made no mention of any plans to enact domestic legislation to pave the way for ratification.⁷³ In its 2012 report, India explained that a bill introduced in Parliament in 2010 had failed to attract the support of the upper house (*Rajya Sabha*) and was instead “referred to a Parliamentary Select Committee which had made certain recommendations.”⁷⁴ In its 2017 report, India again indicated its commitment to ratifying the treaty, but noted that “the Law Commission of India is examining the changes required to domestic law prior to ratification.”⁷⁵ As for the role of the judiciary in serving, in India’s words, “as a bulwark against ... violations” of the torture provisions of the Indian Penal Code,⁷⁶ a recent U.S. government report refers to a “two-fold rise in reported custodial death and police torture cases” and government inaction in the face of court orders.⁷⁷

IV. CANADA’S HUMAN RIGHTS OBLIGATIONS

Canada is a party to the Convention Against Torture, and thus unlike India, Canada accepts both an international legal obligation to extradite upon request under an extradition treaty *and* an international legal obligation not to extradite where there are substantial grounds for believing the individual will be in danger of being subjected to cruel, inhuman or degrading treatment.⁷⁸ The latter is often referred to as an obligation of non-*refoulement*; *refouler* being a French verb for return, force or push back. These treaty obligations have been transformed into Canadian law obligations, through the *Extradition Act* and the Charter, with the Supreme Court of Canada having held that section 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”.⁷⁹ In

⁷³ National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1: India, U.N. Doc. A/HRC/WG.6/1/IND/1 (March 6, 2008), at para. 38.

⁷⁴ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, U.N. Doc. A/HRC/WG.6/13/IND/1 (March 8, 2012), at para. 29.

⁷⁵ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, U.N. Doc. A/HRC/WG.6/27/IND/1 (February 23, 2017), at para. 33.

⁷⁶ *Id.*

⁷⁷ United States, Department of State, *Country Reports on Human Rights Practices for 2017: India*, online: <<https://www.state.gov/documents/organization/277525.pdf>>.

⁷⁸ Convention Against Torture, *supra*, note 66, art. 3(1) read with art. 16.

⁷⁹ *Badesha*, *supra*, note 11, at para. 38, citing *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 23 (S.C.C.) [hereinafter “*Divito*”].

other words, as the Court has emphasized in *Badesha*, “surrendering a person to face a substantial risk of torture or mistreatment in the requesting state will violate the principles of fundamental justice.”⁸⁰ However, in assessing whether there is a substantial risk of torture or mistreatment, the Minister of Justice may take into account any assurances made by the requesting state regarding the treatment to be faced by the requested persons, despite the absence of any means to guarantee in law that these assurances will be respected by the foreign state, or enforced by the local courts.

Extradition on assurance, or conditional extradition, is not new in Canada, with the Court in 2001 recognizing a Charter-derived obligation in capital cases to secure an assurance from the requesting state that a death sentence will not be imposed.⁸¹ However, the death penalty, although heavily circumscribed, remains a lawful penalty under international law, whereas the serious mistreatment of a human being is a universal illegality, with the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment being absolute in nature, and permitting of no exceptions, under both customary and conventional international law.⁸² This distinction was expressly recognized by the Supreme Court in 2001,⁸³ but in *Badesha*, the Court has confirmed 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.”⁸⁴

As for how one determines the reliability of a diplomatic assurance, and thus its sufficiency in removing a substantial risk of ill-treatment, a contextual approach must be taken, involving the consideration of multiple factors. The mere fact that Canada has felt moved to ask another state to promise not to torture cannot be treated as proof that a risk exists, with the Supreme Court accepting that assurances “may be requested by the Minister out of an abundance of caution.”⁸⁵ It has also been argued that assurances can serve to reduce the risk of torture by regulating the

⁸⁰ *Badesha*, *id.*

⁸¹ *Burns*, *supra*, note 1.

⁸² ICCPR, *supra*, note 58, art. 7; Convention Against Torture, *supra*, note 66, art. 2(2) read with art. 16(1).

⁸³ *Suresh*, *supra*, note 53, at para. 124.

⁸⁴ *Supra*, note 11, at para. 46.

⁸⁵ *Id.*, at para. 52.

behaviour of the assuring state,⁸⁶ with Canada having made public its view, by way of a joint submission to the Committee Against Torture,⁸⁷ that “when used appropriately, diplomatic assurances have served as an effective tool for States Parties to help ensure compliance with Article 3” of the Convention Against Torture on non-*refoulement*. The joint submission, however, focused on assurances from states parties, with a non-party state bound by a customary international law prohibition, but shielded from any scrutiny by the treaty-monitoring body by virtue of its non-party status.

As for the contextual factors to consider, Canada’s highest court has adopted the non-exhaustive list of factors identified in the *Othman* decision of the European Court of Human Rights, even though that case concerned the long desired deportation of a non-national from Britain to Jordan on national security grounds.⁸⁸ Indeed, in the *Othman* case, Britain had recognized that there is an absolute legal bar on surrendering a person to face serious ill-treatment, while also recognizing that the risk *Othman* posed to the British public, as an alleged radical Islamic cleric intent on encouraging terrorism, required restrictions on his liberty until a lawful surrender could be arranged. This additional context helps explain the European Court’s view in 2012 that “States must be allowed to deport non-nationals whom they consider to be threats to national security,”⁸⁹ leading to the suggestion (or criticism) of a compromise to support, in the Court’s words, “a firm stand against those who contribute to terrorist acts.”⁹⁰ It is also a context that could be used to distinguish *Othman* from *Badesha* since the latter is not a national security case, nor a case of alleged terrorism, nor a case concerning the surrender of non-nationals. Nonetheless, the Supreme Court of Canada has found the factors identified in *Othman* to assess the assurance to have general

⁸⁶ Jeffrey G. Johnston, “The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11” (2011) 11 Int’l Crim. L. Rev. 1.

⁸⁷ *Joint Observations of Canada, Denmark, the United Kingdom, and the United States of America on Paragraphs 19-20 of the Committee Against Torture’s Draft General Comment No. 1 (2017) on Implementation of Article 3 in the Context of Article 22*, dated March 31, 2017, online: <<http://www.ohchr.org/Documents/HRBodies/CAT/GCArticle3/JointSubmission.pdf>> [hereinafter “Joint Observations”].

⁸⁸ *Othman (Abu Qatada) v. United Kingdom*, App No 8139/09, (2012), 55 E.H.R.R. 1 [hereinafter “*Othman*”]. The U.K. Government’s effort to negotiate memoranda of understanding with Jordan, Libya, Algeria and Lebanon to facilitate the deportation of particular individuals in a manner consistent with the United Kingdom’s international human rights obligations dates back to 2005: United Kingdom, *House of Commons Debates*, December 19, 2005, col. 2356-WA.

⁸⁹ *Othman, id.*, at para. 184.

⁹⁰ *Id.*, at para. 183.

relevance. These factors include such matters as who within the foreign state has provided the assurance and on what terms of specificity, as well as the receiving state's record in abiding by similar assurances, in addition to whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, and whether there is an effective system of protection in the receiving state, defined to include a state's cooperation with international monitoring mechanisms.⁹¹

In and of themselves, these contextual factors are not problematic, and indeed, their detailed exposition by the courts serves to require governments to do more than accept an assurance on mere face value. But the real test lies in the application of this exhortation, and a court's willingness to scrutinize a government's assessment so as to ensure a degree of robustness in judicial review that is in keeping with the absolute nature of the right to be free from serious mistreatment. It is on this aspect where the Supreme Court of Canada disappoints, relying on past holdings that "[t]he role of a reviewing court ... is not to re-assess the relevant facts and substitute its own view for that of the Minister" and that the court "must examine whether the decision falls within a range of reasonable outcomes."⁹² Nevertheless, the Court did come to the view that the majority of the Court of Appeal "did not consider many of the relevant factors the Minister considered in assessing the reliability of the assurance."⁹³ It also found the Court of Appeal to have been dismissive of the role for consular monitoring.⁹⁴

And yet, the Supreme Court of Canada provided no comment on the fact that in *Othman*, the assurances were provided by a state party to the Convention Against Torture, with Jordan having acceded to that treaty in 1991. Nor did the Court draw a link between its mention of rights protection by way of "cooperation with international monitoring mechanisms" and India's complete disregard of its reporting obligation to the Human Rights Committee since 2001. India, as a non-party state, is also not subject to any monitoring by the Committee Against Torture, which has developed a specific expertise with non-*refoulement* claims since they constitute the great majority of its caseload. The existence and terms of the assurances used to secure Othman's deportation to Jordan

⁹¹ *Id.*, at para. 189, cited with approval in *Badesha*, *supra*, note 11, at para. 51.

⁹² *Badesha*, *id.*, at para. 57, citing *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41 (S.C.C.).

⁹³ *Badesha*, *id.*, at para. 59, and see para. 63.

⁹⁴ *Id.*, at paras. 64-65.

were also given public exposure, with publicity being an encouragement for compliance, whereas in Canada, past access-to-information requests for diplomatic assurances have been refused on the basis of a discretionary exemption for “diplomatic correspondence exchanged with foreign states”.⁹⁵ Moreover, in the *Othman* case, the assurances negotiated by way of memoranda of understanding eventually formed the basis of a legally binding treaty,⁹⁶ with Othman voluntarily consenting to his surrender if that treaty, with its guarantees of fair treatment and a fair trial, was ratified by the Jordanian Parliament and endorsed by the Jordanian King.⁹⁷ Upon those terms, Othman, or Abu Qatada as he is also known, was indeed surrendered to Jordan.⁹⁸

V. THE TERRITORIAL CONNECTION

The Minister of Justice has taken the view that the extradition of Badesha and Sidhu must take place so that India can see “justice done on India’s territory”,⁹⁹ and the Supreme Court of Canada has confirmed that it remains “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”.¹⁰⁰ No mention is made of India’s (and Canada’s) acceptance in its treaty relationship of extraterritorial jurisdiction as a means to foreclose a perpetrator’s evasion from prosecution. Moreover, there remains the question as to, on whose territory did the crime of conspiracy to commit murder occur or given the transnational context of this case, on whose territories? The facts suggest an agreement to conspire may well have been made between the

⁹⁵ *Access to Information Act*, R.S.C. 1985, c. A-1, s. 15(1)(h). See also *Do-Ky v. Canada (Minister of Foreign Affairs and International Trade)*, [1999] F.C.J. No. 673, 173 D.L.R. 4th 515, 164 F.T.R. 160 (F.C.A.).

⁹⁶ *Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan*, March 24, 2013, U.K.T.S. 2013 No 25 (entered into force July 1, 2013), online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/252502/TS.25.Cm8681.pdf>.

⁹⁷ David Barrett and Tom Whitehead, “Abu Qatada extradition treaty finalised by British Parliament” *The Telegraph* (June 21, 2013); Dominic Casciani, “Jordan Passes Abu Qatada treaty” *BBC News* (June 12, 2013); “Abu Qatada treaty endorsed by King of Jordan” *BBC News* (June 18, 2013).

⁹⁸ “Britain finally deports Abu Qatada to Jordan after decade long saga” *The Telegraph* (July 7, 2013). He was later acquitted of terrorism charges before the Jordanian courts: “Abu Qatada found not guilty by Jordan court of terror plot” *BBC News* (June 26, 2014).

⁹⁹ Noted in *Badesha*, *supra*, note 11, at paras. 6 and 66.

¹⁰⁰ *Id.*, at para. 35.

mother and uncle in Canada, and at the direction of the mother and/or uncle by telephone with and through relatives in India, possibly backed by the promise of support for a family-class immigration application to Canada.¹⁰¹

Canadian prosecutors may tend to favour a traditional approach to jurisdiction, preferring that prosecutions take place in the territory where a crime was completed.¹⁰² However, Canadian law has long accepted a broader view of territorial jurisdiction, enabling the prosecution in Canada of transnational crime where there is a “real and substantial link” between the offence and Canada.¹⁰³ According to the extradition judge, certified telephone records establish “extensive contact” between Badesha’s telephone number in Canada and the four principals in India before, on the day of, and after the killing in June 2000.¹⁰⁴ Indeed, the extradition judge found there were 266 calls, lasting a total of 18 hours and 13 minutes,¹⁰⁵ lending support to the view that a conspiracy took place on Canadian soil, orchestrated by at least one Canadian citizen, with the aim to have another Canadian citizen killed while she was outside the country. In the view of the Minister of Justice, “much, if not all” of the evidence needed to prosecute Badesha was available in India.¹⁰⁶ However, according to the British Columbia Court of Appeal, “a substantial body of evidence exists in Canada”,¹⁰⁷ with a Canadian prosecution, and not impunity, being the alternative when an extradition is barred by serious human rights concerns. This aspect of extradition law has long been encapsulated by the Latin maxim *aut dedere aut judicare* (“either extradite or prosecute”), embraced in the writings of the Dutch jurist Hugo Grotius since the 1600s,¹⁰⁸ and today codified in various treaties.¹⁰⁹ For more creative thinkers, a third option may also

¹⁰¹ See *Singh Sidhu*, *supra*, note 32.

¹⁰² This is not always the case, with the prosecution in Canada of a Canadian businessman of Indian descent who offered bribes to officials in India to secure a lucrative contract having survived the challenge that was “no sufficient connection to Canada to give the court territorial jurisdiction over what occurred”: *R. v. Karigar*, [2017] O.J. No. 3530, 2017 ONCA 576, at para. 2 (Ont. C.A.), leave to appeal refused [2017] S.C.C.A. No. 385 (S.C.C.).

¹⁰³ *R. v. Libman*, [1985] S.C.J. No. 56, [1985] 2 S.C.R. 178 (S.C.C.).

¹⁰⁴ *Badesha* (BCSC), *supra*, note 24, at para. 8.

¹⁰⁵ *Id.*, at paras. 59 and 97.

¹⁰⁶ As noted in *Badesha*, *supra*, note 11, at para. 21.

¹⁰⁷ *Badesha* (BCCA), *supra*, note 14, at para. 73.

¹⁰⁸ As recognized by the International Law Commission’s Working Group on the Obligation to Extradite or Prosecute, with the Working Group’s final report reproduced as Annex A to *Report of the International Law Commission*, U.N. Doc. A/68/10 (2013), at 126, para. 3.

¹⁰⁹ See, for example, art. 7 of *The Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, December 16, 1970, 860 U.N.T.S. 106, Can. T.S. 1972 No. 23 (entered into force

exist, involving the negotiation of the temporary surrender of a Canadian national for trial in a foreign state on condition or assurance that they will be returned to serve any sentence of imprisonment in Canada. This option finds recognition in the revised *United Nations Model Treaty on Extradition*,¹¹⁰ and in a long-standing pan-European extradition arrangement.¹¹¹ The existence of this option of temporary surrender and return for imprisonment is also acknowledged in several widely ratified multilateral extradition arrangements to which Canada and India are party.¹¹²

VI. CONCLUSION

It is a welcome development that extradition law in Canada no longer speaks of safe havens and rules of non-inquiry but instead embraces the

December 4, 1969). See also the survey of multilateral instruments containing an “extradite or prosecute” provision prepared by the Secretariat to assist the International Law Commission in its study of this topic: U.N. Doc. A/CN.4/630 (2010). Bilaterally, the “extradite or prosecute” principle is most often invoked when a requested state refuses to extradite one of its nationals and instead submits the case to its national prosecuting authorities; an option typically provided by treaty. See, for example, art. 3(2) of the *Extradition Treaty between the Government of Canada and the Government of the Republic of France*, December 17, 1988, Can. T.S. 1989 No. 38 (entered into force December 1, 1989).

¹¹⁰ A footnote added to art. 4(a) of the original *Model Treaty on Extradition* states that “Some countries may also wish to consider, within the framework of national legal systems, other means to ensure that those responsible for crimes do not escape punishment on the basis of nationality, such as, *inter alia*, provisions that would permit surrender for serious offences, or permit temporary transfer of the person for trial and return of the person to the requested State for service of sentence”: *International Cooperation in Criminal Matters*, GA Res. 52/88, U.N. Doc. A/RES/52/88 (1997), annex, art. 4. An agreement to provide for the temporary transfer and subsequent return of a national would also address the point made in *Divito, supra*, note 79, at para. 40, that “as a matter of international law, Canada has no legal authority to *require* the return of a citizen who is lawfully incarcerated by a foreign state” (emphasis in original).

¹¹¹ Article 19(2) of the *European Convention on Extradition*, December 13, 1957, 359 U.N.T.S. 273, E.T.S. No. 24 (entered into force April 18, 1960), as amended, provides for the temporary surrender of a requested person “in accordance with conditions to be determined by mutual agreement”. Belgium, the Netherlands and Luxembourg have each lodged formal declarations with the Council of Europe’s treaty secretariat indicating that they will grant temporary surrender only if it concerns a person who serves a sentence on its territory and if particular (or special) circumstances require it.

¹¹² See, for example, *United Nations Convention Against Corruption*, October 31, 2003, 2349 U.N.T.S. 41, Can. T.S. 2007 No. 7 (entered into force December 14, 2005), art. 44(12), 186 states parties, which provides assurance that there will be treaty compliance if a state party must “surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought”, while also requiring “that the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate”.

view that the extradition process also serves to protect the rights of the persons sought.¹¹³ These rights are best protected when the Charter is interpreted so as to require the Minister to conduct a meaningful appraisal of the human rights record of the requesting state, including its willingness to subject that record to independent third party monitoring. After all, would not all countries comply if they were simply asked to assure us that they will not mistreat? It is worrisome that a country committed to a principled foreign policy does not insist that its extradition partners be parties to the Convention Against Torture. This treaty provides more than support for the customary rule that prohibits the sending of an individual to face a substantial risk of serious ill-treatment. It also imposes a legal requirement for regular state reporting to an independent, international, treaty-monitoring body, with monitoring mechanisms, whether consular or otherwise, viewed as an important safeguard to enhance the reliability of a diplomatic assurance.¹¹⁴ State acceptance of post-surrender monitoring could also be a term written into an extradition treaty, for example, with an Australian parliamentary scrutiny committee having made recommendations, repeatedly, for the inclusion of public monitoring and annual status reports on extradited persons to address concerns about human rights observance in a foreign state.¹¹⁵

As for lessons to be learned from *India v. Badesha*, it would be wise for future legal challenges to extradition decisions to focus on forms of cruel, inhuman and degrading treatment or punishment, rather than claims of torture. With torture being at the very apex of the spectrum of all forms of mistreatment, it may well be difficult to prove that an individual faces a substantial risk of torture upon surrender, while challenges about the weakness of the evidence are even less likely to succeed, absent a case that suggests gross violations of the right to a fair trial. But the real obstacle for a future legal challenge will be the

¹¹³ An objective clearly embraced in *M.M. v. United States of America*, [2015] S.C.J. No. 62, 2015 SCC 62, [2015] 3 S.C.R. 973, at paras. 1 and 16 (S.C.C.).

¹¹⁴ Joint Observations, *supra*, note 87, at para. 8; *Badesha*, *supra*, note 11, at paras. 64-65.

¹¹⁵ See, for example, Commonwealth Parliament of Australia, Joint Standing Committee on Treaties, Report 131, tabled on November 28, 2012, at paras. 3.35-3.36. See also Report 91, tabled on June 26, 2008, Chapter 2, paras. 2.33-2.43, with the non-governmental organization Civil Liberties Australia having also called for an extradition monitor. See also Joanna Harrington, "Monitoring and the Referral of Criminal Cases between Jurisdictions: An ICTR Contribution to Best Practice" in C.C. Jalloh & A.B.M. Marong, eds., *Promoting Accountability under International Law for Gross Human Rights Violations in Africa: Essays in Honour of Prosecutor Hassan B. Jallow* (Leiden: Martinus Nijhoff Brill, 2015), at 478-97.

readiness of a court to scrutinize a government's assessment of the risk, with a heightened level of judicial review surely justified by the absolute nature of the right to be free from serious mistreatment. As for Badesha and Sidhu, Canada may well have wanted to support India in a show of resolve to prosecute those who commit honour killings, a practice that endangers the lives of so many women who fear retribution from their families for marrying an individual of a different caste or religion. Sadly, however, honour killings also occur in Canada,¹¹⁶ calling for a similar Canadian resolve. "Justice for Jassi", in the sense of a judicial proceeding, however, may ultimately be denied, with Badesha and Sidhu now in their 70s and in poor health.

¹¹⁶ See, for example, *R. v. Shafia*, [2016] O.J. No. 5627, 2016 ONCA 812 (Ont. C.A.).

