Court File No. 36981

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N :

ATTORNEY GENERAL OF CANADA
ON BEHALF OF THE REPUBLIC OF INDIA

APPELLANT

- and -

SURJIT SINGH BADESHA and
MALKIT KAUR SIDHU

RESPONDENTS

- and -

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INTERVENERS

JOINT FACTUM OF THE INTERVENERS CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, THE CANADIAN CENTRE FOR VICTIMS OF TORTURE, AND THE CANADIAN COUNCIL FOR REFUGEES

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

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PART I - FACTS

1. Canadian Lawyers for International Human Rights, the Canadian Centre for Victims of Torture, and the Canadian Council for Refugees (collectively, the "joint interveners") accept the facts as set out in the parties' facta and take no position on disputed facts.

PART II - ISSUES

2. The joint interveners take the following positions on matters at issue in this appeal:

(i) Canada is obligated under both international law and the *Charter* to refuse to order surrender where there is an established risk of torture or cruel, inhuman or degrading treatment ("CIDT");

(ii) The evidentiary standard to establish a risk of torture or CIDT must be practical and fair;

(iii) Diplomatic assurances regarding torture or CIDT are ineffective and unreliable and cannot remedy an established risk; and

(iv) Comity must be understood in the context of Canada's multilateral human rights treaty obligations and *jus cogens* norms.

PART III -STATEMENT OF ARGUMENT

A. Canada's International Law and *Charter* Obligations

3. Canada is obligated under both international law and the *Charter* not to remove a person – whether by extradition, deportation, *refoulement* or otherwise – to a state where he or she would be in danger of being subjected to torture or CIDT. Canada has ratified and is a party to the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT") and the *International Covenant on Civil and Political Rights* ("ICCPR"), both of which prohibit removal to the danger of torture. Article 3 of the CAT provides that:

> 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.[1]

[1] December 10, 1984, 1465 UNTS 85.

4. The ICCPR specifically prohibits removal to the danger of CIDT as well as torture. Article 7 states in part, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[2] In *General Comment 20*, the UN Human Rights Committee, the body that monitors implementation of the ICCPR, directed that Article 7 requires States not to "expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[3] As held by this Court, "[t]he clear import of the ICCPR, read together with *General Comment 20*, is to foreclose a state from expelling a person to face torture elsewhere."[4]

5. The prohibition on removal to torture reflects the peremptory and non-derogable nature of the prohibition on torture itself, and the obligation of states *erga omnes* to forestall its infliction. The prohibition on removal is prospective and preventative, and imposes a responsibility on states not to put individuals into a situation of risk. It does not depend on the risk of torture or CIDT materializing, but is instead an "independent human right."[5]

6. This right and corresponding responsibility inform the approach to be taken to section 7 of the *Charter*. This Court has repeatedly affirmed that the *Charter* should be interpreted consistently with Canada's international obligations,[6] and is "presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[7] With respect to extradition, it is well-established that surrender to the danger of torture would be fundamentally unjust. Indeed, as La Forest J observed 30 years ago in *Schmidt*, situations "falling far short" of those that "might involve the infliction of torture" could nevertheless sufficiently shock the conscience as to make a decision to surrender one that

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[2] December 19, 1966, 999 UNTS 171.

[3] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992 at para 9. Further, "States should indicate in their reports what measures they have adopted to that end."

[4] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 67.

[5] Cornelis Wolfram Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia: Mortsel, 2009) at p 25.

[6] See *eg Henry v British Columbia (Attorney General)*, 2015 SCC 24 at paras 136-137; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 64; *R v Hape*, 2007 SCC 26 at para 55.

[7] See *eg Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23.

breaches the principles of fundamental justice.[8]

7. Thus, where a person sought for extradition establishes that surrender to the requesting state exposes him or her to a risk of torture or CIDT, the Minister is required, pursuant to both international law and the *Charter,* to refuse to order the surrender.

B. Establishing Risk of Torture or CIDT

8. On the question of the evidentiary standard that an applicant must meet to establish risk, the joint interveners submit that while the person sought for extradition must show 'substantial grounds' that a 'danger' or risk of torture or CIDT exists, he or she is not required to establish a probability that the risk will materialize. This is consistent with the approach taken by this Court in extradition cases involving the death penalty, where the burden on the individual is simply to show that the death penalty is available in relation to the offence charged, not that it is likely to be sought or imposed in his or her particular case.[9]

9. The risk of torture or CIDT must be 'real' – that is, not merely speculative or subjective but based on an objective assessment of sufficient and reliable evidence. At the same time, in determining whether that threshold has been met, care must be taken to ensure that the evidentiary burden on the person sought for extradition is not unduly onerous or indeed impossible to discharge. The burden must be "practical and fair".[10]

10. In particular, while the person sought for extradition must demonstrate that he or she is personally at risk – that is, there is a real risk that torture or CIDT will be personally inflicted upon him or her – this should not be equated to an obligation to prove that the nature of this risk

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[8] [1987] 1 SCR 500 at para 47. See also *Kindler v Canada (Minister of Justice),* [1991] 2 SCR 779 at 851 *per* McLachlin J (as she then was): Extradition would violate the principles of fundamental justice "if, for instance, the fugitive faced torture on return to his or her home country" and at 832 *per* La Forest J concurring: "There are, of course, situations where the punishment imposed following surrender – torture, for example – would be so outrageous to the values of the Canadian community that the surrender would be unacceptable."

[9] See *eg United States v. Burns,* [2001] 1 SCR 283. The Court's decision that surrender without assurances would violate section 7 was made notwithstanding "the degree of causal remoteness between the extradition order to face trial and the potential imposition of capital punishment as one of many possible outcomes to this prosecution" (at para 57; emphasis in original). Indeed, the Court's reasons for refusing extradition where capital punishment is a 'possibility' were based in part on a further 'possibility' of miscarriages of justice in prosecutions. In contrast to capital punishment, which remains in widespread official use in certain countries, torture is universally prohibited.

[10] *Németh v Canada,* [2010] 3 SCR 281 at paras. 106, 111.

is somehow "unique to the person sought" (as the Minister submits).[11] Although in some cases the risk of torture or CIDT will arise from or be heightened by personal factors such as the person's membership in a particular group or the nature of the offence alleged, in others it will arise simply from the fact of detention and systemic practices in the state in question.[12] The assessment of risk must recognize practical realities and ensure that persons in the latter category are not artificially excluded from the scope of protection.

11. The approach urged by the Minister, in contrast, would lead to the absurd result that extradition is barred to countries where particular classes of person or categories of offender are at risk of torture or CIDT, but not to countries where torture or CIDT is an indiscriminate and arguably more pervasive practice. It is simply not the case that evidence of a systemic practice of custodial torture or CIDT would not, on its own, shock the conscience or otherwise violate fundamental justice.

C. Diplomatic Assurances on Torture or CIDT are Ineffective and Unreliable

12. The joint interveners submit that once a real risk of torture or CIDT has been established, it cannot be meaningfully remedied by the use of diplomatic assurances. Diplomatic assurances are legally unenforceable.[13] While certain kinds of assurances may be politically effective, assurances on torture or CIDT are inherently unreliable precisely because of the nature of the activity they are intended to prevent. Unlike the death penalty, which is sought and imposed lawfully through public court processes, torture and other forms of CIDT are almost always illicit and clandestine. This Court has previously held that assurances regarding torture should be accorded less weight than those regarding the death penalty:

> A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). 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

[11] Minister's Factum at para 40.

[12] Human rights reports documenting a state's general pattern of conduct are not only relevant, but arguably mandatory considerations pursuant to Article 3(2) of the CAT (see para 3 above).

[13] Wouters, *supra* at p 28; Julia Hall, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture" (2005), Human Rights Watch, Vol. 17, No. 4(D) at pp 18-19.

> territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.[14]

13. Those observations were made in early 2002. Over the decade and a half since, there has been a growing body of evidence and an emergent international consensus concerning the deficiencies of and dangers in relying upon diplomatic assurances regarding torture or CIDT. Canada has itself been involved in several cases – including those of Maher Arar[15] and the Afghan detainees transferred from Canadian custody[16] – in which such diplomatic assurances were not honoured. While these cases are particularly instructive domestically, Canada is not the only state to have learned through experience the ineffectiveness and unreliability of diplomatic assurances regarding torture or CIDT.[17]

14. International human rights experts have concluded that diplomatic assurances regarding torture or CIDT cannot be relied upon to remedy an established risk.[18] As Louise Arbour has noted, it is difficult to make the case that receiving states that do not comply with the binding prohibition against torture or CIDT in international law will respect a non-binding bilateral agreement concluded on the basis of trust, without enforcement or sanctions if violated.[19] The European Court of Human Rights has also repeatedly dismissed diplomatic assurances given in

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[14] *Suresh*, *supra* at para 124.

[15] Mr. Arar's rendition to Syria by the United States was apparently based on assurances from Syrian authorities. Justice O'Connor observed that the "fact that Mr. Arar was tortured in Syria despite an assurance to the contrary is a concrete example" of the dangers of relying on diplomatic assurances: *Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (Ottawa: Public Works and Government Services Canada, 2006) ("O'Connor Commission") at Vol 1, p 156.

[16] Omar Sabry, *Torture of Afghan Detainees: Canada's Alleged Complicity and the Need for a Public Inquiry* (Ottawa: Canadian Centre for Policy Alternatives and Rideau Institute on International Affairs, 2015) at p 63; see also *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336, affd 2008 FCA 401, leave to appeal to the SCC refused (SCC Case No. 33029).

[17] See *eg Agiza v Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005); *Alzery v Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006); *Shamayev and Others v Georgia and Russia*, Application no. 36378/02, ECtHR 2005-III.

[18] See *eg* Manfred Nowak, then-UN Special Rapporteur on Torture, Report to the UN General Assembly, 30 August 2005, UN Doc. A/60/316 at para 51; Louise Arbour, then-UN High Commissioner for Human Rights, "In Our Name and on Our Behalf," Intl & Comp L Q 55 (July 2006) at pp 521-522; Thomas Hammarberg, Council of Europe Commissioner for Human Rights, "Viewpoints: Torture Can Never, Ever Be Accepted," 27 June 2006.

[19] Arbour, *supra* at p 522.

respect of torture or CIDT as insufficient, including in *Chahal v United Kingdom*, where it held that diplomatic assurances from India were inadequate in light of evidence that human rights abuses by members of the security forces in Punjab and elsewhere were a "recalcitrant and enduring problem."[20]

15. This expanding awareness of the frailties of diplomatic assurances regarding torture and CIDT amplifies the concerns expressed by this Court in *Suresh*. The joint interveners respectfully urge this Court to reject categorically the use of and reliance on diplomatic assurances regarding torture or CIDT – including those that provide for ongoing monitoring.

16. Monitoring schemes, even where they are implemented in good faith and with the apparent cooperation of the receiving state, do little if anything to alleviate the inherent unreliability of diplomatic assurances concerning torture or CIDT. In addition to being practised in secret, many torture techniques such as waterboarding or mock drowning, sleep deprivation and other forms of psychological abuse, use of electricity, and sexual assault, leave little if any physical evidence. Victims are often reluctant to disclose the abuse they have suffered – including to consular officials – because they reasonably fear reprisals against them or their family members. Torture is therefore often difficult if not impossible for monitors to detect.[21]

17. The experiences of Maher Arar amply demonstrate these challenges. Léo Martel, the Canadian consul in Damascus, was permitted to visit Mr. Arar while he was in custody, but only in the presence of Syrian officials. Mr. Martel did not observe any physical signs of torture, but also noted that Syrian authorities "would never have let him see an individual with visible signs

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[20] Appl. No. 70/1995/576/662, 11 November 1996 at para 105. See also *Saadi v Italy*, Appl. No. 37201/06, 28 February 2008 at para 147 (assurances that merely restate domestic legal and international treaty obligations "are not in themselves sufficient to ensure adequate protection …where…reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the [European] Convention [on Human Rights]"); *Ismoilov and Others v Russia*, Appl. No. 2947/06, 24 April 2008; *Ryabikin v Russia*, Appl. No. 8320/04, 19 June 2008; *Ben Khemais v Italy*, Appl. No. 246/07, 24 February 2009; *Klein v. Russia*, Appl. No. 24268/08, 1 April 2010. In *Othman (Abu Qatada) v United Kingdom*, Appl. No. 8139/09, the ECtHR set out a non-exhaustive list of factors to be considered in assessing the reliability of diplomatic assurances, in addition to the general human rights record of the requesting state – including whether it has an effective system of protection against torture, investigates allegations and holds perpetrators to account. Although the ECtHR held extradition with assurances not to violate the applicant's rights on the specific facts of that case, its decision reaffirms the unreliability of diplomatic assurances from states that tolerate torture or CIDT.

[21] Nowak, *supra* at para 51; Hall, *supra* at pp 24-27.

of mistreatment or torture."[22] Mr. Arar did not alert consular officials to the physical and psychological abuse he had suffered, out of fear that he would not be allowed further visits and/or would be beaten in retaliation for the disclosure.[23]

18. Consular monitoring can result in reprisals even where officials are permitted to meet with detainees privately. If monitors visit a single detainee in a prison, authorities will be readily able to identify the source of any complaints. Of greater concern is the fact that consular monitoring will at best uncover abuses that have already occurred rather than prevent them. For these reasons, the UN Special Rapporteur on Torture has rejected the proposition that occasional visits to a single detainee can effectively prevent torture and ill-treatment, concluding that "post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability."[24]

19. Even though they are legally unenforceable, international agreements based on trust can be effective where there are practical incentives that ensure monitoring and compliance.[25] But in the case of assurances regarding torture or CIDT, incentives have the opposite effect of undermining monitoring and compliance. Once an assurance is given, the sending state has little or no incentive to monitor for or highlight a breach of the assurance, because a sending state that discovers a breach "would have to acknowledge a violation of its own *non-refoulement* obligation."[26] Meanwhile, a receiving state has the incentive – and the ability – to conceal the breach should it occur. Such assurances are ineffective both legally and practically.

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[22] O'Connor Commission, *supra* at p 185. The UN Special Rapporteur found that the case of Maher Arar "illustrates very clearly the consequences of violating the principle of non-refoulement and the inoperability of diplomatic assurances in the protection against torture and other forms of ill-treatment" (Nowak at para 48).

[23] Statement of Maher Arar, 4 November 2003, reproduced in Rachel Meeropol, *America's Disappeared: Detainees, Secret Imprisonment and the "War on Terror"* (New York: Seven Stories Press, 2005), pp 60-71 at 68-69.

[24] Nowak, *supra* at para 46; Arbour, *supra* at p 521. No reliance should be placed on a country's membership to the Vienna Convention on Consular Relations, which provides only limited obligations in respect of consular access and communication (at Article 36) and, among other things, does not require privacy of consular visits. Mark Warren, *Rendered Meaningless? Security Detentions and the Erosion of Consular Access Rights* (Fall 2013) 38 S Ill U LJ 27 at pp 46-51. Moreover, "the universality of consular communication and access rights has eroded to a stunning degree over the past decade" (p 28).

[25] Examples include the threat of retaliatory noncompliance in international trade law or competitive market forces that press for compliance in international finance: Hall, *supra* at p 21.

[26] Hall, *supra* at pp 22, 27.

D. The Appropriate Role of International Comity

20. In extradition cases involving a risk of torture or CIDT, it is essential that principles of comity and bilateral treaty obligation be understood in their proper international law context. This context includes the established multilateral system of mutual legal obligations, including the ICCPR, the CAT and the *jus cogens* prohibition on torture. Too often, extradition is seen as a matter of comity or respect for Canada's extradition partner, without a recognition that this same respect extends equally to Canada's multilateral human rights treaty partners and the *jus cogens* obligations it owes to the international community as a whole.[27]

21. The Minister's factum in this appeal is emblematic of this narrow conception of the role of comity and respect in international law. The Minister invokes the "principles of comity, mutual trust, good faith and respect for extradition partners"[28] at each stage of the analysis, including in determining the legal burden when assessing the risk of torture or ill-treatment,[29] and in deciding whether to rely on diplomatic assurances against ill-treatment,[30] without acknowledging the international legal framework within which these extradition treaties operate.

22. Under customary and treaty law, all states have a legal interest, at once joint and individual, in ensuring that the practice of torture and CIDT by other states is prevented and prohibited, and that all persons are protected from such mistreatment.[31] The prohibition on torture is *erga omnes* and imposes obligations on all states to the community of states as a whole to cooperate and utilize the machinery of international enforcement and remedy to eradicate torture. The prohibition is *jus cogens* and thus peremptory and non-derogable.[32]

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[27] Joanna Harrington. "The Role for Human Rights Obligations in Canadian Extradition Law", The Canadian Yearbook of International Law 43 (2005) at p 4.

[28] Minister's Factum at para 34.

[29] Minister's Factum at paras 34, 42.

[30] Minister's Factum at para 76.

[31] UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 2. See also *Kazemi Estate v. Islamic Republic of Iran,* [2014] 3 SCR 176 at para 49.

[32] *Kazemi*, *supra* at paras 47-48. See also "*Jus Cogens* and *Erga Omnes"* in William A. Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law* (Carswell, 2007) at pp 74-77.

23. Where they conflict, inferior international legal obligations grounded in comity must give way to the *jus cogens* prohibition on torture. This principle is reflected in Canadian law. For instance, whereas comity generally requires respect for a country's sovereign jurisdiction over criminal law, Canada has enacted universal jurisdiction over the crime of torture, properly recognizing that upholding the *jus cogens* prohibition requires an attenuation of traditional comity principles.[33] By imposing criminal liability for torture on foreign as well as domestic officials, Canada has recognized an exception to the principle of sovereign immunity from criminal prosecution – a "doctrine based in 'comity'"[34] – where upholding this comity principle would conflict with Canada's obligations in respect of torture.[35] These measures do not represent an abandonment of comity as such, but rather a recognition of the broader context of mutual legal obligations and non-derogable norms within which comity operates.[36]

24. Principles of comity in extradition law are no less subject to the broader framework of international law. In signing and ratifying the ICCPR and the CAT, Canada's executive did not make reservations in respect of its pre-existing extradition treaty obligations, and therefore expressed no intention to qualify the absolute nature of the binding norms it was affirming.[37] Moreover, comity is not the exclusive domain of extradition law; Canada's obligations to its human rights treaty partners are no less a matter of comity, good faith and respect.[38]

25. The point gains force where the higher obligation in question is not simply a multilateral treaty or even customary law but a *jus cogens* norm. Where a treaty conflicts with a *jus cogens* norm, it is void.[39] Whereas states may freely withdraw from treaties or persistently object to rules of customary international law, no such prerogative exists in respect of *jus cogens* norms, which

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[33] *Criminal Code*, RSC 1985, c C-46, s 269.1.

[34] Thomas Weatherall, "*Jus Cogens* and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence" Georgetown Journal of International Law 46 (2015) at 1156.

[35] *Kazemi, supra* at para 103 ("an exception to immunity for *jus cogens* violations exists in the criminal context").

[36] *Sosa v Alvarez-Machain*, 542 U.S. 692, 762-63 (2004 (Breyer J., concurring).

[37] Wouters, *supra* at p 506; Harrington, *supra* at p 49; *Vienna Convention on the Law of Treaties*, 23 May 1969, Art 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" [*"VCLT"*].

[38] *General Comment No. 31, supra* at para 2: Calling attention to breaches of the Covenant by other States Party is a "reflection of legitimate community interest."

[39] *VCLT, supra* at Art 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

"derive their status from the fundamental values held by the international community." A violation of a *jus cogens* norm does not simply disrespect another state, in the sense of a breach of 'comity'; rather, it is considered to "shock the conscience of humankind".[40]

26. The *jus cogens* prohibition on torture and the principle of *non-refoulement* require that the Minister's assessment of the risk of torture or CIDT in extradition operate as a stand-alone inquiry. The risk of torture is an evidentiary question, not a political one; it is no more or less real depending on the 'comity' or 'respect' that Canada may owe to receiving states. Allowing inferior legal or political obligations such as comity to alter the evidentiary burden would be contrary to the absolute nature of Canada's obligation to prohibit and prevent torture.

27. Similarly, far from advancing 'comity' between nations, relying on assurances from states that cannot or will not end the practice of torture or CIDT within their borders corrodes one of the core norms "accepted and recognized by the international community of States as a whole",[41] and gives tacit sanction to the practices of such states.[42] To the extent that principles of 'comity' are relevant to the inquiry, Canada's good faith obligation to the international community as a whole to uphold the absolute prohibition against removal to torture must prevail.

PARTS IV AND V - COSTS AND ORDER SOUGHT

28. The joint interveners respectfully request that there be no order of costs for or against it, and that the appeal be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2017.

Adriel Weaver and Louis Century per JC.

Adriel Weaver / Louis Century
GOLDBLATT PARTNERS LLP

Solicitors for the Intervener, Canadian Lawyers for International Human Rights, the Canadian Centre for Victims of Torture, and the Canadian Council for Refugees

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[40] *Domingues v United States,* No 12.285, IACHR, Report No 62/02 (2000) at para 49.

[41] *VCLT, supra* at Art 53.

[42] In light of the frailty of assurances on torture or CIDT, "[a]sking for the creation of such an island of protection comes dangerously close to accepting the ocean of abuse that surrounds it." Hall, *supra* at p 23.

PART VI - TABLE OF AUTHORITIES

Cases (Canadian)	**Paragraph(s)**
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PART VII - STATUTES RELIED ON

***Criminal Code*, RSC 1985, c C-46**

269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Definitions

(2) For the purposes of this section,

official means

(a) a peace officer,
(b) a public officer,
(c) a member of the Canadian Forces, or
(d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c),

whether the person exercises powers in Canada or outside Canada; (*fonctionnaire*)

torture means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(a) for a purpose including

(i) obtaining from the person or from a third person information or a statement,
(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
(iii) intimidating or coercing the person or a third person, or
(b) for any reason based on discrimination of any kind,

but does not include any act or omission arising

***Code criminel*, LRC 1985, c C-46**

269.1 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans le fonctionnaire qui — ou la personne qui, avec le consentement exprès ou tacite d'un fonctionnaire ou à sa demande — torture une autre personne.

Définitions

(2) Les définitions qui suivent s'appliquent au présent article.

fonctionnaire L'une des personnes suivantes, qu'elle exerce ses pouvoirs au Canada ou à l'étranger:

a) un agent de la paix;
b) un fonctionnaire public;
c) un membre des forces canadiennes;
d) une personne que la loi d'un État étranger investit de pouvoirs qui, au Canada, seraient ceux d'une personne mentionnée à l'un des alinéas a), b) ou c). (*official*)

torture Acte, commis par action ou omission, par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne:

a) soit afin notamment:

(i) d'obtenir d'elle ou d'une tierce personne des renseignements ou une déclaration,
(ii) de la punir d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis,
(iii) de l'intimider ou de faire pression sur elle ou d'intimider une tierce personne ou de faire pression sur celle-ci;
b) soit pour tout autre motif fondé sur quelque forme de discrimination que ce soit.

only from, inherent in or incidental to lawful sanctions. (*torture*)

No defence

(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

Evidence

(4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

La torture ne s'entend toutefois pas d'actes qui résultent uniquement de sanctions légitimes, qui sont inhérents à celles-ci ou occasionnés par elles. (*torture*)

Inadmissibilité de certains moyens de défense

(3) Ne constituent pas un moyen de défense contre une accusation fondée sur le présent article ni le fait que l'accusé a obéi aux ordres d'un supérieur ou d'une autorité publique en commettant les actes qui lui sont reprochés ni le fait que ces actes auraient été justifiés par des circonstances exceptionnelles, notamment un état de guerre, une menace de guerre, l'instabilité politique intérieure ou toute autre situation d'urgence.

Admissibilité en preuve

(4) Dans toute procédure qui relève de la compétence du Parlement, une déclaration obtenue par la perpétration d'une infraction au présent article est inadmissible en preuve, sauf à titre de preuve de cette infraction.