

Open Letter to the Honourable Arif Virani

Signed by Legal Professionals and Legal Scholars

3 September 2024

The Honourable Arif Virani
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Minister Virani:

Subject: Assure No Second Extradition of Dr. Hassan Diab and Implement All Recommendations of the Standing Committee on Justice and Human Rights

Canada's wrongful extradition of Dr. Hassan Diab to France a decade ago must not be repeated. Dr. Diab was wrongfully extradited from Canada to France in 2014 for his alleged involvement in a bombing outside a Paris synagogue in 1980. After spending over three years in a French prison, two French (counter-terrorism) investigative magistrates found **no evidence** to send him to trial and released him unconditionally. Dr. Diab returned to his home in Canada in 2018. However, the French prosecutor appealed his release and, on April 21, 2023, Dr. Diab was sentenced *in absentia* to life in prison.

- **We urge you to give clear assurances that Dr. Hassan Diab will not be extradited a second time for a crime he did not commit.**
- **All the recommendations of the report, "Reforming Canada's Extradition System" [1] by the Standing Committee on Justice and Human Rights (JUST) must be implemented.** In particular, the disclosure of exculpatory evidence must be compulsory (JUST's Recommendation 11). The non-disclosure of exculpatory evidence during the extradition hearing was central to Dr. Diab's committal for extradition in 2014.

Context

In February 2023, during a week of parliamentary hearings, the Standing Committee on Justice and Human Rights (JUST) [2] heard about the harrowing story of Dr. Hassan Diab and Canada's unfair extradition law that triggered his ordeal. A victim of false accusation [3], wrongful extradition to France [4], and wrongful conviction [5], Dr. Diab was sentenced *in absentia*, on April 21, 2023, to life in prison for a crime he did not commit: the 1980 bombing outside a Paris synagogue. Two months prior to that sentence, JUST became aware of the perils of Canada's 1999 Extradition Act [6] for persons sought, and the terrible fate that this law spelled for Dr. Diab.

Convinced of the need for legal change, JUST's MPs set to work, producing in June 2023 the report, "Reforming Canada's Extradition System" [1], that highlighted Hassan's case as a shocking example of the shortcomings of Canada's Extradition Act. The JUST report was unanimous, including all political party members, and yielded 20 recommendations for reform. In particular, Recommendation 20 is "That the Government of Canada undertake comprehensive reform of the Extradition Act as soon as possible and consider making changes to the extradition process not requiring legislation, in the interim, in order to avoid further injustices in extradition proceedings."

With its report, the JUST committee achieved what former Justice Minister Jody Wilson-Raybould failed to do in 2018 when she declined to commission a public inquiry into what went awry in the Diab Affair. Ordering instead a narrowly framed external review, she guaranteed that the investigation (assigned to the former Deputy Attorney General of Ontario, Mr. Murray Segal) would shield the defects of the law and leave unchallenged the non-disclosure, during the extradition hearing, of exculpatory fingerprint evidence that ruled him out as the suspect. [7]

Significantly, Recommendation 11 of JUST's report calls for a change to the extradition law that would oblige the Department of Justice to "disclose to the person sought for extradition any exculpatory evidence in its possession or that it knows of that could compromise or weaken the request of the requesting state".

Arguably, Recommendation 11 refers to the discretionary option (Segal report [8], page 29) that allows prosecutors to withhold exculpatory evidence [9]. Hinting at the repercussions of this discretionary option, Recommendation 11 (along with JUST's other recommendations) also points to the law's *encoded power imbalance* between the person sought and the requesting state: the latter is presumed reliable [10] while the person sought is tacitly presumed guilty.

But such blind trust invested in the requesting state can result in malfeasance. In the Diab case, France proved unreliable [11] and deceitful. It withheld the results of a fingerprint analysis that confirmed Dr. Diab's innocence; it also lied in 2008 [12] when it certified in its Record of the Case [13] that it had no exploitable fingerprints to use when, in fact, it had such a print. [14] France's Record of the Case was not only riddled with errors [3], it also "contained a great deal of argument, hypothesis, conjecture, and references to information received, without describing the source of that information or the circumstances upon which it was received", as former extradition judge Robert Maranger noted ([8], page 43).

In your response [15] to the Standing Committee's report, you welcomed a review of the Extradition Act, but simultaneously heralded the law's merits, *implying that there is little to reform*. Yet the devil is not in lofty legal mechanisms of fairness in which the extradition law is *represented*, but in the *details of its application*. The Diab case illuminates the injustice of a law conceived to privilege the requesting state and hasten the expulsion of the person sought. Central to this iniquity is the "legitimate" suppression of exculpatory evidence which

Recommendation 11 tackles head on, demanding *“That the Extradition Act be amended to add a legal obligation for the Department of Justice to disclose to the person sought for extradition any exculpatory evidence in its possession or that it knows of that could compromise or weaken the request of the partner state”*.

In your response [15] to JUST, you write: “I am pleased to inform the committee that of the fourteen recommendations contained in the Segal report, all but one has been implemented. This includes the practice of disclosing any exculpatory evidence in the possession of the government to the person sought for extradition.” With all due respect, sir, this is a most unfortunate sentence, since it tacitly conflates Mr. Segal’s recommendation and that of JUST. The two are not the same. JUST insists that the disclosure of exculpatory evidence be *compulsory* while Mr. Segal, in his 9th recommendation ([8], page 102) stated that the *sharing of evidence should be considered; he does not make it binding* [16]. If, as you say, the Crown attorneys have satisfied Mr. Segal’s 9th recommendation, they have decidedly *not* satisfied JUST’s central proposal for reform, i.e., Recommendation 11.

It is troubling that you have ignored the Standing Committee’s crucial Recommendation 11 (the obligation to disclose exculpatory evidence) and have instead upheld the dubious recommendation made by Mr. Segal. Your formulation (as quoted above) gives the impression that the two proposals are the same, when indeed they are distinct. For, even as Mr. Segal recommends that Crown attorneys consider disclosing exculpatory evidence for purposes of transparency; he does not recommend that such a disclosure be made mandatory. Since the disclosure of exculpatory evidence remains discretionary, a central peril of the current law persists, and, by its very nature, threatens the civil liberties of the person sought. The case of Dr. Diab makes this plain.

Please, if you would, consider the following: Had the disclosure of exculpatory evidence been written into Canada’s 1999 Extradition Act, the Crown attorneys would have had to disclose Dr. Diab’s exculpatory evidence to extradition Judge Robert Maranger, and under those conditions, it is highly unlikely that he, judge Robert Maranger, would have signed the committal order for Dr. Diab. But precisely because the disclosure of exculpatory evidence to the person sought was not mandatory, the Diab case resulted in a wrongful and indeed unconscionable extradition.

In 2014, Dr. Diab was brusquely whisked off to France’s maximum-security prison, Fleury-Mérogis (with no opportunity to say farewell to his pregnant wife and two-year old daughter), where he was incarcerated in solitary confinement for twenty-two hours a day over thirty-eight months. Prolonged solitary confinement is a form of torture [17], with serious health consequences. The duress to which Dr. Diab was subjected contradicts former Justice Minister Rob Nicholson’s assurances [18] (and implicitly those of Canada’s extradition law, as you have represented it in your response to JUST [19]) that Dr. Diab would not suffer undue harm. The contrary proved to be true.

Sir: you are no doubt aware that in 2018, two eminent French investigative magistrates, who had meticulously studied Dr. Diab’s dossier, determined that there was no evidence to justify

bringing Dr. Diab to trial and ordered his immediate and unconditional release, and, by extension, showed that Canada had unjustly extradited him to France in 2014. That wrongful expulsion resulted in one miscarriage of justice after another, from the baseless ruling [3] issued by France’s Court of Appeal in 2021 to France’s sham trial of Dr. Diab in 2023 [5] that sentenced him to life in prison. Hassan Diab has been mercilessly raked over the coals despite clear evidence of his innocence.

Sir: it is high time you gave Dr. Diab clear assurance that he will be safe from further persecution and that he will not be expelled to France a second time. A second wrongful extradition would not only be a stain on Canada’s Ministry of Justice, it would go down in history as a most egregious violation of Canada’s Charter of Rights and Freedoms.

Dr. Hassan Diab’s fingerprints, which have been taken no less than 10 times, irrefutably prove his innocence, as do his powerful alibi. He was in Beirut at the time of the bombing. We, the undersigned, exhort you, as Minister of Justice, to finally release Dr. Diab from his 16-year ordeal.

Notes

[1] “Reforming Canada’s Extradition System”, Report of the Standing Committee on Justice and Human Rights, June 2023, <https://www.ourcommons.ca/DocumentViewer/en/44-1/JUST/report-13/>

[2] Standing Committee on Justice and Human Rights, Extradition Law Reform Study, 2024, <https://www.ourcommons.ca/committees/en/JUST/StudyActivity?studyActivityId=12003653>

[3] “French Court of Appeal Decision Overruling Order of Dismissal of French Investigative Judges and Directing the Trial of Hassan Diab”, legal analysis by Donald Bayne, May 5, 2021, <https://www.justiceforhassandiab.org/wp-content/uploads/2024/03/DIAB-Memo-France-COA-2021-05-05a.pdf>

[4] Two French (counter-terrorism) investigative magistrates found no evidence to send Dr. Hassan Diab to trial and in 2018 released him from his (38-month) incarceration in Fleury-Mérogis prison. https://cdn.dal.ca/content/dam/dalhousie/pdf/law/Faculty_and_Staff/446_Currie.pdf

[5] “The sham trial of Hassan Diab”, Mondoweiss, May 4, 2023, <https://mondoweiss.net/2023/05/the-sham-trial-of-hassan-diab/>

- [6] “Canada's extradition laws need revamping, says Dalhousie law school professor”, Canadian Lawyer, March 9, 2021, <https://www.canadianlawyermag.com/practice-areas/criminal/canadas-extradition-laws-need-revamping-says-dalhousie-law-school-professor/353753>
- [7] “Justice Dies in the Darkness’: The ‘External Review’ of the Hassan Diab Case”, The Bullet, October 1, 2019, Michelle Weinroth, <https://socialistproject.ca/2019/10/justice-dies-in-the-darkness/>
- [8] “Independent Review of the Extradition of Dr. Hassan Diab”, Murray Segal, May 2019, https://www.justice.gc.ca/eng/rp-pr/ci-jp/ext/01/review_extradition_hassan_diab.pdf
- [9] “Hassan Diab, lawyer discuss review of his extradition to France”, Global News, July 26, 2019, <https://www.youtube.com/watch?v=1grSrK2kFrQ&t=351s> (timestamp 5:51-8:07)
- [10] “Hassan Diab, lawyer discuss review of his extradition to France”, Global News, July 26, 2019, <https://www.youtube.com/watch?v=1grSrK2kFrQ&t=608s> (timestamp 10:08)
- [11] “The Diab Affair: Why Canada Must Say No to France”, The Bullet, September 20, 2023, Michelle Weinroth, <https://socialistproject.ca/2023/09/diab-affair-why-canada-must-say-no-to-france/>
- [12] “Hassan Diab, lawyer discuss review of his extradition to France”, Global News, July 26, 2019, <https://www.youtube.com/watch?v=1grSrK2kFrQ&t=639s> (timestamp 10:39-11:49)
- [13] “Hassan Diab, lawyer discuss review of his extradition to France”, Global News, July 26, 2019, <https://www.youtube.com/watch?v=1grSrK2kFrQ&t=628s> (timestamp 10:28 -10:37)
- [14] “Hassan Diab, lawyer discuss review of his extradition to France”, Global News, July 26, 2019, <https://www.youtube.com/watch?v=1grSrK2kFrQ&t=785s> (timestamp 13:05 -13:09)
- [15] “Government Response to the Thirteenth Report of the Standing Committee on Justice and Human Rights”, October 5, 2023 <https://www.ourcommons.ca/DocumentViewer/en/44-1/JUST/report-13/response-8512-441-286>
- [16] Mr. Segal’s 9th recommendation: “Counsel for the Attorney General advancing a case for extradition should consider sharing evidence –particularly relevant and exculpatory or potentially exculpatory evidence –even when they are not required or obligated to do so” (https://www.justice.gc.ca/eng/rp-pr/ci-jp/ext/01/review_extradition_hassan_diab.pdf, page 102).

[17] “The Nelson Mandela Rules: Protecting the Rights of Persons Deprived of Liberty” United Nations, <https://www.un.org/en/un-chronicle/nelson-mandela-rules-protecting-rights-persons-deprived-liberty>

[18] Don Bayne: "The justice minister at the time of the parliamentary debates about the current Extradition Act, promised that no Canadian would ever languish in a foreign prison during a foreign investigation, yet that's exactly what our courts let happen to Dr. Diab", <https://www.cbc.ca/news/politics/extradition-act-review-diab-1.4493187>

[19] “For this reason, Canada’s legislative requirements, including subsection 44(1) of the Act that precludes the Minister of Justice from ordering the surrender of a person if satisfied that it would be unjust or oppressive to do so, having regard to all the circumstances, and constitutional requirements that extradition comply with the Charter, preclude extradition where there is a substantial risk of torture. Through Canada’s extradition process, it is ensured that individuals’ human rights and Charter rights are protected”. (Government’s Response to JUST report, <https://www.ourcommons.ca/DocumentViewer/en/44-1/JUST/report-13/response-8512-441-286>, page 4).

Sincerely,

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