OUTLINE OF SUBMISSIONS ON STANDARDS OF CONDUCT

OF HUMAN RIGHTS WATCH

Submitted to the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

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PART I - Overview

1. In this outline of submissions to be made at the hearing before this Inquiry on January 8 – 9, 2008, Human Rights Watch ("HRW") addresses legal principles directly relevant to Items 1, 2 and 5 of the Amended Notice of Hearing. HRW describes Canada's binding international human rights law obligations concerning torture and cruel, inhuman or degrading treatment, and considers how they bear on the "standards of conduct that would be appropriate" to the circumstances set out in Items 1, 2 and 5 of the Amended Notice of Hearing on Standards of Conduct.

2. Thus, HRW's submissions address the question of when certain conduct will engage and potentially violate Canada's international human rights law obligations pertaining to torture and cruel, inhuman or degrading treatment.

3. Determining what may be "appropriate" in any given circumstances encompasses a wide range of considerations of law and policy. However, it is difficult to envisage circumstances in which a course of conduct that is illegal is nevertheless "appropriate."

4. HRW submits that domestic and international legal obligations must be considered to be a binding, minimum standard for any determination of what is or might be "appropriate" for Canadian officials to have done or do. Conduct which could or does amount to a violation of Canada's international human rights law obligations is, *ex hypothesi*, inappropriate.

5. The Inquiry has requested submissions on these questions in a context in which its investigation into relevant facts is ongoing. It has not disclosed to Participants or Interveners any

documents or other evidence gathered thus far by the Inquiry, and has not yet made available a draft of its proposed Factual Findings.

6. HRW therefore faces the difficult task of making submissions *in abstracto* in respect of the questions posed.

PART II – Factual Context of these Submissions

7. HRW observes that some of circumstances and events under investigation by the present Inquiry have already been the subject of factual findings by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the "Arar Inquiry").

8. HRW understands that the factual findings of the Arar Inquiry do not bind this Inquiry.

9. Nevertheless, certain Arar Inquiry findings establish a factual context for the consideration of many of the questions posed by this Inquiry and greatly assist HRW in framing some of the legal issues addressed in these submissions.

10. Specifically, HRW takes note of the following factual findings of the Arar Inquiry as they relate to Messrs Almalki, Abou-Elmaati and Nureddin.

11. At relevant times between 2002 and 2003, relevant officials of both the Department of Foreign Affairs and International Trade (DFAIT), the Canadian Secret Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP) had access to, and in some cases had reviewed, a range of reports indicating that Syria's human rights record was poor and that there was credible evidence of torture in Syria in regard to persons detained in detention centers run by one of the security services.[1]

12. The Arar Inquiry Report's findings concerning the "Factual Background" contains the following information that is of particular relevance to these submissions:

(a) DFAIT's *Syria: Annual Human Rights Report 2001* and *2002* were approved by the then-Ambassador to Syria, Mr. Pillarella. The reports contain information

[1] Report of Events Relating to Maher Arar, Factual Background, Volume 1, pp.239-249 ("Arar Factual Background")

drawn from, inter alia, US State Department Human Rights reports and Amnesty International reports. The information detailed the routine use of torture and ill-treatment against persons detained by Syrian security and military services.[2]

(b) Ambassador Pillarella testified that "he might have been aware of the Palestine Branch and might have read about it, but did not recall at that particular point."[3] He also said that it was "extremely difficult to verify" allegations of torture in the US State Department human rights reports.[4] He later testified that in order to "reasonably believe that that a Canadian detained in Syria was being tortured, he would need evidence that this was happening."

(c) Mr. Pardy, then-Director General of the Consular Affairs Bureau at DFAIT Headquarters, testified that, while he did not believe that a political prisoner in Syrian detention would be subjected to torture in every case, his "working assumption" based on the public record was that torture was taking place.[5] His understanding was that abusive treatment or torture usually took place early on in the incarceration. Mr. Pardy believed that DFAIT officials were aware of and shared his working assumption "both horizontally and vertically [in the DFAIT bureaucracy]."[6]

(d) In November 2001, the RCMP's "Project A-O Canada" learned that Ahmad Abou-Elmaati planned to fly to Syria, apparently to get married. Prior to his departure from Canada there was an exchange of information between the RCMP and American authorities. Mr. Abou-Elmaati was detained by Syrian authorities upon his arrival in Syria. According to the Arar Inquiry, "in light of American practice at the time, it is reasonable to assume that Syria was informed of his arrival by American authorities. It is also reasonable to conclude that Project A-O Canada would have been aware that the Americans had informed the Syrians of [Mr. Abou-Elmaati's] arrival in Syria. In his testimony, Inspector Cabana agreed

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[2] Ibid, 238.
[3] Arar Factual Background, Volume 1, p.239.
[4] Ibid.
[5] Ibid, p. 241.
[6] Ibid, p. 242-3.

that in all likelihood [Mr. Abou-Elmaati] was detained as a result of information the Americans gave to the Syrians."[7]

(e) In December 2001, the RCMP discussed with US law enforcement agencies the possibility of interviewing Mr. Abou-Elmaati in Syria.[8] When Abou-Elmaati is moved to detention in Egypt, the RCMP continues to pursue efforts to interview him in Egyptian custody[9] and also considers sending questions to Egyptian authorities to be put by them to Mr. Abouu-Elmaati.[10]

(f) On or about August 12, 2002, DFAIT consular officials conducting a consular visit with Mr. Abou-Elmaati in Egypt were told by him that he had been tortured and forced to give false information in Syria.[11] The RCMP was informed on August 15, 2002, that Mr. Abou-Elmaati stated to consular officials that he was tortured in Syrian custody between November 2001 and January 2002.[12]

(g) In October 2002, DFAIT's Security and Intelligence Bureau (ISI) stated in two memoranda that there was a credible risk of torture in Syria if Canada asked Syria to put questions to a detained Canadian. DFAIT ISI also advised CSIS on December 5, 2002 that "DFAIT reporting and public documents provide credible reports that Syrian security services engage in torture."[13]

(h) CSIS officials confirmed that they had, or likely had, knowledge of Syria's poor human rights reputation before and during Mr. Arar's detention in Syria. This knowledge included reports that Syrian security agencies used torture to interrogate detainees. CSIS officials were familiar with the Amnesty International and U.S. State Department reports and assessed these documents as credible.[14]

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[7] Arar Factual Background, p.64.
[8] Ibid, p. 104.
[9] Ibid, p. 107.
[10] Arar Analysis and Recommendations, p. 208.
[11] Ibid, p. 240.
[12] Report of Events Relating to Maher Arar, Analysis and Recommendations ("Arar Analysis and Recommendations"), pp. 206-214.
[13] Arar Factual Background, p. 240.
[14] Ibid, p. 244.

(i) In July 2002, a memo to Jack Hooper, Assistant Director of Operations for CSIS reported information that was identical to that contained in the State Department and Amnesty International reports. In particular, the memo reported that torture was most likely to occur at a detention centre run by one of the security services, especially when information in a confession was being extracted by the authorities.[15]

(j) In October 2002, CSIS officials knew that the United States might have sent Mr. Arar to a country where he could be questioned in a "firm manner." In a report to his superiors dated October 11, 2002, the CSIS security liaison officer (SLO) in Washington spoke of a trend they had noted lately that when the CIA or FBI cannot legally hold a terrorist subject, or wish a target questioned in a firm manner, they have them rendered to countries to fulfill that role. He said Mr. Arar was a case in point. On October 10, 2002, Mr. Hooper stated in a memorandum: "I think the U.S. would like to get Arar to Jordan where they can have their way with him."[16]

(k) Evidence exists that the RCMP was aware of Syria's poor human rights reputation before Mr. Arar's removal to that country. Information came to Project A-O Canada and RCMP Headquarters during their investigations of Mr. Almalki and Mr. Abou-Elmaati. For example, the RCMP was aware of Mr. Abou-Elmaati's August 2002 allegations that he had been tortured in Syria. It also knew that sending the Syrian authorities questions to ask Mr. Almalki carried the risk of his being tortured; DFAIT ISI officer Jonathan Solomon raised these concerns at a meeting on September 10, 2002.[17]

(l) From June 2002, the RCMP expressed to US law enforcement agencies its interest in having access to Mr. Almalki in Syria in order to interview him.[18] Over the next 6 months, the RCMP continued to discuss the prospects of either having

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[15] Arar Factual Background, p.245.
[16] Arar Factual Background, p. 245 (Additional disclosure authorized by the Federal Court of Canada in accordance with Sections 38.04 and 38.06 of the *Canada Evidence Act*).
[17] Arar Factual Background, p. 247.
[18] Arar Factual Background, p. 108.

Syrian officials put questions to Mr. Almalki on their behalf, or of traveling to Syria to interview Mr. Almalki in Syrian custody.[19]

(m) On January 15, 2003, the Canadian consul delivered a letter from the RCMP to Syrian Military Intelligence chief General Khalil on the instructions of Ambassador Pillarella. Enclosed was a series of questions to be posed to Mr. Almalki, who was incarcerated at the Palestine Branch at the time. In the letter, the RCMP offered to share with the Syrian authorities "large volumes of highly sensitive documents and information, seized during investigative efforts or obtained from confidential informants associated to terrorist cells operating in Canada." Among the questions to be posed to Mr. Almalki were some about his relationships with a number of named individuals, most of whom the SMI would have considered to be very heavily involved in terrorist activities. Mr. Arar, who had been detained by the Syrians in October 2002, was included among these named individuals.[20]

PART III - Canada's International Human Rights Law Obligations

13. The foregoing factual context allows us to narrow the range of human rights obligations which are directly relevant to the broader questions posed by the Inquiry.

14. The factual context of the issues before this Inquiry suggests that there was a credible and substantial risk of the use of torture or of cruel, inhuman or degrading treatment, against individual Canadian citizens detained by Syrian security services. That risk arose both because of the routine use of torture and ill-treatment in interrogation by Syrian security services, and because of the profile imputed to the individual Canadians detained. Messrs. Almalki, Abou-Elmaati, and Nureddin appear to have been detained because:

(a) they were under investigation by Canadian law enforcement and security agencies for alleged membership in Islamist groups suspected of terrorist activities; and

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[19] Ibid, pp.108-110.
[20] Arar Analysis and Recommendations, p. 206.

(b) the information gathered in these investigations was shared with US authorities, who then shared it with Syrian authorities.

15. Accordingly, the persons subject to these investigations would have been imputed with the profile of being active members of militant political Islamist groups, a profile that substantially increased the risk of torture and ill-treatment in interrogation.[21]

16. The central legal question that frames the questions posed by the Inquiry in the Amended Notice of Hearing may be set out as follows: what were and are Canada's international human rights obligations towards Canadian citizens who face a credible, substantial and individualized risk of torture and ill-treatment at the hands of another State, where:

(a) it is reasonably foreseeable that the Canadians may be detained by the other State on the basis of information gathered by Canadian law enforcement and security agencies if the information were provided, directly or indirectly, to the other State, and;

(b) the Canadians are in fact detained by the other State and Canadian law enforcement and security agencies continue to seek means of pursuing their investigations of the detained Canadians in the other State, such as by sending questions to authorities of the other State to be put to the detained Canadians or by attending in the other State to participate in questioning or to question directly.

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[21] Arar Factual Background, Volume 1, p. 241 (Ambassador Pillarella stating that if a Canadian were suspected of being a member of the Muslim Brotherhood , "torture could happen."). See also p. 239, citing then-Foreign Affairs Minister Bill Graham's testimony that he was "generally aware that Syria's reputation included repression of internal dissent, especially with respect to the Muslim Brotherhood." Mr. Arar was specifically alleged to have been a member of the Brotherhood by Syrian Military Intelligence, as a grounds for continuing to detain and interrogate him: pp. 317-9.

A. The Nature of the Prohibition against Torture

17. The prohibition against torture has attained *jus cogens* status: it is a peremptory norm of customary international law[22].The prohibition against torture is also an obligation *erga omnes*. That is, it is an obligation owed towards all the other members of the international community; each member of the international community has the right to insist on the fulfillment of the obligation or to call for the breach to be discontinued[23].

18. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. States are bound to put in place all those measures that may pre-empt the perpetration of torture. International law intends to bar not only actual breaches but also potential breaches of the prohibition against torture[24].

19. The *jus cogens* status of torture is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate[25]

20. In *A and others v Secretary of State for the Home Department (No 2)*[26], Lord Bingham of Cornhill (with whom the other Law Lords concurred in his characterization of the international legal status of the prohibition against torture) stated that:

> the jus cogens erga omnes nature of torture requires member states to do more than eschew the practice of torture. In *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, paras 29, 117, the House refused recognition to conduct which represented a serious breach of international law. This was, as I respectfully think, a proper response to the requirements of international law" [...]
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> [...] Article 41 of the International Law Commission's draft articles on the Responsibility of States for internationally wrongful acts (November 2001) requires states to cooperate to bring to an end through lawful means any serious

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[22] *Prosecutor v Furundzija*, International Criminal Tribunal for the Former Yugoslavia, 10 December 1998, Case No. IT-95-17, para. 153 ("*Furundzija*").
[23] *Furundzija*, para. 151.
[24] *Furundzija*, para. 148.
[25] *Furundzija*, para. 154.
[26] [2006] 2 AC 221 at 262-3.

> breach of an obligation under a peremptory norm of general international law [...] There is reason to regard it as a duty of states, save perhaps in limited and exceptional, as where immediately necessary to protect a person from unlawful violence or property destruction, to reject the fruits of torture inflicted in breach of international law. As McNally JA put it in *S v Nkomo* 1989 (3) ZLR 117, 131: 'It does not seem to me that one can condemn torture while making use of the mute confession resulting from torture, because the effect is to encourage torture.'"

B. Canada's Treaty Obligations

21. The foregoing general features of the international law prohibition against torture are relevant to understanding the scope of Canada's specific treaty-based obligations with respect to torture, and cruel, inhuman or degrading treatment.

22. As will be explained below, the relevant treaty obligations concerning the prohibition on torture not only protect an individual on a State Party's territory, but an also extend to a person held on the territory of another State

C. Canada's Treaty Obligations: The Convention against Torture

23. Canada has ratified the Convention against Torture[27] ("CAT"). .

24. Article 2 of the CAT requires States Parties to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any *territory under its jurisdiction*" (emphasis added).

25. As the UN Committee Against Torture ("the CAT Committee") has recently emphasized, Article 2 means that a state's obligations extend not only to its sovereign territory, "but includes all areas where the State Party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law."[28] The reference to "any territory" in Article 2 refers to prohibited acts committed not only onboard a ship or aircraft registered by a State Party, but also during military occupation or peacekeeping operations and in such places as

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[27] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987, ratified by Canada, July 24, 1987.

[28] Committee Against Torture, General Comment No. 2, Implementation of Article 2 by StateParty, CAT/C/GC/2/CRP.1/Rev.4, November 23, 2007, para. 16. See also *Conclusions and Observations of the Committee against Torture: United States of America*, CAT/C/CO/2, 18 May 2006, para. 15.

embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. This includes situations where a State Party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention.[29]

26. The CAT Committee also made clear that:

> if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment, for ordering, permitting or participating in this transfer contrary to the States' obligation to take effective measures to prevent torture in accordance with Article 2, paragraph 1.[30]

27. At paragraph 17 of *General Comment No. 2*, the CAT Committee observes that:

> States Parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating in or being complicit in acts of torture as defined in the Convention.

28. The purpose of CAT was to establish an implementation machinery aimed at repressing and punishing torture.[31] As Lord Browne-Wilkinson observed in the *Pinochet* judgment,

> The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal – the torturer – could find no safe haven.[32]

29. The CAT explicitly prohibits refoulement to torture (Art. 3), and establishes universal criminal jurisdiction over the offence of torture under the principle of *aut dedere aut judicare* (Arts 4-9). At the inter-state level, the CAT creates the Committee against Torture to consider state party reports and individual and inter-state complaints (Arts 17-24).

30. The CAT was not intended to exhaust the legal obligations flowing from the prohibition against torture or cruel, inhuman or degrading treatment. For example, the explicit inclusion of certain obligations within CAT, such as the obligation of non-refoulement to torture, does not

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[29] CAT General Comment No. 2, *ibid.* para. 16.
[30] CAT General Comment No. 2 *ibid.* para. 19.
[31] See J Burgers and H Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Kluwer, The Hague, 1988, p.131.
[32] *R v. Bartle and the Commissioner of Police; ex parte Pinochet Ugarte (No. 2)*, [1999] 2 WLR 827 at 842.

lead to the implication that other treaties prohibiting torture and cruel, inhuman or degrading treatment do not impose the same or additional obligations in the absence of explicit wording. In *Soering v. United Kingdom*[33], the court noted that:

> the fact that a specialized treaty should spell out in detail a specific obligation attaching to the prohibition does not mean that an essentially similar obligation is not already inherent in the general terms of article 3 [of the European Convention on Human Rights (ECHR)].[34]

31. The CAT Committee has recently confirmed in *General Comment No. 2* at para. 15 that:

> The Convention [against Torture] does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties.

32. The CAT Committee also confirmed at para. 27 that *General Comment No.2* itself must be considered.

> without prejudice to any higher degree of protection contained in any international instrument or national law, so long as they contain, as a minimum, the standards of the Convention.

D. Canada's Treaty Obligations: the ICCPR

33. Canada has ratified the International Covenant on Civil and Political Rights ("ICCPR")[35].

34. Article 7 of the ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

35. The applications clause of the ICCPR (Article 2) is broader than that of CAT, in as much as it is not limited only to territory under the *de jure* or *de facto* control of the State Party. Under Article 2(1) of the ICCPR, States Parties are obliged "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in present Covenant ..."

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[33] *Soering v. United Kingdom,* 11 EHRR 439.
[34] Ibid, para. 88. Article 3 of the European Convention on Human Rights provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[35] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, ratified by Canada, August 19, 1976.

36. The phrase "within its territory and subject to its jurisdiction" has been held to comprise two *alternative* bases for application of the ICCPR, rather than two cumulative conditions for its application. That is, a State Party owes the obligations to respect and to ensure to persons who are *either* within its territory *or* subject to its jurisdiction[36].

37. In the jurisprudence of the Human Rights Committee (HRC) – the expert body established under the ICCPR to supervise compliance with the treaty and to determine individual complaints submitted under the Optional Protocol to the ICCPR – a person may be *subject to the jurisdiction* of the State Party of which they are a national even if that person suffered the violation due to the actions of officials of the State Party of nationality outside the territory of that State Party[37].

38. In *Lopez Burgos v Uruguay*, the HRC observed at para 12.3 that:

> "Article 2(1) of the Covenant places an obligation upon a State party to respect and ensure rights 'to all individuals within its territory and subject to its jurisdiction', but does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it … In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."

39. The actions of foreign diplomatic representatives of States Parties in respect of nationals outside the *de jure* territory of the State, have also been held to engage the State's responsibilities to respect and to ensure Covenant rights under Article 2(1)[38]).

40. Nowak's authoritative *CCPR Commentary* sums up the implications of the holdings of this line of HRC decisions (footnotes omitted):

> "When States parties … take *actions on foreign territory* that violate the rights of persons subject to their sovereign authority [such as nationals], it would be contrary to the purpose of the Covenant if they could not be held responsible. It is

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[36] *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion of 9 July 2004, para 109.
[37] *Lopez Burgos v Uruguay*, No. 52/1979; *Celiberti de Casariego v. Uruguay*, No. 56/1979.
[38] *Varela Nunez v Uruguay*, No. 108/1981; *Samuel Lichtensztejn v Uruguay*, No. 77/1980; *Pereira Montero v Uruguay*, No. 106/1981.

> irrelevant whether these actions are permissible under general international law (e.g., sovereign acts by diplomatic or consular representatives, or in border traffic or by border officials in customs-free zones; actions by occupation forces in accordance with the rules of the laws of war) or constitute illegal interference, such as the kidnapping of persons by secret service agents."[39]

41. The extraterritorial *consequences* of a State Party's actions *taken on its own territory* that adversely affects the enjoyment of a Covenant right, may also attract the obligations of a State party. This is most commonly recognized in the context of the extradition of a fugitive to a State where he or she faces "a real risk of exposure" to torture or cruel, inhuman or degrading treatment.

42. Thus, in *Soering*, the European Court of Human Rights (ECtHR) held the prohibition contained in Article 3 of the ECHR[40],

> can be applicable when the adverse consequences of extradition are, or may be suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State[41].

43. Under Article 1 of the ECHR, States Parties are under an obligation to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In *Soering,* the ECtHR observed that, even though the ECHR does not impose obligations on non-States Parties and does not purport to be a means of requiring States Parties to impose Convention standards on other States, this does not absolve States Parties to the ECHR "from responsibility under Article 3 for *all and any foreseeable consequences* of extradition suffered outside their jurisdiction."[42]

44. This responsibility arises because of the nature of the ECHR as a "treaty for the collective enforcement of human rights and fundamental freedoms … Thus, the object and purpose of the [ECHR] as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards *practical and effective*."[43]

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[39] Manfred Nowak, *CCPR Commentary*, 2nd edition, Kiel: NP Engel, 2005 at p. 44.
[40] The prohibition in Article 3 of the ECHR is in all relevant respects identical to that in Article 7 of the ICCPR, except that the latter expressly includes a prohibition on non-consensual medical experimentation.
[41] *Soering*, *supra*, para. 85.
[42] *Soering, supra*, para 86, emphasis added.
[43] *Ibid,* para. 87, emphasis added.

45. The responsibility also arises because of the special importance of the prohibition against torture or cruel, inhuman or degrading treatment. The extraditing State need not be satisfied that the conditions awaiting the requested person are in full accord with all the safeguards of the ECHR before it surrenders her or him[44]. But the "spirit and intendment" of the ECHR Article 3 prohibition against torture requires that a State Party not extradite the requested person if she or he faces a real risk of treatment violating Article 3, "in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article art.3)."[45] As noted in the *Furundzija* decision, *supra* the obligation to prohibit and punish torture entails an obligation to put in place measures that will pre-empt or forestall the perpetration of torture.

46. Liability is incurred by the State Party "by reason of its *having taken action which as a direct consequence the exposure of an individual* to proscribed ill-treatment."[46]

47. The observations of the ECtHR pertaining to the objects and purposes of the ECHR apply equally to the objects and purposes of the ICCPR. In its *General Comment On Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto* (*General Comment 24*), the HRC has concluded that:

> "the object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."[47]
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> [...] "the Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose."[48]

48. In its *General Comment 20* concerning Article 7 of the ICCPR (1992), HRC concluded that the general prohibition on torture or cruel, inhuman or degrading treatment under Article 7 also included an obligation not to "*expose individuals to the danger of* torture or cruel, inhuman

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[44] *Ibid*, para. 86.
[45] *Ibid*, para. 90
[46] *Ibid,*, para. 91, emphasis added.
[47] HRC, *General Comment 24* (1994), para. 7.
[48] Ibid, para. 11.

or degrading treatment or punishment upon return to another country by way of extradition, expulsion or refoulement."[49]

49. In its admissibility decision in the communication of *Ng v Canada*, No. 469/1991, the HRC explained that the prohibition on refoulement to torture implied into Article 7 flowed from the States Parties' obligation under Article 2(1) to ensure Covenant rights to persons within their jurisdiction:

> "Article 2 of the Covenant requires States parties to guarantee the rights of person within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in another jurisdiction. In that sense, a State party is clearly not required to guarantee the rights of persons within another jurisdiction. *However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant ... For example,* a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequences would not occur until later on."[50]

50. It is submitted that the extradition scenario is only one *instance* of circumstances in which the extraterritorial consequences of a State's Party's intra-territorial conduct can give attract its obligations under the ICCPR. As noted above, it is clear from the jurisprudence of the HRC that a person *need not be on the territory* of the State party (although they invariably are *in the case* of expulsion or extradition) in order to be within its jurisdiction for the purposes of Article 2 of the ICCPR. The more general principle is that articulated by the ECtHR in the case of *Ilascu v Moldova*:

> "A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the [ECHR], even if those repercussions occur outside its jurisdiction."[51]

51. States Parties to the ICCPR are thus under an obligation *not to expose* persons subject to their jurisdiction to the risk of torture or cruel, inhuman or degrading treatment. The obligation

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[49] Ibid, para. 9.
[50] *Ng v Canada*, Admissibility Decision, para. 6.2, emphasis added
[51] *Ilascu and Others v Moldova and Russia*, Application No. 48787/99, 8 July 2004, para. 317.

applies wherever there are substantial grounds for believing that an individual faces a real, foreseeable, personal risk of treatment violative of Article 7,[52] due to the conduct of the State party's agents or officials. The latter would include both law enforcement and security officials and diplomatic representatives.

52. A State party's obligation "to ensure" the Article 7 rights of persons subject to its jurisdiction entails positive obligations, including the obligation of due diligence in assessing whether the conduct of its agents might expose an individual to a real, foreseeable and personal risk of ill-treatment contrary to Article 7, even if the treatment itself occurs at the hands of another State. It is the responsibility of the State Party to set in place the necessary administrative or other measures required to ensure compliance with this obligation. This proposition flows in part from the nature of the obligation to ensure: "The obligation to ensure consists of the obligation to *protect* individuals against interference by third parties (horizontal effect) … "[53]

PART IV – Conclusion

53. It is submitted that the foregoing legal principles have direct application to questions posed in Items 1, 2 and 5 of the Amended Notice of Hearing.

54. It is not within HRW's expertise to comment on the appropriate standards of conduct relevant to Item 3 and 4. However, with respect to Item 3(c), it is suggested that an appropriate source of expertise would be individual experts such as United Nations' Special Rapporteur on Torture, Professor Manfred Nowak, former Special Rapporteur on Torture, Professor Sir Nigel Rodley, or Professor Jim McManus Professor at Glasgow Caledonian University, who acts as an expert for the European Committee on the Prevention of Torture and holds the Chair of the Parole Board for Scotland and was the first Scottish Prison Complaints Commissioner.

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[52] The test is substantially the same as between the ECHR, ICCPR and Article 3 of CAT: see *N v Finland* (2005), 43 EHRR 12 (ECHR); *Ng v Canada*, above; Committee against Torture, *General Comment 1* (1997), para. 6.
[53] Nowak, *CCPR Commentary*, at p. 38, emphasis original.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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