

**INTERNAL INQUIRY INTO THE ACTIONS
OF CANADIAN OFFICIALS REGARDING
ABDULLAH ALMALKI, AHMAD EL MAATI AND MUAYYED NUREDDIN**

**OUTLINE OF SUBMISSIONS BY
ABDULLAH ALMALKI**

(Hearing returnable January 8 and 9, 2008)

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OVERVIEW

1. By amended notice of hearing dated November 26, 2007, Commissioner Iacobucci has requested outlines of submissions concerning the standards that he should apply in determining the matters set out in paragraph “a” of the Inquiry’s Terms of Reference. Submissions have been specifically requested in five areas:

- I. Sharing information with foreign authorities
- II. Questioning Canadians detained in foreign states
- III. Provision of consular services to Canadians detained in foreign states
- IV. Disclosure of information obtained by consular officials
- V. Role of consular officials in national security or law enforcement matters.

2. At the Commissioner’s request, Mr. Almalki has collaborated with other participants so as to facilitate the efficient conduct of the hearing. Consequently, he will not make written submissions concerning all five areas outlined in the amended notice of hearing. Rather, he will focus on aspects of questions (I) and (III), though he may wish to address orally other participants’ submissions at the hearing on January 8 and 9, 2008 (the “Standards Hearing”).

3. Mr. Almalki will also address a preliminary matter of fundamental importance at the heart of the Standards Hearing: the presumption of innocence.

4. Mr. Almalki adopts the submissions of Amnesty International, Human Rights Watch, the International Civil Liberties Monitoring Group, Mr. El Maati and Mr. Nureddin in respect of the other issues raised in the amended notice of hearing.

PART 1 – PREMISE OF HEARING

5. The Commissioner seeks submissions on standards of conduct in five areas relevant to the fact-finding mandate of the Inquiry. The premise for all five areas of questions in the amended notice of hearing is set out in paragraph 1(a)(i) and (ii): the participants are asked to comment on the propriety of conduct by Canadian officials who investigate both “activities that may *on reasonable grounds* be suspected of constituting threats to the security of Canada” and “the *possible* commission of terrorism offences” [emphasis added].

Amended Notice of Hearing dated November 26, 2007, paras. 1(a)(i) and (ii).

6. In effect, the participants – and the public at this public Standards Hearing – are to assume that Messrs. Almalki, El Maati and Nureddin are legitimate terrorist suspects.

7. Commissioner Iacobucci has interpreted the Terms of Reference to preclude him from investigating the reasonableness of the investigations of the three participants by CSIS and the RCMP. He has accepted the Government’s view that the Inquiry is not the forum for the men to clear their names. Yet, by presuming for the sake of the Standards Hearing that the criminal and national security investigations were “reasonable”, this Inquiry propagates the devastating perception that the men are guilty.

8. Moreover, the procedure adopted by this Inquiry, by which the men have not seen one witness, transcript, summary of evidence, or document, precludes them from challenging the propriety of the ways in which they were targeted by Canadian officials. The targeting and labeling is assumed to be “reasonable” and the commission of offences by the three men “possible”. Such a starting point is unfair and dangerous. As Commissioner O’Connor aptly put it in the *Arar Report*,

Labels have a way of sticking to individuals, reputations are easily damaged and when labels are inaccurate, serious unfairness to individuals can result.

Arar Report, Analysis and Recommendations, p. 19

9. The labels attached to the three men by Canadian officials remain in place by virtue of the Standards Hearing and the wording of the amended notice of hearing. The men have no meaningful way to establish the inaccuracy of those labels, and therefore to prevent further unfairness and harm to their reputations.

10. The Terms of Reference for the Arar Commission did not expressly include a mandate to ‘clear’ Mr. Arar’s name nor to confirm the legitimacy of the investigation of Mr. Arar. Nevertheless, Commissioner O’Connor stated categorically in his report that there was no evidence Mr. Arar committed any offence or that his activities constituted a threat to national security. He commented that it was not a case where Canadian investigators lacked resources or time – Canadian investigators made extensive efforts to find any information that could implicate Mr. Arar – but still they found none. Like Mr. Arar, Mr. Almalki has been doggedly investigated. He has never been charged with an offence. The American authorities refused to launch an investigation into Mr. Almalki’s

activities. The Syrians concluded there was no connection between Mr. Almalki and terrorist groups. And still, Mr. Almalki lives under a cloud of suspicion. The very premise of the Standards Hearing only perpetuates this suspicion.

Ibid. at pp. 59 and 126

11. Mr. Almalki therefore submits that it is fundamentally important and in keeping with the presumption of innocence that the Commissioner make absolutely clear in his final analysis that the three men are presumed innocent and in no way should be viewed as having any connections to terrorist activity. Failure to do so inverts the presumption of innocence and propounds the injustice already inflicted on the men.

PART 2: INFORMATION SHARING WITH FOREIGN AUTHORITIES

12. Mr. Almalki divides his submissions with respect to question #1 of the amended notice of hearing into three sections: a discussion of the post-September 11, 2001 security environment; standards applicable to all Canadian officials (including DFAIT, RCMP and CSIS); and submissions relevant to CSIS specifically.

WAS THERE A CHANGE IN TREATMENT OF PEOPLE BEING INVESTIGATED FOR POSSIBLE CONNECTION TO TERRORISM AFTER SEPTEMBER 11, 2001?

13. Much has recently been written (books, magazine articles, newspaper articles) exposing the myriad abuses carried out by the Americans (and their proxies) in extracting information from men being investigated for connections to terrorism. Most recently there have been revelations of the destruction of the CIA tapes of the waterboarding interrogation by the CIA of an alleged high level al Qaeda man named Abu Zubaydah

(American spelling). Ron Suskind, in his book, *The One Percent Doctrine*, suggests that Abu Zubaydah was not a high level al Qaeda man but the travel agent for al Qaeda whose importance was hyped by President Bush and Vice-President Cheney.

Ron Suskind , *The One Percent Doctrine: Deep Inside America's Pursuit Of Its Enemies Since 9/11* (Simon and Schuster 2006) at pg. 100

New York Times articles re destruction of CIA interview tapes, December 7, 8, 11, and 15, 2007

14. In the *Harkat* security certificate reasonableness hearing before Justice Dawson in the Federal Court, there was evidence and information concerning a high-level al Qaeda member named Abu Zubaida. Mr. Harkat's connection, or non-connection, with Abu Zubaida was an important issue. The information Mr. Harkat's counsel received from the Canadian government was that Abu Zubaida had been captured in Pakistan and was reportedly cooperating with the Americans. "Reportedly cooperating with the Americans" is considered to mean euphemistically that Abu Zubaida was being tortured. The decision of Justice Dawson in the *Harkat* case describes the information Harkat's counsel placed before the Court as to the treatment of Abu Zubaida, including that Abu Zubaida was being held in a CIA black site.

Harkat, Re (2005 FC 393) DES-4-02, Date: March 22, 2005 at para. 115-121

15. In *Harkat*, Mr. Copeland filed with the court a now infamous 37 page legal memorandum that came to be known as the Gonzáles Memorandum. It was written by top US lawyers specifically in relation to how to deal with Abu Zubaidah. Until earlier this year Alberto Gonzales was the Attorney General of the United States. Jay Bybee signed that detailed memorandum, prepared by Jonathan Yoo. Jay Bybee is one of the

American lawyers who, by his writing, was destroying the rule of law and eviscerating important international conventions and treaties.

16. Mr. Bybee said in the Memorandum that, under the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, for an act to constitute torture:

it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture, it must result in significant psychological harm of significant duration e.g. lasting for months or even years.

The Gonzales Memorandum can be located on the Arar Commission website
http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm

17. The horrors of that definition were not enough. The Memorandum went on to say that even if your activities got to or beyond the level of his obscene definition of torture, so long as you were carrying out the torture under the order of the President, you would not be criminally liable for what you did.

David Cole “What Bush Wants to Hear” The New York Review of Books, November 17, 2005 (available at <http://www.nybooks.com/articles/18431>)

18. Jonathan Yoo, when he was the US Deputy Assistant Attorney General, wrote the Memorandum and distorted the law for the Bush-Cheney administration. Concerning the treatment of Guantánamo detainees Yoo said, “what the administration is trying to do is create a new legal regime”.

19. Two lawyers who served as chief of staff for Vice President Dick Cheney, Scooter Libby and later David Addington, advanced similar views on behalf of the Bush administration.

20. According to all of those lawyers, and according to former Attorney General Alberto Gonzales, harsh interrogation techniques like waterboarding do not constitute torture.

21. A few weeks ago Bush's nominee for Attorney General, Michael B. Mukasey, declined to tell the Senate Judiciary Committee if he considered harsh interrogation techniques like waterboarding to be torture or to be illegal if used on terrorism suspects. Mr. Mukasey has been confirmed as Attorney General.

22. These lawyers' manipulation of the truth and distortion of the Rule of Law gave the green light to the outrageous conduct at Abu Ghraib, Guantanamo and the CIA blacksites. It is submitted that turning a blind eye to those abuses created the international climate and context in which Canadian officials dealt with so-called terror suspects, including Mr. Almalki. After more than nine years of investigation no charges have been laid against Mr. Almalki. His business has been destroyed, his reputation has been ruined, he has suffered lengthy inhumane detention and torture. The impact on Mr. Almalki and his family is beyond description.

23. It is with this background in mind that the following submissions are made concerning the standards of conduct applicable to relations between police and national security agencies in Canada and Syria.

SUBMISSIONS ON STANDARDS APPLICABLE TO ALL CANADIAN OFFICIALS

24. It is accepted that States have an obligation to investigate threats to national security, and that this means States will share information with each other. But they cannot conduct their investigations in any way they see fit. There are two fundamental rules governing the exchange of information: the information must be accurate, and human rights must be respected.

25. Commissioner O'Connor ruled in the Arar Report that every piece of information, no matter how small, must be accurate before it is shared with foreign authorities. This obvious standard was exhaustively reviewed at pages 26 and 103-112 in the Analysis and Recommendations volume of the Report and should be adopted by the current Commission.

26. The second precondition for the sharing of information is respect for the rights of the individual in question. Human rights law requires a fair balance to be struck between legitimate national security concerns and the protection of fundamental rights and freedoms. The appropriate balance is reflected in both international instruments and

domestic law, namely the *International Covenant on Civil and Political Rights* (“ICCPR”) and section 269.1 of the *Criminal Code* of Canada.

Arar Report, Analysis and Recommendations, p.102
ICCPR, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976)

27. Canada, Syria and Egypt have all ratified the ICCPR. While some rights can be derogated from in times of public emergency, the ICCPR mandates that certain rights are not subject to suspension at any time, under any circumstances. One of those rights is the freedom from torture and cruel, inhuman or degrading treatment or punishment.

ICCPR, art. 7

28. On December 18, 2002, the General Assembly of the United Nations adopted a resolution specifically focusing on the need to protect human rights and fundamental freedoms in the course of countering terrorism. The resolution confirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights law.

General Assembly Resolution, 18 Dec. 2002, A/RES/57/219

29. The Secretary-General submitted a report of the Policy Working Group on the UN and Terrorism to the General Assembly and Security Council in August 2002. The Report observed that terrorism often thrives where human rights are violated. In all cases, the fight against terrorism must be respectful of human rights obligations.

Report of Policy Working Group on the UN and Terrorism (August, 2002), A/57/273-S/2002/875

30. The Human Rights Committee of the UN has also expressed concern that States are sacrificing human rights in the course of security investigations:

While it understands the security requirements connected with the events of 11 September 2001, the Committee expresses its concern... at the attitude of the security forces, including Political Security, which arrests and detains anyone suspected of links with terrorism, in violation of the guarantees set out in the Covenant (art. 9). The State party should ensure that the measures taken in the name of the campaign against terrorism are within the limits of Security Council resolution 1373 (2001) and fully consistent with the provisions of the Covenant. It is requested to ensure that the fear of terrorism does not become a source of abuse.

CCPR/CO/75/YEM, para. 18 (2002)

31. In a separate report, the UN Human Rights Committee confirmed that States must protect persons of foreign extraction, in particular Arabs and Muslims, from stereotypes associating them with terrorism, extremism and fanaticism.

CCPR/CO/74/SWE, para. 12 (2002)

32. In addition to the ICCPR, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT") also must inform the standards by which any criminal or security investigation is conducted. The prohibition against torture is absolute, non-derogable and a peremptory norm. The text of Article 2 of the CAT is unequivocal: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

CAT, art. 2(2)

33. Canada's *Criminal Code* reflects the *jus cogens* nature of the prohibition against torture and inhuman treatment. Section 269.1(3) specifically states that exceptional circumstances are no defence to a charge under the section.

Criminal Code, s. 269.1(3)

34. By virtue of s. 21 of the *Criminal Code*, a person is a party to an offence (including s. 269.1) who “does or omits to do anything for the purpose of aiding any person to commit” the offence. A person may also be a party to an offense if he or she counsels another party to commit the offence; “counseling” includes soliciting or inciting in circumstances where the person knew or ought to have known the counseling would lead to the offence.

Criminal Code, s. 21 and 22

35. Wilful blindness to a material or real risk of torture can amount to complicity in torture.

Testimony of Peter Burns, Arar Commission, Transcripts, pp. 5889-5892

36. Information sharing with foreign regimes that have been reported to engage in torture or inhuman treatment of detainees violates international human rights law and the Criminal Code. So long as there is a real or material risk that torture may result from the sharing of information, Canada should not share the information. It goes without saying that, in any event, the information shared must be accurate and devoid of inflammatory language and labels.

37. In cases where the State has previously engaged in torture, diplomatic assurances that the State will not torture the Canadian detainee are not enough. Professor Burns testified to this effect in the context of the *non-refoulement* principle (the prohibition against returning a foreign national to his own State where there is a real risk he will be

tortured). It is submitted that the same considerations must operate in situations where the person at risk of torture is a Canadian citizen already detained by the other foreign State.

Burns Testimony, Arar Commission, Transcripts, p. 5897

38. The Arar Commission confirmed that questions put to Mr. Almalki in Syria came directly from Canadian sources: CSIS and/or the RCMP. Commissioner O'Connor stated that he "would be very concerned about the RCMP providing information or question to authorities in a country such as Syria for purposes of interrogating a Canadian detainee." It is submitted that the same concern applies equally to CSIS or any other Canadian agency, with respect to information that potentially could be used for detaining (not just questioning) a Canadian.

**Arar Report, Analysis & Recommendations, pp. 200, 208-212
Factual Background, Volume I at page 346**

SUBMISSIONS ON STANDARDS APPLICABLE TO CSIS

39. The *Canadian Security Intelligence Service Act* contemplates liaison agreements with other countries. Section 17 states:

- (1) For the purpose of performing its duties and functions under this Act, the Service may,
 - (a) with the approval of the Minister, enter into an arrangement or otherwise cooperate with
 - (i) any department of the Government of Canada or the government of a province or any department thereof, or
 - (ii) any police force in a province, with the approval of the Minister responsible for policing in the province; or

(b) with the approval of the Minister after consultation by the Minister with the Minister of Foreign Affairs, enter into an arrangement or otherwise cooperate with the government of a foreign state or an institution thereof or an international organization of states or an institution thereof.

Canadian Security Intelligence Service Act R.S., 1985, c. C-23, s. 17

40. Volume II of the Factual Background in the *Arar Report* contains the following regarding liaison agreements:

28. For national security reasons, CSIS may have to enter into relationships with a foreign agency of a country that has a poor human rights record. In such cases, CSIS exercises caution by closely scrutinizing the content of information provided to, or obtained from, the foreign agency and by instituting checks and balances to ensure that none of the security intelligence information exchanged with the foreign agency is used in the commission of human rights violations.

29. Generally speaking, CSIS only discloses information to a foreign agency of a country in which there are human rights concerns after considering various issues. These issues include the potential use to which the foreign agency may put the information, especially if it concerns Canadians, and the degree of the threat that an affected individual poses to national security. Further, CSIS considers the ability and willingness of the foreign agency to respect caveats and protect the information from public disclosure.

Arar Report, Factual Background, Vol. II, page 743, paras. 28 and 29

41. Exhibits P-0004, P-0005, P-0006 P-0007 and P-0008 from the Arar Commission appear to govern how CSIS is to deal with section 17 arrangements with foreign governments and institutions. The Solicitor General is responsible for approving arrangements under section 17 of the CSIS Act. The Director will manage foreign arrangements subject to any conditions imposed by the Solicitor General. In an emergency and the unavailability of the Solicitor General, the Director is authorized to

undertake whatever exchanges and cooperation are necessary to address the urgent requirement.

Arar Commission, Exhibits P-0004, P-0005, P-0006, P-0007 and P-0008

42. Little to no information has been given to Mr. Almalki on which to base his submissions on standards of conduct concerning sharing information with foreign authorities, in this case with Syria.

43. Syria has refused to participate in the Arar Inquiry or in this Inquiry.

44. The Egyptian Ambassador at the 2007 Raoul Wallenberg conference at Osgoode Law School stated that Egypt does not engage in torture. The Ambassador in response to questions put to him by Barb Jackman and Paul Copeland said that Egypt would participate in this Inquiry. In later correspondence the Ambassador stated that Egypt would not participate in this Inquiry.

45. It is known that all three men were tortured in Syria and that Mr. El Maati was tortured in Egypt.

Arar Report, Analysis & Recommendations, p 269

46. It is also known that questions put to the men came from Canadian investigations. It is submitted that questions put to Mr. Almalki in Malaysia, put to Mr. Almalki in Syria by the Malaysians, and put to Mr. Almalki in Syria by Syrian Military Intelligence came directly from Canadian sources: CSIS and/or the RCMP.

Ibid. at 269 and 272

47. Mr. Almalki and the other non-government participants do not know whether there was a liaison agreement in effect between Syria and Canada prior to or after 2001. There is no valid national security reason that counsel for the three men, and the Canadian public, cannot be provided with details of any arrangement with Syria. The Arar Commission examined what happened to Mr. Arar in Syria. It is submitted that the only reason for not revealing whether there was such an agreement is to avoid embarrassment for whichever government agency or officials deemed it permissible to enter into such an agreement.

48. The Arar Commission reported on Syria's human rights reputation and the views of DFAIT, CSIS, the RCMP and Project A O Canada as to whether Syria engages in torture. None of the government agencies concerned themselves sufficiently with the Syrian reputation for using torture.

Arar Report, Factual Background Vol. 1, pages 235-250

49. It has not been disclosed what official opinion was held by CSIS and the RCMP either before or after 2001 as to whether Syria or Syrian Military Intelligence engaged in torture. To comply with section 17 of the CSIS Act, international human rights law and the *Criminal Code*, it would be incumbent on CSIS to assess the human rights record of Syria, including any possible abuses by the security and intelligence organizations, before entering into and following a liaison agreement.

Arar Commission, Exhibit P-0005 2.2

50. Wilful blindness to the possibility or likelihood of torture or mistreatment would not satisfy the minimum standard of conduct with respect to liaison agreements. Based on testimony in various proceedings and statements to the press previously given, it appears that Canadian officials have either wilfully ignored or minimized foreign states' records for human rights abuses or have applied an improper standard for evaluating that record. For example:

- a. Then CSIS Director, Ward Elcock, testified at the Arar Inquiry. He was evasive when he was asked on many occasions by Lorne Waldman if Syria engages in torture. By refusing to come to a definitive conclusion that Syria engaged in torture, Mr. Elcock was able to justify providing information to Syrian Military Intelligence.

Testimony of Ward Elcock, Former Director of CSIS, at the Arar Inquiry, June 21 and 22, 2004

- b. A senior CSIS official, who testified under the initials J.P. at the Jaballah security certificate bail hearing after the release of the Arar Report, said he was unable to conclude that Syria engaged in torture. J. P. had himself been involved in negotiating liaison agreements on behalf of CSIS. When asked whether there could be a liaison agreement with Syria if that country engaged in torture, J. P. said that would be up to DFAIT. DFAIT witnesses, however, testified in Arar that there was a "credible risk" that Syrian Military Intelligence engaged in torture.

Analysis & Recommendations, p. 38

Evidence from Jaballah Bail Hearing ,Testimony of J.P., Oct. 6, 2006, pages 706 to 713, and October 10, 2006 , pages 832 to 837 (an electronic version is available from paulcope9@yahoo.com)

- c. In the October 10, 2002 memorandum of retired CSIS officer Jack Hooper revealed by Court Order for the Arar Commission, he stated "I think the U.S. would like to get Arar to Jordan where they can have their way with him." This was a clear indication that a senior CSIS official was aware that Jordan (and the U.S.) engaged in torture.

Arar Report, Addendum at page 245

- d. SIRC has previously faulted CSIS for claiming that it ensured that none of the information it provided to the government came from torture, when in fact CSIS did not do so.

SIRC Annual Report 2004-2005 page 25
http://www.sirc-csars.gc.ca/pdfs/ar_2004-2005-eng.pdf

- e. In the first Harkat detention review before Justice Lemieux, a senior CSIS analyst who testified under the initials P.G. said that he never asked if information he was receiving came from torture and that, so far as P.G. knew, no one else from CSIS made such inquiries.

Evidence of P.G, November 3, 2005, *Harkat v. MCI et al*, Federal Court File DES-4-02 (an electronic version is available from paulcope9@yahoo.com)

53. Failure to make inquiries about Syria's human rights record, ignorance of evidence that detainees are tortured and otherwise mistreated, and a cavalier dismissal of various opinions and reports (including those by DFAIT officials and NGOs) describing Syria's poor human rights record all fall below the standard required of CSIS before entering into liaison agreements and otherwise sharing information with Syria.

54. It is clear from various government reports (including the U.S. State Department Country Conditions Report) and NGO reports that Syria has engaged and does engage in torture. It was and remains improper, therefore, and a violation of the CAT, to have entered into any liaison agreement with Syria or to have shared information with Syria.

Arar Report, Factual Background, Vol. 1, pages 235-250

55. The actions of all Canadian government officials from CSIS, the RCMP and DFAIT in relation to Mr. Almalki and his detention and torture in Syria were in violation of the CAT.

PART 3: CONSULAR SERVICES TO CANADIANS DETAINED ABROAD

56. According to an Angus Reid poll (June 27, 2007), 53% of Canadians polled were not confident that the Department of Foreign Affairs would come to their aid if detained in another country, up three points since February of the same year.

57. Article 36 of the Vienna Convention on Consular Relations (“VCCR”) provides for without delay notification, communications, access, delivery of written communications, visits and legal representation between consular officers and their citizens.

VCCR, 18 April 1961, 500 U.N.T.S. 95 (entered into force 24 April 1964)

58. At least as of 1977, Canada has recognized that the guarantee of consular protection for Canadian nationals bearing dual citizenship was no different than for Canadians bearing only Canadian citizenship.

http://www.cic.gc.ca/english/resources/publications/dualci_e.asp

59. Some have interpreted Article 36 to the effect that the VCCR does not *oblige* States to extend consular protection only that they have the right of access to their detained citizens should they choose to afford the protection. The International Court of Justice ruled that the State solely can decide whether to extend consular protection, and to what extent. “It retains in this respect a discretionary power the exercise of which may

be determined by considerations of a political or other nature, unrelated to the particular case.”

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), [1970] I.C.J. Rep. 3 at 44

60. It is submitted that in exercising its discretionary power to extend consular protection, Canada cannot ignore the circumstances in which the Canadian is being detained, including the real risk that he is being tortured or treated inhumanely. Furthermore, it would be contrary to the principles of the democratic state to have a different standard of consular protection for Canadians suspected or alleged to be involved in terrorist activity, than for all other Canadian detainees who are charged or convicted with a criminal offence abroad.

61. Notwithstanding the purportedly discretionary nature of consular protection, Justice von Finckenstein has ruled that Canadians have a legitimate expectation of such protection. In *Khadr v. Canada*, he stated:

Based upon the foregoing, there is a persuasive case that both the DFAITA [Department of Foreign Affairs and International Trade Act] and the Guide [for Canadians Imprisoned Abroad] create a legitimate and reasonable expectation that a Canadian citizen detained abroad will receive many of the services which Omar Khadr has requested. Indeed, Canadians abroad would be surprised, if not shocked, to learn that the provision of consular services in an individual case is left to the complete and unreviewable discretion of the Minister.

Khadr v. Canada (Minister of Foreign Affairs), 2004 FC 1145 (CanLII) at para. 22

62. Professor Burns has confirmed that under customary law, a consul's functions are to represent the interests of the citizen abroad. Upon notification that the citizen is being held in circumstances where there was a real risk of torture, it would be a breach of consular functions to make no inquiries about the detainee. It is further submitted that it would be a breach of consular functions not to take all steps necessary to get access to the detainee in these circumstances. "All steps necessary" include soft diplomacy and formal diplomatic notes. A former British Ambassador who testified at the Arar Commission stated that diplomatic notes may be less effective than more informal attempts to gain access to a detainee.

Burns Testimony, Arar Commission, Transcripts, p. 5924

63. In the result, Mr. Almalki submits that the first priority in a situation where a Canadian citizen is being held abroad where there is a credible risk of mistreatment or torture is to gain access to the detainee. DFAIT (including the head of Consular Affairs and the Minister of Foreign Affairs) must be apprised of the full situation by RCMP, Consular or CSIS officials accurately and promptly. Moreover, the same legal obligation to a Canadian detainee would require not taking steps that might prolong detention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 19, 2007

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