INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN

REPLY SUBMISSIONS ON BEHALF OF ABDULLAH ALMALKI, AHMAD EL MAATI AND MUAYYED NUREDDIN CONCERNING STANDARDS OF CONDUCT

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1. Mr. El Maati, Mr. Almalki and Mr. Nureddin make these submissions to respond to those made by the Attorney General of Canada and adopted by the Ontario Provincial Police. They rely on their submissions already filed and make the following additional comments.

A. General Concerns:

2. The submissions of the AG focus primarily on the need to cooperate with other states, regardless of their human rights records, in pursuit of the international objective of preventing and prosecuting terrorist acts and other crimes. The submissions focus on the need to prevent and combat terrorism, almost to the exclusion of any other concern. It is accepted that Canada has a legitimate interest in combating and preventing crime, whatever form it takes. However, several concerns arise from the AG's submissions.

3. In their earlier submissions, Mr. El Maati, Mr. Almalki and Mr. Nureddin expressed their concern that the manner in which the standard of conduct questions were framed would lead, at least in the minds of the public, to a perception that they are terrorists, who have just not been 'caught' yet. The AG's submissions reinforce this perception. While the AG has indicated that his submissions are general in nature, the impression left is that Canadian officials acted properly in sharing information with other states about the three men. The underlying premise is that sufficient accurate and verified information existed

about these men to justify sharing it with other states, including those known to routinely abuse human rights. The Commissioner has agreed with the AG that the Inquiry does not have the purpose of clearing the names of the three men. However, neither the AG nor the Inquiry ought to further destroy their names and reputations. The inferences that will inevitably be drawn from the AG's submissions as to involvement in terrorist activity by any or all of the three men are completely unfounded.

4. Because the questions regarding standards of conduct were posed in the abstract, the AG has taken the opportunity to develop a broad justification for sharing information grounded in circumstances which clearly do not obtain in the cases of Mr. El Maati, Mr. Nureddin and Mr. Almalki. By way of example, the AG argues that terrorists travel clandestinely on false or altered passports, using human smugglers[1]. The three men in question, however, traveled openly, in their own names, and with their own Canadian passports. The AG's submissions create a perception in the public mind that perhaps clandestine travel or the use of false passports by the men justified the actions which led to their detention and torture in Syria and Egypt, when in fact no such activities occurred. Further, the submissions perpetuate stereotypical assumptions and give the impression that the three men fall within the stereotype. [2]

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[1] At para. 16, AG Submissions

[2] Canada's history of racism and stereotyping of non-citizens is well-documented. See, for eg., The Immigrant's Handbook, A Critical Guide, Black Rose Books, Montreal, 1981, Ch. 1 "History of Immigration Laws and Policy", p. 16-51; Canadian Council for Refugees, www.web.net/~ccr/fronteng.htm. Other books document specific incidents, for eg. None is Too Many, Canada and the Jews of Europe 1933-1948, Irving Abella & Harold Troper, Lester & Orpen Dennys, 1983.There are many new articles about the profiling and stereotyping of

5. The AG represents the government of Canada in these proceedings. Canada has many international and domestic obligations. The emphasis in the AG's submissions on police and security enforcement objectives, almost to the exclusion of Canada's human rights obligations, distorts the discussion on the standards of conduct for Canadian officials dealing with Canadians detained in countries which do not respect human rights. The import of the AG's submissions is deeply troubling, in that they appear to imply that Canada must for law enforcement reasons, albeit reluctantly, turn a blind eye to the human rights abuses inflicted on its citizens detained abroad, if not also actually participate or become complicit in such abuses.

6. Conversely, Mr. El Maati, Mr. Nureddin, Mr. Almalki and the intervenors who have provided submissions, have focused on the need to ensure that human rights are protected. The three men were subjected to severe human rights abuses and seek a full examination of the deficiencies of Canadian officials, which they believe led to and exacerbated the abuses they experienced. The intervenors are human rights organizations and so their submissions are made within the framework of their mandates. Neither the men nor the NGO's purport to represent or authoritatively articulate a broad understanding of the 'public interest' framework which must govern the conduct of Canadian officials. The AG, however, representing the government of Canada, must do

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Muslims and Arabs. See for eg. Choudhry, Sujit, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter", The Security of Freedom, Essays on Canada's Anti-Terrorism Bill, Daniels, R.J., Macklem, P., & Roach, K.U. of T. Press, 2001, p. 39-61

this. It has not done so. The 'public interest' is multi-faceted. It cannot be limited to crime prevention and prosecution, but must involve, as a primary focus, human rights protection of citizens.

7. The AG cties the UN *Charter* and the *Declaration on Friendly Relations* to underscore the importance of collective cooperation in law enforcement to maintain world peace and security.[3] The documents do not just speak to law enforcement cooperation, but as well to human rights. The opening article of the UN *Charter* states that a purpose of the United Nations is: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[4] Similarly, the *Declaration on Friendly Relations* also speaks of the "importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights".[5]

8. Further, while the AG focuses on the enforcement aspects of arrangements with

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[3] At para. 23-25, AG Submissions

[4] *United Nations Charter,* Art. 1

[5] *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (24 October 1970), UN GA 2625 (XXV), Preamble; The UN Security Council Counter-Terrorism Committee has published guidelines for reviewing security council resolutions. It's guideline indicates that for limitations on rights to be lawful they must be prescribed by law, necessary, not impair the essence of the right, be interpreted strictly in favour of the rights at issue, be proportional, compatible with the objects and purposes of human rights treates, respect the principle of non-discrimination and not be arbitrarily applied. These principles apply to UN SC Resolution 1373. See Proposals for Further Guidance for the Submission of Reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001), Compliance with International Human Rights Standards, UN SC CTC

other states, there are equally numerous international and domestic indications of the need to ensure human rights are protected during this time.[6]

9. The AG notes that it is important to consider the environment that existed between 2001 and 2004.[7] The AG refers to this time period as a "unique time in our history, one never to be repeated". The very nature of the war on terrorism, as it has been defined and constructed, is that it is unending and unwinnable. As Mr. El Maati noted in his submissions, reacting to a perceived crisis is not a justification for ignoring the need to ensure that actions taken will not result in human rights abuses. It is precisely in times of crisis that officials must be most cognizant of the need to protect human rights, because this is when they are most easily forgotten or ignored for the sake of expediency. Canada's own historical overreaction to world events ought to have taught its officials the need to

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[6] See for Eg. UN Security Council, Counter Terrorism Committee, "Human Rights", www.un.org/sc/ctc/humanrights.shtml; UNComHR, Final Report of Special Rapporteur, Koufa, K.K., *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter Terrorism, Terrorism and Human Rights*, E/CN.4/Sub.2/2004/40, June. 2004; UNComHR, Report of Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism *,* Scheinin, M*., Promotion and Protection of Human Rights*, E/CN.4/2006/98, Dec. 2005; UN Report of the Secretary General, *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism,* September, 2005; Council of Europe, Committee of Ministers, *Guidelines on Human Rights and The Fight against Terrorism*, December, 2002; UN Commission on Human Rights, Report of the Rapporteurs*, Situation of Detainees at Guantanamo Bay*, E/CN.4/2006/120 (2006); UN Commission on Human Rights, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism,* E/CN.4/2006/94, Feb. 2006; European Parliament, *Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, 2006/2027(INI), Final A6-9999/2006, June, 2006. It is to be noted that some of the resolutions and statements upon which the AG relies do not create international obligations. The G-8 is not an international organization. Its resolutions are not binding on Canada. Canada's human rights obligations 'trump' such arrangements, including the smart border agreement. See for eg. *Canadian Council of Refugees et al v A.G. Canada*, [2007] FC 1262.

[7] At para. 1, 12, AG Submissions

protect human rights, not pander to hysteria as a justification for abuse.[8] The internment of Japanese and Italian Canadians during the Second World War is one case in point, as was the internment of Ukrainians in the First World War.[9] It is essential the Commission not excuse wrongful conduct on the basis of a perceived crisis, as this will have ramifications in the furture. As the former High Commissioner for Human Rights, Sergio Vieira de Mello, stated in October, 2002, he was concerned that "yet one more casualty of the terrorist has been the erosion in some quarters of fundamental civil and political rights."

10. As has been noted the protection from torture is non-derogable, including in times of crisis. As the House of Lords stated:

> "the international prohibition of the use of torture enjoys the enhanced status of a jus cogens or peremptory norm of general international law. For purposes of the Vienna Convention, a peremptory norm of general international law is defined in article 53 to mean "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147, 197-199, the jus cogens nature of the international crime of torture, the subject of universal jurisdiction, was recognised. The implications of this finding were fully and authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v Furundzija [1998] ICTY 3,the international prohibition of the use of torture

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[8] It is noted, in any event, that Bin Laden's threat in November, 2002, against Canada came long after the detention of two of the men in Syria.

[9] The Immigrant's Handbook, A Critical Guide, Black Rose Books, Montreal, 1981, Ch. 1 "History of Immigration Laws and Policy", p. 16-51; Luciyk, L. Ed. Righting an Injustice: The Debate over Redress for Canada's First National Internment Operations, Justinian Press, 1994; Ethnicity, the State and War: Canada and its Ethnic Minorities, 1939-1945, Halloran, Mary, *International Migration Review*, Vol. 21, No. 1 (Spring, 1987), pp. 159-167

> enjoys the enhanced status of a jus cogens or peremptory norm of general international law. For purposes of the Vienna Convention, a peremptory norm of general international law is defined in article 53 to mean "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147, 197-199, the jus cogens nature of the international crime of torture, the subject of universal jurisdiction, was recognised. The implications of this finding were fully and authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v Furundzija [1998] ICTY 3..." [10]

11. The AG speaks of the 'very few' people who may pose significant risks implying that sharing of information is limited and only done in serious cases. The 'no fly lists' maintained by the US and Canada belie this statement. The numbers are high and the grounds upon which individuals are identified as terrorist suspects appear to be tenuous if not non-existent[11].

12. The AG notes that Canada is a net importer of information because it does not have an external agency to collect information and so must rely on other states for information.[12] The AG uses this to emphasize the importance of reciprocity: Canada must share information, even with states which abuse human rights, because it needs the information which those countries may have. That Canada may be a net importer of

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[10] *A (FC) v Secretary of State for the Home Department*, [2005] UKHL 71

[11] At para. 16, AG Submissions; "No Fly List", Wikipedia; "Ottawa Going Overbaord with No Fly List, Expert Warns", CBA, June 17, 2007; "Critics Alarmed by Canada's No Fly List", CBC, June 18, 2007

[12] At para. 68-74, 78, AG Submissions

information cannot excuse sharing information with states that abuse human rights. The AG assumes that the information received may be helpful. If it is information likely obtained through torture, it is not useful at all. It may also be misleading, or advance a foreign agenda against dissidents, which was recognized years ago by the Senate Standing Committee on Legal and Constitutional Affairs.[13]

B. Sharing of Information by CSIS:

13. The AG relies on a number of international, regional and bilateral agreements. There are common elements to these agreements, beyond the narrow one identified by the AG, the obligation to share information. An underlying premise of these arrangements, whether explicit or implicit, is that the information shared be accurate and verified.[14] The purpose must be to combat and prevent terrorism.[15] The persons about whom the

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[13] In 1987 the Standing Senate Committee on Legal and Constitutional Affairs in its report on *Report on Bill C-84,* Dec. 1987, at p. 12 stated: "The Committee is also concerned that much of the security intelligence that would underlie the exclusion decision might be unreliable and possibly even fabricated because it would originate in the country of the person's origin and might be designed to discredit dissidents." The concern about disinformation is widely shared, see for eg. *Prosecutor v Tadic*, *35 I.L.M. 32 (1996) (Int. Crim. Trib. A.C.), at p. 55*, a judgement of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. In that case the Appeals Chamber speaking to the difficulty of obtaining accurate information about conduct in an armed conflict. The Court noted that "....*often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign governments*."

[14] Eg. *International Convention for the Suppression of Terrorist Bombings,* Art. 2, cited at para. 26, AG Submissions. Even the standard of "reasonable suspicion" taken from the *International Convention for the Suppression of the Financing of Terrorism*, Art. 18, does not negate the requirement for accurate and verified information

[15] Eg. *UN GA Declaration on Measures to Eliminate International Terrorism*, 1994, Art. 5(d), 6, cited at para. 27, AG Submissions

information is shared must be “terrorist persons” or otherwise involved in terrorist financing or acts[16] and the sharing of information must be in accordance with law. [17]

14. The standard for sharing information which the AG indicates is used by CSIS is not reflected in the international standards upon which the AG relies. The sharing of information in those agreements cited is related to the prevention and combating of terrorism. The AG, however, indicates that information may be shared by CSIS where the citizen is “suspected on reasonable grounds of engaging in activities which pose a threat to national security"[18]. The *CSIS Act* defines a “threat to national security” much more broadly, which the AG fails to note in his submissions:

> “threats to the security of Canada" mean:
> a. espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
> b. foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
> c. activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

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[16] Eg. *UN GA Declaration to the Supplement on Measures to Eliminate International Terrorism,* 1996, Art. 8, cited at para. 27 - this requires that information be shared about "terrorists". *UN SC Resolution 1373 (2001)*, Art. 3(a), cited at para. 29, AG Submissions - refers to "terrorist persons"; *G-8 Foreign Ministers Meetings, June, 2002*, s. 8, para. 4, cited at para. 32 AG Submissions - refers to the movement of "terrorists"; *EACP, Partnership Action Plan Against Terrorism*, Nov. 2002, Preamble, cited at para. 36, AG Submissions - refers to "terrorist persons or networks".; *Inter-American Convention Against Terrorism*, AG/RES 1840, Art. 7.1, cited at para. 37, AG Submissions - refers to the movement of "terrorists".

[17] Eg. *G-8 Foreign Ministers' Meetings, June, 2002*, s. 6, para. 4, cited at para. 32 AG Submissions

[18] At para. 47, 52, 54, AG Submissions;

> d. activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,
> but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).[19]

C. Sharing of Information by the RCMP:

15. Of concern in the AG's submissions is the disclosure that most information sharing by the RCMP is done on an informal basis,[20] notwithstanding a well developed legal framework for the sharing of information. Once one moves beyond the legal framework, it is difficult to ensure that standards are applied at all. The reality of police work may necessitate the rapid transfer of information, but unless there are strict controls on what is shared and what standards are to be applied, the tendency will inevitably be to 'relax the rules' for the sake of perceived operational effectiveness. Further it is the police who enforce laws; they should not be breaching them in the course of their work.

16. As with CSIS, the RCMP does not appear to comply with the international standards for sharing information. Not only does it 'informally' share outside of the legal framework where this should occur, it may share information about a 'person of interest' and a 'target' and it may share the fruits of its searches and seizures, where there is an 'investigative need' to do so. While the AG has outlined the restrictions on sharing - caveats, need to know, and centralized oversight - it fails

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[19] *Canadian Security Intelligence Service Act*, s. 2

[20] At para. 57, AG Submissions

to address evidentiary standards for sharing information.[21] Investigations may involve the collection of all sorts of information about a person, including gossip. Gossip may flavour an investigation, but it does not qualify as information which ought to be shared.

17. It is worth noting that the AG has buttressed its arguments with selective quotations from the Arar Report. The AG states at paragraph 62, for example, that Commissioner O'Connor found that the standard for information sharing contained in the RCMP Policy Manuals were "essentially sound".[22] The AG neglected to quote the preceding paragraph of the Report in which Commissioner O'Connor emphasized that information sharing

> must take place in a reliable and responsible fashion.The need for information sharing does not mean that information should be shared without controls, particularly without the use of caveats. Nor does it mean exchanging information without regard to its relevance, reliability or accuracy, or without regard to laws protecting personal information or human rights.[23]

18. The AG pays lip service to the absolute requirement that information that is shared is accurate and not misleading. As Commissioner O'Connor stated, "[s]haring unreliable or inaccurate information does not provide a sound foundation for identifying and thwarting real and dangerous threats to national security and can cause irreparable harm to

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[21] At para. 58-66, AG Submissions

[22] Citing page 331 of Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Analysis & Recommendations*

[23] Ibid.

individuals."[24] The AG also did not avert to obligation on the part of Canadian agencies to avoid using potentially emotive or inflammatory phrases (like "Islamic extremist"). The importance of using precise and accurate labels is critical when the information is being shared; there must be an assessment done as to how the recipient agency may interpret the labels used by the RCMP (or other Canadian agency).[25]

19. The AG has been frank about the practice of disclosing travel information. It does not appear to be necessarily linked to imminent threat of engagement in a criminal act; rather, it may simply further the investigator's curiosity about what a person is doing. The AG is disingenuous in noting that it expects the state receiving the information to take no further action against the person, beyond mere monitoring, unless the RCMP requests that the person be stopped or 'engaged' at the border on entry to the country.[26] In light of how the men were labeled, the RCMP and/or CSIS knew or ought to have known that the sharing of travel information would lead to much more robust actions on the part of the receiving states than a mere watching brief.

E. Questioning of Detained Canadians:

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[24] Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Analysis & Recommendations*, page 335.

[25] Ibid. at 337.

[26] At para. 67, AG Submissions

20. The AG submits that Canada, as a net importer of information, may require information from foreign agencies to advance its own investigations.[27] This assertion is flawed. It assumes, as noted above, that the information received will be reliable, an assumption which cannot be made, where it is a state that engages in torture to obtain information from detainees. Further, the AG does not explain why it would be necessary to examine a Canadian detained in a state which commits human rights abuses who is facing no charges there, rather than examine the person on return to Canada (or before the person left). It is highly relevant that the three men were questioned and Mr. El Maati and Mr. Almalki agreed to be questioned further in Canada if counsel could be present, an arrangement Canadian investigators rejected.

21. In its submissions, about the RCMP or CSIS officials examining detained Canadians there is no explicit recognition that a factor which ought to be assessed is whether the request to examine a Canadian detained in a state which commits human rights abuses would or could lead to mistreatment.[28] It is of concern that the AG outlines a cautionary approach for DFAIT officials attempting to see a detainee, because of the concern that such intervention might make matters worse for the person,[29] but appears not to be aware

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[27] At para. 78-80, AG Submissions

[28] At para. 81-82, AG Submissions

[29] At para. 103, 112-113, 133, 136, AG Submissions. While the AG indicates that more pressure from DFAIT could worsen the person's position, the opposite could well be true. The UK and Australian detainees at Guantanamo have been released, and their governments made concerted efforts to assist them. Omar Khadr, who has had no assistance from his Canadian government remains at Guantanamo. Further Arar was released after approximately 10 months in detention in Syria, with intense publicity, and greater, although still deficient, efforts on the part of Canadian officials and politicians. Mr. El Maati and Mr. Almalki both spent

that a request by CSIS or the RCMP to examine a person entails the same considerations. Further, while the AG notes that a person is not likely to be tortured in the presence of a DFAIT official present at an interview of the detainee, this ignores the fact that a detained person facing an interrogation by a Canadian police or security officer may well be tortured beforehand to make him or her more compliant for the interview, and may be tortured after as a form of punishment for not being sufficiently compliant.[30]

F. Consular Services:

22. The AG asserts that the provision of consular services is not a legal right.[31]This is debatable, where the human rights of a Canadian citizen are in jeopardy.

23. While it is recognized that DFAIT officials may not be able to interfere with the internal laws and judicial processes of another state, it is apparent from the practice of some other states, that consular officials can be proactive in assisting their nationals.[32]

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over two years in detention, with no publicity and apparently little effort by Canadian officials to assist them.

[30] Another example of the insensitivity to human rights concerns in the AG's submissions is its concern in paragraph 82 with the RCMP being able to obtain information for use in court, that is information which was not received in breach of the principles of fundamental justice. No concern is expressed by the AG with the victim of the breach - only whether it would be admissible in court.

[31] At para. 89, AG Submissions

[32] As noted in Mr. El Maati's submissions the Philippines has been very proactive in assisting its nationals whose cases had dragged on before the courts for lengthy periods of time. It has conducted independent investigations of these cases. DFA Accomplishment Report, 2003, Philippines, Department of Foreign Affairs, Jan. 2004, p. 18, "Assistance to Nationals"

The AG notes that Syria and Egypt were under emergency laws which permitted indefinite detention during the relevant time period. This raises the issue of whether consular officials ought to take a more aggressive stance in protecting the rights of Canadians in the face of unjust laws.[33]

24. The AG emphasizes the problems which arise where the Canadian also is a national of the detaining state.[34] This concern did not arise in Syria with respect to either Mr. Nureddin, a dual Canadian/Iraqi national, or with respect to Mr. El Maati, a dual Canadian/Egyptian national.

25. The AG notes that DFAIT may not be able to take steps to locate the person unless it has the name of the detainee and the approximate date of detention.[35] This did not arise in the cases of the three men. Their families or friends notified DFAIT of their detentions.[36]

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[33] Consular officials do not always take a non-interventionist position as was apparent in the case of the Canadian Vietnamese woman who was executed in Vietnam, See Amnesty International, The Socialist Republic of Viet Nam: The Death Penalty - Inhumane and Ineffective, Aug. 28, 2003; The provision of consular assistance where a Canadian faces human rights abuses should not be dependent on whether or not Canadian officials approve of the person or the government detaining that person.

[34] At para. 93, 100, 126, AG Submissions

[35] At para. 101, AG Submissions

[36] Mr. Almalki's family's contact with DFAIT was belated out of a sense of concern that his detention was caused by Canadian officials. In spite of their mistrust of Canadian officials they eventually did contact them.

26. The AG lists the kinds of matters of concern to consular officials visiting a detainee. One of these is the physical and mental condition of the detainee. It should be noted that it is very unlikely that a state which routinely engages in torture would permit an obviously tortured detainee to have a consular visit. It is generally only when the person is presentable that a consular visit would be permitted. As well the mannerisms of detainee may not be a good indicator of injury having been inflicted on that person. Detainees subjected to torture and fearing it again will do their best to appear alright in order to avoid punitive torture for not properly behaving at a consular interview.

27. The AG notes that obtaining a private visit might not be realistic. It notes that if no signs of a judicial process emerge consular officials may ask that the detaining state either proceed towards this or consider releasing the person.[37] The AG does not indicate if private visits were sought in relation to any of the men, or if requests were made to Syria or Egypt to commence a legal process or release the men. Further, the AG does not indicate what steps it took in the face of the refusal of the Egyptian government to comply with the three release orders issued for Mr. El Maati. Intervention in this respect would not be interfering with a foreign legal process. It would be asking for a state to comply with its own legal process.

28. The AG notes that it is not Canada's practice to escort Canadians home and that, in any event, consular officials have no consular privileges outside their accredited

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[37] At para. 113 -115, AG Submissions

country.[38] A DFAIT official did escort Mr. Arar and Mr. Nureddin back to Canada, but not Mr. El Maati or Mr. Almalki, leaving the clear impression that it is selective in the assistance it provides, and may be motivated to provide greater assistance where there is more intense publicity. DFAIT ought not to be making decisions to assist on this basis. All Canadians are entitled to appropriate levels of assistance and there is no discernible difference between Mr. El Maati's and Mr. Almalki's concerns about return to Canada and those of Mr. Nureddin and Mr. Arar. The presence of an accompanying Canadian consular official, even without any powers, might well cause a border officer to hesitate before detaining a Canadian citizen.

All of which is submitted in reply this December 24, 2007.

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[38] At para. 122-123, AG Submissions