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

CONFIDENTIAL CLOSING SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA

DATED: June 20, 2008

John H. Sims
Deputy Attorney General of Canada
Department of Justice
Litigation Branch
Bank of Canada Building
234 Wellington Street
Ottawa ON K1A 0H8

Per: Michael Peirce
Alain Prefontaine
Roger Flaim
Gregory Tzemenakis
Yannick Landry

Tel: (613) 948-9800
Fax: (613) 948-9802

Counsel for the Attorney General of Canada

PART I: OVERVIEW

No Complicity

1. The actions of Canadian Government officials did not directly or indirectly result in the detention or any mistreatment of Messrs. Almalki, Elmaati, or Nureddin.

2. These three individuals each traveled to Syria of their own accord. Canada did not in any way seek to have these individuals detained in Syria or to have Mr. Elmaati transferred to Egypt. In fact, Canada took steps to ensure that the three individuals would not be detained.

3. The actions of the three individuals made them of interest to foreign police and security agencies, including in Syria and Egypt. Canada did not create the Syrian interest in the three individuals or the Egyptian interest in Mr. Elmaati.

4. Canada also had a legitimate investigative interest in each of the three individuals. Canada had credible information that the activities of Mr. Almalki, Mr. Elmaati and Mr. Nureddin posed a threat to the security of our country. As a result, it was imperative that Canada continue to take investigative steps in regard to the related threat while the individuals were detained.

5. At no time did Canadian officials approve, encourage or condone in any way the alleged mistreatment much less the alleged torture of the three individuals. In addition, there are no instances in which the alleged mistreatment of any of the three individuals can be said to have resulted from the actions of Canadian officials. Canadian officials were in no way complicit in any alleged mistreatment. Canadian officials did not know that the individuals were mistreated, if that was in fact the case. Canada had no specific evidence establishing that the individuals were mistreated. Canadian officials did, however, have evidence to the contrary.

6. This Commission knows the facts concerning the actions of Canadian officials. The Commissioner has seen all of the relevant Government documents, in unredacted form, and has heard from over forty Government witnesses. Based on these facts, the Commissioner can and must conclude that the actions of Canadian officials did not result directly or indirectly in the detention or any specific instance of alleged mistreatment. That much is known and certain. That is all that is needed for the Commissioner to meet his Terms of Reference.

7. It is incumbent upon the Commissioner, therefore, to say in his final report that the actions of Canadian officials were not responsible for the detention and any alleged mistreatment of the three individuals. The Canadian public should not be left with the misimpression that Canada and Canadian officials were in any way complicit in the detention and any alleged mistreatment of the three individuals.

8. It is unnecessary for the Commissioner to determine who was responsible for the detention of the individuals, and why, so long as he can conclude that Canadian officials were not responsible. Further, except with respect to the provision of consular services, the Commissioner is not called upon to assess the sufficiency of the actions of Canadian officials at large but rather only in so far as those actions resulted in the detention or mistreatment of the three individuals. Since that did not happen, the Commissioner is not mandated to make findings on the sufficiency of the actions of Canadian officials.

The Terms of Reference: Resulted In

9. Whether the actions of Canadian officials may have in any way affected the detention or treatment of the three individuals is unknowable and, perhaps for that reason, would take the Commissioner beyond his Terms of Reference. The standard of causation set out in the Terms of Reference – "resulted in" – is clear and does not admit of lower levels of causation and certainly not speculation or conjecture. By his Terms of Reference, the Commissioner is specifically called upon to make a "determination" not to offer his speculation.

10. Not only would a low standard of causation be contrary to the Commissioner's Terms of Reference, it would be entirely impractical in the circumstances. It is simply not possible for the Internal Inquiry to trace through the actual causes of the detention and any mistreatment of the three individuals. Absent the participation of foreign governments and agencies in the Internal Inquiry, it is impossible to know what occurred beyond the involvement of Canadian officials for which there is a clear record before the Commissioner.

11. It is always possible to create theories and make assumptions that somehow, unintentionally and indirectly, the actions of Canadian officials might have affected the treatment of an individual. With respect, such a low ill-defined standard would simply lead the Internal Inquiry into unknowable areas of uncertainty and ultimately the realm of speculation; such a standard would be inappropriate when the reputations of officials are in issue and the integrity of fundamental Canadian institutions is questioned.

12. This is a Commission of Inquiry. It is intended to end speculation not propagate it; this Commission's findings must be based in fact. The facts here establish that the actions of Canadian officials did not result directly or indirectly in the detention or alleged mistreatment of the three individuals.

13. Any speculation about an unsubstantiated connection would serve no useful purpose. The Government would gain no useful guidance from such speculation. Equally, the actions of Canadian officials in those circumstances could not be blameworthy.

14. It may be useful to examine some aspects of what the Internal Inquiry knows and what it does not and cannot know. It is important to stress that these areas of uncertainty do not in any way take away from the Internal Inquiry's ability to fulfill its mandate.

15. With respect to Mr. Almalki, we know that he was of interest to other countries because of his association with known Islamist extremists, his past training and his procurement activities. We know that the United States had a demonstrated interest in his detention.[1] We know that Canada had no interest in having him detained in Syria.[2] We know that he traveled to Syria of his own accord, without the fore-knowledge of Canadian and American officials. We do not know why he was detained upon arrival in Syria. We do not know whether it was based on the Syrians' own interest, whether it was sparked by information provided to the Syrians by Mr. Elmaati, whether it resulted from the American interest in his detention or whether it resulted from the actions of other individuals.

16. We know that Canada only learned of Mr. Almalki's detention in Syria one month after he was detained. We do not know why this was the case. We know that Canada shared very little information with the Syrians and Egyptians. We do not know what information was shared by other countries or even other individuals. We do not know why Canada received very little information from the allegedly comprehensive interrogation of Mr. Almalki. We do not know why consular access was granted for Mr. Arar but not for Mr. Almalki. We do not know why Mr. Almalki was released from custody on March 9, 2004.

17. There are similar points of certainty and uncertainty in respect of Mr. Elmaati and Mr. Nureddin. We do not know what roles other countries, other individuals or even the other named individuals may have played in the detention of Mr. Elmaati and Mr. Nureddin, who pursued what interests during their detention and why they were released. Without knowing these basic facts, it is impossible for the Commissioner to determine who is responsible for the detention and any mistreatment of the three individuals. We do know that the actions of Canadian officials did not result in the detention or any mistreatment of the three individuals.

18. It is important to recognize that Canadian officials worked with the same and greater uncertainty and did so in exigent circumstances. They had to work in real time, without the full body of information that has been compiled by the Internal Inquiry and without the benefit of hindsight. It would be an injustice to now imply a degree of certainty that did not exist. It would be an even greater injustice to judge the conduct of Canadian officials in the face of such uncertainty.

19. Even if the Commissioner were inclined to speculate as to who is responsible for the detention and any mistreatment of the three individuals, such speculation falls outside of his mandate, is unhelpful and would be inappropriate where the reputations

---

[1] As explained in paragraph 19, for the purpose of this Submission, detention means being arrested and incarcerated.
[2] CSIS had no interest in having Mr. Almalki (or Mr. Elmaati or Mr. Nureddin) detained in Syria. To be clear, CSIS is an intelligence gathering organization and does not seek to have people arrested or incarcerated. Further, the RCMP never has an interest in the detention of an individual in a manner that does not respect due process because that renders inadmissible any evidence elicited from the individual. For this reason, the RCMP never has an interest in the mistreatment of an individual.

of Canadian officials and institutions are in issue. This is an internal inquiry into the actions of Canadian officials and no one else; it is an inquiry into whether their actions resulted in the detention and any mistreatment of the three individuals. The evidence establishes that this is not the case.

Detention

20. The concept of detention in the Terms of Reference is not defined but necessarily takes its meaning from what occurred in these three cases. Detention does not mean being stopped and questioned at a point of entry. Rather, as it is used in the Terms of Reference, detention means being arrested and incarcerated. That is what occurred in these three cases and that is what is meant when the term is used in these submissions.[3]

Mistreatment

21. The Attorney General acknowledged in his submissions on the Terms of Reference that, for the purpose of the Internal Inquiry, the detention of the three individuals in the conditions in Syria and Egypt constituted mistreatment. While the Attorney General maintains that acknowledgment, the Commissioner subsequently ruled that detention and mistreatment should be treated as distinct concepts under the Terms of Reference. Specifically, the Commissioner ruled:

> I agree with the views expressed that the words "any mistreatment" are to be interpreted broadly and to include any treatment that is arbitrary or discriminatory or resulted in physical or psychological harm, as well as denial of properly entitled assistance and other forms of treatment that would normally be included in the meaning of mistreatment.[4]

22. This definition is so broad and the threshold so low that every aspect of detention in the conditions in Syria and Egypt must constitute mistreatment even if detention itself in those conditions cannot be said to constitute mistreatment.

23. The difficulty with this approach is that it does not permit an assessment of whether the actions of Canadian officials did or did not result in a specific instance of alleged mistreatment. As a result, while acknowledging the definition of mistreatment adopted by the Commissioner, for the purposes of these submissions, a reference by the Attorney General to mistreatment means a specific instance of physical harm.

24. The Attorney General takes no position on whether the three individuals were mistreated in this way while detained in Syria and, for Mr. Elmaati, in Egypt. The Attorney General nevertheless submits that there is no evidence establishing that any

---

[3] In some circumstances, the term detention is used in the documents reviewed by the Inquiry and in the testimony of officials to refer to being stopped and questioned at a point of entry. Care should be taken to avoid confusing this meaning of detention as found in the evidence with the meaning that flows from the Terms of Reference.
[4] Ruling on Terms of Reference and Procedure, May 31, 2007, paragraph 63.

actions of Canadian officials resulted in any specific instance of alleged mistreatment. The lack of a connection between the actions of Canadian officials and any specific instance of mistreatment will be addressed in the Parts 2 through 4 of the Attorney General's submissions dealing with the actions of CSIS, the RCMP and DFAIT respectively.

Torture

25. The Commissioner has also ruled that he ought to inquire into the individuals' allegations that they were subjected to torture while detained in Syria and Egypt. However, because there are no specific instances of mistreatment that can be said to have resulted from the actions of Canadian officials, it is unnecessary under the Terms of Reference for the Commissioner to determine whether, independent of the actions of Canadian officials, the three individuals were tortured in Syria or Egypt. In addition, the process engaged by the Internal Inquiry is incapable of determining the issue, in part because of developments arising subsequent to the Commissioner's ruling.

26. When the Commissioner ruled that it would be appropriate to determine whether the three individuals were tortured, it had not been determined that Syria and Egypt would not participate in the Internal Inquiry. That has now been clearly established, which means that the only evidence available to the Commissioner in support of the individuals' allegations of torture are the stories of the three individuals.

27. The Commissioner does not have any evidence available to him to corroborate the individuals' stories. In other words, any finding that the individuals were tortured must rest exclusively on an assessment of their credibility. The Commissioner should not be in the position of basing a decision of this import on an assessment of credibility where it is not necessary to the fulfillment of his Terms of Reference.

28. It would be particularly problematic to reduce this issue to a finding of credibility because the credibility of the individuals' stories has not been tested by cross-examination. Indeed, the Attorney General was not permitted to be present during the interviews of the individuals and was not given a full right of cross-examination.[5] Inquiry Counsel limited their questioning to the gathering of information only and did not raise questions testing credibility. What is more, the inquiry into torture was purely inquisitorial so that the allegations could not tested by an adversarial process more broadly, for example through the cross-examination of friends and family members and with evidentiary standards appropriate to the gravity of the issue.

29. The Attorney General has been informed by Inquiry Counsel that the three individuals will undergo medical examinations, which will be completed in July. It is

[5] Counsel for the individuals objected to the cross-examination of their clients. As a result, the Attorney General was not permitted to cross-examine the three individuals but rather was limited to the prospect of putting questions to the individuals only if it could be established that the question had not already been asked by Inquiry counsel, were relevant to the torture issue, could only be answered by one of the individuals and only government lawyers and not Inquiry counsel could ask the question (correspondence between Jasminka Kalajozic and Inquiry counsel). This is not cross examination and it is not a right to cross examine on the individuals' credibility.

unlikely that these examinations will be capable of supporting anything beyond a statement that the examinations were not inconsistent with an allegation of torture. This is in part because the three individuals do not allege that there is any notable evidence of physical injury suffered as a result of being tortured.[6] In other words, the individuals have removed any prospect of independently verifiable evidence and the Commissioner is left only with the individuals' claims to the credibility of their story.

30. These individuals are persons for whom there was credible information that their activities posed a threat to Canada's security. Their actions in this respect raise very serious issues about their credibility.

31. It must also be said that the three individuals have made innumerable high profile public accusations against Canada without foundation. They have alleged complicity by Canadian officials in their detention and alleged mistreatment. In fact, the individuals' accusations go further as they claim that they were detained and mistreated as a direct result of the actions of Canadian officials. There is no foundation for these accusations. The evidence proves the contrary. As a result, their credibility in leveling such accusations is clearly compromised.

32. In addition, as discussed below, the testimony of the three individuals alleging specific instances of mistreatment does not correspond to the facts despite efforts by the individuals to establish specific links. This has the result of not only confirming that any mistreatment of the individuals did not result from the actions of Canadian officials, it also undermines their credibility.

33. There is also evidence of possible collusion among the individuals. During his interview as part of the Arar Inquiry, Mr. Elmaati denied being in contact with the other individuals outside of the Internal Inquiry. He acknowledged only a brief meeting with Mr. Almalki and their lawyers. However, during his interview for the Internal Inquiry, Mr. Elmaati admitted that he had spoken with Mr. Almalki and they had shared their experiences.

34. In addition to questions about the credibility of the individuals' testimony, there is evidence directly conflicting with their claims. While Inquiry Counsel did not interview the friends and family members of the three individuals, the evidence of what friends and family members knew does not corroborate, but rather directly conflicts with, the allegations of the three individuals. Even though family members had visited Mr. Almalki in prison in Syria, the family stated in a meeting with DFAIT on November 6, 2003, that "Nobody thought he was being tortured..." Similarly, Mr. Elmaati's father, Badr Elmaati, told reporters upon his son's release that his son had informed him that he was not tortured in Egypt.

35. As well, Mr. Elmaati did not allege during consular visits that he was tortured in Egypt despite having the opportunity to discretely do so when asked about his well-

[6] The evidence currently is that Mr. Elmaati has a mark on his shin that he alleges is a result of a cigarette burn. He has said that the burn occurred during his detention.

being while prison officials were busy with another matter; on another occasion he told consular officials that he had been interrogated by security officials for five minutes but made no mention of torture; and another time, when prison officials stepped out of the room, Mr. Elmaati indicated that he had been interrogated by the Egyptian Security Services (ESS) but again made no mention of torture. This is particularly curious in light of the fact that he claims he told his mother during one of her visits with him that he was being tortured. If Mr. Elmaati ever made such a statement to his mother, it certainly was never reported to DFAIT, despite regular contact between the family and DFAIT.

36. Consular officials who visited Mr. Elmaati in detention in Egypt reported on six separate occasions that he was in good spirits and appeared to be in good physical condition. Rather than signs that Mr. Elmaati was being mistreated, the evidence is that he was receiving biscuits, sending letters to his family, had an MRI scheduled to examine an old knee injury that had been acting up since he had slipped while in detention and even had surgery scheduled prior to his release.

37. Setting aside the unreliable, uncorroborated and contradicted testimony of the three individuals, the Commissioner is left with mere speculation as to whether the three individuals were or were not tortured or even physically mistreated. The position of the Attorney General is that there is insufficient evidence to support a determination that one or more of the individuals was tortured. The Attorney General submits, therefore, that the Commissioner ought not to make a finding on this important issue based on this record. In the alternative, if the Commissioner nevertheless decides to address the issue, he must appropriately qualify any finding he might make.

Deficient in the Circumstances

38. The question of the appropriate measure of the standard of conduct of Canadian officials (i.e. what constitutes a deficiency) was addressed in detail in the Attorney General's submissions on Standards of Conduct. The Attorney General relies on those submissions. However, these Closing Submissions offer the opportunity to provide the necessary context that is invited by the fact that the Terms of Reference require the Commissioner to determine whether the actions of Canadian officials were "deficient in the circumstances."[7]

39. In his earlier submissions, the Attorney General referred to the general context of the post September 11th environment, including the anticipation of a second wave of attacks, the public environment and the incredible workload of Canadian officials at the time.

40. It is imperative, however, that the specific circumstances of these cases be considered by the Commissioner when assessing the conduct of Canadian officials. The Commissioner cannot understand and assess the conduct of Canadian officials

[7] In the Hearings on Standards of Conduct, the Attorney General could not address the circumstances that are important to assessing the sufficiency of Canada's actions because the Parties were called upon to answer hypothetical questions rather than speaking to the actual context.

without acknowledging the nature, extent and bona fides of Canada's investigative interest in the three individuals. It is that investigative interest that explains why Canadian officials took the actions that they did.

41. The Attorney General does not suggest that the fact that Canada had credible information that the activities of the three individuals posed a threat to Canada's national security can justify any alleged mistreatment. Rather, the point is that in order to understand and assess the actions of Canadian officials, it is imperative to begin from the starting point that Canada was conducting bona fide investigations of threats to the security of our country.

42. The Commissioner has reviewed sufficient information to be able to conclude that Canada had credible information that the activities of Mr. Almalki posed a threat to the security of this country. Mr. Almalki became the subject of investigation by Canadian officials in the late 1990s. He has also been of interest to foreign police and security agencies since the 1990s. Mr. Almalki associated with known Islamist extremists in Canada and abroad, including senior members of al Qaeda. He is believed to have served as a procurement officer for that organization.

43. Similarly, the Commissioner has sufficient information to conclude that Canada had credible information that the activities of Mr. Elmaati posed a threat to the security of this country. Mr. Elmaati became of interest to Canadian officials in 2000 and became the subject of an investigation. He associated with known Islamist extremists in Canada and abroad, including his brother Amer Elmaati, who was suspected of plotting to hijack a plane and crash it into a target in the United States. He spent seven years in Afghanistan where he trained and engaged in insurgency. He was believed to be preparing violent acts within Canada and may have been prepared to carry out a suicide mission. Mr. Elmaati was also of interest to foreign police and security agencies.

44. The Commissioner equally has sufficient information to conclude that Canada had credible information that the activities of Mr. Nureddin posed a threat to the security of this country. Mr. Nureddin also associated with known Islamist extremists in Canada and abroad. He is believed to have couriered money between Islamist extremists, including to a member of Ansar Al-Islam which was involved in attacks against coalition forces in Iraq.

45. The Commissioner's Terms of Reference do not, of course, call for a review of the investigation per se. Rather, the Commissioner is only required to review the investigation to the extent necessary to appreciate the nature, extent and bona fides of the investigative interests in regard to the three individuals in order to be able to properly understand the actions of Canadian officials in the circumstances. The Commissioner has before him sufficient documentary and testimonial evidence to conclude that Canadian officials were pursuing legitimate investigative interests into threat activities. Canadian officials worked in the shadow of that threat and, with the exception of consular officials, worked to confirm and prevent that threat.

Consular Services

46. Canadian officials were also concerned about the well-being of the three Canadian dual nationals detained on security grounds in countries that may have poor human rights records. That was an important consideration for officials conducting investigations of the individuals. It was the primary concern for consular officials.

47. Consular officials acted in good faith throughout their dealings with these three cases. Nevertheless, the Commissioner must recognize that, despite its best efforts, DFAIT cannot always ensure the protection of its citizens who are dual nationals. The *Vienna Convention on Consular Relations* is silent in respect of dual nationality. Countries such as Syria simply do not recognize the formal rights of the individual in respect of the other country of nationality. As a result, Canada could not gain access to any of the three individuals while they were detained in Syria. Nothing that Canada could have done would have changed that fact.

48. Canada gained access to Mr. Elmaati in Egypt and provided substantial consular services. In so doing, consular officials acted professionally and evidenced concern for Mr. Elmaati's well-being throughout. Both during his detention and after his release, Mr. Elmaati and his family thanked consular officials for their actions.

49. In assessing whether the actions of Canadian officials in providing consular services were deficient, the Commissioner's Terms of Reference do not require him to determine whether consular actions resulted in any mistreatment of an individual. When testifying, Canadian officials had no notice that the Commissioner might go beyond his Terms of Reference to consider making such a connection. Accordingly, the Commissioner should refrain from so doing, particularly given that any alleged connection is unverifiable. Regardless, the actions of consular officials did not result directly or indirectly in the detention or any mistreatment of the three individuals.

Information Sharing

50. The Terms of Reference specifically refer to information sharing as a matter to be considered in determining whether the actions of Canadian officials resulted in the detention or mistreatment of the three individuals. Canada must share information with countries that may have poor human rights records. Canada must share to receive and, in the interest of national security, Canada must receive information from these countries. Canada cannot live in intelligence isolation, no country can. As a net importer of intelligence, the security of Canada would be put at risk if it attempted to take an isolationist approach. Further, it is an unfortunate reality that important information for the security of Canada comes not just from outside of our borders but from countries that may have poor human rights records. It is acknowledged that caution is important when sharing information with these counties.

51. Caution is exactly the principle that guided the actions of Canadian officials in dealing with Syria and Egypt. Canada actively restricted the information that was

shared and questioned the accuracy and reliability of information that was received from Syria and Egypt. In all, over the course of almost four years, very little was shared and equally little was received from those two countries.

52. These cases do raise important questions about the proper process and considerations that must be brought to bear when dealing with cases in which Canadian dual citizens are detained on security grounds in countries that may have poor human rights records. Again, Canada must deal with countries such as Syria and Egypt in those circumstances. By definition, Canada's security and the welfare of Canadians are in issue in those circumstances. Not engaging the detaining state on either aspect is simply not an option. The challenge is to ensure that the right processes within government are followed and, as a result, the right considerations are weighed. Those processes and considerations were set out in detail in the Attorney General's submissions on Standards of Conduct.

53. The proper processes were engaged and the appropriate considerations were generally brought to bear in these cases. Similarly, it can be said that the actions of Canadian officials were reasonable, were carried out in good faith and cannot be said to be deficient. Regardless, the actions of Government officials did not result in the detention or mistreatment of the three individuals. What is more, there is no formal or informal Government of Canada policy or practice to facilitate the detention or any mistreatment of Canadians abroad.

54. Canada has learned from these cases, and from the Arar case, which, while very different, is still relevant to considering how best to manage cases of Canadians detained on security grounds in countries that may have poor human rights records. Canada has accepted the recommendations in Part 1 of the O'Connor Report and has taken further steps to reinforce the proper handling of cases like those before the Internal Inquiry.

Conclusion

55. The foregoing analysis of the issues flowing from the Terms of Reference and the conduct of the Internal Inquiry provides the Commissioner with the guidance necessary for the preparation of his Report. What follows are submissions specific to the actions of CSIS, the RCMP and DFAIT.

PART II - CSIS

INTRODUCTION

56. The actions of CSIS did not directly or indirectly result in the detention or alleged mistreatment of Messrs. Almalki, Elmaati or Nureddin in Syria and Mr. Elmaati in Egypt. Similarly, there was no formal or informal CSIS or Government of Canada policy or practice facilitating the detention or mistreatment of Canadian citizens abroad.

57. The Internal Inquiry cannot ignore, and should give substantial weight to, the following core principles:

(1) pre and post September 11th, there were no established precedents concerning the detention of Canadian citizens abroad who may have been involved in threat-related activity;

(2) pre-September 11th, CSIS shared information with foreign and domestic services in respect of all three individuals and Messrs. Almalki and Elmaati traveled outside of Canada, including to the Middle East, without being detained or mistreated; and

(3) post-September 11th, CSIS shared information regarding Mr. Nureddin and he traveled outside of Canada to the Middle East without being detained or mistreated.

BACKGROUND[8]

58. The following core facts must be taken into consideration in assessing the actions of CSIS officials.

Intelligence Collection Mandate

59. The Service's mandate is unique. Security intelligence investigations are directed towards future events and attempt to predict occurrences through the discovery of a pattern of occurrences in past and present events. The ultimate goal of intelligence collection is to provide advice to government, as indicated in section 12 of the *CSIS Act*.

Sharing of Information

60. Guided by principles of reciprocity and the comity of nations, Canada's foreign partners expect it to share information in order to combat and prevent terrorism. These fundamental principles are reflected in Canada's international legal and diplomatic

[8] CSIS repeats and relies upon the submissions of the Attorney General of Canada on the Standards of Conduct, December 14, 2007, and in particular paragraphs 42 to 55, 75 and 81.

obligations. Security intelligence agencies such as CSIS could not ignore or not pursue threat-related information, including the sharing of information with countries that may have a poor human rights record. To do so, as recognized by the House of Lords in *A. and others* v. *the Secretary of State for the Home Department*, would have been an abdication of its responsibilities. By a significant margin, Canada is a net importer of intelligence information. Section 17 of the *CSIS Act* provides that with Ministerial approval, the Service may enter into an arrangement with, or otherwise cooperate with, the government of a foreign state or an institution thereof, after consultation with the Minister of Foreign Affairs.

61. Since September 11th, Service information exchanges with foreign security and intelligence agencies have increased, in part because of the elevated threat environment and demonstrated ability of Islamist extremists to increasingly commit tragic acts of violence.[9]

Human Rights Considerations

62. The human rights record of a foreign state and of a particular agency are factors considered by the Service and the Government of Canada when entering into foreign arrangements. The *CSIS Act* and the Ministerial Directive authorize the Service to engage in relationships with foreign states. The Service will consult with DFAIT as is required by section 17 of the *CSIS Act*.

63. When the Service is investigating threats to the security of Canada by engaging in operational activity outside of Canada, the Service will consult with DFAIT when the operational activity has been assessed as high risk.

64. In circumstances where a Canadian citizen is detained in a foreign state with a poor human rights record, the range of considerations which may be taken into account in making information sharing decisions depends on the specific facts of each case and is necessarily open-ended and context specific. These considerations include:[10]

- the nature, imminence and seriousness of the suspected threat posed by the individual and/or the organization with which he is affiliated;
- the potential adverse consequences for public safety in Canada and abroad from failing to share such information;

---

[9] October 2002 bombings in Bali, Indonesia which killed 202; May 2003 suicide bomb attacks on expatriate compounds in Riyadh, Saudi Arabia which killed 35; May 2003 suicide bombings in Casablanca, Morocco which killed 45; November 2003 bombings of the HSBC Bank, the British consulate and two synagogues Istanbul, Turkey which killed 62; the March 2004 bombings of commuter trains in Madrid, Spain which killed 191; August and September 2004 Chechnya extremist bombings of civilian airliners and hostage-taking in a school in Russia, which killed more than 400; October 2004 attacks on the Sinai Peninsula, Egypt which killed 30; July 2005 bombings commuter trains and buses in London, England which killed 55; July 2005 bombings in Sharm el-Sheikh, Egypt which killed 90; November 2005 hotel bombing in Anman, Jordan which killed 57; and the April 2007 bombing in Algiers, Algeria which killed 33.

[10] The considerations were set out in detail in the Submissions of the Attorney General of Canada, December 14, 2007 on Standards of Conduct, paragraph 75.

- the reliability and accuracy of the information being shared; and
- the human rights record of the receiving country/agency.

CSIS Interest in the Three Individuals

65. Starting in the early 1990s, CSIS was actively investigating potential security threats posed by Canada-based supporters of Islamist extremism, Al Qaeda and Osama bin Laden. In the normal course of this investigation, CSIS learned that each of the three individuals likely had knowledge of the threat to Canada and Canadian interests abroad.

- The Service's concerns in respect of Mr. Almalki arose from information which indicated, among other things, that he had links to Islamist extremists and to Human Concern International, a Canadian-based charitable organization which has been publicly alleged to have links to terrorism, the time he had spent in Afghanistan and wanted to sell equipment to the Taliban.
- The Service's concerns in respect of Mr. Elmaati arose from information which indicated, among other things, that Mr. Elmaati had links to Islamist extremists, that he had spent several years in Afghanistan training and engaged in insurgent activities, and the possibility that he would engage in violent activities.
- The Service's concerns in respect of Mr. Nureddin arose from information indicating that Mr. Nureddin had links to Islamist extremists and acted as a financial courier for people believed to supporters of Islamist extremism.

66. To summarize, these individuals fell within the Service's significant and well-founded concerns over the procurement and supply of equipment to Islamist extremists, the planning of violent acts against Canadian facilities or institutions and the couriering of funds between Islamist extremists.

THE ACTIONS OF CSIS DID NOT DIRECTLY OR INDIRECTLY RESULT IN THE DETENTION OR ALLEGED MISTREATMENT OF MESSRS. ALMALKI, ELMAATI AND NUREDDIN

Mr. Almalki

Pre-Detention

67. Mr. Almalki left Canada on November 27, 2001 for Malaysia, with a return ticket and a scheduled return date of December 25, 2001. There is no evidence to suggest

that the RCMP, CSIS, or any other Canadian officials were aware of Mr. Almalki's itinerary or communicated it to foreign agencies before he left Canada.

68. Mr. Almalki did not return to Canada on December 25, 2001, as scheduled, but remained with his family in Malaysia.

69. On May 10, 2002, CSIS and Project A-O Canada learned from foreign agencies that Mr. Almalki had gone missing from his apartment in Malaysia. On May 30, 2002, a foreign agency advised Project A-O Canada that Mr. Almalki had left Malaysia and traveled from Singapore to Bahrain on April 4, 2002 and then to Qatar, U.A.E. on April 6. CSIS was not aware of this information. There is no evidence to suggest that CSIS, nor any other Canadian officials, either were aware of or communicated Mr. Almalki's plans to travel to Syria.

70. In late May 2002, the Service learned that Mr. Almalki might be in detention in Syria. On May 31, 2002, the Service shared this information with DFAIT and the RCMP. In the middle of June 2002, the Service obtained information confirming that Mr. Almalki was detained in Syria.

71. The actions of the Service did not directly or indirectly result in the detention of Mr. Almalki in Syria. The facts clearly and unequivocally demonstrate that the Service was not aware of Mr. Almalki's travel plans to Malaysia and beyond and that the Service had no communications with Syrian authorities prior to his detention. In fact, the Service only learned of his detention **after** it had occurred and was only able to obtain confirmation several weeks later.

CSIS Trip to Syria

72. In November, 2002, a CSIS delegation traveled to Syria to meet with officials from the Syrian Military Intelligence (SyMI). The trip was arranged in response to an invitation from the SyMI that had been communicated to the Head of Mission in Syria. The Service's trip to Syria had several purposes, the most important of which was to allow the Service to acquire valuable intelligence in support of its Islamist terrorism investigation. During the trip, CSIS also raised Mr. Almalki's case with the Syrians, in part to determine what was happening to him, whether he was going to be charged under Syrian law, released or otherwise.

73. CSIS did not provide any reports or information about Mr. Almalki to the Syrian authorities during the November, 2002 trip to Syria.

Possible Interview in January 2004

74. In early January 2004, the Service communicated with the SyMI regarding Mr. Almalki. The Service wanted to know whether the SyMI was planning to release him and whether the SyMI would permit CSIS to interview him prior to his release. In making these inquiries, the Service did not comment on Mr. Almalki's detention or put

forth its position in respect of Mr. Almalki. The Service received information about the basis of the charges against Mr. Almalki, and an indication that he would be tried and released shortly.

75. The Service expressly consulted with DFAIT, which agreed that an interview would be beneficial, especially in light of the fact that there had been no consular access granted. Since the Service and DFAIT believed that Mr. Almalki might be released imminently, both wanted to ensure that the Service's request for an interview did not affect the Syrian authorities' decision regarding his release.

76. There is no evidence that this request influenced the timing of Mr. Almalki's release.

77. Other than during the CSIS trip to Syria in November, 2002, and efforts made to interview Mr. Almalki in January, 2004, the Service had no other contact with Syrian authorities regarding Mr. Almalki.

78. Mr. Almalki was released in March, 2004. There are no documented allegations of mistreatment of Mr. Almalki from January, 2004, when CSIS requested an interview, to March, 2004, when he was released.

79. For the reasons summarized above, the actions of the Service did not directly or indirectly result in the alleged mistreatment of Mr. Almalki.

Mr. Elmaati

Pre-Detention

80. On several occasions in 2000 and 2001, CSIS shared information about Mr. Elmaati with the RCMP and foreign agencies, including U.S. agencies. CSIS did not share or receive information about Mr. Elmaati with Syrian authorities during this time.

81. CSIS learned of Mr. Elmaati's travel plans on November 9, 2001 from the RCMP. CSIS did not communicate Mr. Elmaati's itinerary to any foreign agencies.

82. On November 11, 2001, Mr. Elmaati traveled to Syria on his own accord. He was detained by Syrian authorities upon his arrival in Syria.

83. On November 12, 2001, CSIS learned, for the first time, that a foreign agency had taken steps to have Mr. Elmaati detained and questioned along his travel route, including a request to the Syrian authorities to do so. The Service learned on November 15, 2001, that Mr. Elmaati had been detained in Syria. The Service does not know how or under what circumstances Mr. Elmaati came to be detained.

84. The actions of the Service did not directly or indirectly result in the detention of Mr. Elmaati in Syria. The Service did not communicate Mr. Elmaati's itinerary to any

foreign agencies prior to his detention. In fact, the Service only learned of a foreign agency's intent to have him detained for questioning **after** Mr. Elmaati had been detained and only learned of his detention several days later.

Mr. Elmaati's alleged confession

85. In mid-November 2001, CSIS and the RCMP received unsolicited information from a foreign agency that was said to have been obtained from Mr. Elmaati while in detention in Syria. This information included an alleged plot by Mr. Elmaati to blow up the Canadian Parliament buildings with a truck bomb and the existence of an alleged terrorist cell in Canada.

86. Although the Service had a concern about the reliability of some of the information, the Service considered the alleged threat to Parliament Hill to be fairly credible, and in late November 2001, the Service issued a threat assessment to the Canadian security and intelligence community.

87. Information received by the Service, irrespective of the source, would be evaluated in fundamentally the same way in order to determine its reliability and veracity. To assess the credibility of the information, CSIS drafted and sent a number of clarification questions to a foreign agency in order to determine whether other foreign agencies had played a role in the Syrian information-gathering process and to clarify the nature of alleged threat and its reliability. The questions pertained to how Mr. Elmaati came to be detained and the circumstances that led to his alleged confession. There were no questions about his treatment during his interrogation because the Service had no information to indicate that Mr. Elmaati was being mistreated. Based on the results of these clarification questions, the Service concluded that Syrian authorities had relied on their own information.

88. In early December 2001, the Service sent questions to a foreign agency to be sent to Syrian authorities to be put to Mr. Elmaati. The questions addressed various topics, including Mr. Elmaati's training in Afghanistan, his flight training, his associates, his communications with his brother Amr Elmaati, and the alleged plan to bomb the Parliament buildings.

89. The Service developed the questions to test the veracity of the information derived from Mr. Elmaati's interrogation and to determine whether any other agencies had added an assessment of the information along the way. The questions were specific and were not intended to identify additional areas of questioning to pursue.

90. In early January, 2002, the Service received answers, through a foreign agency, to some of the questions that it had submitted in December, 2001.

91. In the latter part of January, 2002, the Service sent another list of questions to a foreign agency to be sent to the Syrian authorities. These questions were follow-up questions based on the answers that the Service had received to its first set of

questions. Included in these questions were questions about Mr. Elmaati's current location, health and future prospects. These latter questions were added because at this point Mr. Elmaati had been in detention for six weeks.

92. The Service did not receive a response to any of these questions. It seems likely that the Syrian authorities never put this second set of questions to Mr. Elmaati because he was transferred to Egypt around this time.

93. The actions of the Service did not directly or indirectly result in the mistreatment of Mr. Elmaati in Syria. Following receipt of unsolicited information alleging a significant and credible threat to Parliament Hill in the months following the September 11th attacks, the Service, in the fulfillment of its mandate, properly engaged foreign agencies to assess the credibility and reliability of that information. In fact, the Service had no choice but to do so. The Service had no information or basis to suspect that Mr. Elmaati was or had been mistreated.

Mr. Elmaati's Transfer to Egypt

94. On February 14, 2002, CSIS learned from the RCMP that Mr. Elmaati had been moved to Egypt. Based on this information, the Service sought to confirm the transfer by making inquiries of the RCMP and foreign agencies. On March 3, 2002, the RCMP informed CSIS that while it was not in a position to corroborate any information that Mr. Elmaati has been transferred from Syria to Egypt, it had no reason to doubt that he was now in the custody of the Egyptian authorities.

95. On April 12, 2002, DFAIT informed CSIS that it was in receipt of a diplomatic note indicating that Mr. Elmaati had left Syria for Egypt at his own request. This was entered in the Service's records as the first official confirmation of Mr. Elmaati's transfer.

96. On August 6, 2002, CSIS was informed by DFAIT of a telephone call with Egyptian authorities confirming Mr. Elmaati's detention in Egypt. This was entered in the Service's records as the first confirmation by Egyptian authorities of Mr. Elmaati's incarceration.

97. Based on these facts, the Service was completely unaware of Mr. Elmaati's transfer from Syria to Egypt at the time it occurred. The Service did not play any role in this transfer.

Service's Characterization of Elmaati

98. In March, 2003, the Service expressed concern to DFAIT ISI about Mr. Elmaati's activities if he were to be released.

99. In May, 2003, the Service asked the Egyptian authorities about Mr. Elmaati's continued detention. In doing so, the Service expressed similar concerns to those it had earlier communicated to DFAIT.

100. As multiple Service officials testified, the statements of concern were considered accurate, reliable and appropriate.

101. When asked whether the statements had any impact on Mr. Elmaati's continued detention and treatment in Egypt, multiple Service witnesses testified that the Service's characterization of Mr. Elmaati did not have any effect on Egyptian authorities. The Service does not believe that Egyptian authorities were relying on anything the Government of Canada was doing to keep Mr. Elmaati in detention and that it was important for the Service and DFAIT to know what the Egyptian authorities intended for Mr. Elmaati.

102. In fact, there is no evidence to suggest that the Service's expressions of concerns had any effect whatsoever on Mr. Elmaati's continued detention or treatment. The actions of the Service did not directly or indirectly result in the mistreatment of Mr. Elmaati in Syria.

Mr. Nureddin

Pre-Detention

103. Mr. Nureddin traveled from Canada to Iraq on at least two occasions prior to September 2003, without incident. In the summer of 2003, CSIS learned that Mr. Nureddin was again scheduled to travel to Iraq in September 2003. In mid-September, the Service advised a U.S. agency and multiple foreign intelligence agencies (not including Syrian agencies) of Mr. Nureddin's planned travel to Iraq. There is no evidence that the Service advised or permitted disclosure to the Syrian authorities of Mr. Nureddin's travel plans.

104. On September 16, 2003, Mr. Nureddin left Canada to travel to the Middle East. In light of the Service's concerns that Mr. Nureddin acted as a financial courier for people believed to be supporters of Islamist extremism, CSIS provided a U.S. agency and two other foreign intelligence agencies with Mr. Nureddin's travel itinerary. The Service did not share the travel itinerary with Syrian authorities.

105. Contrary to the publicly-stated views of Mr. Nureddin and his counsel, the Service did not conduct an interview of Mr. Nureddin prior to his departure from Canada and did not share the results of any such interview with any foreign agency.

106. In early October 2003, the Service learned that Mr. Nureddin had been stopped, searched and questioned, in late September, while en route to Iraq. In accordance with standard practice and protocol regarding the use of caveated information, the Service asked the originator of the information for permission to share it with the RCMP and other foreign agencies. The originator granted the Service permission to share the information with several foreign agencies but not Syria. The Service did not share the information with Syria.

107. In October 2003, CSIS learned that a foreign agency was searching for Mr. Nureddin, and that it intended to arrange for him to be detained at a port of entry for interview purposes only. Bearing in mind the armed conflict in the region, the Service acknowledged in communications with this agency that Mr. Nureddin might be arrested (in accordance with the domestic law of that country) or detained in one of the countries through which he traveled, and requested that, if he was detained, he be treated in accordance with international conventions and due process.

108. On December 11, 2003, a foreign agency notified CSIS that it felt obliged to advise Syrian authorities that Mr. Nureddin was on his way to Syria. On December 12, 2003, CSIS learned that Syrian authorities had been advised of Mr. Nureddin's travel to Syria and had been asked to question him when he arrived there. Syrian authorities had not, to the Service's knowledge, been asked to arrest Mr. Nureddin or detain him other than for interview purposes. Mr. Nureddin was detained by Syrian officials on the afternoon of December 11, 2003 when he crossed the border from Iraq into Syria.

109. CSIS only learned of Mr. Nureddin's detention on December 19, 2003. In late December, CSIS sent a message to three foreign agencies, including Syrian authorities, asking if they had information pertaining to Mr. Nureddin's detention. This was the **first** time that Canadian officials communicated with Syrian authorities regarding Mr. Nureddin.

110. The actions of the Service did not directly or indirectly result in the detention of Mr. Nureddin in Syria. Any and all information shared was provided in accordance with the domestic and international obligations to combat terrorism. Mr. Nureddin had previously traveled to Iraq, transiting through Syria, on at least two occasions, without incident, and voluntarily chose to travel through Iraq during a period of armed conflict. There is no evidence whatsoever to suggest that there was any intention by the Service to have Mr. Nureddin detained. Quite to the contrary, upon learning of his possible detention for interview purposes, the Service took all reasonable steps to ensure that its position was clearly understood. The Service only learned of a foreign agency's views and communications with Syrian authorities **after** Mr. Nureddin had been detained. In the circumstances of Mr. Nureddin's case, the Service clearly and unambiguously took the appropriate steps to the address the situation as it unfolded.

CSIS Inquiries of Syria

111. In early January 2004, the Service learned that Mr. Nureddin was to be released immediately. The Service communicated with the Syrian authorities regarding Mr. Nureddin, to ascertain why he had been detained and whether he had been formally charged with any offence.

112. Several days later, the Service learned that Mr. Nureddin was still detained, but that he would be released shortly because there were no charges against him. CSIS did not know why Mr. Nureddin continued to be detained.

113. On January 13, 2004, CSIS learned that Mr. Nureddin had been released and was awaiting consular assistance. CSIS immediately notified the Head of Mission in Syria and local consular officials of Mr. Nureddin's release.

114. The actions of the Service did not directly or indirectly result in the alleged mistreatment of Mr. Nureddin. The Service did not interview Mr. Nureddin prior to his departure from Canada and did not communicate any such information (or any other information or questions) to Syrian authorities prior to, or following, his detention. The Service communicated with Syrian authorities in January, 2004, in the hopes of determining the reasons for Mr. Nureddin's detention.

DISCUSSION OF ISSUES

115. The Attorney General wishes to address the following five issues, which have been the focus of discussions in a number of different forums, including the Standards Hearings:

- The use of caveats by CSIS;
- The sharing of personal information derived from consular activities by DFAIT with CSIS;
- The use of descriptions and terminology in communications with domestic and foreign agencies;
- The interplay between DFAIT and CSIS; and
- The consideration of consequences.

The Use of Caveats by CSIS

116. CSIS policy OPS - 603.2 requires that the appropriate caveat be included on all information disclosed to any department, agency or organization outside the Service. As well, when assessing the reliability of a foreign agency for the purposes of engaging in a section 17 relationship, the Service attempts to determine if the agency is respectful of the third party rule not to share information without the originator's consent.

117. Information relating to Messrs. Almalki, Elmaati and Nureddin that was disclosed to, or shared with, foreign agencies had the required caveats attached. There is no evidence to indicate that any of the foreign agencies with whom the Service shared information breached caveats. In fact, there are examples where, as per standard practice and protocol regarding the use of caveats, agencies wishing to share Service information regarding these individuals with another agency requested permission from the Service prior to doing so.

118. It should be noted that in the fall of 2002, two CSIS responses to messages from foreign agencies inadvertently did not contain Service caveats. The messages provided background information and were disseminated to two trusted partners who respect the third party rule to not share information without the originator's consent. There has been no indication that those agencies did not respect the third party rule nor that the caveats were broken.

119. There is also extensive testimony regarding the ability of a foreign agency to generate its own information, which may in fact be similar, if not identical, to the information shared. If a receiving agency already possesses or develops it's own intelligence based on the information provided by the Service, it is considered the property of the other agency and they can share that if they choose. It is not a breach of caveats.

The Sharing of Personal Information Derived from Consular Activities by DFAIT with CSIS

120. The sharing of personal information obtained in the course of providing consular services would have been dealt with on a case by case basis and CSIS would expect access to information, or to be consulted about individuals who might have some knowledge of the threat to Canada and Canadian interests.

121. Further to its mandate, a CSIS official can request disclosure of information of operational significance that DFAIT had obtained from a Canadian citizen to whom officials were providing or had provided consular services. DFAIT would then assess whether the personal information could properly be disclosed to the requesting department or agency consistent with the provisions of the *Privacy Act*.[11]

122. The fact that a CSIS employee knows of the "confidential nature" of a consular visit is immaterial as their knowledge does not change the responsibility of CSIS to gather threat-related information pursuant to its mandate.[12]

123. With respect to Mr. Almalki, CSIS only sought and received information obtained in the course of DFAIT providing consular services following his release from detention in Syria. A DFAIT official volunteered information on one occasion in May 2004, and CSIS asked for information from consular officials and DFAIT HQ after Mr. Almalki had departed Syria.

124. With respect to Mr. Nureddin, the Service sought consular information from a DFAIT official for the first time on January 13, 2004 after learning that he would be released later that day. The Service sought further information from DFAIT officials and DFAIT HQ following Mr. Nureddin's return to Canada.

---

[11] Submissions of the Attorney General of Canada on Standards of Conduct, December 14, 2007, paragraphs 141-142.

[12] There are no Ministerial Directives or legislative prohibitions that prevent CSIS from seeking such information.

The Use of Descriptions and Terminology in Communications with Domestic and Foreign Agencies

125. Descriptions and terminology used by CSIS in communications regarding the activities of Messrs. Almalki, Elmaati or Nureddin were accurate, reliable and appropriate at the times they were provided to domestic and foreign agencies. Descriptions were based on information that was in the possession of the Service at the time. Analysts are trained by the Service to review and analyse all pieces of information available to them to develop an accurate and, to the degree possible, comprehensive summary of information. Descriptions shared with a foreign agency are reviewed by a supervisor and manager of the Service for appropriateness prior to dissemination, and are put into context by the information contained in the message.

126. The level of certainty attached to descriptions depends on the nature and sources of the information, and the degree to which it is corroborated or refuted. Appropriate qualifiers are normally included within documents shared with foreign agencies, as required. Further to the *CSIS Act* and policy, it is therefore appropriate to use "suspected" when describing an individual or his activities. It may be appropriate when the available information allows, to use stronger terminology, such as "believed." The Service's professional expertise to make such an assessment is not, and should not be, in question.

The Interplay between DFAIT and CSIS

127. Pursuant to Ministerial Directives, CSIS is the lead agency for liaison and cooperation with foreign security or intelligence organizations and international organizations of states on matters relating to security assessments and threats to the security of Canada as defined in the *CSIS Act*. As discussed above, there is an extensive consultation process between the Minister of Public Safety and Minister of Foreign Affairs when the Service proposes to enter into a section 17 relationship with a foreign government or agency. Concerns, issues and the balancing of requirements to protect national security versus the compatibility of the arrangement with Canada's foreign policy and the country/agency's human rights record are raised during the consultation period. As well, there are guidelines as to how the relationship should proceed.

128. Once the relationship with the foreign agency has been agreed to, the Service engages in the necessary operational activity to protect the security of Canada and its citizens. There is no requirement for the Service to consult with DFAIT on fulfilling the Service's mandated obligation in regards to threats to Canada's national security. The Service's obligation is to provide DFAIT with information or intelligence gathered under the CSIS mandate.

129. A suggestion has been made that there should be a requirement to provide operational information to DFAIT, or to seek concurrence from DFAIT, prior to undertaking an investigative step. To do so, however, would result in a blurring of

legislated mandates, which is contrary to the intention of Parliament and could have serious adverse consequences for the ability of CSIS to fulfill its mandate. The Service does consult DFAIT when the activity is assessed as high risk but does not consult as a matter of course on operational activity abroad.

The Consideration of Consequences

130. The Service gave adequate consideration to the potential consequences to the three individuals of either seeking to question them or providing questions to be asked of them or sharing information about them. The Service assessed the potential consequences in regards to each set of circumstances and the individual involved and attempted to strike the appropriate balance. Moreover, as the issues surrounding Canadians detained abroad for security reasons evolved, the Service adapted certain practices.

131. CSIS learned in January 2004 that Mr. Almalki was going to be released. At that time, the Service consulted DFAIT which agreed that in the absence of any consular access, an interview would be beneficial. The Service was very clear in its communications with the SyMI that the interview was completely voluntary and the request for the interview was not to have any impact on Mr. Almalki's detention.

132. In the case of Mr. Elmaati, CSIS was receiving reporting based on his questioning while in Syrian custody that he was involved in an alleged plot to bomb Parliament Hill. Bearing in mind there was no information suggesting mistreatment or torture, the Service weighed the potential consequences to the individual of sending questions versus the threat to public safety. The Service has a responsibility to protect the safety and security of all Canadians and therefore is obligated to follow-up on information which indicates there is a potential threat to that security. In fact in such circumstances, the Service would be negligent in its duties if it did not follow-up, particularly in light of the seriousness of the threat and the Service's assessment, given other facts known at the time, that the threat was credible.

133. In the case of Mr. Nureddin, when CSIS learned that another agency intended to advise Syria of Mr. Nureddin's travel plans, the Service requested that the agency seek assurances that he would not be mistreated and was informed this would occur. When the Service learned that he had been detained, it immediately made inquiries to three foreign agencies, including the Syrians, as to the reasons why he had been detained and if he had been formally charged.

134. In regards to consideration given to the potential consequences of information shared with foreign agencies on any of the individuals, it should be noted that the sharing of information was done in accordance with the *CSIS Act* and CSIS policies and was mindful of Canada's international obligations.

CONCLUSION

135. In his report, the Commissioner may choose to recognize that Canada's intelligence community has undergone numerous changes since September 11th and the 2001 - 2004 time period. Most noteworthy in this context, from a CSIS perspective, are:

- The creation of the position of National Security Advisor to the Prime Minister has enhanced the government's ability to effectively co-ordinate efforts and provide direction on sensitive investigations, including those involving detainees abroad.

- Through new Memoranda of Understanding, with the RCMP and DFAIT, CSIS is well placed to work closely with them and to fulfill its own mandate while taking into consideration those of its domestic partners. Close operational collaboration with the RCMP is now firmly established through numerous vehicles and practices, and a CSIS/DFAIT protocol for consular cases with a national security dimension has been established.

- A number of policy revisions have increasingly formalized the Service's pre-existing consideration of human rights issues, and other changes to caveat, disclosure, and information sharing policies are ongoing. Caveat wording and usage have evolved to specifically reflect human rights considerations.

136. The actions of CSIS did not directly or indirectly result in the detention or alleged mistreatment of the individuals in Syria and Mr. Elmaati in Egypt.

PART III - RCMP

OVERVIEW

137. The actions of members of the RCMP did not directly or indirectly result in the detention or any mistreatment of Messrs. Almalki, Elmaati or Nureddin. The RCMP had a bona fide investigative interest in the three individuals and pursued that investigation in good faith. In so doing, the RCMP did not approve, encourage or acquiesce in the detention or any mistreatment of these individuals.

CONTEXT

The Rule of Law and the RCMP

138. The RCMP is committed to the rule of law. It is part of its institutional fabric and the ethic of its members. The rule of law is central to who the Force recruits and how members are trained. It is also enshrined in the Code of Conduct by which members are guided and their actions judged.[13]

139. Respect for the rule of law means:

(a) Conducting investigations in a professional fashion;

(b) Sharing relevant and accurate information to further an investigation;

(c) Respecting caveats and being guided by the third party rule, as an integral part of the working relationship which authorizes the sharing of information;

(d) Using force only when required,[14] not to elicit information;[15]

(e) Arresting and detaining individuals only when there are reasonable and probable grounds to exercise these powers;

(f) Respecting certain minimum standards when detaining individuals, which categorically preclude the use of violence, mistreatment or torture; and

(g) Causing detentions to be periodically reviewed by a judge, to ensure their continued validity.

---

[13] *RCMP Act*, s. 37; *RCMP Regulations 1988*, SOR/88-361, s. 38 to 58.7 (*the Code of Conduct*).
[14] *Criminal Code*, s. 25.
[15] Under Canadian law, information obtained as a result of the use of force by state agents is inadmissible and, therefore, of no practical value to a police force.

140. These basic principles guide both the conduct and expectations of members of the Force.

The Positive Obligation to Act

141. Police work, including conducting investigations, is marked by the overarching standard of flexibility required by the exercise of police discretion.[16] A review of police investigatory decisions is not the occasion for second-guessing or the exercise of hindsight;[17] it is sufficient that police action be objectively grounded on facts which give rise to reasonable suspicion.[18] Consequently, what is considered to be adequate and appropriate can vary, according to the circumstances. For this reason the Commissioner's Terms of Reference specifically require that the actions of Canadian officials must be assessed "in the circumstances."

142. The relevant circumstances here include the Force's investigative interest in the three individuals and the fact that the RCMP has a positive duty to preserve the peace and to prevent crime[19] and to investigate matters that represent a threat to the security of Canada.[20] Further, the RCMP is under a positive obligation to act on information it receives from reliable and trusted sources.

143. The RCMP therefore had a duty to Canadians to determine what, if any, threat the activities of the three individuals posed to Canada, and whether they had knowledge of threats to the security of Canada.

144. In investigating the cases of the three individuals, RCMP members were pursuing the Force's law enforcement mandate. The Force's criminal investigation was intended to prevent or disrupt acts that may have posed a threat to the safety of the Canadian public. It was also aimed at gathering sufficient admissible evidence for a prosecution.

145. The detention of suspects in countries with poor human rights records, such as Egypt and Syria, without due process, and possibly involving exposure to mistreatment, frustrates rather than assists the gathering of admissible evidence. What is more, that kind of conduct is anathema to the very ethic of the Force and the principle of respect for the rule of law which guides the work of its members. For these reasons, the RCMP did not and would not approve, support or acquiesce in the detention or any mistreatment of the three individuals in Syria or Egypt.

RCMP's Interest in the Named Individuals

146. In order to appreciate the actions of the RCMP "in the circumstances," it is necessary to understand the Force's interest in the three individuals.

---

[16] *Hill* v. *Hamilton-Wentworth Regional Police*, 2007 SCC 41 at paragraph 68.
[17] *Hill* v. *Hamilton-Wentworth Regional Police*, 2007 SCC 41 at paragraph 73.
[18] *R.* v. *Clayton*, 2007 SCC 32 at paragraph 46.
[19] *RCMP Act*, s. 18.
[20] *Security Offences Act*, s. 6(1).

147. Starting in 2000, the RCMP was advised by the FBI that Mr. Almalki was suspected of attempting to procure restricted items from the U.S. for shipment abroad. In September 2001, the FBI further advised that Mr. Almalki was suspected of supporting Islamist extremism and having connections to Osama Bin Laden and al Qaeda.

148. In 2001, based on information provided by its partners, the RCMP learned that the activities of Mr. Elmaati might pose a threat to Canada and Canadian interests abroad. Shortly before, when Mr. Elmaati was detained at U.S. borders, he was found in possession of items of concern, including a map of Canadian government buildings and a document entitled "Know your Rights If You are Approached by CSIS."

149. In late September 2001, FBI advised the RCMP that Mr. Elmaati had been added to the FBI watchlist. In short, the Americans had already expressed the belief that Mr. Elmaati was associated with Al Qaeda, based on their own independent information.

150. In October 2002, the RCMP became interested in Mr. Nureddin when a foreign agency advised that there was a "probable" connection between a "senior Al Qaeda facilitator" and a telephone number belonging to Mr. Nureddin.

The Actions of the RCMP did not Result Directly or Indirectly in either Detention or Any Mistreatment

151. The events of September 11th brought into sharp relief for law enforcement agencies their obligation to cooperate and facilitate the flow of relevant information to combat terrorism. For allies and long-standing partners like Canada and the U.S., this requirement was even more compelling.

152. The Attorney General dealt extensively with this issue in his December 2007 submissions on the Standards of Conduct. Commissioner O'Connor found that the structures controlling the method, manner and decision to share information were "essentially sound." On October 5, 2006, the RCMP announced it would implement all of the recommendations made by Commissioner O'Connor in relation to information sharing in the context of national security investigations.

153. The RCMP recognizes the importance of written caveats. Nevertheless, members did not believe that the sharing of information in real time included a lifting of the third party rule. Information was thus always shared with automatic caveats. For example, some members of Project A-O Canada operated under the understanding that given the time, the nature of events and the operational requirement based on the need-to-know principle, they would share information openly with the U.S. authorities, without attaching express caveats. However, they understood that a caveat was always implied; the same holds true with respect to other countries with which the RCMP shared

information. Nevertheless, the RCMP attached caveats to most pieces of information shared with American agencies.

Mr. Almalki

154. The Commission has identified the fact that the list of questions sent to Staff Sergeant Fiorido to be forwarded to the Syrians and asked of Mr. Almalki did not contain any express caveat.

155. Since the explicit purpose of forwarding this list was to authorize the Syrians to ask them of Mr. Almalki, it therefore would have made no sense to attach a caveat. Nevertheless, the RCMP relied on the third party rule to prevent the further dissemination of this information by the Syrians.

156. The evidence clearly supports the reasonableness of this belief: where the questions were shared without express caveats, foreign agencies would clearly have understood that they were under an obligation to obtain permission of the RCMP before acting upon or further disseminating the information. This remains true even when information is verbally exchanged. In addition, U.S. agencies acknowledged the existence of this obligation with their written request for the search results.

Mr. Elmaati

157. The information relating to Mr. Elmaati's travel itinerary was shared with U.S. authorities. Members believed that U.S. authorities would not further disseminate this information without the prior consent of the RCMP.

158. Open sharing of information is necessary for integrated investigations to be effective. The RCMP investigations relating to potential terrorism offences were integrated investigations. Hence, open sharing of information with other members of this integrated team, including the relevant American agencies, was appropriate.

159. The submissions of the Attorney General on standards more fully detail the extent of Canada's obligation to share travel information of individuals suspected of involvement in terrorism activity. This obligation meant that the RCMP had an obligation to warn the United States that an individual under investigation might be traveling to that country to enable American authorities to take action to safeguard their national security interests.

160. In the case of Mr. Elmaati, that obligation was plain. Two months to the day after civilian airplanes were hijacked by terrorists and crashed into U.S. targets, Mr. Elmaati was scheduled to board a flight in Toronto that was destined for Europe. His brother was considered to be a serious threat by the U.S. at the relevant time; based on reliable information, the RCMP had a credible reason to believe that the brother was planning to hijack another plane to divert it into a U.S. target. It was consequently feared that Mr. Elmaati might well intend to carry out the plans of his brother and divert this fully fuelled

flight, shortly after take-off in Toronto, into a target located a few flight minutes away in the neighbouring U.S. In those circumstances, the RCMP would have been remiss if it had not shared the information with its American counterpart.

The RCMP Shared Accurate and Reliable Description, Taking into Account the Potential Consequences for the Individuals

161. The evidence demonstrates that:

(a) American authorities had reached their own conclusions about the profile of these individuals before Canadian agencies were involved; and

(b) American authorities shared descriptions of Mr. Almaki and Mr. Elmaati with other foreign agencies shortly after September 11th . However, it is not known whether the Americans shared the descriptions with Syria or Egypt. The Syrians and Egyptians had their own information about these individuals.

162. It follows that whatever descriptors the RCMP used were not the cause of the detention or mistreatment of the two individuals.

163. Further, in assessing the evidence and reviewing the actions of RCMP members for a possible deficiency, the Commissioner must bear in mind that:

(a) Members reasonably believed that the information they received from long-standing and trusted domestic and foreign partners was accurate and reliable; and

(b) The RCMP commenced its own investigations as a result of receiving information reasonably believed to be both current and reliable.

Mr. Almalki

164. The U.S. had its own investigative interest in Mr. Almalki, prior to the events under review.

(a) As early as July 2000, the FBI informed the RCMP that Mr. Almalki was suspected of attempting to procure restricted items from the United States for shipment abroad;

(b) On September 23, 2001, the FBI advised the RCMP that Mr. Almalki was the Ottawa-based procurement officer for Osama Bin Laden.

165. This information credibly confirmed reports received in 2000 by the RCMP. The RCMP relied on this information in its own description of Mr. Almalki in communications with foreign agencies.

166. Indeed, the description of Mr. Almalki and other members of his family approved by the RCMP for the TECS lookouts did not contain any new information: Americans agencies had already generated it.

167. Similarly, the RCMP held a reasonable belief that the description it used of Mr. Almalki in the faxes that were sent to its liaison officers (LO's), for further dissemination, was accurate and reliable. The information originated from trusted and reliable partners; the RCMP received permission from those partners to use the information in the conduct of its own investigation. As well, Project O Canada sent faxes to various RCMP LO's, seeking further information from other foreign agencies. It is noteworthy that throughout all of those exchanges with its partners, none documented that their original descriptions of Mr. Almalki had changed.

168. The faxes to the LO's resulted in contact with the Syrian authorities (amongst others), requesting background checks on five individuals in late September 2001. By early October 2001, Mr. Almalki's name was added as a subject of query. The evidence illustrates that:

(a) The September communication with foreign agencies described the five listed individuals using the language of the Force's trusted partners, as "*linked through association to Al Qaeda, currently engaged in activities in support of politically motivated violence and which pose an imminent threat to the public safety and security of Canada.*"

(b) The October follow-up fax merely added Mr. Almalki to this list, without further characterization, and by only providing additional biographical information about him.

(c) The only inference to be drawn from these faxes is that Mr. Almalki was associated with the group described in the September fax.

169. The last instance where the RCMP provided a description of Mr. Almalki was the January 2003 communication to the Syrian authorities of the 23 questions Project A-O Canada wanted the Syrians to put to him. Question 21 asked him if he was a member of a terrorist cell in Canada; question 22, whether he had acted as a procurement officer for any such group; and question 23, whether he was aware of any terrorist threats in Canada.

170. At most, these questions lead to the inference that Project A-O Canada believed that Mr. Almalki had associated with members of a terrorist group; none of them lead to a description different than the description already conveyed by U.S. authorities to foreign intelligence and law enforcement agencies in September 2001. The RCMP had proper grounds to characterize Mr. Almalki as it did; that characterization did not indirectly result in either the detention or mistreatment of Mr. Almalki by Syrian authorities.

171. Indeed, the evidence does not support drawing a connection between the sending of the questions and any mistreatment of Mr. Almalki. The RCMP forwarded the questions to the Syrians in January of 2003; for the Syrians, those questions had been answered two months previously, in a briefing to CSIS on November 24, 2002. As Commissioner O'Connor observed, "There is no evidence that the SyMI paid any attention to the letter at all, as it never responded." It is clear therefore that sending questions to the Syrians that they ignored was not the cause of any mistreatment of Mr. Almalki.

Mr. Elmaati

172. The same analysis holds true in relation to the RCMP description of Mr. Elmaati: the American authorities had reached their own conclusions about his description, and shared it with other foreign agencies, before the RCMP was involved.

173. As early as August 2001, Americans authorities had identified Mr. Elmaati as a person of interest and already had a TECS lookout for him, thus triggering his questioning at the border on August 16, 2001.

174. On September 28, 2001, FBI advised the RCMP that Mr. Elmaati was on its list to prevent departures (the FBI "watch list"). On the same day, the CIA advised the RCMP that Mr. Elmaati spent seven years in Afghanistan where he was involved in Jihad related activities. In short, the Americans had already expressed the belief that Mr. Elmaati was associated with al Qaeda, based on their own independent information.

175. The RCMP reasonably believed its information about Mr. Elmaati to be accurate and reliable; it had received it from trusted and reliable sources, CSIS and from the U.S. agencies. Further, the record reveals that when the RCMP had reason to question information shared by those sources, it made further inquiries by going back to the originator of the information to seek clarification.

176. Repeating to U.S. or Egyptian authorities that Mr. Elmaati was associated with al Qaeda could not have caused those authorities any further concerns about Mr. Elmaati than their own information already did. Likewise, the limited communications the RCMP had about Mr. Elmaati with Syrian and Egyptian authorities were neither incorrect nor did they result in mistreatment or detention.

177. Mr. Elmaati was one of the five persons identified in the September 2001 fax sent by the RCMP LO's to foreign agencies, including in Egypt and Syria.[21] The description of Mr. Elmaati in that fax was based on his description by U.S. authorities in their earlier communications with those services; the Canadian fax could not have caused the Syrians or Egyptians to detain or mistreat him.

[21] That event was discussed above.

178. Contact with Egyptian or Syrian authorities after the September 2001 fax was extremely limited. In fact, the RCMP did not share information with either Egyptian or Syrian authorities while Mr. Elmaati was in their custody.

179. While it is true that the RCMP LO once referred to Mr. Elmaati as the "terrorist detained in Cairo," he was merely employing terminology already used by his Egyptian contact during previous discussions to assist this contact in identifying the subject to be discussed. As with the other instance of description, the Egyptians were already of that independent belief. Moreover, this June 5, 2003 letter was sent almost a year after the last occurrence of mistreatment alleged by Mr. Elmaati. There is therefore no causal connection linking the receipt of this June 2003 letter and Mr. Elmaati's alleged mistreatment.

RCMP Members Took Proper Account, in the Circumstances, of Other Countries' Respect for Human Rights

180. The RCMP considered the potential consequences of its efforts to investigate the threat posed by individuals to the security of Canada. Each decision was made on a case-by-case basis to reflect particular circumstances. When appropriate, the RCMP consulted with other relevant agencies. Dealings with agencies of other countries with a questionable human rights record occurred only after consultations with DFAIT. Sharing with the U.S., based on its historical record of respect for human rights, was not inconsistent with Canada's own obligations.

181. Very little was shared with the Syrians and the Egyptians.

The RCMP Complied with the Ministerial Direction

182. The RCMP implemented the Ministerial Direction on National Security Related Arrangements and Cooperation dated November 4, 2003.

183. On its face, the Ministerial Direction applies only to arrangements made, or cooperation extended, after November 4, 2003. The RCMP did not enter into new arrangements after November 4, 2003. Further, the RCMP reviewed pre-existing arrangements to ensure their compatibility with Canada's foreign policy.

184. Likewise, the Direction does not apply to information sharing related to the performance of non-national security law enforcement activities.

185. Further, the arrangement with the U.S. agencies meets the criteria laid out by the Direction since the foreign policy of the U.S. is not incompatible with the foreign policy of Canada. In accordance with the Direction, it was maintained.

186. Lastly, all of its interactions with Syrian or Egyptian authorities occurred months before the Minister issued his direction.

187. In the case of Mr. Almalki, the RCMP questions were delivered to the Syrians in January of 2003. Following General Khalil's statement in August of the same year that he did not wish to interact with a police force, no further interaction took place.

188. With respect to Mr. Elmaati, the RCMP did not interact with either the Syrian or the Egyptian authorities during the time period commencing with the issuance of the Direction in November 2003 and Mr. Elmaati's release from custody in January 2004.

189. With respect to Mr. Nureddin, the RCMP did not interact with the Syrian authorities at any time.

The RCMP Gave Adequate Consideration to the Potential Consequences on the Individuals

190. The record establishes that the key members of the RCMP considered the potential consequences for the three individuals of each significant investigative step. The evidence also reveals that this was but one of the considerations those members factored into their decision-making. Lastly, the evidence demonstrates that the members selected the method of attaining their investigatory objective which they considered to be the less intrusive to the interests of those individuals, consulting with those who possessed the required expertise to reach an informed point of view of the competing interests.

191. Indeed, the insistence of the RCMP in attempting to arrange for a face-to-face interview speaks to the fact that the RCMP considered the potential consequences of its actions on the two individuals. For a police officer, information is valuable chiefly if it is admissible in evidence; evidence obtained under duress is not admissible. It therefore stood to reason for RCMP investigators to insist on a face-to-face interview with the individuals. It ensured that Canadian investigators controlled the most important parameters of this potential interview; it also allowed for the possibility of being informed, during that interview, of allegations of mistreatment. By maximizing admissibility before Canadian courts, RCMP investigators selected the method of attaining their investigatory objective which was the less intrusive to the interests of those individuals.

192. The decision to send questions to foreign authorities with a questionable record of respecting human rights was made after consultation within government. It was not made in a vacuum:

(a) It was grounded in the existence of a positive obligation on the RCMP to investigate a threat to the security of Canada and to preserve the peace;

(b) This obligation was triggered by credible information obtained from trusted and reliable sources that the activities of the individuals were either a threat to the security of Canada or that these individuals had knowledge of

threats to the security of Canada. RCMP investigators recognized the investigative need of obtaining this information; and

(c) The reasonable and probable grounds to investigate these individuals had to also take into account the existence of the assessment made by the Government of Canada that the risk of a further act of terrorism was, until December 10, 2002, high and remained medium thereafter.

DFAIT Already Informed of Mr. Elmaati's Interrogation

193. The evidence unequivocally supports the determination that, since DFAIT was already informed of Mr. Elmaati's interrogation, there was no need for the RCMP to report the information.

194. The policy framework applicable at the relevant time has evolved considerably. The Ministerial Direction on National Security Related Arrangements and Cooperation came into effect on November 4, 2003. It requires the Commissioner of the RCMP to exercise his judgment as to when to inform the Minister of investigations that give rise to controversy. Further, the RCMP policy on National Security Criminal Investigations has now clarified that DFAIT should be immediately notified when the RCMP determines that a Canadian is being detained abroad in connection with a national security-related investigation. Therefore, the events provide no useful basis for commenting on what the governing policy ought to provide.

"Extreme treatment"

195. Making inquiries within the RCMP, or consulting broadly within government, to establish the exact meaning of the expression "extreme treatment" would not have changed Mr. Elmaati's situation. It therefore did not directly or indirectly result in his mistreatment.

196. First, there was no factual connection between the use of the expression "extreme treatment" in the July 8, 2002 briefing note and how Egyptian authorities were treating Mr. Elmaati at that time or immediately before. Mr. Elmaati himself recognizes, according to the summary of his testimony prepared by the Commission, that he was not the subject of any form of "extreme treatment" between June 2002 and August 2002. Consequently, the drafter of the July 8, 2002 briefing note was speculating on this subject, not relaying hard facts.

197. Second, none of the members involved construed the words "extreme treatment" to be synonymous with torture. From the member who drafted the note to the member who reviewed it and the person who decided that the Commissioner did not need to review it, all understood those words to convey the less sinister meaning that Mr. Elmaati was not receiving the care that detainees have in Canada.

198. Today, with the benefit of hindsight, some may make a connection between the words "extreme treatment" and a possible allusion to torture. That connection, however, is not what a contextual assessment "in the circumstances" demands.

There was No Reason to Involve the RCMP Commissioner

199. There is no causal connection between the briefing the Commissioner of the RCMP might have received on "extreme treatment" at the hands of Egyptian authorities and the detention or any mistreatment of individuals. Even if the Commissioner of the RCMP had been briefed and his responsible Minister notified, DFAIT was already engaged and knew of the allegations. There is no evidence to suggest that briefing the Minister would have had any impact on the treatment of Mr. Elmaati.

200. Further, at the relevant time, the invariable practice of the Commissioner of the RCMP, stemming from an understandable desire to prevent any perception of political interference in police operations, was to not brief the Minister on operational details. This practice has since been modified: as discussed above, a Ministerial Directive requires the Commissioner, in all controversial cases, to consider whether to inform the Minister.

Using Mr. Elmaati's Purported Confession in Applications for Search Warrants

201. The use of information to obtain a search warrant did not result in the detention or any mistreatment of the individuals. There is no immediate causal connection such that one act, seeking the warrant, can be said to have resulted in the other act, detention or any mistreatment. The RCMP had no information, at the time it first applied for search warrants, that Mr. Elmaati might have been mistreated while detained in Syria. It is only as of August 12, 2002, after Mr. Elmaati made the allegation during his first consular visit in Egypt, that the RCMP can be assumed to be aware of the allegation. And then, the allegation remained just that: an allegation of mistreatment to be assessed by the RCMP investigators in a larger context. This larger context included what RCMP investigators then understood to be standing instructions given by al Qaeda: when imprisoned, claim you have been tortured.

202. Further, this issue has already been extensively addressed by Commissioner O'Connor. His recommendations have already been implemented by the RCMP.[22]

203. Pursuant to the current policy on National Security Criminal Investigations, the RCMP must assess the reliability of information received from countries with a questionable human rights record. Investigators must evaluate "the risk that the country may provide misinformation or false confessions induced by torture, violence or threats." Further, all national security criminal investigators and analysts in national security are now trained on the risks of dealing with countries with a poor human rights record,

[22] Commissioner Zaccardelli's press conference with respect to the implementation of Justice O'Connor's recommendations dated October 5, 2006.

including the risk of torture and the impact of the recommendations made by Justice O'Connor.

Conclusion

204. The actions of members of the RCMP did not result in the detention or any mistreatment of the individuals. Further, for the reasons stated above, there is no evidence to support the determination that the actions of members of the RCMP were deficient in the circumstances.

PART IV - DFAIT

OVERVIEW: CORE PRINCIPLES

205. DFAIT's provision of consular assistance in these cases was marked by five core principles. An appreciation of these principles is necessary to a fair assessment of the evidence and actions of DFAIT officials.

DFAIT's Consular Affairs Bureau Directs These Cases

206. The Consular Affairs Bureau at DFAIT Headquarters directs the overall conduct of consular cases involving Canadians detained abroad on security related grounds. Because these cases are so rare, the Bureau provides strategic direction to consular officers at embassies, who in turn carry out consular functions such as consular visits and liaising with local officials. In this way, such cases are directed by experts in consular assistance and those with knowledge of multiple aspects of these complicated cases, including various political, diplomatic, legal, geographic, policing and security considerations.

Consular Protection is Limited in Cases of Mistreatment

207. In certain cases, including those subject to the Internal Inquiry, DFAIT officials have legitimate concerns about prolonged detention and mistreatment. Basic human rights are not universally honoured such that in some cases officials carry a working assumption of mistreatment. Nevertheless, in such cases it is unreasonable to expect that consular assistance can prevent mistreatment, particularly in the early stages of a person's detention. DFAIT expressly informs Canadian travelers, particularly dual nationals, of this reality: "It is therefore not always possible to provide appropriate assistance and protection to Canadians in distress abroad, particularly when the Canadian is also a national of the receiving state."

DFAIT's Mandate Extends Beyond Consular Assistance

208. DFAIT is responsible for all matters relating to Canada's external affairs.[23] Consular assistance is one priority among those as wide ranging as trade, aid and immigration.[24] Similarly, DFAIT plays, and must play, a role in assisting, both at Headquarters and at embassies, its security and policing partners when such matters extend beyond Canada's borders. This assistance may involve the Head of Mission (HOM) who is responsible for the supervision of official activities of the Canadian government abroad.[25] Therefore, it is as much a part of a HOM's role to seek consular

---

[23] *Department of Foreign Affairs and International Trade Act*, R.S., 1985, c. E.22, ss. 10(1) (hereinafter "DFAIT Act").
[24] DFAIT Act, ss 10(1) and 10(2)(a).
[25] DFAIT Act, ss. 10(2)(a), (g) and 13(2).

access as it is to assist, in consultation with DFAIT Headquarters, in arranging for CSIS or RCMP questions to be put to a Canadian detained abroad.[26]

Consular Assistance Depends Greatly on Cooperation

209. Canada is alone among its western allies in publishing Consular Service Standards. DFAIT aims to meet these standards, but because so much depends on co-operation from the detaining state, DFAIT cannot guarantee that they will in fact be met. Further, the exceptional nature of security related cases involving dual nationals is such that, by definition, they will fall outside the Service Standards applicable to routine cases.[27] This reality arises for two reasons. Detaining states, particularly in the Middle East, do not generally recognize a dual national's Canadian citizenship. Secondly, DFAIT's normal interlocutor on consular matters – the Ministry of Foreign Affairs (MFA) of the detaining state – is not in control of such cases. The involvement of security services, overseen by the Ministry of the Interior with whom DFAIT has no formal connection, severely compromises DFAIT's potential effectiveness.

The Participation of Family is Invaluable

210. The participation of the family of a detained Canadian is invaluable, particularly in cases of dual nationals detained in countries which do not recognize an individual's Canadian citizenship. Families can alert consular officials to the detention, provide details as to how it occurred, obtain information denied to DFAIT, conduct visits to the detained Canadian, provide comfort items, hire a lawyer, communicate messages to consular officials, and may have useful local contacts or be very knowledgeable about local practices all leading to steps which can assist in resolving the case.

COMMON ISSUES

211. The Internal Inquiry has examined issues common to all three cases. The Attorney General's submissions to these common issues are set forth below, followed by submissions particular to each case.

The Sharing of Personal Information

212. The provision of consular assistance by DFAIT necessarily results in the collection of personal information. The report of a consular visit, for example, includes information about a detainee's wellbeing. Such information is considered personal and is protected by the *Privacy Act* subject to specific exceptions.

213. Over the course of these cases, DFAIT shared consular documents with other Canadian government departments and agencies. These documents included some personal information about the three individuals. In total, DFAIT shared three documents with the RCMP, 10 with CSIS, in addition to various informal conversations

[26] DFAIT Act, ss. 19(2)(g), (h) and 13(2)
[27] Submissions of the Attorney General of Canada, December 14, 2007, paragraphs 95-97.

with CSIS and RCMP liaison officials. DFAIT also shared one document with PCO and two documents with PSEPC.

214. The information was shared (a) because these cases engaged issues of national security, (b) to promote inter-departmental communication and co-ordination, or (c) in the belief sharing would prove helpful to these individuals. The *Privacy Act* allows sharing for these reasons provided certain administrative steps are completed.

215. In sharing this information, DFAIT acknowledges it did not follow the administrative requirements of the *Privacy Act*. Accordingly, DFAIT's actions were in compliance with the spirit of the Act, though not in accordance with the letter of the Act.

216. As DFAIT's concern for the propriety of sharing of information grew, so did its compliance with the requirements of the Act. By late 2003 and early 2004, it applied a more rigorous policy towards the sharing of consular information. As a result, specific requests for sharing were denied. This stricter approach to the sharing of personal information is now reflected both in consular publications for the public and in restated guidelines for consular officers.

DFAIT's Knowledge of the Human Rights Reputations of Syria and Egypt

217. DFAIT officials responsible for the management of these cases were knowledgeable about the human rights reputations of Syria and Egypt and applied that knowledge to the management of these cases.

218. Two consular officers in Egypt, who conducted visits to Mr. Elmaati, acknowledged a lack of familiarity with Egypt's human rights reputation. Because consular work forms only a small part of the overall work of such officers, there was not, at the time, an explicit requirement for them to be familiar with material relevant to this issue.

219. These officers, and all DFAIT officers at posts abroad involved in cases of this type, carry out consular functions at the direction of DFAIT officials in Ottawa and in consultation with their respective HOM's. Accordingly, their actions were directed by those knowledgeable about human rights in Syria and Egypt, thus ensuring due regard for this issue in the management of these cases.

220. Had all consular officers been equally familiar with the human rights reputations of the countries in which they were posted, no different actions would have been taken.

The Alleged Mistreatment of These Individuals

221. Various human rights reports describe the physical and psychological mistreatment that security services of Syria and Egypt are alleged to practice. While, until recently, human rights concerns predominantly related to nationals of the detaining

state, it now appears to be the case that even Canadian citizenship may offer no significant measure of protection upon detention.

222. If these individuals were mistreated, as they allege, neither DFAIT action nor inaction directly or indirectly caused that mistreatment. In fact, it would be unreasonable to conclude that consular or diplomatic activity could ever prevent such mistreatment when such activity hinges on the co-operation of the detaining state.

223. Nevertheless, to the extent that it is permitted by the detaining state, consular assistance can contribute to the well being of a detained Canadian and ultimately encourage a positive outcome to his or her case. In the cases under review in the Internal Inquiry, there is little doubt that the actions taken by DFAIT contributed to a positive resolution. By their various expressions of appreciation throughout these cases, it would appear the individuals and their families at one point thought so as well.

ABDULLAH ALMALKI

Introduction: The Importance of the Co-operation of the Detaining State

224. Beginning in March 2004, upon Mr. Almalki's release from prolonged detention in invariably difficult conditions, DFAIT was able to provide him with robust consular assistance. Prior to his release, the provision of consular services was thwarted by the Syrian refusal to grant access. Without the cooperation of Syria, DFAIT could not offer Mr. Almalki the services provided to Mr. Arar and other individuals detained in Syria. Even the application of vigorous diplomatic and political pressure commencing in November 2003 did not achieve access. Mr. Almalki was released five months later, though, as with all Syrian actions in this case, it remains unknown what role DFAIT's efforts played in securing that release.

Key Issues

Consular Activities in the Period May 2002 through October 2003

Confirmation of Detention

225. On May 31, 2002, CSIS advised DFAIT ISI and the RCMP that Mr. Almalki might be in detention in Syria and that this information should be tightly controlled. CSIS was able to confirm Mr. Almalki's detention by the middle of June 2002. DFAIT similarly took time to confirm the information once it was received in late May. Reasonable confirmation of detention was necessary because the pieces of information received were too tentative to pass along to the Consular Bureau.

226. While the specific steps taken by DFAIT ISI to confirm the information cannot be ascertained from the documentary record, it is clear consultations were ongoing. In

June 2002, there were documented conversations about Mr. Almalki and the specific issue of confirming his detention.

Consular Activities Upon the Confirmation of Detention

227. Between June 26, 2002 and November 2003, DFAIT sought to gain access to Mr. Almalki by sending a diplomatic note and following up two weeks later, raising the case in separate meetings with the Syrian Deputy Minister of Foreign Affairs and the head of the Syrian Military Intelligence and informally checking with Syrian contacts.

228. Over this period, DFAIT did not waver in its commitment to Mr. Almalki. However, DFAIT acknowledges that the level of consular activity in this period was not in keeping with that carried out in the cases of Mr. Arar and Mr. Elmaati.

229. As stated above, the defining feature of Mr. Almalki's case was Syria's refusal to allow consular access. Without such access, DFAIT's effectiveness was severely compromised. Other factors which circumscribed DFAIT's consular efforts included the lack of leverage Canada could exercise with Syria, the toll on resources taken by other crucial regional events, including the outbreak of war, the unprecedented nature of the Arar and Kazemi cases, and global events, including the outbreak of SARS and the relative lack of engagement by Mr. Almalki's family which, like other families, could have been an important source of information and assistance.

230. In contrast to these factors, an element that had no bearing on DFAIT's effort in this case was an apparent difference in opinion, noted by the Commission, between Mr. Pillarella and Mr. Pardy on whether Mr. Almalki's case was being managed as a consular case. Because all such cases are managed by the Consular Bureau, Mr. Pillarella's view of whether Mr. Almalki's case was a consular one was immaterial to the actual conduct of the case. Mr. Pillarella carried out every single instruction provided to him in respect of all consular cases in Syria.

231. Irrespective of the impediments to DFAIT's efforts, the fact is that greater effort would not have produced a different outcome in this case. More would have made no difference. As Commissioner O'Connor has found, "making requests of the Syrian authorities was often an exercise in futility." The lack of response to this Commission's requests of Syria to participate in the Internal Inquiry is a perfect example of this attitude.

Consular Activities Between November 2003 and March 2004

232. By November 2003, allegations of mistreatment, prolonged detention and delayed consular access to dual nationals, became sufficiently important matters of public policy in Canada that a new parliamentary secretary position was created to deal with these cases.

233. Consistent with this approach, the consular activities undertaken in the period November 2003, and continuing well beyond Mr. Almalki's release in March 2004, intensified and were exemplary. The consular actions taken in respect of Mr. Almalki's case included:

- Minister Graham's meeting with Ambassador Arnous on November 4, 2003;
- DFAIT's meeting with Mr. Almalki's family on November 6, 2003;
- DFAIT's extensive efforts to meet with senior Syrian officials including Vice-Minister Mouallem in late 2003;
- November 30, 2003 Diplomatic Note regarding requests for consular access and investigation into allegations of torture;
- Senator DeBané and Ambassador Davis's meeting with former Deputy Minister Haddad of the Syrian MFA and President Al-Assad and subsequent discussions with the Syrian Prime Minister and former Deputy Minister Haddad on December 4, 2003;
- Ambassador Davis's regular contact with former Deputy Minister Haddad following the meeting on December 4, 2003;
- DFAIT's meetings with Minister Sharaa and Vice-Minister Mouallem on February 5, 2004;
- Ambassador Davis's meetings on January 29 and March 11, 2004 with Vice-Minister Mouallem;
- Following Mr. Almalki's release on March 10, 2004, extensive support offered through the embassy including facilitating contact with his family and lawyers in Canada;
- Mr. McTeague and Ambassador Davis's meetings with Mr. Almalki and Syrian officials on March 22, 2004;
- Ambassador Davis's attendance at Mr. Almalki's hearing on June 6, 2004;
- Ambassador Davis's attendance at Mr. Almalki's hearing on July 25, 2004 and his intervention on Mr. Almalki's behalf following the verdict in his case; and
- July 26, 2004 Diplomatic Note regarding Mr. Almalki's military service.

234. These actions constitute the highest form of effective representations to a foreign government and consular protection which DFAIT could undertake.

Mr. Elmaati's Allegation of Torture While In Syrian Custody

235. In a consular visit on August 12, 2002, while in detention in Egypt, Mr. Elmaati advised consular officers that he had been tortured during his previous detention in Syria. This information was not relayed to consular officers at the embassy in Damascus, who at the time were seeking access to Mr. Almalki. DFAIT acknowledges this information should have been passed to those consular officers.

236. Nevertheless, the allegation was reported to officials in the Consular Bureau. Therefore, the officials responsible for the management of Mr. Almalki's case who were instructing consular officers in Syria on what actions to take did so with the benefit of the information.

237. DFAIT officials actively considered whether and how to act on Mr. Elmaati's allegation. DFAIT's response was conditioned by previous experience with the earlier case of Mr. Samson in Saudi Arabia. In that case, Canada raised allegations of torture while Mr. Samson was still in custody. Shortly thereafter, Mr. Samson was summarily tried and sentenced to death. Accordingly, there was concern that raising the issue of torture during Mr. Almalki's detention might worsen matters for him, as it had for Mr. Samson. (At the same time, there was no benefit to Mr. Elmaati, who by that point had been transferred to Egypt.) For these reasons, DFAIT did not pursue the allegations with Syria at this time.

RCMP Questions for Mr. Almalki

238. In January 2003, DFAIT gave adequate consideration to the potential consequences for Mr. Almalki of transmitting to the SyMI on behalf of the RCMP questions to be put to Mr. Almalki. The considerations included:

(i) The human rights reputation of Syria;

(ii) The unprecedented and transparent co-operation shown by Syria in the Arar case;

(iii) Indications gathered over six consular visits in four months to Mr. Arar which suggested that he had not been mistreated;

(iv) The presumption that the arrival of the questions in Damascus meant that appropriate consultations had occurred among all necessary stakeholders in Ottawa, including the Consular Bureau;

(v) The fact that the Canadian Embassy had not yet been granted consular access to Mr. Almalki;

(vi) Mr. Elmaati's allegation of torture; and

(vii) The Syrian offer to have Mr. Almalki meet with a Canadian official, which suggested a decreased possibility of mistreatment.

239. Despite the various considerations taken into account in transmitting the questions, Commissioner O'Connor found that the right balance in assessing these considerations was not struck. Therefore, he concluded that the transmission of questions on behalf of the RCMP increased the risk of mistreatment to Mr. Almalki.

240. As the Internal Inquiry reviews this matter, it is crucial to recognize that the perceived risk to Mr. Almalki did not in fact materialize. As Commissioner O'Connor concluded, there is no evidence that the SyMI paid any attention to the RCMP's letter at all. Ultimately, Mr. Almalki was not exposed to mistreatment as a result of the delivery of these questions to the SyMI on behalf of the RCMP.

241. Related to this issue is the Internal Inquiry's concern about the possibility of "mixed messages" arising by virtue of this parallel consular and investigative action taken by Canadian officials. Despite this concern, there is no evidence of any such mixed message in this or any of these cases.

242. Both Ambassadors Pillarella and Davis were adamant that Canada spoke with one voice on these cases. As in the case of Mr. Arar, had any mixed messages arisen, they would have been communicated to Canada and could have been resolved. No such mixed messages arose owing to Canada's parallel actions and, absent such evidence, concerns about them are hypothetical.

AHMAD ABOU-ELMAATI

Introduction: The True Measure of Consular Assistance in Such Cases

243. Mr. Elmaati's case was the first of a Canadian dual national detained on security related grounds in the Middle East after September 11th. His case was the first to highlight the difficulties of providing assistance in such cases. Mr. Elmaati was held incommunicado by security services, denied consular access for an extended period, and released rather arbitrarily. In these circumstances, it is unreasonable to suggest that any action by consular officials could have successfully prevented any alleged mistreatment. Mr. Elmaati's case was driven by the interests of the security services of Syria and Egypt not by Canada's consular interests.

Key Issues

Briefing Consular Officials on Detention and Interrogation in Syria

Mr. Elmaati's Detention in Syria

244. DFAIT learned of Mr. Elmaati's detention on November 13, 2001. DFAIT sent a diplomatic note to the Syrian MFA on November 22, 2001 inquiring about Mr. Elmaati. DFAIT acted diligently during this period in an effort to ascertain Mr. Elmaati's whereabouts and request consular access to him. During this period, DFAIT officials:

- checked with the Embassy in Damascus on November 13, 2001 to determine whether consular officials had been notified of the detention or whether a request for consular assistance had been received;
- instructed the Embassy in Vienna on November 16, 2001 to check with local authorities as to whether Mr. Elmaati had been detained there;
- consulted with various members of Mr. Elmaati's family on November 22, 28 and 29, 2001 to determine in which country he might be detained;
- confirmed with Austrian Airlines on November 19, 2001 whether the flight from Vienna in fact arrived in Damascus;
- sought from Austrian Airlines on November 19, 2001, but were denied, information as to whether Mr. Elmaati was in fact on the flight to Damascus; and
- sent a diplomatic note to the Austrian MFA on December 2, 2001 requesting assistance from the Ministry to determine Mr. Elmaati's location.

245. At the same time, DFAIT continued to receive competing information from Mr. Elmaati's family about his detention and whereabouts. This information included information that:

- he was in detention in Damascus but would be released in a week;
- he could not in fact be located in Damascus;
- he had never in fact arrived in Damascus;
- he was in fact in detention in Cairo and in police custody; and

- he had been in detention in Damascus but deported to Egypt after 2½ days of detention.

246. In the face of this competing information - and the resulting possibility that the information of November 13 was no longer current - DFAIT acted reasonably in taking the steps it took. As noted by the Internal Inquiry in its factual narrative, "it took some time before the Consular Affairs Bureau could be definitive that Mr. Elmaati was even in Damascus."

247. It is also not reasonable to believe that Mr. Elmaati's case would have benefited at all from action begun nine days sooner. Syria only acknowledged Mr. Elmaati's detention in the face of consistent pressure from DFAIT over seven weeks and only upon the case being raised with its Deputy Minister of Foreign Affairs, to whom DFAIT presented a flight manifest evidencing Mr. Elmaati's arrival in Syria.

Information that Mr. Elmaati had been Interrogated in Syria

248. DFAIT received information by telephone on November 19, 2001 in relation to the interrogation of Mr. Elmaati in Syria. However, DFAIT ISI understood that this information related to an earlier interview of Mr. Elmaati at the U.S. border. Given the circumstances, this information was not passed to consular officials.

249. Consular officials testified that knowledge of the interrogation in Syria would have allowed them to be more definitive in their communications with Syria. However, there is no evidence that more "definitive communications" would have produced any different result in this case. The fact is the recipient of DFAIT's communications, including diplomatic notes, was the Syrian MFA, which was not in charge of this case and had no significant influence over it. In such circumstances, more definitive communication with the MFA would have changed nothing. Indeed, Canada's very definitive communications with the Syrian MFA in November 2003, in which it demanded access to Mr. Almalki and an investigation of Mr. Arar's claims of torture, produced neither.

Briefing Consular Officials on Detention and Treatment in Egypt

Mr. Elmaati's Detention in Egypt

250. On February 12, 2002, DFAIT ISI received information that Mr. Elmaati had been transferred from Syria to Egypt. The first consular action taken with respect to this information occurred March 7, 2002 when the Consular Bureau sent instructions to consular officers in both Cairo and Damascus to take steps to confirm Mr. Elmaati's whereabouts.

251. Arguably, the manner in which DFAIT circulated the information of Mr. Elmaati's transfer to Egypt may have contributed to a delay in its arrival in the Consular Bureau. However, any delay would not have had any impact on the case. Egypt would not acknowledge Mr. Elmaati's detention for a full five months. Over that period, DFAIT

was required to apply escalating pressure, including an unprecedented 10 diplomatic notes and numerous follow up conversations. In these circumstances, immediate action would not have produced any earlier result.

252. Furthermore, it was not until July 2, 2002, that DFAIT secured unambiguous confirmation from Syria that Mr. Elmaati was indeed in Egypt. Yet, Egypt continued to deny Mr. Elmaati's detention until its acknowledgment of August 4, 2002. Given Syria's well known delay in responding to requests for information, as evidenced throughout these cases, it is by no means clear that more immediate action would have made any difference.

Mr. Elmaati's Treatment in Egypt

253. In July 2002, DFAIT ISI received information it interpreted as indicating Mr. Elmaati had been subjected to extreme treatment. This information was promptly shared with consular officials responsible for the management of Mr. Elmaati's case.

254. The memo reporting on the information was copied to the Consular Bureau. Mr. Pardy's inability to recall specifically seeing it is understandable, given the passage of time and the numerous files he was working on at the time. In any event, consular officials directing the case including Mr. Pardy were knowledgeable about the human rights reputation of Egypt and the possibility of mistreatment. On the basis of this knowledge and experience, consular officials at the Embassy in Egypt were specifically requested to raise with Mr. Elmaati the issue of his treatment.

255. As discussed in greater detail below, consular officers worked collaboratively and wrote thorough reports on consular visits in order to provide the fullest information possible respecting the possibility that Mr. Elmaati had in fact been mistreated.

256. Beyond providing the information on the likelihood of extreme treatment to consular officials, the question arises as to what other action DFAIT could have taken in response to it. The source of this information rendered it impossible to act on. It was useful only as information which assisted in guiding the case, rather than as information which could be acted upon.

February 27, 2003 – September 24, 2003

257. Upon receiving consular access in August 2002, Mr. Elmaati received immediate and regular consular visits. He was visited by consular officials five times in the first six months. The results of those visits were reported to the Consular Bureau, and action was taken to fulfill Mr. Elmaati's various requests, including contacting and arranging visits with his family, transmitting letters to his family, and assisting with the retrieval of personal items.

258. Between February and September 2003, Mr. Elmaati did not have a consular visit, although the Embassy arranged for regular visits by his mother. This period

coincided with two significant events. Between February and May 2003, the increased security concerns for Canadian citizens living in or visiting Egypt owing to the outbreak of war in the Middle East resulted in increased requests for services and advice from DFAIT, thus encroaching on normal consular resources. Secondly, the regular rotation at DFAIT of staff posted overseas in May, June and July and the related administrative requirements further strained resources.

259. Nevertheless, there was no apparent reason based on the consular visits which had occurred to date to suggest that Mr. Elmaati's safety was compromised during this period. Instead:

- the consular visits to date suggested Mr. Elmaati was doing reasonably well in the circumstances and was afforded basic necessities;
- he had family visits and his family had brought him money and comfort items, including food items;
- he was not in solitary confinement and was able to purchase cooking items from the prison kitchen;
- his family was in regular contact with DFAIT both in Canada and Egypt and, by virtue of their visits, could have alerted DFAIT to any concerns or need for a visit;
- his family had retained legal counsel for him;
- he was in the midst of a judicial process, including having already secured two release orders from the courts; and
- he was able to send and receive letters.

260. The participation of family is the most important of these points. Had the family requested a consular visit for Mr. Elmaati, DFAIT officials would have facilitated the request, as they had attempted to do with all requests made of Mr. Elmaati's family, such as providing a list of lawyers, facilitating bi-monthly family visit, seeking to provide telephone access to communicate with family in Canada, and forwarding money.

Requesting Private Consular Meetings

261. Each of Mr. Elmaati's consular visits occurred in the presence of Egyptian officials. Over the course of these visits, DFAIT did not direct its consular officers to request a private consular visit and no such request was made.

262. It was understandable that DFAIT would not pursue a private consular visit given what was known about this case. Consistent with the experience of consular officers (as confirmed by locally engaged staff) that consular visits were always monitored, any

request for a private visit would have been extraordinary. However, DFAIT had already seen that extraordinary requests could be denied and could lead to delays in securing permission for a consular visit. Accordingly, DFAIT would have been risking timely access to Mr. Elmaati in order to make a request that was certain to be denied.

263. More importantly, owing to the information DFAIT received in July, it is certain that any request for a private visit would have been denied.

264. In any event, the purpose of a private visit would have been to allow Mr. Elmaati to express himself freely, which DFAIT understood he was likely not generally able to do during a monitored visit. However, moments of privacy did arise during multiple consular visits sufficient to allow Mr. Elmaati to advise officials of mistreatment. Mr. Elmaati did not to do so.

Training to Recognize Mistreatment

265. At the time of these cases, DFAIT did not provide training to consular officials to assess possible instances of mistreatment when conducting consular visits.

266. There is no agreement in the international community that any training can effectively enable consular officers to assess instances of mistreatment. The British Foreign Office, for example, does not offer such training as it is difficult if not altogether impossible to provide people with the means to detect mistreatment.

267. The reality of consular visits in these cases - monitored, restrictive, potentially tense, and relatively short in duration – renders it practically impossible to detect mistreatment by observation and questioning. Even international experts in the field are limited to arriving at their conclusions only with the benefit of medical analysis.

268. In such circumstances, the key function of consular visits is thorough and collaborative reporting by consular officers. In this case, consular officers noted Mr. Elmaati's tone, demeanour, physical appearance, wording, access to basic needs and amenities, environment, health, medical condition, morale and treatment. The very same approach was adopted in Syria in the case of Mr. Arar. These assessments enabled officials in the Consular Bureau to appropriately direct each case. Accordingly, even absent the training, Mr. Elmaati's case was not materially affected.

269. Notwithstanding this, in response to Commissioner O'Connor's recommendation, DFAIT now provides training aimed at improving awareness about mistreatment and assisting consular officers to assess its occurrence. All of the observation techniques outlined above are recommended in DFAIT's 'Torture and Abuse Awareness' material.

Referring to Meetings with CSIS and RCMP During Consular Visits

270. During the first consular visit on August 12, 2002, consular officials inquired about what had happened to Mr. Elmaati to date. Obtaining such information is

necessary to provide effective consular services. For example, by inquiring about why an individual is detained (drugs, violence, national security), consular officials can provide a list of lawyers specialized in the required area.

271. In the course of providing this information, Mr. Elmaati advised of his previous encounters with CSIS and indicated that he would now only discuss certain details of his case with CSIS and the RCMP.

272. As Mr. Elmaati's detention continued into late 2002 without resolution, consular officers sought to obtain more information in the hope of moving his case forward. Recalling that Mr. Elmaati would only discuss matters with CSIS and the RCMP, consular officers asked Mr. Elmaati whether he in fact wanted to discuss his case with either CSIS or the RCMP. On these occasions, consular officers were neither relaying messages on behalf of either CSIS or the RCMP, nor attempting to arrange an interview with Mr. Elmaati to further a law enforcement or national security investigation. The issue was raised for the *bona fide* purpose of attempting to move Mr. Elmaati's case forward.

273. Because it was Mr. Elmaati who initially raised the option of meeting with CSIS or the RCMP to discuss his case in his first consular visit, no obvious concerns arose with respect to raising the issue again with him in subsequent visits. It was simply not reasonable to assume there would be any consequences to doing so. In fact, during the February 27, 2003, consular visit, Mr. Elmaati advised, in the presence of Egyptian officials that "he would now be willing to talk with CSIS or RCMP officials as long as Egyptian authorities agreed." Therefore, Mr. Elmaati had already agreed to meet with Canadian security officials before he alleges that Egyptian officials pressed him to agree.

274. Furthermore, Mr. Elmaati gave no indication of any discomfort in having this issue raised at consular visits, even during those occasional moments of privacy which arose during visits. Rather than indicate any concern about the issue, Mr. Elmaati appeared appreciative about how the visits were being conducted, at one point even giving consular officers a token of appreciation.

275. Canada's Ambassador to Egypt had in-depth knowledge and experience with human rights and familiarity with detention conditions in the region. He did not consider the raising of this issue to be detrimental to Mr. Elmaati, but rather felt it was appropriate in the circumstances and not a mixed message. Similarly, the issue was reported to consular officials in the Bureau responsible for the management of this case who also expressed no concerns.

Briefing the Minister

Information Obtained July 2002

276. In July 2002, DFAIT ISI received information about Mr. Elmaati's detention which it interpreted as suggesting that Mr. Elmaati might have been tortured during interrogation while in detention in Egypt. Though the information was relayed to the Consular Bureau, DFAIT did not brief Minister Graham on this information.

277. As stated above (paragraph 261), DFAIT could not act upon this information. For this reason, officials did not consider it necessary to brief the Minister, particularly where the briefing could not recommend a course of action. What was important was to ensure the Consular Bureau was aware so that it could manage the case accordingly.

Allegation During First Consular Visit

278. During his first consular visit on August 12, 2002, Mr. Elmaati advised consular officers that he had been tortured in Syria. DFAIT did not brief Minister Graham on this allegation.

279. As described above, DFAIT was of the view that there was little benefit to be gained in pursuing the allegation with Syria at the time it was made. Mr. Elmaati was already in Egypt and had received consular access which showed him to be in reasonable condition given the circumstances. Further, there may have been negative repercussions for Mr. Almalki who was still in detention in Syria at the time. As there was no obvious benefit to acting on the information nor a recommended course of action in respect of it, DFAIT did not brief the Minister.

280. Commissioner O'Connor recommended that credible information that a Canadian detained abroad has been tortured should be brought to the Minister's attention. Canada has accepted Commissioner O'Connor's recommendations. As a result, this is now the practice at DFAIT.

MUAYYED NUREDDIN

Summary

281. DFAIT learned of Mr. Nureddin's detention in Syria on December 18, 2003. On the very next business day, a diplomatic note was sent seeking consular access. Subsequently, DFAIT officials provided an update of consular efforts in the case to the family friend who first advised DFAIT of Mr. Nureddin's detention in Syria. Consular officials also followed up with the Chief of the consular section of the Syrian MFA on December 21, 2003, to request a response to the Diplomatic Note and met with the Chief on January 3, 2004. Shortly thereafter, DFAIT was advised of Mr. Nureddin's

release. Upon his release, he was provided with robust consular assistance in advance of his eventual return to Canada.

PART V - CONCLUSION

282. The actions of Canadian officials did not directly or indirectly result in the detention or any mistreatment of the three individuals. Beyond that, any findings about the detention and alleged mistreatment of the individuals would be speculation that falls outside the Commissioner's Terms of Reference.

283. Canadian officials acted reasonably, professionally and in good faith in carrying out their duties in relation to these three cases, keeping in mind the circumstances including the threat environment that existed at the time and Canada's legitimate investigative interests in the activities of these individuals. Nevertheless, Canada has learned from these cases and benefited from the occasion to review its practices before this Internal Inquiry.

DATED: June 20, 2008

Michael Peirce
Alain Préfontaine
Roger Flaim
Gregory Tzemenakis
Yannick Landry