Commission of Inquiry into the Actions of Canadian Officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

FINAL WRITTEN SUBMISSION
of the
International Civil Liberties Monitoring Group (ICLMG)

Concerning the Deficiency of Actions by Canadian Officials
In Accordance with the Commission's Terms of Reference

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(the ICLMG has been granted "Intervenor Status" by the Commission)

Part I
Introduction

1. According to his Terms of Reference, the Commissioner is directed to determine whether the detention in Syria or Egypt, of Messrs. Almalki, El Maati and Nurredin (the three men) resulted, directly or indirectly, from actions of Canadian officials, and whether those actions were deficient in the circumstances.

2. The same direction is given with respect to "any mistreatment" of the "three men" in Syria or Egypt.

3. A similar direction is given with respect to deficiencies in the actions taken by Canadian officials to provide consular services to the "three men" while they were detained in Egypt or Syria.

4. In the Commissioner's ruling of May 31, 2007 (par. 63), he ruled that the term "any mistreatment" should be interpreted broadly.

5. The ICLMG will argue, based on the Draft Factual Narratives (made available on May 13, 2008) and other sources of information, that the detention and mistreatment of the "three men" in Syria or Egypt, did in fact result directly or indirectly from the actions of Canadian officials, which were deficient in the circumstances.

6. The ICLMG will not, in this submission, deal with deficiencies in the provision of consular services.

7. The deficient actions by Canadian officials, which resulted in the detention and mistreatment of the "three men" can be grouped together under the following headings :

    a) **Labeling** : Inaccurate, false and misleading labeling of the "three men", resulting from careless and neglectful investigation; incomplete and unsubstantiated evidence; hearsay, guilt by association and racial profiling – none of which was subject to appropriate oversight and reliability checks. Judge O'Connor on page 19 of his first report states that "Labels have a way of sticking to individuals, reputations are easily damaged and when labels are inaccurate, serious unfairness to individuals will result."

    b) **Sharing** : Careless, imprudent and irresponsible sharing of such inaccurate information (labels) without the proper caveats, and without proper direction and oversight.

    c) **Direction** : The lack of proper and clear direction with respect to labeling and sharing.

    d) **Communications** : Poor communications and cooperation between Canadian government agencies (RCMP, CSIS, PCO, DFAIT, Consular Services) - which resulted in ambiguous policies, ineffective action and mixed messages to foreign governments and agencies.

    e) **Training** : The inadequate training for officials working in security and intelligence – including a lack of knowledge of human rights standards and situations, information respecting country-specific situations, of middle eastern politics and Islam – and the inability to properly analyze and interpret such information.

This also includes a deficiency in knowledge and judgment with respect to the U.S. (FBI and CIA) policies and practices relating to human rights in general and to torture and extraordinary rendition in particular.

8. In Parts 2,3, & 4 of this submission, ICLMG will refer to examples from the Narratives which illustrate each group of deficient actions (described above) for each of the "three men". These are examples of false labeling, indiscriminate sharing, incompetent direction, poor communications and inadequate training.

9. ICLMG believes that there is sufficient evidence set out in the Narratives, the two volumes of factual background for the Arar Report, the Chronology and other pertinent documents, to support the allegations of deficiency with respect to these actions.

10. In addition, the Commissioner has access to other documents and testimony which are not available to ICLMG and the other Intervenors.

11. When at a meeting with the Commissioner and his Counsel on May 30, 2008, the ICLMG and other Intervenors stated that there was nothing in the Narratives to indicate that the Commission had checked the accuracy of statements dealing with labeling and sharing – a general assurance was given by Counsel that this was, or would be dealt with, but it was not appropriate material for the Narratives.

12. Since the Commissioner is mandated to investigate deficiencies in behaviour, ICLMG believes that it was essential to question officials on how they came to certain conclusions, on the thoroughness and legality of their investigative procedures, on how they tested credibility and accuracy, whether there were any directives relating to labeling, sharing and caveats, and if so, were they ignored or poorly communicated. How else could a judgment on deficiency be made by the Commission ?

13. On Jan. 8th and 9th, 2008, the Commission held hearings on the standards of conduct that should apply to Canadian officials with respect to the matters falling under the Commission's Terms of Reference – in particular, with respect to the sharing of information with foreign authorities and the provision of consular services.

14. The ICLMG made a written submission to the Commission on these matters, setting out the standards of conduct that should apply to the sharing of information with foreign authorities and to other matters falling under the Commission's Terms of Reference.

15. In its submission, the ICLMG argued that all aspects of sharing personal information with foreign agencies and its consequences should be subject to the Canadian Charter, relevant Canadian laws, international law including international human rights law and to best practices for police and security investigations (for ICLMG's complete argument, refer to the written submission). It is never legitimate to share information when there is general knowledge that it could result in torture and other serious violations of human rights.

16. Similar arguments respecting standards of conduct were made by the other Intervenors and participants and we refer in particular to those made in the submission of Amnesty International.

17. Thus far, following the hearings of January 8th and 9th, 2008, there has been no ruling or other indication by the Commission as to which standards of conduct should apply to the actions of Canadian officials in the matter set out in the terms of reference.

18. In arguing that there has been a deficiency in the actions of Canadian officials which led directly or indirectly to the detention of the "three men" in Syria and Egypt, the ICLMG will use those standards of conduct set out in its submission of Jan. 9th, 2008, those of supporting submissions and finally, those applied by Judge O'Connor in the Arar Commission.

19. Furthermore, ICLMG will argue that such actions by Canadian officials (as described) amounted to complicity in torture, discrimination, the disregard of "innocence until proven guilty", and other violations of Articles 7 to 12 of the Canadian Charter of Rights and Freedoms.

20. In his first Arar Report of Sept. 2006, Judge O'Connor referred to the following standards which should apply to the sharing of information (these are in summary form) :

    a) information to be shared must comply with policies requiring screening for relevance, reliability and accuracy and with relevant laws respecting personal information and human rights (Pgs. 13, 18, 22 & 25)

    b) must comply with policies to attach written caveats, without caveats shared information could be reshared on an ongoing basis and used in a manner never intended (Pgs. 13 & 22)

    c) the sharing agency must be given clear and unambiguous direction on how to share information with foreign agencies (Pgs. 22 & 24)

    d) in any particular case, there must be active and clear communication between the several Canadian agencies which might be involved with intelligence gathering and sharing (Pgs. 15, 26 & 31)

    e) when briefing senior officers and government officials on individual cases, the investigating and sharing agency should report the whole story, omitting no key facts (Pgs. 17 & 48)

    f) the officials in investigative and sharing agencies should be properly trained for national security investigations and in addressing human rights and culturally sensitive issues (Pgs. 17 & 27)

    g) labels such as "terrorist" should not be used unless they are factual and fully comply with policy criteria (Pgs. 19 & 25)

    h) sharing cases should be subject to senior approval and oversight (Pg. 22)

    i) written policies on sharing should only be changed or suspended in accordance with proper procedures and never verbally (Pg. 23)

21. The ICLMG rejects the standards of conduct put forward by the Attorney General of Canada in his written submission and his attorney's verbal statement on Jan. 8th, 2008 to the effect that – (a) in judging officials, it was important to consider the environment that existed in the "post 9-11" period, and (b) Canada has an international obligation to share intelligence information with foreign agencies in virtue of U.N. treaties, U.N. resolutions and Declarations of the G8, NATO and the OAS

22. While the ICLMG agrees that it is essential and legitimate to share information to combat terrorism, this must always be subject to the rule of law and certain specified conditions.

23. General provisions in the U.N., NATO and OAS charters obliging cooperation to pursue and maintain peace certainly do not take precedence over specific provisions in human rights treaties outlawing torture and arbitrary arrest, nor do general provisions in U.N. General Assembly or Security Council resolutions requesting cooperation to fight terrorism. The same can be said with respect to similar resolutions of NATO and the G8. Not only are such resolutions not part of international law, but they must be read subject to human rights and other binding treaty obligations. Such resolutions cannot negate or override customary or conventional international law.

24. According to Art. 4 of the International Covenant of Civil and Political Rights, certain provisions of that Covenant may be suspended in times of national emergency, but this is subject to special procedures and never includes torture (Sect. 7).

25. Finally, according to Art. 53 of the Convention on the Law of Treaties, one can never derogate from "jus cogens" rules of law.

26. It goes without saying that a simple interpretation of the international environment in the period 2001 to 2004 can never justify derogations in international law, including international human rights law. As stated above, if there is a real emergency, then there are provisions to suspend certain rights but these are exceptional and strictly written.

27. The ICLMG's argument on standards is supported by the recent unanimous judgment of the Supreme Court of Canada in Canada vs. Khadr 2008 SCC 28. The Court ruled that the Canadian Charter applied to the conduct of Canadian officials respecting their operations outside of Canada. It also concluded that the Charter requires respect for all of Canada's binding international obligations. These obligations include respect for the absolute prohibition against torture and the return of any person to torture, respect for the right of habeas corpus and the right to due process.

PART II
Ahmad Abou-Elmaati

28. In this Part, ICLMG will provide examples from the Narratives of deficient actions by Canadian officials which resulted directly or indirectly in the detention and mistreatment of Ahmad Abou-Elmaati in Syria and Egypt (numbers in brackets refer to paragraph in Elmaati Narrative).

a) <u>Inaccurate and misleading labeling – characterization</u>

1. links to Islamist extremists (1)(CSIS)(1990's)
2. involved in Jihad and Islamist extremist movement (9)(CSIS)(2001)
3. imminent threat to public safety and security of Canada (11)(RCMP)(2001)
4. politically motivated violence (12)(RCMP)(2001)
5. imminent threat to security of Canada (12)(RCMP)(2001)
6. requested lookout through ICES and CPIC (19)(A-O Canada)(2001)
7. considered a threat to Canada (25)(RCMP)(Nov. 9, 2001)
8. of interest in terrorism investigation (35)(RCMP)(Nov. 11, 2001)
   * **<u>Elmaati detained at Damascus airport and imprisoned (Nov. 12, 2001)</u>**
9. assumed detention justified (43)(RCMP)(Nov. 13, 2001)

10. plot to blow up Parliament Buildings (51)(CSIS & RCMP)(Nov. 1, 2001)
11. concluded confession was reliable and valid (60)(RCMP)(Nov. 2001)
    * **Elmaati transferred to Egypt and imprisoned (Feb. 12, 2002)**
12. extremist element (131)(DRAIT)(Aug. 4, 2002)
13. help only if Elmaati would not return to Canada (229)(CSIS)(Nov. 2002)
14. element of an extremist group (232)(Egypt to DFAIT)(Jan. 26, 2003)
15. a criminal danger (239)(Egypt to DFAIT)(May 20, 2003)
16. extremist element and Al Quaeda (242)(Egypt to AOC)(Spring 2003)
17. concern about Elmaati's activities if released (247)(CSIS)(March 2003)
18. if confession was true (263)(RCMP)(Aug. 2003)
19. still listed as person of interest (287, 288)(CSIS & AOC)(March 5, 2004)
    * **Elmaati returns to Canada (March 29, 2004)**

Conclusion – These are examples from the Narrative of inaccurate and harmful labeling and characterization of Abou-Elmaati as recorded in written documents of Canadian government officials. They are the result of a faulty investigative process, of bits and pieces put together here and there, added to from day to day, compounded in a helter-skelter fashion. Much of it seems based on unsubstantiated hearsay, guilt by association and racial profiling. There is little indication of attempts to verify the information or to seriously circumscribe its significance. Unless these statements can be verified and tested, their depiction and inscription constitutes a serious deficiency in conduct, and when shared indiscriminately, were no doubt part of the cause of Elmaati's detention and mistreatment.

b) Indiscriminate sharing of inaccurate and misleading personal information

1. based on CSIS and U.S. information, stopped at border (2)(Sept. 2001)
2. CSIS shared with foreign agencies including U.S. (8)(2001)
3. sent request for information to several countries, including Syria and Egypt about Elmaati and others – imminent threats (11)(12)(RCMP)(Sept. 2001)
4. follow-up with caveat, but admitted no control (14)(RCMP)(Oct. 2001)
5. they shared everything with the U.S., FBI and CIA (16)(RCMP)(Fall 2001)
6. shared information linking Ahmed with his brother (24)(RCMP)(Nov. 8, 2001)
7. shared travel agenda with Germans and Austrians (27)(RCMP)(Nov. 2001)
8. shared travel plans with FBI and CIA (28)(31)(RCMP)(Nov. 2001)
9. Zaccardelli said they shared everything (30)(RCMP)(Nov. 2001)
10. detention probably due to information U.S. gave Syria (46)(RCMP)(Nov. 2002)
11. questions sent to foreign agency to be sent to Syria (75)(CSIS)(Dec. 2001)
12. search warrant information shared with CSIS and U.S. (108)(109)(RCMP)(Feb. 2002)
13. Elmaatis's will shared with U.S. (113)(RCMP)(April 2002)
14. Syrians got all the information necessary for the Canadian investigation ((145)(DFAIT) (July 4, 2002)

Conclusion – These are examples from the Narrative of the indiscriminate and poorly-controlled sharing of critical personal information about Elmaati, for the most part inaccurate and incomplete, with foreign agencies, especially the FBI and CIA, and indirectly with Syria and Egypt, which was no doubt a cause of Elmaati's detention and mistreatment. The RCMP and CSIS should have known of the U.S. policy with respect to torture, rendition and due process in other countries (Guantanamo Bay and Abu Ghraib) and they should have known about the human rights situation in Syria and Egypt.

c) <u>The lack of appropriate and clear policy direction with respect to labeling and sharing</u>

1. there were no policies or fence posts to guide (10)(CSIS)(2001)
2. describing an individual as an "imminent threat" was unusual (15)(RCMP)
3. Zaccardelli did not recall (30)(RCMP)(Nov. 2001)
4. RCMP could be considered complicit (47)(RCMP)(Nov. 2002)
5. Zaccardelli could not recall taking any action (48)(RCMP)
6. despite concerns, RCMP concluded confession reliable (60)(RCMP)
7. when questions sent, a judgment call (77)(CSIS)(Dec. 2001)
8. RCMP were not concerned about torture (96)(141)(RCMP)(Jan. 2002)
9. Ambassador told RCMP not to concern itself with Elmaati because of his alleged Syrian citizenship (127)(DFAIT)(March 2002)
10. Zaccardelli had no recollection (157)(RCMP)(July 2002)
11. there is no protocol for alleged torture cases (161)(181)(RCMP)(Consular)
12. torture not CSIS concern (185)(CSIS)(Aug. 2002)
13. no DFAIT policy to request access alone (198)(201)(DFAIT)(Summer 2002)
14. disclosed information to prevent terrorist attacks (218)(Consular)(Fall 2002)
15. characterization would not have impact (249), would have impact (250)(CSIS)

<u>Conclusion</u> : These are examples from the Narrative which indicate a lack of policy direction from senior officials or from Ministers. When there are no clearly established policies or directives, or when they are poorly communicated, then we have the misleading labeling and indiscriminate sharing described above. These are deficiencies which also contributed indirectly to the detention and mistreatment of Mr. Elmaati and the other two men.

d) <u>Poor communications and cooperation between Canadian government agencies which resulted in ambiguous policies, ineffective action and mixed messages to foreign governments and agencies.</u>

1. unknown to the RCMP (CID), the RCMP (A.O.) decided to allow … (26)(RCMP)
2. RCMP did not share this information with Syria (32) – while RCMP sent a request to several countries, including Syria (12)(RCMP)
3. DFAIT advised of Elmaati's detention on Nov. 13, 2001 (38); CSIS learned on Nov. 15, 2001 (41); and RCMP learned on Nov. 13, 2001 (43)
4. Zaccardelli expected Policy Centre to follow-up – could not recall briefing Minister (48)(RCMP)(Nov. 21, 2002)
5. different views on confession (53)(54)(55)(56)(RCMP)(DFAIT)
6. Zaccardelli couldn't recall any briefing on confession (62)(RCMP)
7. RCMP did not consider possibility of torture (64)(RCMP)
8. unclear when DFAIT learned of confession (68)(DFAIT)\
9. Consular Affairs Bureau not made aware of confession (71)(DFAIT) because they were civilian (72)
10. DFAIT not consulted about sending questions (79)(CSIS)
11. Pardy had no information (80)(DFAIT)
12. news that Elmaati is transferred (118-124)(127)
13. DFAIT, CSIS, PCO learned of possible torture on July 1, 2002, RCMP on July 8, 2002 (151)
14. Zaccardelli had no recollection of RCMP negotiations (156,157)
15. Proulx unsure of definition of torture (161)(RCMP)
16. varying knowledge of Human Rights Reports (165-170)(DFAIT)(CSIS)(RCMP)
17. varying views on torture (180-185, 187)(DFAIT)(RCMP)(CSIS)
18. Zaccardelli could not recall information on torture (189)(RCMP)

19. Maya P.L. (Consular) learns for first time (192)(DFAIT)
20. Sigurdson changes policy re sharing Camant notes (221)(DFAIT)
21. competing interests – consular access vs. police access (266)(DFAIT)(RCMP)

Conclusions : These examples demonstrate a lack of communication and cooperation within and between Canadian agencies which affected the situation of Mr. Elmaati, resulted in ambiguous policies and gave mixed messages to foreign agencies. All of this constituted deficiency in action and inaction which indirectly led to the detention and mistreatment of Mr. Elmaati and the other two men.

e) Inadequate training and briefing of officials; the inability to properly recognize, discern and analyze certain documents and situations due to lack of training and of focus briefings.

1. seizure of map ten years out of date (3)(6)(RCMP)
2. exaggerated assessment of "know your rights" document (3)(RCMP)
3. CSIS categorizes people to get response (10)(CSIS)
4. describing individual as "imminent threat" unusual (15)(RCMP)
5. because of brother, had to advise U.S. (29)(RCMP)
6. RCMP assumed detention justified (43)(RCMP)
7. suspected interrogation "Syrian style" but not torture (45)(RCMP)
8. don't usually rely on information derived from torture (57)(CSIS)
9. no experts in CSIS re torture evidence (58)(CSIS)
10. problem assessing confession (59)(64)(RCMP)
11. issued threat assessment on basis of confession (63)(RCMP)\
12. no knowledge of reports on torture in Syria (65)(RCMP)
13. RCMP not concerned about torture (96)(RCMP)
14. used confession to get search warrant (102)(RCMP)
15. ability to understand original confession in Arabic (102)(RCMP)
16. no evidence that Syria was human rights violator (106)(RCMP)
17. inability to assess seized evidence (108)(RCMP)(CSIS)
18. inability to interpret provisions in Muslim will re martyrdom, forgiveness, the Hajj, Jihad, etc. (112)(114)(RCMP)
19. inability to equate "most effective means" with torture (146)(RCMP)
20. lack of knowledge re definition of torture (160, 161)(RCMP)
21. Consular officials did not have the same understanding of human rights (167)(DFAIT)
22. Regardless of how much torture is inflicted … (187)(RCMP)

Conclusion : These examples demonstrate the lack of training in the RCMP, CSIS and the consular service, essential for work in security and intelligence, and in particular, for work dealing with the Middle-East, Arabs and Islam. There was not only a lack of knowledge but also an inability to recognize what was relevant and what was not and to properly analyze key events and situations. This in turn led to improper labeling, the unwarranted sharing of information and to ineffective consular work. All of this was an indirect cause of the detention and mistreatment of Elmaati in Syria and Egypt. This deficiency in training programmes by Canadian agencies is closely related to the deficiencies in direction and communication by Canadian officials referred to above.

29. **The causal connection** : The link between the deficient actions of Canadian officials and the detention and mistreatment in Syria and Egypt of Mr. Elmaati are illustrated by the following examples from the Narrative.

    1. CSIS learned a foreign agency had taken steps to have Elmaati detained (37)
    2. CSIS said Elmaati's arrest was possible at the request of a foreign agency (41); RCMP assumed it was justified (43)
    3. RCMP officers stated that probably, Elmaati detained as a result of information U.S. gave Syrians (46)
    4. Proulx suggested RCMP could be complicit in Elmaati's detention (47)
    5. CSIS gives a list of questions to foreign agency to give to Syrian authorities (75)(115)
    6. Khalil said Syria got all the information Canada would need (145)
    7. Elmaati suspected he was set up by CSIS (174)
    8. Egyptian government still considered him an extremist (259)
    9. Egyptian officials told him that they had nothing against him, that he was held because Canadian authorities wanted it (260)

    Conclusion : The Narrative indicates that Elmaati's detention in Syria and Egypt was based on information they received from a foreign agency – most likely, the United States (CIA or FBI). There is no evidence that Elmaati had been the subject of an independent Syrian or Egyptian investigation and that his description as an "extremist" was the result of their own work. Furthermore, there is evidence the U.S. wanted him detained and questioned. Canadian agencies suspected this. But while Canadian officials may not have requested his arrest, their inaccurate labeling and open sharing with the U.S. makes them complicit in his arrest and mistreatment. Additionally, the RCMP and CSIS understood why he was detained and thought it was justified. Finally, their principal object was not his release, but rather, to question him in order to get more information from him.

    Judge O'Connor, in the first Arar Report, stated that while there was no evidence that Canadian officials participated in the American decision to detain Mr. Arar and remove him to Syria, it was very likely that in making the decisions to detain and remove, American authorities relied on information about Mr. Arar provided by the RCMP (4.2). Judge O'Connor also concluded that the RCMP had no basis for their inaccurate description of Mr. Arar which he said had the potential to create serious consequences for Mr. Arar in the light of American attitudes and practices at that time (4.1)(Pg.13).

    These same principles should apply in this case. At the very least, the inaccurate information given openly and fully to American agencies was, no doubt, shared again with the Syrians, Egyptians and others, which directly or indirectly resulted in Mr. Elmaati's detention and mistreatment. However, the Canadian officials were also deficient in sending questions and other information to Syria and Egypt which increased their responsibility.

PART V

30. **Closing arguments** : Based on the evidence available to ICLMG, we have cited numerous examples of deficient actions – and inaction – by Canadian officials (RCMP, CSIS, DFAIT) which contributed directly and indirectly to the detention and mistreatment of the "three men" in Syrian or Egypt. The Commission, of course, had additional information which was not available to the intervenors. On the whole, these three cases are very similar to that of Maher Arar and ICLMG doesn't see how this Commission can come to conclusions which are substantially different than those made by Judge O'Connor.

31. Because of the enormous amount of work required to prepare this submission and the shortness of the delays for its presentation, the ICLMG was not able to complete its brief, nor complete it in the manner desired. Furthermore, we were not able to treat all of the nuances and complexities as we would have preferred. For these and other reasons, we strongly request that the Commission agree to closing oral hearings, if necessary in some format that will protect the confidentiality that may be required. Only in this way can the Intervenants contribute fully to the work and goals of the Commission.

32. The ICLMG would also request clarification with respect to the eventual release of the three factual Narratives and the intervenor submissions based on the Narratives. Since there is nothing in the Narratives which is subject to "national security confidentiality", we trust that with the publication of the Commission's Report, the ICLMG and other intervenors will be released from their "undertaking" in accordance with Para. 7 of the Inquiry's General Rules of Procedure, and that both the Narratives and these submissions can be made public.

Respectfully submitted.

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for the ICLMG