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

JOINT REPLY SUBMISSIONS BY ABDULLAH ALMALKI, AHMAD EL MAATI & MUAYYED NUREDDIN

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JOINT REPLY SUBMISSIONS

1. Mr. El Maati, Mr. Almalki and Mr. Nureddin make these submissions to respond to those made by the Attorney General of Canada (AG). They rely on their submissions already filed, including those filed in December 2007 and January 2008, and make the following additional comments.

2. We have not replied to every paragraph contained in the AG's submissions. However, the failure to note a particular paragraph should not be taken as agreement with its contents. Counsel for the three men find little with which they can agree in the AG's submissions.

3. The AG has divided his submissions into four sections - Overview, CSIS, RCMP, and DFAIT. That structure is followed in this Joint Reply, although we do not address discrete issues in the same order in which they were discussed in the AG's submissions. In addition, responses to allegations about the men which appear throughout the AG's submissions largely can be found in Part I.

RESPONSE TO PART I: OVERVIEW

Propagating Untrue and Unfair Accusations

4. Through the Terms of Reference for this Inquiry the Canadian government created a secret process to serve its own ends, at the expense of numerous other important principles, including public accountability, transparency and fairness to the three men

whose lives were permanently damaged by Canadian government action. In short, the Canadian government purposely designed an uneven playing field; unreasonable time deadlines, financial limitations, an absence of disclosure, and a completely secret interview process made the men's status as "parties" in this Inquiry meaningless. The effects of this process on Messrs. Almalki, El Maati and Nureddin were well-expressed in Amnesty International's final submissions,[1] and are adopted here.

5. A corollary of the uneven playing field has been the extent to which counsel has been unable to properly protect the interests of Messrs. Almalki, El Maati and Nureddin throughout the process. The traditional role of counsel in our legal system -- to provide reasoned and professional[advice[to the client and obtain instructions -- has been rendered dangerously hollow in this Inquiry. None of the documentary or *viva voce* evidence presented by the government was shared with counsel or the Participants.[[Counsel were even precluded from sharing the summary of the redacted evidence with their clients. As a result, serious ethical and professional difficulties have resulted. Counsel have been unable to provide meaningful[advice to Messrs. Almalki, El Maati and Nureddin and have been unable to get informed instructions or even input in return. To quote Justices Iacobucci and Arbour, it is "difficult to understand how the public good is better served by the qualified participation of professionals who cannot discharge their publicly entrusted mandate."[2]

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[1] Amnesty International, "Justice Must be Served" (June 21, 2008) at paras. 25, 27, 31-40.
[2] Arar Report, *Analysis & Recommendations*, p. 286, quoting from *Vancouver Sun (Re),* [2004] 2 S.C.R. 332 at para. 49.

6. The need to protect the men's interests has never been more pressing than now, in the face of the AG's final submissions. Those submissions are shocking in their unabashed propagation of unfair and unfounded allegations and speculation about three Canadian citizens who have never been charged with a crime. The AG heaps damning accusation upon accusation against the men in its final submissions as "context", so that the Commissioner can better understand what Canadian officials were doing "in the shadow of that threat".[3] Even the usual practice of inserting "alleged" before a label or description is abandoned.[4] Worse yet, the language makes clear that the government continues to view the men in the same way it has viewed them for years; the present tense, not the past tense, is used to describe allegations against the men.[5]

7. The lack of any disclosure as to the basis of the serious allegations against the men is contrary to the spirit of the *Charter* and the basic tenets of fairness in our legal system. In a decision released today, the Supreme Court of Canada in confirmed the importance disclosure to ensuring procedural fairness. In *Charkaoui v. Canada (Citizenship and Immigration)*, the Court was clear that s. 7 of the *Charter* will require different standards for disclosure depending on the nature of the case:

> But whether or not the constitutional guarantees of s. 7 of the *Charter* apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state's actions for the individual's fundamental interests in liberty and security and, in some cases, the right to life. By its very nature, the security certificate procedure can place these rights in serious jeopardy, as the

[3] AG Submissions, para. 45.
[4] *See for e.g.,* para. 15 where the AG says with spectacular certainty that "we know" Mr. Almalki was associating with "known" Islamist extremists, had training (presumably military) and was engaged in "procurement activities".
[5] *See for e.g*., para. 42, where Mr. Almalki "is believed" – not "was believed" or even "was suspected" – of working for al Qaeda. and para. 44, which states that Mr. Nureddin "is believed" to have couriered money.

> Court recognized in *Charkaoui*. To protect them, it becomes necessary to recognize a duty to disclose evidence based on s. 7.[6]

8. The Supreme Court went on to find that procedural fairness in the context of security certificate proceedings requires disclosure to the named person and "a procedure for verifying the evidence against him or her."[7] Admittedly, Messrs. Almalki, El Maati and Nureddin are not subject to security certificates and are not being detained. However, the consequences of the outcome of this Inquiry on their reputations and psychological integrity are potentially devastating. As a result, the Commissioner must disclose as much information as possible, within the bounds of legitimate, narrowly defined "national security confidentiality" ("NSC") claims, to Messrs. Almalki, El Maati and Nureddin.

Disclosure of Further Information in the AG Submissions

9. The AG has used the opportunity of final submissions to repeat untested, unsworn and unfounded allegations against the men, in a document that it expects will be made public once the Commissioner's report is released. To further the unfairness, the AG has presented new allegations, for the very first time, beyond what was even averted to in the Draft Narrative.[8] This raises a number of concerns on the part of the Participants. Either the AG has made a strategic decision to abandon some NSC claims in order to release further information in his submissions or the AG Submissions disclose details that Commission Counsel felt unnecessary to include in the Draft Narratives. Either way, the

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[6] *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at paras. 53 - 56
[7] *Charkaoui, ibid.* at para. 56; see also *Khadr v. A.G. (Canada)* 2008 FC 807 (F.C.A.)
[8] Time does not permit a careful comparison between the Draft Narrative, a copy of which we do not have in our possession, and the AG's submissions. Counsel did alert Commission Counsel, however, to the obvious instances, namely paras. 34, 42, 107, 147, 150, 161, 164(b) and 166-169.

new details revealed inure only to the government's benefit. This process is fundamentally unfair and further harms the reputational interests of the Participants.

10. By way of example, in paragraph 34 of the AG Submissions, one single comment from a meeting between DFAIT and Mr. Almalki's family is disclosed in an attempt to undermine Mr. Almalki's credibility. The AG Submissions suggest that a member of Mr. Almalki's family said that they did not believe that Mr. Almalki was tortured. This was not included in the Almalki Draft Narrative. Without access to the report from this meeting, we are unable to assess the accuracy of this submission. In any event, it is clearly designed to further damage Mr. Almalki's interests.

11. Similarly, paragraphs 164 to 170 include significantly more detail than the Almalki Draft Narrative about information received from the FBI and information shared with Syrian authorities. This has been strategically disclosed to support the government's position that the U.S. was interested in Mr. Almalki before Canada and, as a result, any information sharing by Canada was largely irrelevant. While Mr. Almalki strenuously rejects the inferences left by this new information, his counsel is not in a position to test its accuracy or reliability.

12. In paragraph 150, it is disclosed for the first time that there was "probable" contact between a telephone number belonging to Mr. Nureddin and a "senior al Qaeda facilitator". This information was not contained in the Nureddin Draft Narrative. Again, it is being strategically disclosed in an attempt to justify the RCMP interest in Mr. Nureddin. Without disclosure of the nature of the contact and the identity of the

suspected al Qaeda "facilitator", we are unable to determine the validity of this assertion or the true significance that ought to have attached to this "probable contact".

13. Finally, in paragraph 44, it is disclosed for the first time that Mr. Nureddin is believed to have courier money for "a member of Ansar Al-Islam which was involved in attacks against coalition forces in Iraq." The reference to Ansar Al-Islam and its involvement in the violence in Iraq is gratuitously emotive and can only have been included in the AG Submissions in an attempt to artificially enhance the seriousness of the allegations against Mr. Nureddin. This allegation, like all others, is completely unfounded.

Incomplete Disclosure to the Commission

14. In paragraph 6, the AG states "the Commissioner has seen all of the relevant Government documents, in unredacted form." There is good reason to question the veracity of this statement. During a conference call on June 24, 2008, Commission counsel asked permission to disclose to government counsel a number of documents that were provided by counsel for Mr. Nureddin along with comments on the Draft Narrative on June 10, 2008. Those documents include the following:

(a) receipts for gold purchased by Mr. Nureddin which were copied by CCRA upon his return from the Hajj in February 2003;

(b) a Statement of Goods seized issued by CCRA;

(c) a Customs Seizure Report issued by CCRA; and

(d) letters sent to and received from CCRA regarding the duty and penalties levied against Mr. Nureddin for the gold purchased.

Commission counsel indicated that the documents provided by counsel for Mr. Nureddin, although clearly "government documents" relevant to the mandate of this Inquiry, had not been produced by the government during the Inquiry.

15. There is also reason to believe that the Commission has not sought out and obtained relevant documents from other sources. For example, the Commission did not get a copy of the letter sent by Mr. Edelson to Sergeant Walsh of the RCMP in June 2003 requesting assistance in respect of Messrs. Almalki and/or any response sent by the RCMP. The Commission did not obtain a copy of the public documents from the Syrian Supreme State Security Court indicating that Mr. Almalki had been cleared of all allegations (including the allegation that he committed actions which were a threat to any foreign country or their citizens).[9] When we learned in early June the Commission did not have this document, we provided it to the Commission on June 19, 2008.

16. We know from the Arar Report that Commissioner O'Connor had to make "numerous requests for documents".[10] The Participants have raised this issue throughout the process, and continue to be concerned that the Commission does not have all relevant information to assess the scope and magnitude of the deficiencies in these cases. Given the apparent failure on the part of the government to disclose all relevant documents, the Commissioner must be suspicious about any claims made by the government that the conduct of Canadian officials was not deficient. Before accepting <u>any</u> argument in the

[9] Syrian court record of acquittal, p. 8
[10] Arar Report, *Analysis and Recommendations*, p. 290

AG Submissions, the Commissioner must be satisfied that no relevant, exculpatory information has been withheld by the Government.

Investigative Competence or Incompetence

17. From the outset of this Inquiry, we pressed the Commissioner to look at the national security investigations from their inception, to determine whether officials' conduct of those investigations was deficient. We did so because once the innuendo is separated from fact, and documents and relationships are fairly assessed, it is highly likely the "cases" against the three men will fall apart.

18. Regrettably, the Commissioner rejected this approach to his mandate. Yet, the AG submits, at para. 45, that "the Commissioner has before him sufficient documentary and testimonial evidence to conclude that Canadian officials were pursuing legitimate investigative interests into threat activities."[11] For the reasons set out in our final submissions dated June 20, 2008, the Commissioner must not reach such a conclusion.[12] It would be fundamentally unfair for the Commissioner to make any findings that suggest, directly or indirectly, that Messrs. Almalki, Nureddin or El Maati were involved in any illegal or suspicious activity, without giving them a full opportunity to test the evidence or provide evidence in their own defence.[13] Importantly, repeating the

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[11] AG Final Submissions, para. 45.

[12] Joint Final Submissions, paras. 9-12.

[13] As recently as June 24, 2008, counsel offered to review documents, including Mr. Almalki's business records, with Commission Counsel in order to rebut the allegation that Mr. Almalki was involved in nefarious business dealings; this offer was refused on the basis that it fell outside the scope of the Commissioner's mandate.

government's allegations, like the ones littering the AG's final submissions, is as damaging and unfair as finding that the officials were pursuing legitimate terror suspects.

19. The Commissioner must reject the AG's submission at para . 45, and refrain from repeating the untested and unproven allegations about the men. Even with disclaimers, such alleged "facts" would forever ruin the men's reputations. In light of the refusal of the Commission to hear from the men or receive the documentary evidence that would refute the government's allegations, fairness dictates no other approach.

20. The AG's Closing Submissions are replete with sweeping statements which purport to apply equally to Messrs. Almalki, El Maati and Nureddin. It is incumbent on the Commissioner to carefully scrutinize these submissions and to determine whether they apply to each individual. For example, paragraph 5 of the AG Submissions states that Canadian officials had evidence to suggest Messrs. Almalki, El Maati and Nureddin were not mistreated abroad. Similarly, in paragraph 161 the AG suggests that American authorities had reached their own conclusions about the profile of Messrs. Almalki, El Maati and Nureddin before any Canadian agency was involved and that Syria and/or Egypt had their own information about them. Without suggesting that any of the submissions made are accurate or fair in respect of Mr. Almalki and El Maati, it is clear that these general assertions (and many others) in the AG Submissions have no application to Mr. Nureddin.[14]

[14] The Canadian government did not have any evidence to suggest that Mr. Nureddin was not tortured in Syria. Similarly, there is no reference in the AG Submissions or the Draft Narrative to information that

21. In a number of instances, the AG fails to provide any analysis of Mr. Nureddin's case in relation to crucial issues. For example, under the heading "The Actions of the RCMP did not Result Directly or Indirectly in either Detention or Any Mistreatment",[15] there is no mention of Mr. Nureddin. In particular, there is no analysis of the RCMP decision to share information with U.S. authorities in September 2003 regarding Mr. Nureddin's travel plans as well as information obtained from him by INSET investigators during his interrogation at Pearson Airport prior to his departure.[16] Given the striking similarities between the content of the interrogation in Toronto on September 16, 2003 and the interrogations in Syria and the failure of the AG to address this issue, Commissioner ought to find that information collected from Mr. Nureddin on September 16, 2003 was shared with the Syrian authorities and was used as a basis for his detention, interrogation and torture.

22. Similarly, under the heading "The RCMP Shared Accurate and Reliable Description, Taking into Account the Potential Consequences for the Individuals",[17] there is simply no analysis of the labels attached to Mr. Nureddin in RCMP communications with Canadian and foreign agencies. There is no attempt to justify the use of labels such as "Islamist extremist", "financial courier" or "associate of a suspected senior member of al Qaeda". These descriptions are all completely inaccurate. The AG provides no explanation for the use of such inflammatory labels and no analysis to support the suggestion that these labels did not contribute to Mr. Nureddin's detention or

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would suggest the Americans had reached any conclusions about Mr. Nureddin independent of information shared by Canadian authorities.

[15] AG Submissions, p. 27

[16] Nureddin Draft Narrative, paras. 19 - 20

[17] AG Submission, p. 29

mistreatment abroad.[18] Interestingly, paragraph 162 simply states that the descriptors used by the RCMP were not the cause of the detention or mistreatment of Messrs. Almalki and El Maati for various reasons, including the suggestion that the U.S. had already come up with labels for them and Syria/Egypt already had information about them. Again, without accepting the accuracy of this argument, the exclusion of Mr. Nureddin from this submission is telling: It should be taken as a confirmation that the U.S. had not come up with labels for him, Syria had no information about him and the misleading and unfair labels attached to him did cause or contribute to his detention and mistreatment in Syria.

The Commissioner's Mandate and the Terms of Reference

23. In several paragraphs of his submissions, the AG argues for an unduly narrow interpretation of already restrictive Terms of Reference.[19] In addition to what is stated in section A(iii) of our Final Submissions,[20] we make two additional points to refute the government's incorrect interpretation of the Terms of Reference.

Interpretation of Mistreatment

24. The Terms of Reference do not limit the Commissioner to determining deficiencies only where they result in a "specific instance of alleged mistreatment", as argued at para. 6 of the AG's submissions. Rather, part (iii) of the Terms of Reference

[18] The mere assertion in paragraph 189 of the AG Submissions that the RCMP did not interact with Syrian authorities about Mr. Nureddin does not address the use of inaccurate labels when sharing information about Mr. Nureddin and the possibility, in light of the fact that caveats were down, of further sharing by foreign agencies with Syria.
[19] AG Submissions, paras. 6, 8, 9, 23, 24, 38 and 282.
[20] Joint Final Submissions, pp. 13-16 ("Standard of 'Proof' to be Applied when Assessing the Acts of Canadian Officials").

direct the Commissioner to determine "whether **any** mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials" (emphasis added). The Commissioner has ruled that "mistreatment" is 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."[21] The AG did not appeal that ruling. Thus, all of the mistreatment suffered by the three men, including their prolonged detention in inhumane conditions and their continued psychological harm, can be the basis for findings of deficient Canadian conduct.

Causation

25. The AG is offering, at the 11th hour, an overly literal interpretation of the words "resulted in" which requires the Commission to find deficiencies only on a "but for" standard. This argument is inconsistent with his earlier submissions in respect of the Terms of Reference, where he wrote as follows:

> There is only a need to resolve the remaining question in respect of mistreatment: what actions of Canadian officials, if any, **contributed** directly or indirectly to the mistreatment suffered by Messrs. Almalki, Elmaati and Nureddin?[22]

This approach is the correct one: any conduct that contributes to the men's detention and other mistreatment is properly the subject of determinations by this Commissioner. The

[21] Ruling on Terms of Reference and Procedure (May 31, 2007), para. 65.
[22] Reply Submissions on Rules of Terms of Reference and Draft Rules of Procedure (April 16, 2007) at para. 5 (emphasis added) (available online at http://www.iacobucciinquiry.ca/pdfs/hearings/2007-04-16-Reply-Submission-of-AG-en.pdf).

Terms of Reference do not require a direct causal connection and the Commissioner ought not adopt the narrow interpretation suggested now by the AG.

26. A 'but for' test is simply inappropriate when addressing human rights violations. It could be that Canadian officials were solely responsible or were responsible in conjunction with many other state actors, each action building on the actions of another. If the AG position is correct then none of the state actors can be held responsible because the detentions were not caused by a single act. This cannot be. Even if the men were of interest to other police and security agencies in other states[23] this does not absolve Canada for the role its officials played.

27. Further, states ought not be able to immunize each other from findings of wrongdoing by refusing to participate in the other state's investigation. Even in criminal prosecutions, it is not necessary to have all members of a criminal joint venture charged in order to prove the guilt of one of the parties.

28. In any event, as with Mr. Arar, the evidence here supports a conclusion of causation between the initial and prolonged detentions and the acts of Canadian officials. Commissioner O'Connor noted:

> Finally, I must point out that much of the "causation argument" was directed at the American decisions to detain Mr. Arar in New York and remove him to Syria. Those making this argument contended that I should not comment critically on the actions of Canadian officials unless it can be shown that the actions of their clients "caused or contributed to" the American decisions. In this report, I have concluded that information supplied by the RCMP very likely played a role in the American decisions

[23] *AG Submissions*, para. 3.

> to detain and remove Mr. Arar to Syria. In that sense, those actions did "cause or contribute to" Mr. Arar''s fate. That conclusion, it seems to me, provides another answer to the "causation argument," at least as it applies to the American decisions.[24]

29. The AG asserts that the men are the authors of their own misfortune by travelling voluntarily to Syria. [25] This must be considered in light of the evidence that Canadian officials shared information with each other and with foreign agencies that labelled the Participants as Islamic extremists, terrorists, and/or members of Al Qaeda. If there was any truth to these allegations, the last country to which these men would have voluntarily travelled would have been Syria or Egypt. Both states have a long history of persecuting Islamists - not only members of Islamist groups but those merely suspected of association with Islamists. Travelling to Syria is itself indicative of non-involvement in Islamic terrorism. Further as both Amnesty International and Human Rights Watch have emphasized, there is a positive obligation on states to protect from torture. Canadian officials knew or ought to have known that the men would be detained, and they knew or ought to have known that once detained in Syria the men would be subjected to torture. They were under an obligation to warn the men not to travel to countries like Syria and Egypt.

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[24] Arar Report, *Analysis & Recommendations*, p. 289
[25] AG Submissions, para. 2.

Standard of Assessment

30. The Participants agree that the Commission should only draw conclusions from the facts in evidence before it.[26] This does not prevent the Commissioner from drawing reasonable inferences from those facts. While there is often a fine line between inference and speculation, it can be said that speculation involves filling in gaps that cannot be logically filled in on the available evidence, while with inferences there is sufficient evidence upon which to fill in the gaps.[27] For example, if the evidence shows that one of the men was labelled an Islamic extremist, that this information was sent by a Canadian official to Syria, and that Syria is a country with an internationally well known reputation for detaining and torturing suspected or actual Islamic extremists, then it is a logical inference that the information sent to Syria by the Canadian official caused or contributed to the person's detention. There are sufficient available facts to enable the decision maker to draw a reasonable inference, even without confirmation from Syrian officials. On the other hand it would be speculation to conclude that the act of an official caused the detention if the evidence was that the official sent information to Syria, but it was not known what that information was. One might speculate that the official labelled the person and this caused the detention, but an essential underpinning upon which to draw the conclusion of causality would be missing.

31. Just as the Commission ought not speculate, it cannot condone speculation by Canadian officials about the three men. The AG asserts that its officials had credible

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[26] *AG Canada Closing Submissions*, para. 12-13, 19, 37; The irony of this submission appears to have escaped the AG as CSIS and the RCMP did not apply the same rule. There is no doubt that in these cases they drew inflammatory, pejorative and incorrect conclusions on no actual evidence.

[27] *Zhang v M.C.I.*, [2008] F.C.J.No. 678, at para. 2-3, *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 209, per Doherty J.A.; *R. v. Munoz,* [2006] O.J. No. 446 (S.C.J.) at paras. 23 – 31, per Ducharme J.

information to investigate and to continue this investigation.[28] There is a difference between checking out suspicions and taking steps that prejudice the person, as happened in these cases. Commissioner O'Connor addressed this point; steps taken, such as sharing information, must be based on accurate and precise information.[29]

32. We have already addressed the AG's reliance on the 'exigent circumstances'[30] under which officials were operating. It is not an excuse for improper conduct. Non-democratic regimes like Syria and Egypt use the same excuse to justify human rights abuses. As Amnesty International points out in its submissions,[31] the states of emergency in both countries are illegal under international law, yet are used by both countries to justify arbitrary and indefinite detentions and the imposition of cruel, inhumane and degrading treatment, including torture.

33. In its submissions the AG additionally asserts that its officials were preoccupied with the 'anticipated second wave'. This did not come to fruition, raising the question as to whether this 'second wave' was grounded in the same inaccurate intelligence used to justify the invasion of Iraq or whether it was solely grounded in fear arising from September 11.

[28] AG Submission, para. 4.
[29] Arar Report, *Analysis & Recommendations*, pp. 26, 103-104.
[30] AG Submissions, para. 18. See *infra*, paras. 49-56.
[31] Amnesty International Final Submissions, para. 54

Detention

34. Detention can cover a border check, but in the context of this Commission's mandate, we agree that the detention contemplated is the incarceration of the men in Syria and for Mr. El Maati, also in Egypt.[32]

Mistreatment

35. The AG acknowledges that detention is mistreatment but then goes on to complain that the term 'mistreatment' is too broadly defined and sets the threshold too low. The AG suggests that the Commissioner ought to decide whether actions of Canadian officials caused specific instances of mistreatment.[33] The AG's concern stems from a misunderstanding of causality, as noted above. The Terms of Reference do not call for or require this level of specificity.

Torture

36. The AG's position on torture is perhaps the most shocking aspect of his submissions. The AG continues to take issue with the Commissioner's ruling that he should inquire into Mr. El Maati's, Mr. Nureddin's and Mr. Almalki's allegations of torture. The AG is of the view that there has been a significant change since the Commissioner's ruling in May, 2007 -- Syria and Egypt will not participate, so only the men's 'stories' are before the Commission, which cannot be corroborated, the men lack

[32] AG Submissions, para. 20.
[33] Ibid., paras. 21-23.

credibility and the process followed by the Commissioner to hear the 'stories' is inadequate because there is no cross examination.[34]

37. It had to have been clear to any reasonably informed person that at the time the Commissioner made his ruling in May, 2007 there was no realistic possibility -- not a scintilla of hope -- that Egypt, Syria or the United States would participate in the Commission. Neither Syria nor the U.S. participated in the Arar Inquiry. There was no basis to expect any foreign state would cooperate with the Inquiry. There has been no change in circumstances since the AG agreed to the protocol and processes for the examination of the three men on the issue of torture. He must not be permitted to resile from his position now.

38. It is trite to note that cross examination is not the *sine qua non* for credibility assessment. While it is the normal method used before Courts in civil and criminal proceedings, this is not the case when it comes to commissions or other administrative bodies. The Refugee Protection Division (RPD) hearings, for example, are not based on the adversarial process except when there are allegations that the claimant ought to be excluded from protection.[35] This is the body in Canada which regularly determines the credibility of claims by asylum seekers that they have been tortured in the past. Most claims are determined on an assessment of the claimant's credibility, the plausibility of the account, and often medical/psychological reports.

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[34] AG Submissions, para. 25-37.

[35] The RPD process is consistent with the recommended non-adversarial process for refugee determination set out in the *Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the UN High Commissioner for Refugees, Geneva, 1979, para. 189-205.

39. In paragraph 27, the AG cautions the Commissioner against finding that Messrs. Almalki, El Maati and Nureddin were tortured on the basis that there is not "evidence available to him to corroborate the individuals' story." This argument must be rejected. The lack of direct corroborating evidence is not unique to the cases of Mr. Nureddin, Mr. Almalki and Mr. El Maati. It is the norm for virtually all who claim to have been tortured precisely because torture is usually carried out in secret. More importantly, it is trite law that testimony of a single witness, if believed to a requisite degree of certainty, is sufficient.[36] Confirmatory evidence is not necessary. The Commissioner is perfectly entitled to conclude, and should conclude, that Messrs. Almalki, El Maati and Nureddin were tortured in Syria and/or Egypt on the basis of their testimony alone.

40. In paragraph 29, the AG suggests that Messrs. Almalki, El Maati and Nureddin strategically decided how to describe their torture so as to "remove any prospect of independently verifiable evidence." Messrs. Almalki, El Maati and Nureddin have honestly described the horrific treatment they endured. They did not choose the methods by which the Syrian and Egyptian officials tortured them. They did not choose to be left with no physical scars to "corroborate" their experiences (although their medical records do confirm the existence of past physical injury). An expert called at the Arar Inquiry, Dr. Payne, explained that over time, physical torture techniques have been developed which leave no permanent scars:

> Over the years there seems to be much less scarring shown, that countries tend to use methods of torture that leave less evidence of scars. They also tend to allow

[36] J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada*, p. 891; *R. v. Vetrovec*, [1982] 1 S.C.R. 811.

> individuals to recuperate for some time after before they are released. That gives some time for healing to occur.[37]

41. It goes without saying that psychological torture also leaves no permanent physical scars. The Commissioner must not consider the lack of physical scars in assessing whether Messrs. Almalki, El Maati and Nureddin were tortured. It is simply not relevant.

42. Further, the AG minimizes or perhaps misunderstands the significance of medical/psychological evidence as a means of corroborating assertions of having endured torture. Such reports do more than merely confirm that "the examinations were not inconsistent with torture"; when done by experienced professionals they stand as a confirmation that the indicia in the person's medical/ psychological profile is consistent with the account given of torture. Persons who lack medical expertise cannot easily fake physical and psychological symptoms such as to fool an expert.

43. The AG further diminishes the significance and weight of credibility findings. As noted in our Final Submissions, a determination of credibility involves more than just judging the person's demeanour. It calls for a determination of truth "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".[38] Mr. El Maati, Mr. Nureddin and Mr. Almalki were wrongfully labelled as Islamic extremists. As such they were saddled with the very profile of those most likely to be detained and tortured in

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[37] *Testimony of Dr. Bayne*, Arar Inquiry, June 8, 2005, p. 6058, ll. 17 0 25
[38] *Farnya v Chorny* , [1952] 2 D.L.R. 354 (BCCA).

Syria and Egypt. Understandably, while they were detained they did not report their torture -- even if there had been an opportunity, reporting torture while still in the control of the torturers is to risk reprisal and further mistreatment. Immediately after their release from Syrian prison all three men did speak of their torture with consular officials.[39] It would be implausible to believe that between the time of each man's release and his meeting with Canadian consular officials, he had the time and the means to check the human rights reports in order to falsify an account of torture and other forms of mistreatment.

44. The reasons why the AG asserts that the men lack credibility are tenuous at best. The AG urges that the Commissioner conclude that the men have lied about being tortured because Canadian officials believe that they had credible information that the men presented a threat to Canada; because the men have publicly blamed Canadian officials for what happened to them; and because Mr. El Maati and Mr. Almalki have talked to each other during the course of this Inquiry, while Mr. El Maati said that they had not talked much together during the Arar Inquiry.[40]

45. These assertions do not lead to a *prima facie* negative credibility conclusion. First the 'credible evidence' that the men posed a threat, was not even sufficiently 'credible' to meet the low reasonable and probable grounds threshold for the laying of charges. In any event, the presumption of innocence must operate to prevent the AG from relying on allegations of criminal wrongdoing to draw negative credibility conclusions. Second, the

[39] See Chronology, pp. 41, 88 and corresponding statements in interview summaries.
[40] AG Submissions, paras. 30-33.

accusations of the men that Canada was involved in what happened to them is borne out in the evidence before this Commission and the findings of Commissioner O'Connor. Finally there is no contradiction in Mr. El Maati's statement that he had not talked much with Mr. Almalki when the Arar Commission was underway, but now he has talked to him more. The Commissioner has from the outset encouraged cooperation and joint submissions among the three Participants and their counsel. Such cooperation necessarily entails communication. If the litmus test of credibility is not talking to others in like circumstances, then the Commissioner would likely have to discount the evidence of most if not all of the government officials who have testified before the Commission. It is unlikely that they have not talked to each other about what was or was not done during the years that Mr. Almalki, Mr. El Maati and Mr. Nureddin were detained.

46. The AG refers to statements attributed to Mr. Almalki's and Mr. El Maati's family members as evidence that the men were not tortured.[41] Assuming the summary of what was said is accurate, Mr. Almalki's family was speaking of his not being mistreated at a time when he was still detained in November, 2003. There is a clear risk in asserting that a person has been tortured when the person is still detained. Mr. El Maati's father was speaking publicly about his son after his son's release but while he was still in Egypt. Mr. El Maati was unlikely to have talked about his torture on the phone from Egypt with his father in Canada. Even if his phone was not tapped, it would be a reasonable assumption on his part that it was. As well, had the Canadian press reported that Mr. El Maati was tortured, this could have led to his re-arrest by Egyptians authorities.

[41] AG Submissions, para. 34.

47. The AG faults Mr. El Maati for not disclosing his torture to the consular officials who came to visit him and asks that the Commissioner discount his account of torture because of this. It is understandable why Mr. El Maati would not talk, in the odd unguarded moment, to consular officials.[42] He believed Canada was involved in his detention and torture. He was being asked questions in Egypt and Syria about matters that arose in Canada and of which other states would not know unless the information was passed on by Canadian officials. He was told by his torturers that Canada was responsible for his detention. The consular officials -- Mr. Bale, Mr. Chen, and Ms. Pappas -- did not act like consular officials, but rather as proxies for CSIS and the RCMP. Mr. El Maati had indicated during his first consular visit that he would not meet with CSIS or the RCMP while detained in Egypt. Yet in almost every visit thereafter he was pressed by consular officials to do so. This is not conduct calculated to foster trust. As with much of the AG's submissions, there is a deeply troubling lack of sensitivity to the circumstances of these men, and a worldview that lacks an air of reality.

48. The submissions are all consistent with and supported by the conclusions of Commissioner O'Connor on the issue of torture:

> Before leaving the subject of the assessments made of Mr. Arar's treatment, I have one further comment about the reluctance of some officials to recognize what likely happened to this individual. Detecting torture in countries such as Syria will always be difficult. It is unrealistic to expect torturers to admit to their actions or allow outsiders to make observations that would prove conclusively that torture has occurred. Thus, an assessment that depends solely on "hard facts" is unlikely to ever uncover torture. Canadian officials must be more sophisticated in their assessments, taking into consideration all of the available information in order to draw reasonable inferences about what may have happened. The Convention against Torture and Other Cruel, Inhuman or Degrading

[42] Ibid., paras. 35-36.

> Treatment or Punishment (Convention against Torture) provides that the human rights record of a country must be considered in assessing the risk of torture. Mr. Arar's case is an excellent example of a situation where it should not have been particularly difficult to arrive at a conclusion that Mr. Arar probably had been tortured during interrogation.[43]

Deficiencies - Consideration of All the Circumstances

49. The AG urges the Commissioner to assess the conduct of Canadian officials in light of the circumstances consistent with the Terms of Reference.[44] The AG pleads the exigent circumstances of the time[45] and relies heavily on the strength of its allegations against Mr. Almalki, Mr. El Maati and Mr. Nureddin.[46] While not clearly stated in his submissions, his purpose is to ask the Commission to find that these men presented credible threats to Canada such that in the post 9/11 crisis (which continued apparently for several years), the conduct of Canadian officials was perfectly appropriate.

50. The Participants' and the Intervenors' counsel have already submitted that exigent circumstances, including national crises and states of emergency, neither of which Canada was experiencing, do not justify nor excuse deficiencies in conduct which result, directly or indirectly in torture or other forms of cruel, inhuman or degrading treatment. The same submission is made with respect to the AG submission that it had a strong case against each of the men. Even if this were true -- which it is not -- it is not a justification nor an excuse for conduct which has a causal link to torture.

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[43] Arar Report, *Analysis and Recommendation,* p. 192

[44] The Terms of Reference call for the Commissioner to determine whether the detention (para. a.1) and the mistreatment (para. a.2) resulted from the actions of Canadian officials and if so whether those actions were deficient "in the circumstances."

[45] *AG Submissions*, para. 38-39.

[46] Ibid., paras. 40-45.

51. Of particular concern to the Participants' counsel is the AG's assertions that there was credible evidence against the men to justify the investigation, and from this, to justify everything that was done by officials in the course of the investigation, including labelling the men as terrorists and sharing such information with states that engage in gross human rights violations, such as Syria, Egypt and the United States.

52. It is apparent from the limited disclosure given in the Draft Narrative that the conclusions about who the men were and what they were doing became exponentially stronger with the passing on of information. Someone who allegedly knew or associated with Islamic extremists at the outset, Mr. Almalki became a leading member of al Qaeda with the repeated sending out of memos and reports. There was no 'evidence' to warrant the change in terminology. The same occurred with Mr. El Maati and Mr. Nureddin. The information was passed on worldwide to democratic countries and dictatorships alike. And now, for the first time to counsel for the men, the AG asserts that Mr. Almalki and Mr. El Maati have also been of interest to foreign police and security agencies. If this is accurate, it is as likely a function of the kind of allegations, dressed up as fact, that were sent by Canadian officials to those foreign police and security agencies.

53. There are three serious concerns arising from the AG's assertions that it had credible evidence not just to commence investigations, but to continue them with the labelling of the men and the sharing of information with other countries.

54. First, is the question of whether the AG is relying on information obtained under torture from the men to make its case. If one takes Mr. El Maati for example, there were

a series of disparate facts -- he is an observant Muslim; he had been in Afghanistan with a faction from the Northern Alliance; he was a truck driver; there was a delivery map in his truck of Tunney's Pasture in Ottawa; he took several hours of flying lessons; his brother, wrongly said to be a trained pilot, was said to be an extremist. These facts do not point to a plot to engage in a violent act in Canada or a suicide mission. But Mr. El Maati confessed to such a plot because the Syrians wanted him to confess to one when they tortured him. Now the AG asserts there is credible evidence he was involved in such a plot. The AG is relying on tortured evidence. The Commissioner must determine the issue of whether the men were tortured, because he must not permit the AG to continue, contrary to the most basic norms of international human rights protections, to rely on evidence obtained through torture.

55. Second is the AG's insistence that the Commissioner find that Canadian security and police officials were justified in their investigations -- they were 'legitimate' investigations based on 'credible' evidence. These investigations never led to charges which require only reasonable and probable grounds to proceed. If there was truly credible evidence against one or more of the Participants, they would have been charged.

56. Third is the fact that the men were not given any opportunity either before this Commission or otherwise to challenge the allegations against them. A significant part of the cases appears to be based on associations that the men had with 'extremists'. As set out in greater detail below, to a significant extent, the allegations against the Participants are based on their believed association with "extremists". The real issue is not whether

there was any connection but the nature of any connection and the purpose of the connection. In Canada, the Muslim community is not large, and Muslims will come to know each other through the mosques that they attend. People do not advertise that they are terrorists. If, for example, Mr. Nureddin becomes friends or "associates" with another Muslim at the local mosque, he should not be considered a suspect simply because CSIS or the RCMP have concerns or are conducting an investigation about his friend.

Labels

57. Throughout his submissions, the AG makes gratuitous statements about the three men, without reference to the Draft Narrative or to any other document. Certainly, no evidence is presented to substantiate the claims.[47] Nowhere in the AG's submissions is it acknowledged that despite a huge investment in resources over such a long period of time, despite such extensive searches and seizures and information sharing carried out across several countries between so many agencies, the *men have never been charged*. This omission is shocking. No explanation is provided as to why, if the men were such threats to Canada's security, no charges were ever laid. This fact is difficult to reconcile with most of what is said about the three men in the AG's submissions, and in the Draft Narrative, including most starkly the allegation that the RCMP had reasonable and probable grounds to charge Mr. Almalki.[48]

58. The AG takes the position that all descriptors used in relation to Messrs. Almalki, El Maati and Nureddin were based on information from other sources which was

[47] Among the most troubling statements made with respect to Mr. Almalki are those found at paras. 15, 41, 42, 147, 164, 166 and 168.
[48] Almalki Draft Narrative, para. 101.

believed to be accurate. The AG also asserts that CSIS often puts "appropriate qualifiers" on information shared or descriptors used.[49] Without any disclosure of the CSIS investigation beyond the AG Submissions and Draft Narrative, we are not in a position to accept that qualifiers were ever attached to descriptions of Messrs. Almalki, El Maati and Nureddin or that any qualifiers used were accurate. Regardless, attaching "qualifiers" is insufficient to protect Canadians from the misuse of information by foreign agencies.

59. In recommending that the RCMP take steps to ensure that all information shared was accurate, Commissioner O'Connor made special mention of the need for accuracy, precision and caution when attaching labels to individuals:

> The relevant RCMP operational manual dealing with information sharing should be amended to specify that accuracy and precision are essential when classifying information and individuals in an investigation. To promote precision in language used, I also suggest that the revised manual provide definitions of at least two terms commonly used in national security investigations: "suspect" and "person of interest"
>
> References to a "suspect" should be to a person who is a "target" or "a subject of a national security investigation." This would normally be a person who is suspected involvement in terrorist offences or offences that would constitute threats to the security of Canada, as defined in section 2 of the *CSIS Act*.
>
> Suspects should always be distinguished from "persons of interest", who may have information relevant to an investigation or may be associates of suspects. Available information relating to "persons of interest" falls short of creating a suspicion that the individual has committed an offence or constitutes a threat in terms of doing so. Associates of suspects should not automatically become suspects themselves. The danger of guilt by association is particularly great in national security investigations, as the police often have a legitimate interest in collecting information about anyone associating with a suspect.

[49] AG Submissions, paras. 125 – 126, 163

> The determination of whether or not a person is a suspect must be made by relating the person's conduct to an offence under Canada's laws, not on the basis of potentially innocuous associations. There should be careful thought before a person is elevated from the "person of interest" category to the "suspect" category.
>
> Caution is also necessary with respect to the use of potentially emotive or inflammatory phrases. To say that someone is an "Islamic extremist" or a "*jihadist*" can open the door to a slipshod and casual process in which guilt is assigned by association. Such emotive labels can also blur the distinction between a suspect and a person of interest. Investigators must make every effort to be precise and accurate at all times. The use of loose or imprecise language about an individual or an event can have serious and unintended consequences. Labels, even inaccurate ones, have a way of sticking.
>
> The importance of using accurate and precise labels is magnified when information is shared outside the RCMP. In such cases, it is essential not only that information be screened for accuracy and precision, but also that consideration is given to how the recipient agency may interpret the assessment or label attached by the RCMP. Even a "person of interest" classification may have a more serious connotation in the eyes of others than intended.[50]

60. Both the RCMP and CSIS must be very cautious before placing any label (qualified or unqualified) on a Canadian citizen in documents or information shared with foreign agencies. There is no evidence that qualifying terms such as "suspected" or "believed" are not uniformly accepted and understood internationally. As a result, they do not provide any guarantee that the descriptor will be treated with the appropriate degree of skepticism by foreign agencies and will not be used to justify the detention and/or mistreatment of Canadians abroad.

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[50] Arar Report, *Analysis and Recommendations*, pp. 336 - 337

61. Commissioner O'Connor's warnings are particularly relevant to Mr. Nureddin's case. It is clear that he became a "person of interest" because he was believed to associate with Islamist extremists and because he was believed to have couriered money for people "believed to be supporters of Islamist extremism." There is nothing in the Draft Narrative or the AG Submissions to suggest that Mr. Nureddin himself was an "Islamist extremist" or that he engaged in any illegal or suspicious activities. He was presumed guilty as a result of his associations with others which were, in fact, entirely innocuous.[51] This reality was entirely eclipsed by the use of emotive and inflammatory phrases that were shared around the world and likely used as a basis to detain him in Syria. Assuming without admitting that the RCMP and CSIS were entitled to conduct an investigation of any and all associates of "Islamist extremists", they must not share information about those associates until there is objectively verifiable facts which give rise to reasonable suspicion they are involved in some illicit activity. And even then caution must be taken before attaching any label to them.

62. There is nothing in the Draft Narrative nor in the AG's submissions which supports the characterization of Mr. Almalki as alternately a "threat to Canada's national security" (para. 41), "of interest to other countries because of his association with known Islamist extremists" (paras. 15 and 42), "suspected of supporting Islamist extremism" (para. 147) or a "procurement officer for Osama Bin Laden" (paras. 42 and 164). Similarly, nothing in the Draft Narrative or the AG's submissions supports the characterization of Mr. Nureddin as a "financial courier" or "associate of a senior al

[51] See, for example, Comments on Draft Narrative Regarding Muayyed Nureddin (*Schedule "A" to the Final Submissions*), p. 3: Mr. Nureddin had contact with many people in the Muslim community is Scarborough as a consequence of his position as the principal of the Salaheddin Islamic School.

Qaeda facilitator." Similarly, the allegations against Mr. El Maati appear to be rooted in conjecture. He appears to have been first labelled as a person associated with extremists because he was in Afghanistan. It is likely this and the concerns about his brother that led CSIS to characterize him as possibly violent, and then, of course, as more reports are prepared the 'possibly' is dropped and he becomes an imminent threat. There is no evidence to support this. The Commissioner is urged to state emphatically that the evidence proffered to the Inquiry did not prove these descriptors to be accurate.

63. It is clear that Canadian officials founded their investigation and condemnation of the three men on guilt by association. Yet the structure of this Inquiry prevents us from refuting allegations that the government continues to repeat, in its investigations, in its information sharing, in media leaks, and in this very Inquiry.

64. By way of example, the identities of the "known Islamist extremists" with whom Mr. Almalki is said to have associated, for example, are not revealed and we are, therefore, unable to respond or to offer the Commission a balanced version of events. If the person in question is Ahmed Khadr, our response would point out that the working relationship between the men was brief, and corroborated by HCI documents. If the person is Mohamad El Zahabi, our response would refer the Commissioner to the recent abandonment of all terrorism-related charges against the man by U.S. authorities. Although the AG has said repeatedly the Inquiry is not "about the men", and that they "have no case to meet", his submissions are riddled with charges against which the men cannot defend themselves.

65. For the first time, in the Final Submissions, the AG claims that the U.S. authorities wanted Mr. Almalki first. Noticeably lacking, however, is any statement to the effect that the Americans came to suspect him based on their own independent information, and not on information shared by CSIS in the 1990s.[52] The Draft Narrative confirms that the interest in Mr. Almalki originated in Canada, and that CSIS shared information with the RCMP and "various foreign intelligence and law enforcement agencies" starting in the late 1990s.[53]

66. The reliance on the U.S. as a "trusted partner"[54] is itself open to scrutiny, given what was known about American practices in the wake of the September 11, 2001 attacks. In his report, Commissioner O'Connor pointed out that labels attached by American authorities to people under investigation for terrorism related activities were equally unreliable and imprecise:

> [T]he United States adopted the labels "high interest", "of interest" or "of undetermined interest" to identify aliens who could be arrested on immigration charges in connection with the U.S. government's investigation of the 9/11 attacks. In April 2003, the Office of the Inspector General of the U.S. Department of Justice concluded that there was little consistency or precision to the classification process and that the FBI should have exercised more care in the process, given the significant ramifications on detainees' freedom of movement and rights. As one knowledgeable commentator recently said:

An inordinately high price is paid when less than accurate intelligence is relied upon by state agencies, whether the field in question is that of security intelligence or law enforcement. Lives and security may be unreasonably or negligently placed at risk and, equally, lives may be ruined and reputations decimated by the ill-advised disclosure of or reliance upon erroneous or misleading personal information.[55]

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[52] AG Submissions, paras. 147, 161 and 164.
[53] Almalki Draft Narrative, para. 4.
[54] AG Submissions, para. 163
[55] Arar Report, *Analysis and Recommendations*, p. 337

Response to Specific Allegations against Mr. Almalki

67. Given the devastating impact that the dissemination of the AG's allegations would have on Mr. Almalki, they cannot go unanswered. In this reply, three main allegations will be addressed: the Americans' interest in him; his "procurement" activities; and his alleged military training.

American Interest

68. The claim that Mr. Almalki was a legitimate and early target of U.S. investigation as a suspected "procurement officer" is belied by the following publicly known facts:

- Mr. Almalki traveled through the U.S. in December 1999 and was not stopped.
- When traveling through the U.S. a month or so later (two weeks after Canadian immigration authorities stopped him in Vancouver), he was stopped but was not asked any security related questions or questions about his travels or his business. His sales manager, who accompanied him, was asked no questions.
- As late as November 2001, Mr. Almalki's employees were never questioned by U.S. border agents or any other officials;
- No one at any company with whom Mr. Almalki did business was ever questioned by U.S. officials about him or his business;
- Mr. Almalki's cousins and uncle who are American residents visited Mr. Almalki's family in Canada in November 2001, and were not questioned by U.S. border agents at the airport;
- Mr. Almalki's name did not appear on the U.S. Treasury Department's "Terrorists List", which contains the names of thousands of foreign individuals and organizations suspected of "supporting or otherwise associating with foreign terrorists".[56]

[56] The list is available online, and includes historical information including dates on which entities were designated as assisting in or providing financial or technological support or services to or in support of terrorism: http://www.treas.gov/offices/enforcement/ofac/programs/terror/terror.pdf.

- Mr. Almalki was not on the confidential FBI list of people suspected of helping the al-Qaeda terrorist network that was mistakenly posted on the Internet in early October 2001.[57]

- AO Canada "was not successful in convincing the FBI to institute a criminal investigation."[58]

Alleged Procurement Officer

69. The bald assertion made by the AG that Mr. Almalki was a procurement officer is not supported by the Draft Narrative, nor is it supportable on all of the evidence. This, too, is a deficiency: investigators failed to properly analyze the business records which they ultimately shared with foreign agencies. Unfortunately, the Commission has made it clear that they are not interested in reviewing such documents. But a competent review of the evidence would reveal that the AG's allegation on the procurement issue is without merit for the following reasons:

- In October 2001, Mr. Almalki's company's biggest client, MicroElectronics, was the main supplier of two-way radios to the Pakistani army and border police.

- Pakistan's army and police were in the process of beefing up security on its border with Afghanistan to ensure key al-Qaeda players, including bin Laden himself, could not cross over undetected, and disappear.

- The U.S. had just announced new funding for Pakistan, including, among other initiatives, $73 million to "improve Pakistani border security by providing helicopters, vehicles, fuel, night vision goggles, communications equipment, training, and border post communications; and $7.5 million to replace existing outdated secure phones."[59]

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[57] http://www.vrwa.org/fbiwatchlist.htm

[58] Arar Report, *Addendum*, p. 103. Note that the May 31 presentation to the FBI is not even summarized in the Draft Narrative, and it is not known why the FBI, which was quick to investigate anyone with suspected ties to al Qaeda, chose not to commence an investigation.

[59] White House Office of Management and Budget, "President Bush Releases $1.7 Billion in Emergency Funds to Provide for the Security and Humanitarian Needs Related to the Attack on America," news release, 23 October 2001. U.S. military aid to Pakistan climbed from $9.1 million in the three years preceeding 9/11 to $4.7 billion in the three years after 9/11. See Sarah Fort, "Billions in Aid, With

- Mr. Almalki's company had become MicroElectronics' most trusted supplier. He was selling equipment to MicroElectronics, which was selling them to the Pakistani army, to outfit the front line border guards tasked with helping the U.S. stop al Qaeda from crossing into Pakistan. For this, the RCMP did have evidence, if they cared to look for it. The funding for the Pakistani government had been announced publicly. The RCMP had seized all the waybills and purchase papers and other documents about Mr. Almalki's clients in the searches.

- It appears that no Canadian official bothered to check with the customer itself. Several years later, a journalist did so. "We have never been questioned by any local or foreign intelligence agency about the imports in question . . ." Munawar Ali, a retired air-force officer and International marketing manager at MicroElectronics, would tell a Globe and Mail reporter in 2007. "You are the first one who has asked for such information."[60]

Alleged Military Training

70. With respect to the purported fact of Mr. Almalki's military training repeated throughout the AG's submissions, it is submitted in response that the Commission has been advised of the two witnesses who live in Canada who were with Mr. Almalki throughout his work tenure who can and are willing to confirm that he did not receive any military training while in Pakistan and Afghanistan.

71. The availability of this evidence makes the repetition of the AG's untested and unfounded allegations throughout his submissions all the more unfair and unacceptable.

No Accountability: Pakistan receives the most post-9/11 U.S. military funding, yet has failed to ferret out al Qaeda, Taliban leaders," 31 May 2007, <www.publicintegrity.org/Content.aspx?src=search&context=article&id=877> (March 26, 2008).

[60] Colin Freeze, "Torture, radios and why the U.S. won't let go," Globe and Mail, 17 March 2007, A8. See also Chronology, p. 92.

Response to Specific Allegations against Mr. El Maati

72. Throughout the AG's submissions there are assertions about Mr. El Maati which are incorrect or based on pure speculation. Several of those which are consistently repeated are addressed below.

Brother and Afghanistan

73. Both CSIS and the RCMP relied on Mr. El Maati's time in Afghanistan and the fact that Amr El Maati is his brother to develop a terrorist profile for him.[61] Thousands of young Arabs heeded the call from their mosques, backed by Saudi Arabia and the United States, to fight the Soviet occupation and later Soviet proxy government in Aghanistan. They were not all terrorists - in fact very few of them were. They were no different than young Canadians, Americans or British, motivated by idealism, to join the allied forces in World War II. It is no more than speculation to conclude that because he was in Afghanistan Mr. El Maati would want to engage in violence in Canada. He was not with the Taliban forces - he was with the Northern Alliance. He was not an active combatant because of knee injury. He was a truck driver. He left Afghanistan as the Taliban took over - in fact he was forced to leave at that time. One would expect that our intelligence agencies would be sufficiently sophisticated to not stoop to gross stereotyping. One cannot and ought expect the same of intelligence agencies in countries like Egypt and Syria. For those agencies, being in Afghanistan is more than a sufficient basis to conclude

[61] *AG Canada Closing Submissions*, para. 65

that the person is a terrorist. Part of the tragedy here is that Canadian police and intelligence services were really no different in their stereotyping.

74. The aspersions cast on Mr. El Maati because of his brother came much later. There is no evidence, other than some documents found in a house in Afghanistan that had belonged to Amr, which would support the assertion that Amr was a terrorist. But even if the allegations about Amr are true, this is hardly relevant to a determination about Mr. El Maati's intentions. This is another example of using gross speculation as though it is fact and as though it can justify imposing a terrorism label on Mr. El Maati.

Plane Hijacking

75. The RCMP justified sharing travel information with the United States about Mr. El Maati because officials determined that while en route to Europe with his mother, he might hijack the plane he was on and divert it to an American target.[62] So instead of apprehending Mr. El Maati, the RCMP got on the plane with him and his mother. The RCMP does not indicate what information it had that would lead it a conclusion that Mr. El Maati might blow up a plane killing himself and his mother. It would appear that the conclusion was drawn because there was an allegation about his brother, the strength of which itself is not apparent. This is not evidence. It is speculation. It did not justify sharing his travel itinerary with the U.S. or anyone else.

[62] AG Canada Closing Submissions, para. 160

Tortured Confession

76. CSIS took the 'plot' to blow up the Parliament buildings seriously, sending questions to have the Syrians interrogate Mr. El Maati further.[63] It appears from the AG's submissions that questions were sent to the Syrians three times, not just two as set out in the Draft Narrative. Given the Service' reluctance to discount evidence obtained from torture it is likely, although this has not been disclosed in the draft narrative, that its representations to the Egyptians as to its concerns about Mr. El Maati in May, 2003, mentioned its fear that Mr. El Maati might blow up some target in the future.[64] CSIS did not concern itself with how Mr. El Maati's confession was obtained. It cannot hide behind its own wilful blindness. Even to the present it continues to rely on a tortured confession.

Other Agencies Using Inaccurate Labels Does Not Prevent Finding of Deficiency

77. The argument at paragraphs 164-170 that Canadian officials cannot be found to have acted deficiently when they shared descriptions of Mr. Almalki with foreign agencies that were identical or similar to the descriptions disseminated by the Americans is flawed. First, it is not correct as a matter of law that a person whose actions contribute to harm is released of liability merely because others may have also contributed to the harm in portions unknown.[65] Second, the argument completely overlooks the impact that statements, actions and omissions have when they are committed by the country whose own national has been detained. Third, contrary to the AG's submission at para. 51,

[63] *AG Canada Closing Submissions*, para. 85
[64] *AG Canada Closing Submissions*, para. 98-99
[65] See section entitled "Causation", *supra.*

Canadian officials contributed a large amount of information about the men, in the form of the Supertext database among others, information that was not vetted for accuracy or relevance,[66] and which was shared with the CIA and an unknown number of other countries. The AG does not disclose what portion of the information being received from the Americans was in fact circular intelligence that originated either in the Canadian investigation or through torture abroad.

RESPONSE TO PART II: CSIS

78. The approach taken by the AG to the conduct of CSIS, as with the RCMP's conduct, is technical and distorts the reality of what happened. It selectively focuses on some actions while ignoring others. The AG's approach appears to be that if there is no Syrian or Egyptian official, as there is not, to say that the detention of the men was caused by an act of CSIS, then there is no causality.

79. Issue is taken with the 'core principles' set out by the AG.[67] They are not 'principles' but factual conclusions which the AG wants the Commissioner to consider as mitigating circumstances. With respect to the first point that no established precedents existed for Canadians detained in respect of threat related activity, this is likely not true. It is difficult to believe that no Canadian has ever been detained outside of Canada on security related matters. Aside from this, even if there were no established detention

[66] Arar Report, *Analysis & Recommendations*, p. 101; *Factual Background*, vol. 1, pp. 91-96 ("Theoretically, every piece of paper Project A-O Canada generated or received was scanned and stored in the Supertext database").
[67] AG Submissions, para. 57.

precedents there was a multitude of international human rights principles and precedents as well as domestic ones governing CSIS.

80. With respect to the second point, we do not know what CSIS did or did not share, nor do we know the contents of the information shared. We do expect that the Commissioner will apply the same considerations to information that was shared before and after September 11, 2001: it has to be accurate and precise.

81. The third fact which the AG characterizes as significant is that Mr. Nureddin travelled to the Middle East without being detained or mistreated. A specific reply to this "fact" is set out under a separate heading below.

Background

82. CSIS has a mandate directed towards the protection of Canada's security, broadly writ, as the Supreme Court of Canada recognized in *Suresh v M.C.I.*[68] To this end, it must engage in information sharing with other intelligence agencies. While this is recognized, it is essential that CSIS officials only share accurate and precise information which is necessary to advance its mandate. For example, when seeking information about a Canadian who has travelled abroad is it necessary to set out detailed facts, allegations, and reasons why the information is being sought. One senior CSIS official, for example, told the Inquiry that a label could be used in the shared information to prompt a response to corroborate or refute the label.[69] This is not necessary and is

[68] *AG Submissions*, para. 58; *Suresh v M.C.I.,* [2002] S.C.J. No. 3.
[69] El Maati Draft Narrative, para. 10

particularly inappropriate when the information is being sent to a state that abuses human rights, such as Syria, Egypt or the United States, or to a state which uses other states as its proxies to abuse human rights, such as the U.S..[70]

Human Rights Considerations

83. The AG identifies four considerations which inform information sharing with human rights abusers: the seriousness and imminence of the threat; the potential adverse consequences for public safety; the reliability and accuracy of the information; and the human rights record of the country. It then justifies its interest in the three men and sets out a selective chronology of its contacts with foreign agencies in respect of the three men.

84. The AG does not, in the course of this outline, point to any overriding need to share information about these men with Syria or Egypt. The threat could not be said to be imminent nor serious: the men were detained. As a result, there were no potential adverse consequences for public safety even if there had been a remotest possibility that the allegations were true. The information was neither reliable nor accurate.

85. And finally CSIS did not assess the human rights record of any of the countries as it shared information about the men. The obligation to consider the human rights record

[70] It should be clear that the practices of the US in renditions and in torture pre-date 9/11. See Grey, Stephen, *Ghost Plane*, St. Martin's Press, New York, 2006, at p. 269, renditions started as early as 1987 and did involve renditions to states other than the US; McCoy, Alfred W., *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror*, Metropolitan Books, Hold & Co. New York, 2006; Levinson, Sanford, Ed. *Torture: A Collection*, Oxford University Press, p. 24-29, 105-127; if any institutions ought to have been aware of US practices in this respect it had to have been CSIS and the RCMP, who have traditionally shared a close and ongoing working relationship with US agencies, including training with them at times and posting into the US.

of the country is not final upon entering into a s. 17 *CSIS Act* agreement: compliance with human rights is an ongoing obligation. It is interesting to note that SIRC recommended in its Annual Report, 2005-2006 that CSIS amend its policy governing the disclosure of information to foreign agencies, to include consideration of the human rights record of the country and possible abuses by its security or intelligence agencies.[71]

86. The 'thumb nail' précis of the case against the three men contains information which is not grounded in fact or which does not give rise to an inference that a threat is well founded. First, what is not said is that all three men are observant Muslims from the Middle East. All three are said to have links to extremists but we do not know who these extremists are, other than that Mr. El Maati and Mr. Almalki knew each other and Mr. Arar. With the other 'extremists' there is no indication that the contacts were current, that the men knew each was an extremist, or even that they were in fact extremists and not just more victims of guilt by association because they knew one or more of the three men. Human Concern International was found by SIRC not to be linked to Islamist extremists.[72] The allegation came from CSIS. In what is a very troubling CSIS practice, it ignores the conclusions of SIRC.

87. Spending time in Afghanistan in relation to the anti-Soviet jihad is not an indicator of support for al Qaeda or other forms of Islamic extremism. The dynamics in Afghanistan and the Pakistan border were far too complex to taint all who were there as

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[71] *Security Intelligence Review Committee*, Annual Report, 2005-2006, at p. 14

[72] SIRC 2006-2007 Annual report: http://www.sirc-csars.gc.ca/pdfs/ar_2006-2007-eng.pdf.

extremists supportive of al Qaeda.[73] Mr. Almalki did not sell to the Taliban. Mr. El Maati was not possibly going to engage in violence. Mr. Nureddin was not a financial courier for Islamic extremists. These are speculative conclusions, not actual facts. They are neither reliable nor accurate.

88. CSIS has a practice of drawing conclusions from profiles of its own creation. This permits the AG to assert that these individuals fell within the Service's "significant and well founded concerns" over engagement in logistical support for terrorism. It is the profile that is faulty. The AG assumes the validity of the profile. It is submitted that the Commissioner cannot and should not assume the same.

Nureddin's Earlier Unimpeded Travels in Syria

89. The AG suggests, in paragraph 110, that the decision by CSIS to share Mr. Nureddin's travel itinerary with the U.S. and other foreign agencies did not result in his detention in Syria. The AG points to the fact that Mr. Nureddin was able to transit through Syria twice without incident. This assertion is not true. Mr. Nureddin was only in Syria once after September 11, 2001 and prior to his detention in December 2003.

90. More importantly, Mr. Nureddin's ability to enter and leave Syria without incident on an earlier occasion is not determinative of the issue of whether the actions of any Canadian agency shared information about Mr. Nureddin which increased the risk that he would be detained and tortured. Mr. Nureddin entered Syria from Turkey on September 27, 2003. He was stopped, interrogated and searched in Turkey before being

[73] Arar Report, *Factual Background*, vol. 1, p. 280-281.

allowed to leave. He traveled through Syria and crossed into Iraq on September 29, 2003. Mr. Nureddin was not detained in Syria until December 19, 2003. The Draft Narrative indicates that the RCMP did not share information with the "U.S. authorities" until "later in September 2003." CSIS did not learn until early October 2003 – after Mr. Nureddin had already been through Syria without incident – that Mr. Nureddin had been questioned by a foreign agency[74] and that a foreign agency was looking for him. Without disclosure of what information was shared, the precise date(s) on which information was shared and with whom it was shared, it is impossible to establish with certainty that foreign agencies received information about Mr. Nureddin from Canadian officials through a third party after September 29, 2003 but prior to his arrest in December 2003. This, however, is a reasonable inference the Commissioner ought to draw on the evidence available in the Draft Narrative and other public sources. It is apparent from the Draft Narrative that Mr. Nureddin was labelled a courier for Islamic extremists because of his Hajj pilgrimage in February, 2003, which was done as part of an organized group. Once labelled a courier, he was detained in his travels.

RESPONSE TO PART III: RCMP

Standards for Policing

91. The Participants agree that the RCMP must conduct itself in accordance with the rule of law. The Participants further agree that the principles set out in paragraph 139 of the AG Submissions are to be followed in every case. Finally, the Participants agree that police action, to be justified, must be "objectively grounded on facts which give rise to

[74] Presumably this is a reference to the detention, search and interrogation at the Turkish exit point.

reasonable suspicion." However, there is one additional governing principle that is not included in the AG Submissions: for an investigation to be conducted in a "professional manner", based on objectively reasonable facts, it must not be the product of stereotypes or racially based assumptions.

92. In the week following the attacks of September 11, 2001, the RCMP issued the following "terrorist profile" to assist its investigators:

> By all accounts the hijackers of the four planes were men who lived in the United States for some time, did not act conspicuously, were well spoken, well dressed, educated and blended in well with the North American lifestyles. Similar suspects live in Canada and some have been identified….These identified individuals travel internationally with eases, use the Internet and technology to their advantage, know how to exploit our social and legal situation and are involved in criminal activities. Indications from investigative leads in the past week have given us a glimpse that there are many more potential terrorists in Canada.[75]

In his testimony before the Arar Inquiry, Inspector Cabana agreed that implicit in this description of terrorist suspects is that they are Arab/Muslim men.[76] Inspector Cabana also agreed that this document was an express invitation to use racial profiling.[77]

93. To the extent this same "profile" informed the initial decision to investigate Messrs. Almalki, El Maati and Nureddin or influenced the manner in which information was collected and analyzed, the investigation was not conducted according to the rule of law. As set out in our final submissions, it is clear from the Draft Narrative and the AG Submissions that Canadian officials made improper, stereotypical assumptions about the

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[75] Arar Inquiry, Exhibit P-85, Vol. 5, tab 23
[76] Testimony of Inspector Cabana, *Transcript of Proceedings before the Arar Inquiry*, June 30, 2005, pp. 8186, ll. 6 - 20
[77] Testimony of Inspector Cabana, *Transcript of Proceedings before the Arar Inquiry*, June 30, 2005, pp. 8186 - 8187

activities of the Participants which led investigators to improperly conclude that they were involved in suspicious activities when they were not. This is a serious deficiency which, particularly when taken together with deficiencies in relation to international information sharing, contributed to their detention and torture in Syria and/or Egypt.

94. Commissioner O'Connor commented on the dangers of making unwarranted assumptions about individuals:

> Inaccurate analysis of information and unwarranted assumptions must be avoided, as they may trigger unforeseen chains of events and cause grave damage. Incorrectly analyzing information may lead someone to overlook information that, if properly analyzed, could help prevent crimes that would threaten national security.[78]

Commissioner O'Connor further explained that sharing unreliable and inaccurate information "does not provide a sound foundation for identifying and thwarting real and dangerous threats to national security and can cause irreparable harm to individuals."[79] These comments are equally applicable to the cases of Messrs. Almalki, El Maati and Nureddin. The RCMP made unwarranted assumptions and drew inaccurate conclusions about the Participants which were shared broadly and which triggered a chain of events that caused grave danger.

Information Sharing

95. In paragraph 153, the AG suggests that members of the RCMP "did not believe that sharing information in real time included a lifting of the third party rule. Information

[78] Arar Report, *Analysis and Recommendations*, p. 325
[79] Arar Report, *Analysis and Recommendations*, p. 335

was thus always shared with automatic caveats." This assertion is entirely inconsistent with the findings of Commissioner O'Connor in the Arar Report[80] and must be rejected.

96. Commissioner O'Connor expressly found that there was an understanding among managers involved with Project A-O Canada that all information could be shared with partner agencies without screening it for relevance or attaching caveats. Commissioner O'Connor further found that there was an understanding that parties to the "open book" investigation could further share information they received without seeking the consent of the originator. This Inquiry heard from many of the same witnesses as Commissioner O'Connor on this issue. It would be unreasonable for the Commissioner to come to a different conclusion on this crucial issue (or any other crucial issue common to the mandates of both Inquiries) without first affording the Participants an opportunity to review the documents and cross-examine the witnesses.

Least Intrusive Investigative Steps

97. The Commission must reject the argument that the RCMP selected investigative steps that were "less intrusive."[81] Even from the small amount of information that is known to counsel for Messrs. Almalki, El Maati and Nureddin, this position is untenable. There are at least three investigative steps which put the lie to this submission: (a) the

[80] Arar Report, *Analysis and Recommendations,* p. 110
[81] AG Submissions, para. 190

sharing of travel information with the U.S.; (b) the sharing of the entire Supertext Database with the FBI in April 2002;[82] and (c) the decision to send questions to Syria.

98. The RCMP shared travel information with American authorities about Messrs. El Maati and Nureddin.[83] The purported explanation for this, as set out in paragraph 159 of the AG Submissions, is 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" (emphasis added). There is no evidence that either Messrs. El Maati or Nureddin were planning to travel to the United States when travel information was shared with the U.S. authorities. Mr. El Maati was destined for Syria through Vienna. Mr. Nureddin flew to Amsterdam and then Germany en route to Iraq through Turkey.[84] Given there was no information to suggest either intended to travel to or through the United States (or even U.S. airways), to suggest that sharing travel itineraries is the least restrictive means of sharing information is disingenuous. Were this submission true, however, it would be reasonable to conclude that the RCMP did share the travel itinerary with those countries where Messrs. Nureddin and El Maati were intending to travel, including Syria, Turkey and Iraq.

99. Commissioner O'Connor dealt at length with the decision to share the entire Supertext database from Project A-O Canada with U.S. agencies without caveats attached and without any analysis of relevance of the information shared.[85] Commissioner

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[82] Arar Report, *Factual Background*, pp. 91 - 100
[83] The timing of Canadian officials' knowledge and sharing of Mr. Almalki's travels in November 2001 and the spring of 2002 remains a contested issue; see Almalki comments chart and Joint Submissions.
[84] Nureddin Draft Narrative, para. 19
[85] Arar Report, *Analysis and Recommendations*, p. 122 - 125

O'Connor pointed out that the information shared was not "screened for relevance, reliability and personal information." This can hardly qualify a "less intrusive" manner of accomplishing the investigative objective of sharing information with foreign partners (even assuming that was a legitimate objective in respect of the Participants).

100. Finally, in January 2003, the RCMP sent question to the Syrian Military Intelligence to be posed to Mr. Almalki while in detention. We have previously commented on the impropriety of sending questions to SMI and the risk that it created that Mr. Almalki would be tortured during the interrogation. Regardless of the propriety of the decision, it simply cannot be characterized as the "least intrusive" means of obtaining information from Mr. Almalki.

RCMP Acquiescence in Detention

101. The AG suggests, in paragraph 145, that 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." Their conduct in this case, however, tells a very different story. Their conduct demonstrates that they knew other countries were all too willing to detain people believed, rightly or wrongly, of terrorist activities and sent out clear signals that they believed Messrs. Almalki and El Maati posed an imminent threat to public safety.

102. On September 22, 2001, members of the RCMP, CSIS, FBI and other law enforcement agencies held an "all agency" meeting to discuss the ongoing investigation

and promote cooperation between the various forces. According to the Arar Report, shortly after the meeting, the FBI sent a letter to the Canadian agencies asking that they detain and interrogate a number of individuals they believed were associated with terrorism.[86] While the RCMP did not act on this request (because they had an insufficient basis to justify detention), they nonetheless circulated memoranda of their own through their Liaison Officers that described Mr. El Maati and later Mr. Almalki 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." In early October, the RCMP also made contact with Syrian authorities and others to obtain further information about Messrs. El Maati and Almalki.

103. On this basis, the RCMP knew that other countries were prepared to arrest and detain individuals that were thought to pose a threat to public safety and national security. Rather than protecting Canadian citizens from this fate, the RCMP fueled the fire by widely distributing information that labeled Messrs. Almalki and El Maati as posing an imminent risk. The RCMP must have understood that their September 2001 and October 2001 memoranda and inquiries about Messrs. Almalki and El Maati would likely be taken as a signal to others that they ought to be detained and interrogated wherever they were found. The RCMP clearly increased the risk, intentionally or recklessly, that Messrs. Almalki and El Maati would be detained by circulating inflammatory and emotive information about them in the immediate wake of the September 11, 2001 attacks. This is a clear deficiency.

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[86] Arar Report, *Factual Background, Vol. 1,* p. 14 – 15.

RESPONSE TO PART IV: DFAIT

104. Due to the lack of disclosure of the many documents[87] that would inform any discussion of the competence or deficiency of DFAIT action, limited reply submissions will be made to specific paragraphs in the AG's submissions.

105. In response to paragraph 206, the theory that CAB in Ottawa directs the overall conduct of consular cases was not matched by what actually occurred in practice. There was clearly a breakdown in communication between CAB, the Embassy in Damascus, and various other agencies when it came time to provide consular assistance to Mr. Almalki. Ambassador Pillarella said that CAB told him not to treat Mr. Almalki's case as a consular one;[88] Mr. Pardy disagreed that those were the instructions but rightly acknowledged that "CAB lost focus".[89]

106. In response to paragraph 207, the only official who appears to have had the working assumption of mistreatment was Mr. Pardy; according to the Draft Narrative, this view was not universally shared.[90] We disagree that consular assistance cannot prevent mistreatment – early and unambiguous attention to the situation of a dual national detained in national security context is at the very least more likely to help the detainee than complete silence and disregard.

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[87] Numerous documents were carefully explored by Commissioner O'Connor in the Arar Report, including Consular Affairs memos, Camant notes, CAB reports, faxes, emails and detailed debriefs of at least Mr. Nureddin by Mr. Martel (Arar Exhibit P245). In our case, it appears there are also transcripts of meetings held between DFAIT officials and members of the Almalki and El Maati families.
[88] Almalki Draft Narrative, para. 80.
[89] Ibid. at para. 81.
[90] Almalki Draft Narrative, paras. 51-53.

107. More particularly, government officials have admitted that there is an obligation to provide full consular services, irrespective of the Canadian's dual nationality.[91] At the very least, a Consul has a duty to inquire about the conditions in which the Canadian was detained,[92] including size of cell, access to exercise and a doctor, basic hygiene conditions, heat and access to clean water. Canada would then launch "vigorous protests if these essential needs were not provided."[93] Moreover, under international law, consular officials are mandated to remind foreign officials of the prohibition of the use of torture and of arbitrary arrest or detention.[94] There is no indication in the Draft Narrative or in the AG's submissions that such minimal actions were done in a timely way or at all, especially in respect of Messrs. Almalki and El Maati while they were in Syria.

108. The contention that the Head of Mission is responsible for supervising all official activities of the Canadian government abroad and therefore must assist CSIS and the RCMP in their investigative efforts was argued before Commissioner O'Connor and rejected. The Commissioner wrote that such a role "may well put the ambassador in a difficult position of conflict."[95] The ambassador's primary responsibility, and that of his or her staff, is to "promptly and adequately represent the interests of Canada and of Canadians held abroad."[96] Clearly, Ambassador Pillarella's priority vis-à-vis Messrs. El

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[91] Arar Report, *Factual Background*, vol. 1, p. 391 (referring to Mr. Martel's testimony).
[92] Ibid. Henry Hogger, the British Ambassador to Syria in 2002-2003 testified in Arar that he would have expected a description of the cell in which a detainee was being held to be included in a consular report, and further, that he would have informed the foreign ministry if a British citizen was being held in a cell of the size in which the three men and Mr. Arar were individually held.
[93] Ibid. at 270.
[94] Amnesty International, "Justice Must Be Served" (June 21, 2008) at 60 and instruments cited therein.
[95] Arar Report, *Analysis & Recommendations*, p. 352.
[96] Ibid.

Maati and Almalki was in the pursuit of the national security investigations, not consular assistance and protection.

109. The argument at paragraphs 47 and 209 must be rejected. The dual nationality of Messrs. Almalki, El Maati and Nureddin is not a justification or explanation for why more robust consular assistance was not provided to them. First, neither Mr. Nureddin nor Mr. El Maati were nationals of Syria at the time of their incarceration, so the "exceptional" circumstances that arise with dual nationals cannot explain the failure of consular officials to get more timely access to the men. There is no evidence that the Syrians considered Mr. Nureddin to be an Iraqi citizen only and, on that basis, denied consular access. Similarly, there is no evidence that the Syrians denied consular access to Mr. El Maati because he was an Egyptian citizen.

110. Second, while it is recognized that DFAIT officials may not be able to interfere with the internal laws of another state, it is apparent that consular officials can be proactive in assisting their nationals.[97]

111. In addition, the AG suggests that detaining states generally do not recognize a dual national's Canadian citizenship. This is a much broader statement of principle that appears on the DFAIT website which provides that dual citizenship *"*can lead to serious difficulties for Canadians when they are in the country of their second citizenship*."* It can

[97] The Phillipines has been very proactive in assisting its nationals and has conducted independent investigations of those cases; see DFA Accomplishment Report, 2003, Phillipines, Department of Foreign Affairs, Jan. 2004, p. 18 ("Assistance to Nationals"). In a different context, the robust efforts of Australia, Britain and others in securing the release of their nationals from Guantanamo Bay stands in contrast to the lack of attention paid by the Canadian government.

also create problems in third countries if there is any confusion over what citizenship was used to obtain entry.[98] It is not that countries fail to recognize dual citizenship generally. Rather, difficulties relating to dual nationality arise when Canadian citizens are detained in their country of second citizenship. As is evident by the disparate consular treatment experienced by Mr. Arar and Mr. Almalki, dual nationality alone cannot explain or excuse deficient consular efforts.

112. In response to paragraph 214, the only permissible reason under the *Privacy Act* for DFAIT to share personal information with CSIS or the RCMP (absent consent of the individual, of course) is the "consistent use" exception. That is, disclosure of personal information would be permitted if the information was to be used for the purposes for which it was collected – *i.e.* to assist the person in detention.[99] The sharing of such information with CSIS by Mr. Martel and others[100] was in clear violation of the Act and the Manual on Consular Instructions, and was therefore deficient.

113. In response to the assertion at paragraph 217 that DFAIT officials responsible for the management of the three cases "were knowledgeable about the human rights reputations of Syria and Egypt and applied that knowledge" to the cases, we refer the Commissioner to the findings and recommendations of the Arar Commission. Commissioner O'Connor found that the Canadian Consul had no training in detecting signs of torture or abuse and he recommended that specific policies and training be developed to address the situation of Canadians detained in countries where there is a

[98] http://www.voyage.gc.ca/main/pubs/dual_citizenship-en.asp
[99] Arar Report, *Factual Background*, vol. 1, pp. 265-266.
[100] Almalki Draft Narrative, paras. 187-189.

credible risk of torture.[101] Moreover, the evidence summarized in the Draft Narrative suggests that officials were not knowledgeable, particularly with respect to Syria's notorious human rights record.[102]

114. In response to paragraph 223, the belated efforts by DFAIT to assist Messrs. Almalki and El Maati prove, to a large extent, the fallacy of the government's argument that little can be done when it comes to dual nationals detained abroad. The marked difference in treatment between Mr. Arar and the other cases is also not explained by the AG, but clearly resulted in large part from the concerted and more timely efforts taken on his behalf. For example, on October 20, 2002, Ambassador Pillarella met with General Khalil where he expressed his "main concern" was obtaining consular access to Mr. Arar.[103] At that very first meeting, General Khalil agreed that the Canadian Consul could visit Mr. Arar the next day.[104] On November 3, 2002, the two men met again, and this time discussed Mr. Almalki. Again, General Khalil "seemed disposed to accept" that Mr. Almalki could meet with a Canadian official.[105] No such meeting was ever arranged, and in light of the different approach taken by the Ambassador to the two cases (with respect to Mr. Almalki, the approach was not to treat it as a consular case[106]), the Commissioner has ample reasons to conclude earlier, earnest efforts by DFAIT would have secured Mr. Almalki's release much sooner.

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[101] *Analysis & Recommendations*, pp. 352-353.
[102] See for eg. Almalki Draft Narrative, paras. 56, 122.
[103] Arar Report, *Factual Background*, vol. 1, p. 251.
[104] Ibid. at p. 256.
[105] Almalki Draft Narrative, para. 74.
[106] Ibid., para. 80.

115. Mr. Almalki disagrees with the characterization of the post-release consular efforts in paragraph 224 of the AG's submissions. The deficiencies of those efforts are listed in part in our Final Submissions. In addition, it should be emphasized that efforts to get his youngest son's passport (so that Mr. Almalki could be reunited with his wife and children) were apparently thwarted by Canadian officials; officials refused to help reunite the family. It was only after his wife threatened to go to the media that her youngest son's passport was delivered, with an issuance date that confirmed the passport had been ready much earlier.

116. Consular officials' conduct vis-à-vis Mr. Arar and his family was markedly different. DFAIT considered hiring James Lockyer to act as an independent observer at Mr. Arar's court hearing, assisted in finding a lawyer for Mr. Arar, issued an emergency passport for Mr. Arar's youngest child, arranged for Dr. Mazigh to go to Syria for Mr. Arar's expected court appearance, instructed embassy officials to assist in her departure from airports in Tunis and Paris to ensure she cleared security, and helped her come back to Canada from Tunisia.[107]

117. In response to paragraphs 229 to 231, we submit that the defining feature of Mr. Almalki's case was not Syria's refusal to allow consular access, but the Canadian conduct that resulted in that refusal. DFAIT's approach to his case was starkly different than for the other men, a distinction that could not have been lost on the Syrians. Add to this the sending of questions, the personal visit by CSIS agents, and the sharing of information, and the message that Syrian officials could reasonably infer was that Mr. Almalki was a

[107] Arar Report, Factual Background, vol. 1, pp. 285-286, and 396-398.

"special" case. None of this releases Canadian officials from responsibility for the foreseeable result of their actions and omissions.

118. Moreover, the statement at the end of paragraph 229 that the "relative lack of engagement by Mr. Almalki's family" was a factor which circumscribed DFAIT's consular efforts is without merit and ought to be soundly rejected. First, both Mr. Pardy and Ms. Pastyr-Lupul rejected the notion that the Almalki family did not want DFAIT to pursue the case.[108] Second, the argument that consular assistance to a detainee depends at all on the actions of the detainee's family is illogical and not supportable at law.[109] Similarly, the absence of a request for assistance by the detainee in no way relieves Canadian consular officials of their duty to assist. As a matter of logic and principle, both of these notions make eminent sense, since the pressures facing family members and the detainee might make them understandably reticent to go public; others may not even be aware of their rights to consular assistance or know how to get in touch with anyone.

119. Finally, on this point it is important to state that Mr. Almalki has repeatedly suggested that both members of his family, Senator Stratton, Mr. Edelson and others be interviewed by Commission Counsel in order to put the complete record of efforts made on Mr. Almalki's behalf before the Commissioner. Commission Counsel declined all of these suggestions and it is likely, therefore, that the Commissioner does not have all of the relevant evidence on this point. It is crucial, therefore, that the AG's argument in paragraph 229 be dismissed in its entirety.

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[108] Almalki Draft Narrative, para. 81.
[109] See our submissions on standards and transcript of oral hearing.

120. Noticeably absent from the list in paragraph 233 is Mr. Martel's refusal to allow Mr. Almalki to stay at the Embassy when the latter feared he might be re-detained.[110] Mr. McTeague's evidence on this point is not in the Draft Narrative.

121. In response to paragraph 238, while some within DFAIT were alive to the substantial risk sending questions to SMI would cause for Mr. Almalki's safety and well-being, many were not, as discussed in our Final Submissions. Moreover, the "total breakdown in communication between Canadian officials [DFAIT and the RCMP]" on the issue has already been determined to be a deficiency.[111]

122. In response to paragraph 240, there is ample and uncontradicted evidence that the questions were asked of Mr. Almalki, and that psychological torture attended that interrogation session.[112] Furthermore, the very act of sending questions gave rise to the unacceptable risk (if not certainty) that the Syrians would continue to detain Mr. Almalki.

All of which is respectfully submitted this 26th day of June, 2008

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[110] Chronology (April 11, 2007), pp. 95-96.
[111] Arar Report, *Analysis & Recommendations*, p. 210.
[112] Joint Final Submissions, paras. 55, 56 and 113.

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