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

OUTLINE OF SUBMISSIONS ON PROCEDURE

AMNESTY INTERNATIONAL
CANADIAN SECTION (ENGLISH BRANCH)

OPENING OBSERVATIONS

1. In line with Canada's international human rights obligations, the meaning of the phrase "any mistreatment" should be interpreted to include any treatment that fails to conform to the internationally protected rights of Messrs. Almalki, Elmaati and Nureddin. This must certainly encompass not only torture, but also cruel, inhuman and degrading treatment. It must also consider the consular obligations of officials dealing with Canadians detained abroad and in particular, in circumstances where the risk of torture, cruel, inhuman and degrading treatment is high. Mistreatment must encompass the right to due process of law in any investigation of alleged terrorists, or terrorist links.

2. The purpose of this Inquiry and of Canada's international human rights obligations would be undermined if the Commissioner fails or declines to examine the extent to which Messrs. Almalki, Emaati and Nureddin were tortured in Syria and Egypt. The experience of these men, and the specific details concerning their interrogations abroad is the only way to grapple with when, how

and if the actions of Canadian government officials caused or contributed in any way to their mistreatment, including torture. However, in much the same way as it proved impossible for Maher Arar to testify at the Arar Inquiry, concerns about fairness may make it impossible for these three men to testify in the present inquiry, especially given the fact that much of the evidence against them remains subject to national security confidentiality claims. The Terms of Reference, along with the general provisions of the *Inquiries Act*, give the Commissioner sufficient flexibility to appoint a fact finder similar to the process followed in the Arar Inquiry.

3. Amnesty International Canada respectfully submits that the Commissioner must be wary of interpreting the *Inquiries Act* narrowly, lest the government's conduct become the subject of an internal department investigation in the guise of a process that purports to be something more. The government cannot assert that this is a private investigation. Clearly public expectation requires something more. Despite the special challenges that this inquiry will face, and in particular the use of national security evidence, it important to acknowledge and underscore that Part I of the *Inquiries Act* calls for a process of inquiry that is at its base public. This is not a Departmental Investigation, convened under Part II of the Inquiries Act.

4. The UN Human Rights Committee has emphasized that "the publicity of hearings is an important safeguard in the interest of the individual and of society at large".[1] The fair conduct of this Inquiry requires that the Commissioner not make findings adverse to the interest of any person on the basis of evidence that the person has not had an opportunity to hear and challenge. Given the strong national security implications of this Inquiry, this process will not be easy. In order to ensure that the public participation remains meaningful, the parties and interveners must, at a minimum, be kept advised of the nature of the anticipated evidence. Moreover, the parties and interveners must be able to advise Commission Counsel of areas of evidence they wish to be covered and be informed if those areas were in fact addressed.

5. Amnesty International Canada is aware that the three men are proposing that their counsel be security-cleared, and thus able to fully participate in all *in camera* and private sessions of the Inquiry. We fully endorse this proposal. At a minimum, submissions on the following particular subject matters be held in public to ensure accountability and build public confidence in Canada's intelligence and security agencies: (a) consular advice provisions and embassy conduct, (b) Canadian policy and actions related to torture, evidence produced under torture, protect against torture; (c) caveats, testing and reliability of shared information, in ongoing investigations

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[1] UN Human Rights Committee, General Comment 13, 13 April 1984 at para. 6 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 (1994).

OUTSTANDING ISSUES

1. Amnesty International Canada recommends that the words "deficient" or "deficiencies" found in the Terms of Reference are defined broadly, in according with Canada's international human rights obligations, to include any act or omission that constitutes a violation of the internationally protected rights of these three men. Investigating government deficiency must include an examination of the standards, protocols and policies used in this context, against international human rights obligations of the Canadian government.

2. In order to fulfill the Terms of Reference, this Inquiry will have to examine the policy gaps and reform needs necessary to ensure that Canadian officials are not directly or indirectly responsible for any mistreatment in future cases. More so than in the Arar Inquiry process, this Inquiry points to a possible disturbing pattern and must ask the important question: whether DFAIT, CSIS, RCMP and other related agencies can actually fulfill their obligations in the current institutional climate, or as set out in established policies and practice.

3. This Inquiry must ensure that it does not admit evidence obtained through torture, or other violations of internationally recognized human rights, since this would not only cast substantial doubt on the reliability of the evidence, but also would be antithetical to and seriously damage the integrity of the proceedings. Amnesty International Canada recommends that Rule 13 of the Draft Rules of Procedures and Practice be amended such that the words "reliable and appropriate evidence" replace the current reference to "appropriate evidence."

QUESTIONS FROM THE INQUIRY'S SUPPLEMENTARY NOTICE

Question 1. What is the meaning of the phrase "any mistreatment" as it appears in paragraph (a)(iii) of the Terms of Reference?

1. In line with Canada's international human rights obligations, the meaning of the phrase "any mistreatment" should be interpreted to include any treatment that fails to conform to the internationally protected rights of Messrs. Almalki, Elmaati and Nureddin. This must certainly encompass not only torture, but also cruel, inhuman and degrading treatment. Mistreatment must be defined according to the applicable minimum standards for the treatment of detainees.[2] It must also consider the consular obligations of officials dealing with Canadians detained abroad and in particular, in circumstances where the risk of torture, cruel, inhuman and degrading treatment is high. Mistreatment must encompass the right to due process of law in any investigation of alleged terrorists, or terrorist links.

2. In Canada international human rights obligations are rarely implemented expressly, requiring claimants seeking remedies for international human rights violations to anchor their claims in general Canadian law, supported, where appropriate, by the presumption of conformity with international law under the *Charter*.[3] The submissions of the government of Canada itself before relevant international treaty based bodies makes clear that the *Charter*, while not explicitly implementing international obligations, is the principal means by which Canada's obligations under international human rights law are given domestic effect.[4] Canadian courts have observed, "That these fundamental freedoms were entrenched in the *Charter* in conformity with Canada's commitment in the ICCPR cannot be doubted."[5]

3. It is a basic principle of international law, that any breach of an obligation requires redress and reparation.[6] This principle is affirmed in section 24(1) of the *Charter*, which provides, "Anyone whose rights or freedoms, as guaranteed by this *Charter* have been infringed or denied may apply to a court of competent

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[2] *United Nations Standard Minimum Rules for the Treatment of Prisoners,* adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1955), approved by the Economic and Social Council Res. 663 C (XXIV), 31 July 1957, and 2076 (LXII) 13 May 1977; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res. 43/173, 9 December 1988.

[3] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 348-350.

[4] See, *Core document forming part of the reports of states Parties: Canada* (1998) UN doc. HRI/CORE/1/Add.91 at para. 137. See also, *Fourth Periodic Report of Canada to the UN Human Rights Committee*, 15 October 1997 UN Doc. CCPR/C/103/Add.5 at para. 22.

[5] *R v. Big M Drugmart*, [1984] 1 WWR 625 (Alta CA) at 655. See also, *Mack v. Canada (Attorney General)*, (2001) 55 O.R. (3d) 113 S.C.J. at para. 35, per Cumming J.; *R v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 73: "Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect", per L'Heureux-Dubé J.

[6] "[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation" *Chorzow Factory (Germany v. Poland)(Merits)* (1928), P.C.I.J. Series A. no. 17 at 29.

jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Though this Inquiry lacks the remedial powers and procedures of judicial bodies, it does have the required investigatory functions, decision making powers, and structural independence necessary to make an important contribution to the promotion and protection of human rights in Canada and the fight against impunity.

4. The Articles on State Responsibility, seen largely as customary international law, provides that internationally wrongful state conduct consists of an action or omission attributable to the state under international law and constituting a breach of an international obligation of the state.[7] The nature of a state's responsibility for violations of human rights obligations has been affirmed by a widely-endorsed report adopted by the UN Commission on Human Rights, according to which a state's obligations to respect, ensure respect for, and enforce international human rights law, includes a state's duty to investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law, as well as to provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation.[8]

5. Under the *International Covenant on Civil and Political Rights* (*ICCPR*), the government of Canada has a duty to ensure an effective remedy for the violation of all rights under the Covenant.[9] Mistreatment must thus include any act or omission which would violate established international human rights obligations of the government of Canada, and which can be attributed to the state as a matter of international law. States will generally be considered responsible under international human rights law for the acts or omissions of their officials, broadly defined, regardless of whether an official's unlawful conduct was authorized by the state.[10]

6. The responsibility of a State for violations of protected rights, whether directly or through acquiescence has been recognized by relevant treaty bodies. In particular, the Human Rights Committee has stated:

> Article 2(1) of the Covenant places an obligation upon a State Party to respect and to ensure rights 'to all individuals within its

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[7] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts 2001, G.A. res. 56/83, 12 December 2001, art. 2.

[8] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, annexed to M.C. Bassiouni, "The Right to Restitution, Compensation and Rehabilitation For Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report," UN doc. E/CN.4/2000/62 (2000).

[9] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S.1976 No. 47, art. 2.

[10] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts 2001, G.A. res. 56/83, 12 December 2001, art. 7. Also, under art. 32 it is sufficient to show that the official carried out the act or omission in an official capacity, regardless of whether the conduct was prohibited by domestic law.

> territory and subject to its jurisdiction' , but it does not imply that the State Party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. … it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[11]

7. Moreover, in relation to its jurisdiction to hear the complaints under the Optional Protocol, a jurisdiction which is currently accepted by the government of Canada, which also speaks of "individuals subject to its jurisdiction", the Committee held that "The reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' (…) is <u>not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred</u>".[12]

8. A useful international standard is found in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[13] It provides, that there is an obligation:

> to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
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> (*a*) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
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> (*b*) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
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> (*c*) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective

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[11] *Lopez Burgos* v. *Uruguay* (Comm. No. 52/1979), UN Doc. CCPR/C/13/D/52/1979 (1981) at para. 12.3; *Celiberti de Casariego* v. *Uruguay* (Comm. No. 56/1979), UN Doc. CCPR/C/13/D/56/1979 (1981) at para. 10.3. This principle has also been recognized, in a particularly wide formulation, by the European Commission of Human Rights. *Stocké* v. *Federal Republic of Germany*, E.C.H.R. Series A, No. 199, Opinion of the European Commission at para. 166.

[12] see *Lopez Burgos*, (Comm. No. 52/1979), UN Doc. CCPR/C/13/D/52/1979 (1981) at para. 12.2; *Celiberti de Casariego* v. *Uruguay* (Comm. No. 56/1979), UN Doc. CCPR/C/13/D/56/1979 (1981) at para. 10.2 [Emphasis added].

[13] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. Available: http://www.ohchr.org/english/law/remedy.htm

> access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
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> (*d*) Provide effective remedies to victims, including reparation, as described below. [14]

9. Other international instruments such as the draft Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity of the United Nations Commission on Human Rights, illustrate the importance of a broad definition of "mistreatment". Principle 18 states "Impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations."[15]

10. A State will violate its international obligations if it hands over a person to another State where there are reasonable grounds to believe that there is a "well-founded fear" or a "real risk" that he or she will suffer a violation of his or her fundamental rights in the receiving State.[16] The principle can easily be extended to acts of omission, or providing information that would lead to the detention of a person in similar circumstances. In this regard, the Human Rights Committee in a case against the government of Canada has stated that:

> If a State Party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State Party itself may be in violation of the Covenant. This follows from the fact that a State Party's duty under Article 2 of the Covenant would be negated by the handing over a person to another State (whether a State Party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over.[17]

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[14] *Ibid.,* I. Preamble.
[15] Updated Set Of Principles For The Protection And Promotion Of Human Rights Through Action To Combat Impunity, 8 February 2005, UN doc. E/CN.4/2005/102/Add.1 Available: http://www.derechos.org/nizkor/impu/principles.html
[16] See *Soering v. United Kingdom*, E.C.H.R. Series A, No 161, Application no. 14038/88 (1989) at para. 88; *Cruz Varas* v. *Sweden, Merits*, E.C.H.R. Series A, No. 201 (1991) at paras. 75-76. See also, *Vilvarajah and Others v. United Kingdom*, E.C.H.R. Series A, No. 215 (1991) at paras. 107-108, 111. S. Borelli, "The rendition of terrorist suspects to the United States: Human rights and the limits of international cooperation", in A. Bianchi (ed.), *Enforcing International Law Norms Against International Terrorism*, (Oxford: Hart Publishing) at 331.
[17] *Kindler* v. *Canada* (Comm. No. 470/1991), UN Doc. CCPR/C/48/D/470/1991 (1993) at para. 6.2.

11. In its General Comment on article 2 of the ICCPR, the Human Rights Committee has stated that:

> …the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, (…) either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[18]

Question 2. Is it necessary, in order for the Commissioner to determine the matters that paragraph (a) of the Terms of Reference mandate him to determine, for him to decide whether, and the extent to which, Mr. Almalki, Mr. Elmaati and Mr. Nureddin were tortured in Syria and Egypt?

12. The purpose of this Inquiry and of Canada's international human rights obligations would be undermined if the Commissioner failed or declined to examine the extent to which Messrs. Almalki, Elmaati and Nureddin were tortured in Syria and Egypt. The experience of these men, and the specific details concerning their interrogations abroad is the only way to grapple with when, how and if the actions of Canadian government officials effected their treatment. The Chronology of Public Information Relating to the Cases of Messrs. Almalki, El Maati, and Nureddin, provides an incomplete but nonetheless disturbing picture of potential Canadian involvement.[19]

13. However, in much the same way as it proved impossible for Maher Arar to testify at the Arar Inquiry, concerns about fairness may make it impossible for these three men to testify in the present inquiry, especially given the fact that much of the evidence against them remains subject to national security confidentiality claims. The Terms of Reference, along with the general provisions of the *Inquiries Act* give the Commissioner sufficient flexibility to appoint a fact finder similar to the process followed in the Arar Inquiry.

14. This Inquiry was called largely because of the allegations of torture and mistreatment. People were shocked and want to know if Canadian officials were in any way involved in what happened to these men. Most disturbingly, following the Arar Inquiry, these three cases raise the disturbing prospect of a

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[18] UN Human Rights Committee, General Comment No. 31 at para. 12, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 (1994).

[19] Chronology of Public Information relating to the cases of Messrs. Almalki, El Maati, and Nureddin. Prepared by Kerry Pither for Organizations with Intervenor Status at the Iacobucci Inquiry, 11 April 2007. See, Annex I.

pattern of investigative practices which may point to systemic failings on the part of Canadian officials to protect Canadians against torture, and ensure due process and consular assistance in cases arising in the context of the war on terror.

15. The importance of receiving evidence and making finding as to these three men is, in our view, beyond doubt, just as it was in the case of Maher Arar.[20] Canadians want and need to know. The three men, as part of their effort to have justice and accountability need to have this issue resolved. And, your own legal analysis will have different implications and consequences depending on the findings regarding torture.

16. The question remaining is how to receive the information. There is room within both the Terms of Reference and the Draft Rules on Practice and Procedures to build in a special Fact Finding process by which evidence of the extent of torture and mistreatment of the three named individuals can be introduced before the Inquiry. In order to protect the three individuals' right to make fair answer and defence, Amnesty International Canada recommends that the Commissioner adopt a process that is sensitive to their inability to see and challenge government information flowing from its investigation into the three individuals.

17. As a party to all the relevant human rights treaties, Canada has a duty to fulfill its obligations under those international conventions. As regards the ICCPR, the Human Rights Committee has insisted on the duty of States to take action against the acts prohibited in article 7 of the Covenant, providing that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment." The prohibition against torture and the right to life are peremptory, non-derogable norms that cannot be departed from no matter how grave the situation. Moreover, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, which binds Canada, Egypt but not Syria, requires States Parties to prevent, promptly and impartially investigate acts of torture "committed in any territory under its jurisdiction."[21]

18. In addition to any general principles of State Responsibility for harm that might apply as a matter of customary international law, article 2(2) of *CAT* imposes specific obligations on Canada not to permit any justification of torture whatsoever. While the government's obligations under the CAT are principally implemented by s. 269.1 of the *Criminal Code*,[22] Canada's position before the Committee Against Torture and other treaty bodies has been that s. 12 and other *Charter* provisions fully implement Canada's obligation to prohibit torture and cruel, inhuman or degrading treatment or punishment.

19. Commissions of Inquiry offer human rights claimants an opportunity to investigate alleged violations of their rights and put their concerns on record.

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[20] See, *Iacobucci Inquiry*, Ruling on Process and Procedural Issues, 9 May 2005.
[21] Adopted by G.A. res. 39/46, 10 December 1984. Entered into force 26 June 1987, 1465 U.N.T.S. 85.
[22] *Criminal Code*, S.C. 1987, c. 10 (3rd Supp.), s. 269.1.

However, any evidence introduced through the testimony of Messrs. Almalki, Elmaati and Nureddin during this Inquiry must carefully minimize any potential unfairness to the three men arising from the fact that they have not had access to many documents.

20. The Commissioner's present mandate requires this Inquiry to investigate and report on the actions of Canadian officials in relation to the three men and their detention in Syria and Egypt. It is true that this is not an individual inquiry into Messrs. Almalki, Elmaati or Nureddin, and that it is not a civil or criminal proceeding. Rather, it is an inquiry into the actions of Canadian officials and their potential responsibility, negligence or wilful blindness, to the ensuing detention without charge, torture and abuse that occurred while the men were detained and interrogated abroad. However, in line with Justice O'Connor's Ruling on Process and Procedural Issues, there is indeed a duty of procedural fairness, requiring as much disclosure of information relevant to their proposed testimony as possible.[23] This duty stems from general common law principles, and was described by Le Dain J. in *Cardinal v. Director of Kent Institution*.[24]

21. Moreover, to echo Justice O'Connor's Ruling on Process and Procedural Issues "It would be unfair to receive information for evidentiary purposes, alleging wrongdoing without giving those who are subject to the allegations an opportunity to directly challenge the evidence by way of cross-examination."[25] Thus, the fact finder should not look into any allegations of misconduct against Canadian officials, since that information would have to be introduced through evidence at the Inquiry and subject to cross-examination.

22. There would be little if any prejudice that would result from directing a fact finder to interview the three named individuals on their treatment in Syria and Egypt. The fact finding process would not unduly expand the mandate of the Commission, and would allow all parties to make submissions on the outcome report on the use of any fact-finding report.

23. Paragraph (b) of the Terms of Reference leaves the Commissioner the discretion to decide how much weight may or may not be given to other examinations in relation to Mrs. Almalki, Elmaati or Nureddin, such as the Fact-Finding report of Prof. Stephen Toope in the Arar Inquiry. Amnesty International Canada urges that Professor Toope's finding regarding the torture of these three men in Syria be given considerable weight. There has not yet been any fact-finding regarding the torture of Mr. Elmaati in Egypt.

Question 3. What does paragraph (d) of the Terms of Reference mean in requiring the Commissioner, subject to paragraph (e), to take all steps necessary to ensure that the

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[23] Arar Inquiry, Ruling on Process and Procedural Issues, 9 May 2005.
[24] [1985] 2 S.C.R. 643 at para. 14
[25] Arar Inquiry, Ruling on Process and Procedural Issues, 9 May 2005.

Inquiry is conducted in private? In particular, who should be entitled to attend any hearing conducted in private?

24. Like others before it, this Inquiry has been established as a response to proven and alleged human rights abuses, possibly implicating Canadian officials and agencies, raising important public issues. Thus, the core of this Inquiry is to investigate into and report on events or issues of public importance, with a view of stimulating effective government and public policy responses to its findings and recommendations.[26] The independence of the Commissioner enables this Inquiry to adopt Rules of Procedure which conform with the implied purpose of restoring public confidence, and providing a credible process through which the government of Canada can be held to account. Moreover, paragraph (e) of the Terms of Reference specifically allows the Commissioner to determine the appropriate balance between ensuring the private nature of the Inquiry and the necessary openness required for an effective, accountable and transparent process.

25. The inquiry process is itself a creature of statute. As such, it is imperative that the Commissioner interpret relevant provisions of the Inquiries Act so as to preserve the underlying purpose of the legislative sections itself. Section I of the Act, aptly entitled "Public Inquiries" requires a broad interpretation, with an eye to the social goals the legislation sought to achieve or the mischiefs it seeks to cure.

26. Amnesty International Canada respectfully submits that the Commissioner must be wary of interpreting the Act narrowly, lest the government's conduct be the subject of an internal department investigation in the guise of a process that purports to become something more. The Order in Council clearly calls for an Inquiry under Section I of the *Inquiries Act* and not an internal investigation, such as that provided under s. II.

27. The government cannot comport themselves as if this is a private investigation. Clearly public expectation requires something more. Despite the special challenges that this inquiry will face, and in particular the use of national security evidence, it important to establish that Part I of the *Act* calls for a process of inquiry that is at its base public. This is not a Departmental Investigation, convened under Part II of the Inquiries Act.

28. Moreover, the Preamble to the Inquiry's Terms of Reference makes clear that the review should be done through "an independent and credible process" that "inspires public confidence in the outcome". As such, the process must ensure public accountability and transparency through a fair and open process.

29. In the conduct of this Inquiry, Amnesty International asks that the Commissioner be guided by the principles adopted by Justice O'Connor in both the Walkerton and Arar Inquiries, namely thoroughness, expedition, openness to the public and

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[26] A. Manson & D. Mullan, eds., *Commissions of Inquiry: Praise or Reappriase?* (Toronto: Irwin Law, 2003) at 4.

fairness.[27] As noted above, this Inquiry has been called under Part I of the *Inquiries Act*, and as such is not an Internal Investigation. It is imperative that to maintain public confidence, the process of the inquiry remain open to public scrutiny. The purpose of such an inquiry is to inform the public, which has a special interest, and a right to know, as well as a right to form its opinion as the process goes along.[28]

30. Justice O'Connor in the Walkerton Inquiry quoted with approval the statement of Mr. Justice Cory on the role inquiries play in rebuilding public confidence:

> An inquiry must also respond to the concerns of the public, especially to those individuals most affected by its *raison d être* – in this case, the people of Walkerton. Mr. Justice Cory expressed this role as follows:
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> > Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. It can channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement.[29]

31. Moreover, it is important that the Rules minimize the impact of the private hearings on the principles of openness and fairness. Private, *in camera* hearings must allow for a process by which the evidence subject to national security confidentiality undergoes rigorous scrutiny.

32. The lack of procedural fairness where an individual is not able to obtain full disclosure of information, despite the serious consequences that may result from the proceedings, has been an overriding concern in Canadian society, as demonstrated by submissions of civil society and members of the public,[30] as well as in the course of recent judicial proceedings.[31] Both Parliamentary Committees reviewing the Anti-Terrorism Act have recommended the use of Special

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[27] Walkerton Inquiry Report, Part I, Chapter 14. Cited with approval in Arar Inquiry, Ruling: Rules of Procedure and Practice, 15 June 2004.

[28] See S.G.M. Grange, Commissioner of the Inquiry into Certain Deaths at the Hospital for Sick Children, "How should lawyers and the legal profession adapt?" in A. Paul Pross, Innis Christie, and John A. Yogis, eds. *Commissions of Inquiry, Dalhousie Law Journal*, vol. 12 (1990), 151 at 154-155; As quoted in Walkerton Inquiry Report, Part 1, Ch. 14 at 473.

[29] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 117. Cited with approval in Walkerton Inquiry Report, Part 1, Chapter 14 at 473-474.

[30] Special Senate Committee on the *Anti-terrorism Act*, "Fundamental Justice in Extraordinary Times: Main Reports of the Special Committee on the *Anti-Terrorism Act.* February 2007; House of Commons, Subcommittee on the Review of the Anti-terrorism Act, "Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues" March 2007.

[31] *Charkaoui v. Canada (Citizenship)*, 2007 S.C.C. 9; *R. v. Khawaja,* [2006] O.J. No. 4245.

Advocates to test applications under the *Canada Evidence Act* prohibiting the disclosure of information to respond to the government's confidential information.[32]

33. In a report issued in April 2006, the UN Human Rights Committee expressed concern over the amendments to the *Canada Evidence Act* introduced by the *Anti-Terrorism Act*, stating that they did not fully comply with the requirements of due process set out in art. 14 of the ICCPR. In particular, the Committee states that Canada had an obligation "to guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they or those representing them do not have full access."[33]

34. Amnesty International Canada urges that the Commissioner take note of and respond to these concerns and ensure a fair process consistent with the requirements of a fair hearing in article 14(1) of the *ICCPR*. With regard to the concept of "fair trial" in article 14(1) of the *ICCPR*, the Human Rights Committee has explained that it "must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings", and that "these requirements are not respected where ... the accused is denied the opportunity personally to attend the proceedings, or where he is unable properly to instruct his legal representative".[34]

35. The notion of equality of arms is an essential feature of a fair trial, and is an expression of the balance that must exist "between the prosecution and the defence".[35] While this Inquiry is not a trial, the stakes are very similar for these three men, and Amnesty International Canada therefore urges the Commissioner to be guided by these well established international standards.

Question 4. If the Commissioner decides that some participants are not entitled to attend a hearing conducted in private, what if any steps should he take to ensure that those participants can participate appropriately in the Inquiry's process?

36. The fair conduct of this Inquiry requires that the Commissioner not make findings adverse to the interest of any person on the basis of evidence that the person has not had an opportunity to hear and challenge. Given the strong national security implications of this Inquiry, this process will not be easy. However, it is vitally important that the public be allowed to form an opinion based on adequate public information from this Inquiry's investigation and report on the actions of Canadian officials in relation to Messrs. Almalki, Elmaati, and Nureddin.

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[32] SenateCommittee Report, *supra* note 29 at 30, House of Commons Report, *supra* note 29, Ch. 10.
[33] UN Human Rights Committee, *Concluding Observations: Canada*, 20 April 2006, UN doc. CCPR/C/CAN/CO/5 at para. 13.
[34] *D. Wolf v. Panama* (Comm. No. 289/1988) 26 March 1992 at para. 6.6.
[35] *J. Campbell v. Jamaica* (Comm. No. 307/1988) 24 March 1993 at para. 6.4.

37. The Human Rights Committee has emphasized that "the publicity of hearings is an important safeguard in the interest of the individual and of society at large".[36] Apart from the "exceptional circumstances" provided for in article 14(1), "a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons".[37]

38. The duty to hold suits of law in public under article 14(1) is incumbent on the State, and "is not dependent on any request, by the interested party ... Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish".[38]

39. In order to ensure that the public participation remain meaningful, the parties and interveners must, at a minimum, be kept advised of the nature of the anticipated evidence, as was done at the Arar Inquiry.[39] Moreover, the parties and interveners must be able to advise Commission Counsel of areas of evidence they wish to be covered and be informed if those areas were in fact addressed. Additionally, prepared and published summaries of the evidence heard, to the extent that the Commissioner is able to do so, without breaching national security confidentiality.

Question 5. What considerations should the Commissioner take into account in determining, in accordance with paragraph (e) of the Terms of Reference, whether he is satisfied that it is essential to ensure the effective conduct of the Inquiry that specific portions of the Inquiry be conducted in public?

40. Amnesty International Canada is aware that the three men are proposing that their counsel be security-cleared, and thus able to fully participate in all *in camera* and private sessions of the Inquiry. We fully endorse this proposal.

41. As stated by the UN Human Rights Committee, "[t]he publicity of hearings is an important safeguard in the interest of the individual and of society at large."[40] Courts do have the power to exclude all or part of the public for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or <u>to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice</u>".[41] Except for these exceptional

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[36] General Comment 13, 13 April 1984 at para. 6 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 (1994).
[37] *Ibid.*
[38] *G. A. van Meurs v. the Netherlands* (Comm. No. 215/1986) 13 July 1990 at para. 6.1.
[39] Arar Inquiry, Ruling: Rules of Procedure and Practice, 15 June 2004; Ruling on Process and Procedural Issues, 9 May 2005.
[40] General Comment 13, 13 April 1984 at para. 6 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 (1994).
[41] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S.1976 No. 47, art. 14(1).

circumstances a hearing should remain public, and, except where the privacy concerns of the parties require, must not be limited only to particular category of persons.

42. International law does not grant to states an unfettered discretion to define for themselves what constitutes an issue of national security. According to experts in international law, national security and human rights: "A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the threat or use of force, whether from an external source, such as a military threat, or an internal source, such as incitement to overthrow the government."[42]

43. The right to a public hearing is an essential safeguard of the fairness and independence of the judicial process, and a means of protecting public confidence in the justice system. Except in narrowly defined circumstances, court hearings and judgments must be public.[43] Art. 10 of the *Universal Declaration on Human Rights* states clearly, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[44] The right to a public hearing means that not only the parties in the case, but also the general public, have the right to be present. The public has a right to know how justice is administered, and what decisions are reached by the judicial system.

44. Public confidence in Canadian intelligence and security agencies has been shaken, not least through the discoveries of the Arar Inquiry, and the ongoing process to release information to the public, concerns over secrecy during the Air India Inquiry, as well as privacy and secrecy concerns raised by the reports of Parliamentary Committees reviewing the *Anti-Terrorism Act*. This inquiry is at least in part about restoring that confidence. The tendency to overly rely on secrecy and national security confidentiality is still present and troubling.

45. Administrative efficiency or expedience should not be the guiding principle behind how much or little public participation there will be. Rather, this Inquiry must be guided by the principles of fairness and openness, in line with the international fair trial standards. Amnesty International Canada acknowledges that this process is neither a civil suit, nor a criminal trial, however, for the three men it may be the only redress they receive. It is a process that must address the need for procedural fairness and the public's right to truth.

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[42] *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, October 1995, adopted at a meeting convened by Article 19, the International Centre Against Censorship, and the Centre for Applied Legal Studies of the University of Witwatersrand, South Africa.
[43] UN Human Rights Committee, General Comment 13, 13 April 1984 at para. 6 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 (1994).
[44] *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

46. Amnesty International Canada respectfully submits that, at a minimum, submissions on the following particular subject matters be held in public to ensure accountability and build public confidence in Canada's intelligence and security agencies: (a) consular advice provisions and embassy conduct, (b) Canadian policy and actions related to torture, evidence produced under torture, protect against torture; (c) caveats, testing and reliability of shared information, in ongoing investigations.

OUTSTANDING ISSUES OF CONCERN

Question 1. What is the meaning of the terms "deficiencies" or "deficient" in paragraph (a)(ii) or paragraph (a)(iii), respectively, of the Terms of Reference?

47. Given the broad and purposive interpretation called for by the phrase "any mistreatment", Amnesty International Canada respectful submits that the same broad and purposive interpretation be applied to the meaning of the terms "deficient" or "deficiencies" as they appear in the Terms of Reference.

48. Amnesty International Canada recommends that the words "deficient" or "deficiencies" found in the Terms of Reference are defined broadly, in according with Canada's international human rights obligations, to include any act or omission that constitutes a violation of the internationally protected rights of these three men. Canada's human rights obligations should serve as a baseline for the investigation of Canadian officials, and be used to measure the current procedures, practices and policies which were used in this context.

49. In particular, deficiencies or deficient conduct must be measured against an international human rights standard, taking into account Canada's international human rights obligations, as well as other obligations. It should include an assessment of the requirement of consular assistance weighed against the public perception of government obligations, and the adequacy of ministerial directives for information sharing, as well as the policy and practice surrounding the use of caveats. This and other issues must be sufficiently studied and publicized so as to ensure that the public is fully aware and informed of the government's current obligations and practice with respect to Canadian citizens detained abroad.

Question 2. Will interpreting the Terms of Reference implicate policy issues wider than the fact-finding mandate of the Inquiry? Is there a place in a fact-finding Inquiry to look into broader policy issues?

50. In order to fulfill the Terms of Reference, this Inquiry will have to examine the policy gaps and reform needs necessary to ensure that Canadian officials are not directly or indirectly responsible for any mistreatment in future cases. Any

recommendations the Inquiry makes must properly assess the extent of the deficient current practices and policies within Canada's intelligence and security agencies, in the context of what these three men have already been through.

51. More so than in the Arar Inquiry process, this Inquiry points to a possible disturbing pattern and must ask the important question: whether DFAIT, CSIS, RCMP and other related agencies can actually fulfill their obligations in the current institutional climate, or as set out in established policies and practice. It is important that what O'Connor J. in the Arar Inquiry referred to as "common investigative practices" be thoroughly investigated.

Question 3. What are the implications of the omission of the word reliable in Rule 13 of the Draft General Rules of Procedure and Practice, particularly in regards to information obtained under torture?

52. Rule 13 states "The Commissioner may receive any evidence or information that he considers to be relevant to the mandate of the Inquiry whether or not the evidence or information would be admissible in court." The use of relaxed rules of evidence in judicial proceedings that may be subject to national security confidentiality claims by the government without sufficient attention being paid to its reliability has recently come under scrutiny before the Parliamentary Committees reviewing the *Anti-Terrorism Act*.

53. The prohibition on the use of evidence obtained under torture comes within the exclusionary rule of Article 15 of the UN *Convention against Torture*.[45] The *CAT* provides that "each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". The inadmissibility is also included in the right to a fair trial, having regard to the right against self-incrimination and to the unreliability of statements obtained by torture.

54. Amnesty International Canada respectfully submits that this Inquiry must ensure that it does not admit evidence obtained through torture, or other violations of internationally recognized human rights, since this would not only cast substantial doubt on the reliability of the evidence, but also would be antithetical to and would seriously damage the integrity of the proceedings.[46]

55. Amnesty International Canada recommends that Rule 13 of the Draft Rules of Procedures and Practice be amended such that the words "reliable and appropriate evidence" replace the current reference to "appropriate evidence."

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[45] See also *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56.
[46] See, *Statute of the International Criminal Court*, 2187 U.N.T.S. 3, entered into force July 1, 2002, art. 69(7).

56. Given the ability of the Commissioner to consider “any evidence” under paragraph 13 of the Draft General Rules of Procedure and Practice, there is a need to be able to challenge and test the national security confidentiality claims that the government will be making.

57. All of which is respectfully submitted.

ANNEX 1

Chronology of Public Information relating to the cases of Messrs. Almalki, El Maati, and Nureddin. Prepared by Kerry Pither for Organizations with Intervenor Status at the Iacobucci Inquiry, 11 April 2007.