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

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

Hearing on Standards of Conduct

Audience sur les critères de conduite

Commissioner

L'Honorable juge /
The Honourable Justice
Frank Iacobucci

Commissaire

Held at:

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111 Sussex Drive
Ottawa, Ontario

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salon Bytown
111, promenade Sussex
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le mardi 8 janvier 2008

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Ottawa, Ontario

--- Upon commencing on Tuesday, January 8, 2008

9:15 a.m. / L'audience débute le mardi

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COMMISSIONER IACOBUCCI: Thank you very much.

THE REGISTRAR: Please be seated. Veuillez vous asseoir.

COMMISSIONER IACOBUCCI: Good morning and welcome to all of you.

I apologize for our delay in starting. We made it on the second attempt to land this morning and obviously we are delayed.

The topic for today deals with the meanings to be given to the standards that are set forth in the Terms of Reference for the Inquiry that are reflected in the Amended Notice of Hearing.

I would like at the outset to make something clear by reiterating what was stated in the Amended Notice of Hearing: namely, inviting submissions on the questions should not be taken as confirmation of any fact or circumstances to which the questions refer. The Inquiry's investigation into relevant facts is ongoing. To be more specific, no findings or conclusions have been made on any of the issues before the Inquiry.

Consequently, I caution everyone not to infer any finding or conclusion from the questions asked or the

discussion on the questions that we will have today and tomorrow.

Before we commence our hearing on the standards issues, I thought it might be helpful to all concerned if I were to provide a very brief overview of what the Inquiry has been doing and what the next steps are.

First, what has been done. In short, much progress has been achieved in pursuing the Inquiry's mandate. Specifically, we have interviewed under oath over 40 witnesses and government officials, and I have had follow-up interviews with many of those officials. We have examined some 35,000 documents and undertakings have been given for additional documents to be provided.

A composite draft narrative of background factual summaries and related matters is well under way, although, to repeat, no findings or conclusions have been made.

Pursuant to a protocol agreed to by the affected parties, I have conducted extensive interviews with Mr. Almalki, Mr. Elmaati and Mr. Nureddin relating to their claims of mistreatment and torture in Syria, and Egypt with respect to Mr. Nureddin. These interviews were conducted in the presence of their counsel, Inquiry counsel and Professor Peter Burns, former Chair of the UN Committee Against Torture, who is Special Adviser to the Inquiry. Transcripts of these interviews have been provided to counsel for the Attorney General pursuant to the

terms and conditions set forth in the protocol that I previously mentioned.

Mr. Paul Heinbecker, former Ambassador of Canada to the United Nations and former Ambassador of Canada to Germany, is a Special Adviser to the Inquiry and, as such, has reviewed relevant material relating to the role and conduct of DFAIT officials.

Next, brief comments on the way ahead.

I laid out in my November 6, 2007 ruling further steps that the Inquiry will be following. I just wish to add that understandably further interviews need to be conducted, notably with the three individuals, Mr. Almalki, Mr. Elmaati and Mr. Nureddin, to ensure the Inquiry has heard all the relevant evidence and concerns that relate to those individuals.

Second, additional documentation will be received by the Inquiry pursuant to undertakings to provide same by various participants.

Third, as mentioned in our media release, I have written to the government requesting an extension of the January 31, 2008 deadline for the submission of my reports.

To conclude on this overview, I reiterate that much progress has been made and for that I want to thank all the participants and intervenors for their help and cooperation.

With those opening remarks, I would now like to proceed to hearing oral submissions from the various participants and intervenors.

May I call upon counsel for the Attorney General of Canada, Mr. Peirce.

SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL OF CANADA

MR. PEIRCE: Good morning, Commissioner.

For the record, my name is Michael Peirce and I am appearing for the Attorney General of Canada.

Commissioner, in these public hearings you have asked five questions that the parties and intervenors are to address before you today. You have expressly set those five questions in the time period between 2001 and 2004 and, in my submission, that is the correct approach.

Let me go back for a moment to September 11, 2001.

It was a day that changed the world, a statement that if it weren't for the gravity of it would almost be trite to say. I can remember watching the planes -- and I'm sure many people here can -- watching the planes crash into the World Trade Center. The first plane crashed, the second plane was circling. The second plane crashed. There were reports of other planes. There was already a sense of a second wave of attacks.

I, at the time, sat across the street from the Parliament buildings. I remember wondering whether my children were safe. Then there were the silent skies in the days that followed. For me, it was an eerie feeling driving along the roads

and there were just no planes in the skies. Again, there was a sense of waiting for a second wave of attacks.

We cannot judge the actions of Canadian officials in 2001 to 2004 with hindsight. We have to judge them as they were standing in the headlights of an onrushing train, a train threatening a second wave of attacks, a train that was bringing terrorism into our lives. Those men and women, those Canadian officials who worked in those circumstances under tremendous pressure to keep Canada secure did so thoughtfully, humanely, and professionally. They do not deserve to be judged in hindsight.

I want to be clear, though, the Government of Canada does conduct itself with the benefit of hindsight. We know more than we did in 2001 to 2004. We know more about how the world works following September 11. We have the benefit of the O'Connor Commission, reports from around the world in fact on events following September 11.

The Government of Canada has accepted all of the recommendations of the O'Connor Commission. We act with the benefit of hindsight. But, in my submission, it is not proper to judge the actions of Canadian officials through that hindsight.

The distinction between 2001 and 2004, that period, and 2008 is also important to keep in mind in order to understand the process that we are engaged in here today of

determining the appropriate standards. We are not engaged in a policy debate.

As you observed during the standing hearings, there is no policy component to this Inquiry. This is an investigative Inquiry which focuses on the actions of Canadian officials and whether those actions were deficient. This is not a process, therefore, aimed at devising what the appropriate standards should be for the sharing of information or the provision of consular services or the conduct of investigations. Equally, this is not a process for determining today what the standards should have been in 2001 to 2004. That would be to create new standards and then to apply them to judge past conduct.

In my submission, it would be an artificial process to do that. I believe it would also be contrary to established jurisprudence.

Rather, your task is to determine what the known standards were in 2001 to 2004 and to judge the conduct of officials against those standards.

In that respect, in my submission, you have correctly framed these questions to determine the standards from that time period.

I have an admission to make. I'm going to mix up tenses throughout these submissions. I have read over my written submissions. There might be the odd moment when the tenses get a little bit confusing. It is very difficult to talk in the

appropriate tense, "would have been", all the time so I beg your indulgence on that and I will try to correct it if it seems to cause confusion.

I would like to address a suggestion by my friends that the government has not acknowledged and does not heed its international human rights obligations in the sharing of information, the conduct of investigations or the provision of consular services.

Here I would suggest to you that my friends have not read paragraphs 4, 7, 75, 78 and 91, among others, of the government's submissions. It takes a prominent place in the introduction to our submissions.

In any event, for the benefit of everyone in the room and to ensure that there is no doubt, let me say unequivocally that when sharing information with foreign states, when engaging in investigative practices, and when providing consular services, Canada is mindful and respectful of its international human rights obligations.

Let me also say in the clearest possible terms that Canada does not countenance torture.

COMMISSIONER IACOBUCCI: I have to interject on something you have said, Mr. Peirce, because I understand hindsight and its avoidance as a general matter, but when you say that the standards were in place for these different actions of Canadian officials, and you submit that the standards are fixed and that the only question for this Inquiry is to see

whether or not there was conduct short of those standards, is it not open to this Inquiry to say those standards that were used were in fact deficient; that there was a deficiency in the nature of the standards, let alone the conduct that was taken pursuant to those standards?

Are you saying that the Inquiry can't make any comment or finding on a standard that is deficient, that that is prohibited by the Terms of Reference?

MR. PEIRCE: In my submission, first and foremost I would suggest to you that it is prohibited to judge the conduct of Canadian officials by standards that are devised today that ought to govern from that period.

Similarly, I believe that the focus of this Inquiry is in fact on the conduct of Canadian officials and a determination of whether that conduct was deficient in the circumstances.

In that sense, then --

COMMISSIONER IACOBUCCI: Let me give you an example of what I mean and maybe you can help me.

You said, and you repeated from your submissions, that the Government of Canada does not countenance torture. Well, if for some reason -- and this is all speculation. All these questions are hypothetical. I'm not trying to relate to the record in any way, as I said in my introductory commentary.

But suppose, upon investigation and review, there is some indication that no attention was paid to the question of mistreatment and that was the standard by Canadian officials, I'm honestly trying to find the answer to this because it rings rather hollow for you to say the Government of Canada doesn't countenance torture and then we find the standard was, well, there was never any inquiry about that made or any kind of concern that we can get from -- again speculation -- from the record.

What do we do with that?

MR. PEIRCE: In my submission -- and here tense may already be a problem -- I anticipated this. Perhaps the submission more properly is to say Canada did not countenance torture and that that would be therefore an appropriate standard.

So if you judge the conduct of Canadian officials and say in your conduct -- again purely hypothetically -- in your conduct you in fact did countenance torture, then that would be, in my submission, grounds for a finding of misconduct.

COMMISSIONER IACOBUCCI: You can see my concern.

MR. PEIRCE: And then the question undoubtedly is the extent.

COMMISSIONER IACOBUCCI: Well, let's suppose we get evidence that the standard is that we never -- our standard is we didn't make inquiries on torture. We don't

countenance torture, of course we don't, but the standard in terms of detained Canadians is that we don't inquire into that.

That's what I'm trying to get a response on and some guidance on.

MR. PEIRCE: I believe in that situation it would be appropriate to report that fact.

COMMISSIONER IACOBUCCI: That's fine. Thank you.

MR. PEIRCE: To come back, the world is, in my submission, a bit more complicated than my friends would have you believe. It's not a case of human rights on the one side and anti-terrorism on the other side. In some of the submissions that is quite consciously a divide that has been offered.

Let me give you an example, one concrete example and one general statement. A concrete example is: When the RCMP collects evidence, especially from another country, so through the process of information sharing, it must be mindful of the human rights conditions in which the evidence was gathered, both by itself and because that will be a factor in determining the admissibility of the evidence in a court of law. As a result, human rights considerations are a necessary component or incident of the anti-terrorism work of the RCMP.

In some respect I would like to suggest that there is an even more profound connection between anti-terrorism and human rights.

Here I would like to cite the UN General Assembly which observed in Resolution 57-219:

> "... terrorism in all its forms and manifestations are activities aimed at the destruction of human rights..."

Anti-terrorism, therefore, is profoundly a struggle to protect human rights.

Let me conclude my opening comments here just to reinforce the point that I was pleased to hear you make at the outset, which is that there is nothing to be implied about the facts by the posing of these particular questions. Here I just want to underline that equally there is nothing to be implied by the answers offered by the Attorney General. These are answers to these questions as opposed to answers to these facts.

Turning to the five questions, the first question concerns information sharing with foreign authorities. Canada shares information with its foreign partners to combat and prevent terrorism. In doing so, Canada is guided by reciprocity, operational necessity and by its international obligations, both legal and diplomatic obligations.

The questions are posed in such a way as to refer to the standards of the organizations that collect information or share information here, and I'm going to refer to CSIS and the RCMP expressly.

As noted by previous commissions of inquiry, international cooperation and coordination are key

elements of the effort to counter terrorism. Not surprisingly, you can go to Commissioner O'Connor for comment on this.

In his report he specifically says:

> "... I strongly endorse the importance of information sharing. Sharing information across borders is essential for protecting Canada's national security interests, in that it allows more complete and accurate assessments of threats to our security. The importance of information sharing has increased in the post-9/11 era, when it is clear that the threats that need to be addressed are globally-based and not confined to national borders. Our information must be shared in a principled and responsible manner."
>
> "Prevention is frequently the primary objective when investigating terrorist threats. The harm resulting from an attack is potentially devastating."
>
> "Investigators often work under great pressure to identify the source of a threat and ascertain ways of disrupting or preventing an attack. To this end, they must obtain as much information

as possible from domestic and foreign sources."

"Information sharing among agencies allows a more comprehensive picture to emerge. Viewing different pieces of information together may allow a more complete and accurate assessment of the threat and the steps needed to address that threat. Sometimes, seemingly inconsequential bits of information may take on importance not otherwise apparent when viewed alongside other information. Broad information sharing therefore is essential to effective prevention."

COMMISSIONER IACOBUCCI: There is a question I have in this area, from your written submissions in any event, and maybe you will develop it. I don't want to disturb the flow, but I have to share this question with you.

And it is generally I can understand the incentives for the sharing of information, the legal obligation or the diplomatic obligations as you put it, but what are the brakes on that? What are the conditions?

Is Canada's obligation to share information and absolute one? Is it a discretionary one? If it is discretionary,

what are the kinds of circumstances or conditions pursuant to which that discretion should be exercised?

If you pose the issue as a fight between terrorism and human rights, I'm not -- is that the right balance?

I would have thought that we know that terrorism is bad, of course, but we are talking about what is our democracy's response to terrorism. That response must be consonant with recognizing human rights.

So that's behind my question here.

Yes, there is an obligation to share information on terrorists, but is that obligation, when you factor in the human rights aspects of this challenge, does that lead to some form of whatever you would say is appropriate to, on the one hand recognize the struggle against terrorism and on the other hand to recognize that this response should be reflective of preserving human rights as much as possible?

MR. PEIRCE: In my submission -- and I will develop this a little later on. But to --

COMMISSIONER IACOBUCCI: Just on the sharing of information at this point.

MR. PEIRCE: -- foreshadow the answer, the international obligations to share, those obligations cannot be absolute. In fact, there are a number of considerations that must be weighed.

If it were absolute, all information that came in with flow out. And that is not the case. And I will spend

considerable time developing the constraints on sharing and the considerations that way into that.

COMMISSIONER IACOBUCCI: Fine. Thank you.

MR. PEIRCE: I do want to take time at the outset to develop -- and I won't spend too much time on it -- but to develop the foundation for sharing, those international obligations for example, both legal and diplomatic.

I also would like to give some sense to the importance of it beyond it being just an obligation. Canada, for instance: It is well established multiple judgments of courts across this country have confirmed that Canada is a net importer of national security information and that Canada's apparatus for securing national security information is not as great and certainly not as great by itself as it is in combination with other countries and that as a result it is especially important in Canada to share information internationally and to do so in a form of reciprocity. In order to receive information, you are share information.

Canada has committed to act in concert with other nations to combat terrorism, including fully implementing United Nations and other international instruments relating to terrorism and specifically ones addressing international information sharing.

At the same time, Canada is mindful that its international obligations recognize the importance of and the need to ensure that the sharing of information with foreign

agencies respects Canada's international human rights obligations. That is a consideration.

Canada as a member of the UN. Let's start at the top.

Canada's international legal obligations to share information and combat terrorism flow from founding UN documents. The UN Charter states the purpose of the United Nations is to maintain international peace and security; to that end, to take effective collective measures for the prevention and removal of threats to the peace and for suppression of acts of aggression or other breaches of the peace. And the founding document is there.

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States provides further:

> "... that states have a duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in order to maintain international peace and security."

There have been multiple resolutions from the General Assembly and from the Security Council addressing the fight against terrorism, the need to share information and, in many instances, specifically the need to share travel information, which is one of the issues that you identified in the questions.

Those declarations are not new. The UN General Assembly Declaration on Measures to Eliminate International Terrorism in 1994, supplemented in 1996. There were of course developments following September 11.

UN Security Council Resolution 1373, which is referred to in the materials:

> "... requires states to find ways of intensifying and accelerating the exchange of operational information regarding terrorism, especially regarding actions or movements of terrorist persons or networks."

It became all that much more important.

Canada has also ratified several multilateral treaties. I won't take you through them all. It takes pages and pages.

Let me draw just for example Article 18 of the International Convention for the Suppression of the Financing of Terrorism which requires states:

> "... to facilitate the secure and rapid exchange of information concerning terrorist financing including the identity, whereabouts and activities of persons for whom there is a reasonable suspicion are involved in terrorist financing."

Similarly, Canada has international diplomatic obligations from multiple organizations who during the period 2001 to 2004 in particular came out with very strong statements about the need to share information, to keep the peace, to maintain security, and including again sharing of information, travel information.

A quick rundown -- and I won't go through what they have said, but a quick rundown of the organizations include the G8, NATO, the Organization of American States, bilateral agreements, APEC, the Organization for Security and Cooperation in Europe. The list goes on.

In my submission, it not only establishes the obligations that exist, but by virtue of the number of organizations and the significance of the organizations that have made either the diplomatic statements or compose the legal obligations, international legal obligations, in my submission, there can be no doubt about the propriety of sharing information.

It needs to take place to combat terrorism effectively.

This leads to the next question which is: What are the conditions? What are the constraints?

Is it simply open sharing of information? That is not the case.

In my submission, to understand the constraints on the sharing of information you first have to go to the purposes.

Here I would take you to the mandates of CSIS and the RCMP, the legislative Acts which govern, the Ministerial Directives which govern and the policies.

Let's begin with CSIS.

The collection of information by CSIS must conform to the CSIS Act. Section 12 of the Act authorizes CSIS to:

> "... collect by investigation or otherwise, to the extent that it is strictly necessary, and analyze and retain information and intelligence respecting activities that may activities that may on reasonable grounds be suspected of constituting threats to the security of Canada."

In order for CSIS to collect information it must fall within those conditions. It is not simply the collection of any intelligence that might seem helpful; it must be strictly necessary.

Now, what CSIS shares is derived from what it collects.

If Canadian citizens are suspected of reasonable grounds of engaging in activities which pose a threat to national security, and CSIS suspects that foreign agencies may possess or be able to obtain information which will further a particular investigation, it may be appropriate -- I want to

underline the word "may". It may be appropriate for CSIS to share information with those agencies, depending on the circumstances and the considerations which I have outlined below.

CSIS is a centralized organization. Decisions about whether to exercise that discretion, that "may", are made centrally at Headquarters by senior members of the organization. There are a number of structures that govern the method, manner and decision to share information and it will be factored into the decision by those senior officials.

I have already spoken about section 12.

The next section is section 17.

Section 17 requires ministerial approval before CSIS can enter into an arrangement or otherwise cooperate with any foreign government or agency. In order to enter into an information sharing agreement or arrangement with a foreign government or agency, there must be consultation with the Minister of Foreign Affairs and approval by the Minister of Public Safety.

Here, in the consideration you have consultation with the Minister of Foreign Affairs to ensure that an arrangement to share information is consistent with Canada's foreign policy, including consideration of its international human rights obligations.

I might just say that to confirm that there is oversight for a section 17 arrangement, so you need section 17 in

place. You need to be satisfying section 12, yet there is oversight, independent oversight by the Security Intelligence Review Committee. It can review any information exchange pursuant to an arrangement and can review the arrangement.

COMMISSIONER IACOBUCCI: First of all, are you able to tell us, share with us, what are the considerations that go into a ministerial approval of a section 17 arrangement?

MR. PEIRCE: I'm not sure if I can answer that question.

COMMISSIONER IACOBUCCI: Do you want to take that under advisement?

MR. PEIRCE: If I could.

COMMISSIONER IACOBUCCI: Second, have there been any arrangements that have been cancelled by Canada or by the Minister?

MR. PEIRCE: There have been arrangements that were entered into and that were then subsequently put in.

COMMISSIONER IACOBUCCI: A supplementary question to that that you also take under advisement is: What would be the basis for that kind of response by Canada or action by Canada in terms of cancelling the section 17 arrangement?

MR. PEIRCE: Without speaking more broadly to it, I will make a comment that consistency with Canada's foreign policy and consideration of Canada's

international human rights obligations could be a factor that was weighed in there.

COMMISSIONER IACOBUCCI: You can expand on that if you wish.

MR. PEIRCE: If I'm able to, yes.

The Minister of Public Safety has the responsibility to provide direction to the Director of CSIS. So we have legislative structures that govern, section 12, section 17, the oversight through section 38 with the SIRC, and there are limits in section 19 as well.

In addition, there are ministerial direction and policy guidelines.

There is ministerial direction towards CSIS operations which was issued in 2001, as well Annex D of the Arrangements and Cooperations and Appendix 1 to Annex D includes the Standards and Guidelines for Establishing a Foreign Arrangement. Some of that can be shared. I just don't know the full extent of it.

Those guidelines -- and certainly you will receive the full extent of it. I'm just not sure what I can say standing here before you in a public hearing.

Certainly those guidelines set the overall framework for entering into arrangements and for conducting the sharing pursuant to the arrangements.

There are a number of CSIS policies that also govern. They govern directly with guidelines for the disclosure

of operational information, the use of caveats in the exchange of information; that is express limits on the use that can be made of information that is shared, including limits on further sharing.

I should say expressly that the sharing of information by CSIS with a foreign state may include the travel plans of Canadian citizens suspected on reasonable grounds of engaging in activities which constitute a threat to national security. Knowledge of their movements, contacts and activities may be required to further investigations and better equip CSIS to assess any threat to national security and to advise the Government of Canada of any such threats.

The expectation flowing from the sharing of information is, or perhaps I should say was, to correct my tenses, that the receiving agency would act in accordance with its domestic laws and respect CSIS' caveats on the limits of the use of that information.

For instance, information is shared for intelligence rather than enforcement purposes.

COMMISSIONER IACOBUCCI: What kind of assurance or investigation or inquiry would be effected?

When you say at paragraph 55 of your submissions just what you said about the sharing of travel information, that there is a premise of the receiving agency acting in accordance with its domestic law and respecting CSIS' caveats on use and dissemination of the information, et cetera, what is the basis of that?

What are the factors that would go into concluding that reliance on compliance with domestic law or caveats of CSIS?

MR. PEIRCE: To begin with, there would be an assessment at the outset in entering into the section 17 arrangement of the reliability of the foreign agency or government with whom you are considering entering into a section 17 arrangement, a history of respect for caveats; as well, consideration of that full range of factors that goes into section 17 now.

Information sharing then begins not with we have a section 17 arrangement and so tomorrow here is all of the information. It is a matter of sharing consciously at the outset to determine and to be able to monitor reliability.

Are caveats respected? Are we receiving useful information? Are there good reasons for continuing to share information therefore?

So that is a process that builds over time, weighing those considerations. And I will go through a more detailed list of considerations in regard to sharing very shortly.

COMMISSIONER IACOBUCCI: A lot of my questions are obviously anticipating your coverage of the issues, so please follow your game plan. But I'm trying to alert you to concerns I have as you go through your submissions.

One of them is in this area of sharing of information, sharing of travel plans and how that figures with the

other considerations like, as you said, factors like the human rights record of the receiving agency's country, those kinds of things.

MR. PEIRCE: I think I heard you asking what follow-up is there? Is there something else following the sharing of information?

It is not follow-up in the sense of is there a formal investigation. When information is shared, you can't then go back each time and say we need an investigation of whether our caveats were respected. That said, it is an ongoing consideration, were caveats respected, and there are consequences for not respecting caveats.

If there is an indication that caveats are not respected, those consequences could rise all the way to the level of cancelling the section 17 arrangement, for example. There may be consequences that don't rise fully to that level. It may be that you are more restrained in what information you share subsequently.

I don't want to leave the impression, though, that the review that is there, that ongoing consideration, is one where you have some kind of formal ongoing review. It simply does not take place that way. It is an ongoing as a relationship is when you share information with a colleague: Can you rely on that person when you share information with that colleague? And certainly you are aware if there is reason to believe that information may have been disclosed.

That doesn't mean you jump to the conclusion that that person disclosed the information. Similarly, the fact that there is other information, similar information, doesn't lead to the conclusion that a caveat was breached.

So it is a very complex matter to assess whether caveats are being respected.

Before getting to the list of considerations, I would like to address the RCMP mandate control structures.

CSIS and the RCMP have overlapping but of course different responsibilities in respect of national security. The duty of RCMP members is set out in section 18 of the Act. Includes the preservation of the peace, the prevention of crime and the apprehension of criminals: prevention, disruption and prosecution. Not that the RCMP conducts the prosecution, but providing the evidence.

Naturally as a police force the RCMP always places a priority on collecting information in a way that will ensure its admissibility in the course of an eventual criminal proceeding. That is always a priority and therefore is one of the governing principles.

The RCMP has been engaged in information sharing with domestic and foreign governments and law enforcement agencies for well over 100 years. This is not a new development.

Most information sharing is done on an informal basis. You will see that statement in our submissions and I believe my friends have commented on it.

To say that it is done on an informal basis is not to suggest in any way that it is done extra legally, that it is done outside of controls and constraints, that it is in any way done inconsistent with the laws of Canada. The point is simply to say that there are two ways that you can share information.

You can share information through a formal mechanism such as a Mutual Legal Assistance Treaty or you can share information informally, that is not through such a formal structure but nevertheless subject to laws, policies, oversight, et cetera.

The RCMP may share information to the extent reasonably necessary for law enforcement purposes with the appropriate safeguards and in accordance with applicable policies and agreements.

I would like to quote, if I may, Commissioner O'Connor, who says:

> "... the RCMP does not indiscriminately provide all of the information it collects to others. It, like other agencies that share information, has developed policies aimed at carefully screening the content of information that may be

shared for relevance and reliability, as well as for personal information."

So there we have the identification of two important considerations, relevance and reliability, in our sharing of information.

COMMISSIONER IACOBUCCI: But he also says -- and I do think it should be repeated at this point. He does say that the sharing has to be done in a principled and responsible manner.

MR. PEIRCE: Absolutely. And these considerations, including considerations of relevance and reliability, refer to those principles that have to govern in meeting those and the other considerations we will discuss. You share information in a principled manner.

I should say, talking about a principled manner, that Commissioner O'Connor also found that the standard contained in the various ministerial directives in the RCMP policy manuals for national security investigations in particular, and the sharing of information especially, were essentially sound. These ensure that information is shared in a principled and responsible manner.

Ministerial direction, the Minister of Public Safety has responsibility to provide direction to the Commissioner of the RCMP on matters concerning policies, operations and mandates of the RCMP, management of the RCMP.

There is a directive on RCMP agreements which was issued in 2002 that pertains to the operation to the RCMP's cooperation with foreign law enforcement agencies or organizations. So there is an express directive.

There is also a direction on national security related arrangements and cooperations in 2003 which includes, among other things, it governs the RCMP arrangements with foreign security or intelligence organizations for the purposes of performing its duties under the Security Offences Act and outlines the appropriate division of efforts between CSIS and the RCMP.

Are careful records kept in international cooperation and periodic evaluation and audits are conducted internally with the results provided as part of the agency's annual report.

Caveats again are an important part of information sharing by the RCMP. All information has to be designated or classified and a caveat must be attached to the information then.

Classified information should only be released where there is an operational need, a need to know.

There are also mutual legal assistance treaties and information will be shared pursuant to those treaties with Canada's obligations being outlined in the Mutual Legal Assistance and Criminal Matters Act.

The RCMP is a decentralized organization by its very nature. It does policing across the country. There is

independence for peace officers. It is also an organization that has arrangements to provide policing in provinces and reporting therefore to provinces and municipalities.

Nevertheless, national security investigations do come under central coordination, with Headquarters coordinating the communication with foreign agencies in the case of national security.

My point here is to emphasize, both with CSIS and the RCMP, that there are very well-developed structures; that these are not ad hoc decisions. They are not unsupervised decisions. They are not decisions that are made at a lower level. They are reviewed at a higher level.

I want to come to considerations then.

As I do, one consideration that is -- or one issue that is outstanding that has been commented on by my friends is the sharing of information with countries with poor human rights records.

If this were, in my submission, a policy debate, what should the standard be for 2008? We might engage in a healthy exchange on this issue. In my submission, what we are focused on is: What were the standards in 2001 to 2004?

Certainly it was possible there was authority for sharing information with countries with poor human rights records. Unfortunately, we know that terrorism is often exported from countries with poor human rights records. It is an important source of information, therefore.

Canada cannot afford to be isolated in its information gathering from those important sources of information. The fact that after weighing appropriate considerations Canada can enter into an arrangement to share information with a country with a poor human rights record does not mean that Canada does share information with the country. It means it may share information.

You then have to go to considerations as to whether it is necessary and appropriate to share that information. What are those considerations?

The first set of considerations are the ones I have articulated about the legislative constraints and the ministerial directives and policies.

CSIS' policy on disclosure requires it to consider potential threat to the security of Canada, national interests, privacy of the persons and organizations concerned, including operational necessity, as well as the impact of the disclosure on the safety of individuals.

In my submission, that term is meant broadly.

The safety of individuals include individuals who may be affected by a terrorist act. It includes the safety of the target of an investigation.

COMMISSIONER IACOBUCCI: Are you reading from your submissions?

MR. PEIRCE: I'm not because I'm not actually going from my submissions, as much as it seems I am.

COMMISSIONER IACOBUCCI: All right.

Do you mind if I pause from time to time on your submissions?

MR. PEIRCE: No. I think I'm at pages 27 and 28.

COMMISSIONER IACOBUCCI: Yes, all right. Thank you.

MR. PEIRCE: You have exposed me now for the degree to which I am following my submissions, because I think they are comprehensive and complete.

COMMISSIONER IACOBUCCI: Well, I'm glad you think that, Mr. Peirce.

--- Laughter / Rires

COMMISSIONER IACOBUCCI: If it gives you confidence to continue, that's good enough for me.

MR. PEIRCE: I would like to suggest that Mr. Flaim and Mr. Landry here, my associates, are responsible for ensuring that it is comprehensive and complete.

COMMISSIONER IACOBUCCI: Let me again -- if you are going to come to this, fine, but my question is you list these items of considerations and you acknowledge the human rights record of Middle East countries is questionable. Let me just leave it at that.

MR. PEIRCE: Yes.

COMMISSIONER IACOBUCCI: Your friends would say more than that, but just for purposes of discussion, I'm just trying to get into some help from you.

When you say things at paragraphs 73 and 74, for example:

> "The fact that a particular country may have a poor human rights record is not sufficient, without other compelling circumstances, to preclude the sharing of information."

The question I have is: What are those compelling circumstances? What are examples of compelling circumstances that could lead Canada to say we're not going to share information with this country? We agree that it is important to share information. We know that a lot of terrorist activity is exported from some of these countries with poor human rights record, as you pointed out, but there is compelling circumstances in this situation for Canada not to share this information.

I really would like some help on what are those compelling circumstances.

MR. PEIRCE: The sharing of information always involves a weighing of the variety of considerations that are here and there aren't, in my submission, specific circumstances that trump.

So when I say "compelling circumstances", I mean that taking into consideration the full range of considerations here.

But compelling circumstances could include circumstances where there is reason to believe not just that there is a general concern about the human rights record of a country, but a specific knowledge of the risk of human rights abuse; that there may be other circumstances, including suggested to you that caveats are very important in sharing of information and that there is an indication that those caveats are not being respected.

That would have to be a very serious consideration weighed into the sharing of any further information with a country with a poor human rights record in particular.

So those are kinds of compelling circumstances that weigh in.

But it is a weighing of a variety of factors that you have to look at. You have to look at what is the imminent nature of the suspected threat, too, as part of your consideration.

You have to look at what information have you been able to receive from that country about the imminence of the threat.

If you are receiving information that is dubious quality, for instance, you then have to weigh that against what are the compelling factors on the other side of the equation and you have to weigh the need. It may be that in fact receiving

dubious information requires further sharing to confirm the nature of that information, to confirm that there isn't a threat, for example.

What are the potential adverse consequences for public safety both in Canada and abroad?

It is clear that actions abroad may impact on the public safety of the national security of Canada. What would be the implications of failing to share the information? Where is the reliability and the accuracy of the information that Canada is going to share?

When considering the human rights record of the country -- and it is an important consideration. When considering the human rights record of the country, you have to consider more broadly than simply a template of is it a country with a poor human rights record.

And you do this, and I believe that it is well recognized, recognized by the Supreme Court of Canada in the Suresh case in regard to removal of an individual to another country which may have a poor human rights record.

What you do is you must assess not just the general record but the record as it may relate to these particular circumstances.

So to give you an example, there may be a country that has a poor human rights record, perhaps allegations of torture, but those allegations of torture may be allegations that refer to residents of that country. You may then look at the

situation and consider whether the sharing of information is in relation to residents of that country; and if it's not, then in fact your overall concern may be balanced off to some degree.

And I realize that in some ways these factors are abstract. You weigh the human rights record of the country. I can even give you generalized examples, but for a more concrete example that will have to wait a moment when we can speak directly to the facts and can situate it in those circumstances.

COMMISSIONER IACOBUCCI: Would you go so far as to say that there is then in the human rights record a component, there is a duty of Canadian officials to make inquiry as to what is the human rights record of that country generally and specifically in a case of where someone, a Canadian citizen is detained?

MR. PEIRCE: Yes. In regard to the general, that has to be done in order to enter into a section 17 arrangement.

COMMISSIONER IACOBUCCI: But we all know that agreements have a timeframe; that when they are entered into that condition may be fulfilled, but it may be that with the passage of time the general conditions have changed.

MR. PEIRCE: If those conditions do change, it is an ongoing consideration. If those conditions do change, then that may lead to the annulment of the arrangement.

So that is an ongoing general consideration.

COMMISSIONER IACOBUCCI: So the answer to my question is, yes, there is a duty to inquire of the Canadian officials as to the general state of human rights conditions in countries generally prior to sharing information?

MR. PEIRCE: Yes, there is a duty. I want to be clear, though, that that duty does not necessarily fall on the shoulders of the individual on the ground because they are not the ones ultimately who make the decisions.

COMMISSIONER IACOBUCCI: I'm talking about the government.

MR. PEIRCE: Yes.

COMMISSIONER IACOBUCCI: Institutionally as opposed to individually.

MR. PEIRCE: Yes.

I believe I have talked about reliability and accuracy of the information being shared; the reliability of the foreign agency, including its respect for caveats; potential use that can be made of the information. That may be expressly addressed in the sharing of the information. And the continued need of a foreign agency to receive information about an individual or organization and the continuing need for Canada to receive information in exchange, because it is, as I said earlier, a question of reciprocity. One shares information to receive information.

Many of those considerations which are specific to CSIS do apply to the RCMP. The mandate of the

RCMP is somewhat different: the need to preserve the peace, prevent crime, apprehend criminals.

There is a need to assess whether there is a reasonable belief that the individual about whom information is being exchanged is involved in or connected to the commission of a specific offence contrary to law of Canada. That is the starting point.

Will the sharing of information further the RCMP's investigation or will it assist the receiving agency in preserving the peace, preventing the commission of a criminal offence?

Again, the impact of the disclosure on the safety of individuals, including human and technical sources. Would sharing of information disclose the source of the information, put at risk an informant, for instance; as well as respect for caveats generally.

Specifically I should refer to the third-party rule; that is, shared information with you will not be shared with another country without our prior authority, will not be used in formal proceedings without our prior authority.

Again, the RCMP takes into consideration the human rights record of the receiving country and agency.

Now what I didn't say, what I didn't refer to is Canada's international human rights obligations necessarily as a specific consideration. I talked about the human rights record,

talked about safety to individuals, including the individual who may be the target of the investigation.

All of those are factors that go to informing Canada's ability to ensure respect for its international human rights obligations. Those obligations are always there and are always a factor governing.

I should take a moment, in talking about Canada's international human rights obligations, to address submissions of my friends about the Convention Against Torture and whether that obligation specifically governs information sharing.

In my submission, it does not specifically govern information sharing except in one particular respect.

Article 2 of the Convention Against Torture creates a duty to prevent acts of torture, but is territorially limited. It is limited to acts of torture within the territorial jurisdiction of the country. So it doesn't apply here when Canada shares information. It is not in regard to -- it doesn't provoke a risk of torture within Canada, nor is that an issue here.

So the CAT doesn't govern in that respect.

The only extraterritorial reach of the CAT, the only requirement to consider the impact in another country is in respect of what I will broadly call removal, extradition, refoulement or deportation, for example, where there is an express obligation that if there is a substantial risk of torture that must be considered.

That of course has been subject to much jurisprudence in Canada, the leading case being Suresh.

Now, my friends have referred to what I would suggest are some novel arguments that may extend the reach, including general comment by the Committee Against Torture, general comment that suggests the possibility of extending the reach of the CAT so that that obligation to prevent acts of torture somehow includes an obligation that would extend to within Canada domestically.

That is not the position of the Government of Canada, and the Government of Canada has commented on the general comment to that effect.

That is not to say that the Convention Against Torture isn't relevant. It is important background information, background piece that reflects on the significant international view of the torture. It is jus cogens that the prevention of torture is an international norm. That does not bring with it necessarily a broader application. It is prevention that goes to removal. It does not bring with it necessarily an expanded scope that governs information sharing, for example.

There is one provision of the CAT that I should specifically refer to. I believe it is Article 15, although I don't have it at my fingertips, which restricts the use of information that may be the product of torture. And it restricts its use in formal proceedings.

Other than that, though, the CAT does not directly govern, directly create an obligation in respect to information sharing in my submission.

COMMISSIONER IACOBUCCI: I'm looking at the Terms of Reference of the Inquiry and I wonder whether, just focusing on that, the (iii) paragraph, A(iii), says:

> "... whether any mistreatment of Mr. Almalki, Mr. Abou-Elmaati and Mr. Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian ..."

Directly or indirectly.

> "... from actions of Canadian officials, particularly in relation to sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances."

So why do we have to go to answer that question about whether the torture convention deals with the sharing of information and sharing of information being -- I'm not saying we shouldn't. I'm saying why do we, if we have these Terms of Reference to focus on?

MR. PEIRCE: Perhaps that's a question that my friends --

COMMISSIONER IACOBUCCI: Well, you might help me, too, though.

MR. PEIRCE: --at Amnesty International or Human Rights Watch may want to address. But why do we?

COMMISSIONER IACOBUCCI: Well, you help me with that. I'm saying that there is wording in these Terms of Reference that indicate is there some action taken by Canadian officials -- we are not going into the record now. I'm just saying this is something we have to focus on and whether sharing of information in this case was obviously deficient, we will be pursuing that.

But the standard is -- is it your submission that the answer to this question is given by what you have been submitting; that the CAT doesn't deal with the sharing of information? And that's an answer to this question?

MR. PEIRCE: Yes. That is to say that the CAT does not create a standard, certainly not one that governed in 2001 to 2004, by which to judge sufficiency or deficiency of Canadian actions, because it did not impose such a standard.

The Terms of Reference I would certainly agree lead you to the inquiry to whether the sharing of information directly or indirectly resulted in mistreatment. The reference to the CAT which others have brought up and therefore I thought necessary to address, the reference to the CAT goes to the question of whether you look to the CAT to determine the standard for assessing deficiency. And, in my submission, you don't. It does not create a standard. It does not create a binding legal obligation.

MR. TERRY: Mr. Peirce, if I may, I just have a point of clarification before you move on.

In introducing your submissions on the issue of sharing information with countries with a poor record of human rights, I believe you talked about the fact that in 2008 your words were to the effect that you could have a debate about it, and you have emphasized of course in your submissions that we are focusing on the period of 2001 to 2004.

I just want to clarify, are you suggesting, then, that there is a difference in the standards that would apply today in 2008 versus the standards that applied on that issue in 2001 to 2004?

MR. PEIRCE: I'm suggesting that if there were a conclusion that in 2008 the CAT somehow created obligations, something which I haven't turned my mind to and haven't addressed, it certainly didn't in 2001 to 2004.

So I don't draw a conclusion as to whether there is a difference. But if there were a difference, it is not material to the Inquiry here because the Inquiry here is about 2001 to 2004.

I can't remember what time we started at. Am I an hour into it?

COMMISSIONER IACOBUCCI: You still have time.

MR. PEIRCE: Yes, I just have considerable material to get through still.

Many of the same considerations that we have been talking about are the same considerations that would govern a determination of whether to engage in any of the three investigative practices identified in question 2, as the sending of questions to authorities, the foreign state to be used by the foreign authorities to question, attending in a foreign state to participate in the questioning by the foreign authorities, or attending in a foreign state to question directly.

So those considerations, the imminence of the threat, the impact of the country's human rights record, the reliability of information that may be received from the foreign authority if the foreign authority conducts the questioning, those are all factors that would weigh into a determination of whether to pursue any of those investigative techniques.

There are additional factors, though, that I would like to address.

One is mandate coordination as I refer to it. What that specifically refers to is that there are different responsibilities within the Government of Canada. CSIS, the RCMP and Foreign Affairs are all identified by name in this Inquiry.

So if CSIS were considering engaging in one of the investigative techniques here, it would need to consider the position of the Department of Foreign Affairs with respect to any implications, negative or positive, for consular access, the health and welfare of the detainee, for the RCMP whether the RCMP is

conducting the investigation and therefore CSIS participating in an interview, sharing questions are conducting an interview might affect the RCMP investigation. So mandate coordination is an important piece.

There's the question at the outset: What will the other investigative agency, the other country, agree to?

Those are three possible investigative techniques. You may only have one choice, though. The investigative agency may only say we will receive questions.

You also have to consider the limitations or qualifications that might be put on engaging in any of those three investigative techniques. So if there are conditions for the conduct of an interview, are those conditions conditions that are acceptable in light of the other considerations that you have, in light of the imminence of the threat, the reliability of the foreign agency, the possible implications for the individual?

That is one I would like to highlight, specifically look at the potential impact on the detainee of pursuing a particular investigative step. What are the implications of sharing questions or of attending to conduct an interview?

I want to suggest to you that that isn't a very difficult matrix to navigate.

COMMISSIONER IACOBUCCI: For instance again, not shy in giving us a standard to go by, and you have seen that standard: a reasonable basis of credibility of a substantial risk of mistreatment, torture, whatever.

I agree with the matrix from reading your materials and the considerations that go into all of this, but what is the standard for saying well, wait a minute, we are going to go ahead with this, that is share information, participate by questions directly or indirectly, but can you express a standard test, a threshold for what was applicable back in this period of time?

MR. PEIRCE: I do not believe there was a known standard at the time, to begin with.

Next, I don't believe that you could in fact properly devise a single standard. It has to be a weighing of the factors. Let me give you an example on the removal side.

The United States had a policy that removal to torture was acceptable up until the point where on the balance of probabilities it was likely to result in torture. And that standard was criticized. It was criticized as being a fixed standard that did not take into account the fact that in certain circumstances a slightly lower standard might be appropriate in extreme circumstances.

I believe in fact back at the O'Connor Commission that there was testimony from Professor Burns about that fact, that there is an exception; that you don't set the standard and put the bar here and that governs all cases. You have to allow for some weighing.

Now, in these circumstances in regard to conducting particular investigative steps, this is not something that has been subject to widespread -- or certainly wasn't at the

time -- widespread international debate that resulted in a standard that was a known standard that applied at the time.

So it wasn't that, on top of which I would suggest to you there would be a risk in setting a single standard. You have to weigh the variety of factors. And those are those factors that we have discussed up until this point in time.

COMMISSIONER IACOBUCCI: I have a little trouble understanding that.

It seems to me one can develop a standard that says looking at all of these factors -- so applying your factors, the different things, safety, et cetera, the quality, the reliability -- does this Act create -- and then whatever you want to put in as your standard.

It's not that you don't have other things to look out, a myriad of things to look at, but you do have focus on the standard that will guide you in looking at all those factors to come to a conclusion as to whether you share the information or whether you participate in questions or whether you do so through offering questions, and so on, those kinds of things.

That's what I'm trying to -- I'm not trying to simplify this, being simplistic and saying well, this is not a difficult thing to do. But the development of a standard is something that I think isn't unrealistic. It may have different components and factors to look at in determining the judgment.

But in any event, your suggestion is that at this time there was not an articulation of the standard.

John, did you want to ask a question?

MR. LASKIN: Mr. Commissioner, perhaps I could just follow up on that again just to assist the Commissioner with some clarification perhaps.

One could posit a standard, a variety of standards taking all of these factors that are listed in your submissions into account. One could say, for example, having regard to all of the factors, all these sensible factors that are listed in your submissions, it is necessary to proceed with the investigative technique, reasonable to proceed with the investigative technique, prudent to proceed with the investigative technique, just to take three examples.

Is there a particular formulation that you are advocating as the governing standard in that sense as of the relevant time period?

MR. PEIRCE: If I understand your question correctly, then, it isn't the standard of the implications for the individual and if you reach a certain standard of, a certain level of risk of torture, you don't do it.

You are looking at the standard in some respect that weighs more globally on the other side of when will you do it out of necessity, reasonableness --

MR. LASKIN: I put the question the way I did because I understood you to be ruling out, at least in your submission, an approach under which a risk of mistreatment at a

particular level would absolutely render unthinkable or undoable the particular investigative technique.

So if that's not it, is it an overall assessment of necessity, reasonableness or something else that you are advocating?

MR. PEIRCE: I believe the overall standard for CSIS would derive from section 12 of the CSIS Act: Is it strictly necessary?

MR. LASKIN: In light of all of the factors that you --

MR. PEIRCE: In light of all of the factors that are weighed there.

MR. LASKIN: All right.

--- Pause

MR. PEIRCE: I just received a note from Ms Smith kindly offering to donate her 15 minutes to the Attorney General of Canada. I believe she concludes the note with "it looks like you need it".

--- Laughter / Rires

MR. PEIRCE: Hopefully that's not because of the substance but rather just the timing as we are moving along.

The additional considerations I believe is where we were at.

I referred to the potential impact on the detainee of pursuing a particular investigative step whether the

individuals expressed a desire or willingness to meet with CSIS officials or with RCMP officials; the reason for the individual's detention by the foreign authorities and the position of the foreign agency on providing access to the individual.

As I say, that has to be a consideration to begin with.

The potential benefits of a first-hand assessment of the individual and the potential ability to control the interview.

It may be that there is greater benefit in being able to attend to witness the circumstances of the interview if that is possible.

I won't go through the entire list, but I think it is important to point out it is a question of whether there has been prior access, in particular consular access or other access, to the detained individual and the information that arises from that access, including information regarding the conditions of detention, the treatment during detention.

Of course, for CSIS again it comes back to the existence of a section 17 arrangement.

Additional considerations specific to the RCMP include very importantly whether in all the circumstances the investigators believed that the resulting information may be admissible in an eventual prosecution.

It is important not to taint the evidence. That is on top of these other considerations.

MR. TERRY: If we could clarify again, Mr. Peirce, you talked about in the case of CSIS it went back to the strictly necessary standard.

What about in the case of the RCMP with respect to involving the use of these techniques?

MR. PEIRCE: Is it operationally necessary?

MR. TERRY: All right. Thank you.

MR. PEIRCE: Subject to questions from the Commissioner, those are my submissions on questions 1 and 2 in regard to information sharing and investigative techniques.

Let me come to the provision of consular services, then.

DFAIT is responsible -- that is the Department of Foreign Affairs and International Trade -- for the conduct of consular relations. It is, to be fair, only a small part of the overall work of the Department of Foreign Affairs.

The Vienna Convention of Consular Relations, the VCCR, codifies consular rights and obligations. These include the right of Canada to be informed if one of its citizens is arrested or detained by a foreign state; if the individual so requests, the right to visit the individual, to converse, correspond with them, to arrange for legal representation.

The Department of Foreign Affairs -- I will refer to them as Foreign Affairs generally I think -- seeks to exercise these consular rights for the benefit of detainees in all cases, irrespective of the charges laid against them.

It also seeks to provide these services to dual nationals, not just to nationals who are exclusive nationals of Canada. Since 1977 Canada has recognized dual nationality. An individual may have more than one nationality. Dual nationality is not recognized in the VCCR.

Canada will always seek to provide consular services to its dual nationals, but because it is not protected in the VCCR, not referred to, other countries may not in fact facilitate or accept Canada's providing those services. The country detaining an individual may claim that the individual is a national of that state and therefore deny Canada access, even information about whether the individual is detained.

As you can see from that instance, the nature and frequency of consular efforts is heavily influenced by the cooperation received from the state detaining the individual.

The domestic legal situation may be an important factor.

Since these questions specifically address Syria and Egypt, it is notable that emergency law was in place in Syria and Egypt during that time period.

In addition -- these are just the opening remarks on consular services -- it has to be noted that consular cases having security implications and involving dual nationals detained in countries with poor human rights records are simply rare. Such cases are so unique that they require unique judgment to be brought to them.

In my submission, there were not specific standards that applied to those cases in the period from 2001 to 2004. Those standards then had to be gleaned more generally.

What efforts would Canada have had to make to identify the location of an individual, their detention?

Under the VCCR, Canada had a right to be notified without delay of arrest or detention of a Canadian citizen if the detainee so requests. And it is contingent on the detainee requesting access.

Of course, again, those rights aren't necessarily recognized for dual nationals. So while that right exists for Canadian citizens, it may not apply for dual nationals.

Often times, then, in those circumstances, in fact Foreign Affairs efforts to locate the individual and to confirm the detention of the individual, the trigger for beginning the provision of consular services, may be frustrated by the detaining state.

When Canada receives information that an individual is detained, it has to determine whether that information is what I will refer to as actionable information. Can Canada take action based on the information? Is it a reliable source?

If it is from the family, for instance, that they have confirmation that so-and-so is detained, then Canada can take action on that information. But it may not be from a reliable source. If it is not from a reliable source, Canada will seek to

confirm the information, will seek to garner actionable information.

When it receives actionable information, it will normally seek to react within 24 hours, in any event with a minimum of delay, sending a Diplomatic Note seeking access. That's done in all cases.

Now, depending on the circumstances, additional follow-up may be necessary. Often times responses are not received in a timely way. It may be that having sent a Diplomatic Note, information is received back informally and confirmation formally of that information is needed.

In these circumstances, particularly security cases, particularly where there are no VCCR rights per se to the provision of consular services because of dual nationality, a great deal of judgment has to be brought to bear to ensure that you don't risk offending the interlocutor from the foreign state, that you don't risk overwhelming them.

It must be appreciated that in a security case, for instance, it may not be that the Ministry of Foreign Affairs with whom Canada's foreign affairs would be consulting has any control over the situation. They may in fact be dealing with a security service or a police force. There are multiple security services in some countries. So they may not be able to do a whole lot and may be having to proceed carefully, and for Canada to simply press the issue may be counterproductive as to the

expertise and judgment that people on the ground have to bring, in consultation with Headquarters.

COMMISSIONER IACOBUCCI: I have to say, upon reading your submissions and listening to you now, Mr. Peirce, in my mind -- tell me why I'm wrong in thinking this -- I see a bit of a disconnect between the concern about consular services, all the concerns about what is going on in a country of poor human rights records, that the intelligence services look after and not the normal External Affairs Department, the exacerbating effects of getting involved, the delays to get responses, and so on. Then when we talk about CSIS and the RCMP, why wouldn't all of that information that we have just gone through, which shows it is pretty difficult -- and I am not making any criticism about it, just that it is difficult -- why aren't those things considered ex ante by CSIS or the RCMP in their investigatory or enforcement roles when deciding questions about sharing information, participating in questions either directly or indirectly?

We see now that this is where we get the real tension with the human rights record weak in a particular country or highly questionable. The red lights are going on all over the place in this area.

Am I right in that assessment?

MR. PEIRCE: You are right in the assessment that the red lights are going on in this area, and I don't want to be in the position --

COMMISSIONER IACOBUCCI: And so tell me why I'm wrong not saying that should also be considered in any investigation side of things and the enforcement side of things.

MR. PEIRCE: I'm happy not to have to tell you that you are wrong. It is a consideration.

As I said, in respect of, for instance, engaging in those investigative practices one of the first question was mandate coordination. It is a consideration. And I listed the considerations they include.

Has there been consular access? Is there acknowledgment? What are the circumstances of detention? Those are all important factors.

Those difficulties in delay are important factors and you are weighing those in the conduct of your investigative or intelligence functions equally in considering those investigative practices, for instance, as you do when you are pursuing consular access.

We will see ultimately, I would suggest to you, that there may be circumstances in fact -- and I think in some respects I have alluded to this. But there may be circumstances where it is desirable to seek access, for instance to conduct an interview, specifically because there hasn't been consular access, and at least viewing the individual, whether it's CSIS or the RCMP viewing the individual, may be of significance.

So that may be a consideration weighing in favour of one of the investigative techniques. I think that those complications are equally relevant.

COMMISSIONER IACOBUCCI: Just as a matter, your position is that the provision of consular services is discretionary. It is traced to the prerogative.

MR. PEIRCE: Yes.

COMMISSIONER IACOBUCCI: You point out that detention in countries of poor human rights records is rare of Canadian citizens. It's rare.

MR. PEIRCE: Specifically with security implications, yes.

COMMISSIONER IACOBUCCI: Yes. But would you go so far as to say that where there is a detention of a Canadian in a country of poor human rights records that it would be virtually automatic that a serious effort would be made to provide consular services?

MR. PEIRCE: Yes, an effort would be made.

COMMISSIONER IACOBUCCI: A serious effort?

MR. PEIRCE: A serious effort would be made. However, in assessing that serious effort, what constitutes a serious effort, were the proper steps taken, that is where the exercise of judgment is even of more importance in those circumstances because of the kinds of factors I'm articulating: the fact that you may be seeking the efforts but the individual may

not be under the control of an organization that the Ministry of Foreign Affairs can influence in anyway.

So your efforts can't put their backs against the wall. You have to weigh the judgments. You have to appreciate that access in those circumstances is virtually unprecedented.

So if that is the case, then you have to consider are our consular people going to be able to bring that foreign state across that line to which they will then provide consular access?

COMMISSIONER IACOBUCCI: We are dealing with a very fundamental issue, the liberty and integrity of a human being. So we are into serious, serious issues.

The fact that access is being either delayed or otherwise curtailed, would that be the end of the effort made by the government in this respect? Well, we see this obstacle. Therefore, would there not be other action countenanced by officials and maybe senior government leaders?

MR. PEIRCE: Yes, absolutely, there comes a moment to pursue other avenues to escalate or elevate the matter as it were.

Again, you want to make sure that when you do that, there is a real opportunity to effect a positive outcome, effect access, for example. So that is a judgment that is based in part on the weighing of these factors.

If you first send your Diplomatic Note and you don't hear back for some time, there will be follow-up. That follow-up may be formal follow-up. It may be informal follow-up because it may be necessary to test what is going on. Can we get other information about what is going on, not because we can necessarily even act directly on that information, but because that information will inform the other actions that we will take.

Are there related matters that we could look at to see and to draw upon?

But there does come a point when consideration must be given to elevating it to involving more senior levels, including possibly visits, direct relations at senior levels to try to ensure provision of consular services.

If access is granted, one of the issues is what efforts are made to determine the treatment? In situations of cases where there are serious concerns about country's human rights records, DFAIT will strive for greater access, particularly at the outset if it receives access, in order to be able to assess the treatment of the individual, the conditions of the detention, the individual's health and welfare.

If a detainee appears in relatively good condition and if there are other factors -- and one I haven't mentioned yet that relates to the efforts, and I should have, the efforts to seek consular access, is: Are there family visits.

If there are family visits ongoing, that may provide information as to the circumstance of the individual and it

may be that you want to weigh the prospect of family access if you are pushing on consular access. It is just another weighing that takes place.

If an individual is receiving family access, that may reflect on your understanding of their treatment.

To the fullest extent possible Foreign Affairs would normally seek to ascertain the detainee's physical and mental condition, the conditions of detention, treatment received in detention, including access to adequate nutrition, essential clothing, any medical issues, any issues on the need for medication.

They consider the charges that have been brought and any other information may go to the need to assist in providing information about access to legal representation.

We will seek to confirm whether the individual is detained in circumstances that conform to the local laws and standards. In doing so, consular officials have to be sensitive to the very circumstances in which they are operating.

If it's a security case, especially one involving dual nationality, but if it's a security case in general, the opportunity for private access, a private meeting, is almost certainly not going to be there.

As a result, the assessment will largely be a visual assessment. It may be difficult to ask questions of the individual with guards in the room or a security officer in the

room. A person may not be at liberty to speak and in fact even asking the questions may put that individual in some risk.

MR. TERRY: Mr. Peirce, during the period 2001 to 2004, what was the Canadian practice with respect to asking for a private visit with detainees?

MR. PEIRCE: In these kinds of cases I don't believe that there was any standard that would have compelled asking for private visits, nor do I think it would have been practical to ask for private visits. It simply would not have been available and it would have been unnecessarily confrontational to pursue that.

Let's take what we have and what we can get access.

COMMISSIONER IACOBUCCI: Does Canada provide private access when it is detaining someone in similar circumstances, not necessarily security intelligence? Are you aware of what Canada's policy is?

MR. PEIRCE: I am not aware of what Canada's policy is.

COMMISSIONER IACOBUCCI: Could you find out for me, please?

MR. PEIRCE: I could find out for you.

--- Pause

MR. PEIRCE: In conducting a consular visit, as I said, there is the eyeball test, the viewing, the consideration of the circumstances, what information do you have

and what information are you able to glean. Careful attention will be paid, would be paid, to anything that the individual tries to convey, understanding that the individual may try to convey information in an indirect, a subtle, a covert way, possibly even creatively.

The specific question about the effort to secure the release of an individual, there is I believe a misperception that consular officials are tasked with or have a mandate to secure the release of Canadians detained in foreign countries. That is not the case.

There are competing principles that guide consular services. One is the principle of sovereign jurisdiction over one's territory, one is the principle of jurisdiction over one's nationals, and those have to be balanced.

So if an individual is detained, there is the sovereignty of the country in which they are detained and what Canada does, it cannot interfere with the local laws, for instance, and the application of those laws.

What Canada can do is seek to ensure that those laws are applied and that there is due process. It is not their Foreign Affairs officials able to seek the release of the individual per se.

Now, if there isn't timely action in regard to the person's conduct of trial, Canada may push to conduct the trial, provide the due process, or release the individual. But that is as a means of providing the pressure to say conduct a fair trial.

These questions become a bit disjointed, but the next is contact with the detainee's family.

The nature and frequency of contact with the detainee's family varies. DFAIT has to respect the privacy of the detainee and it is not every detainee who wishes to have their family notified of their detention. If the family has contacted Foreign Affairs, Foreign Affairs will engage in an ongoing information exchange with the family, will keep the family apprised. If that is not how contact is made, then Foreign Affairs has to look to the individual to consent to information being provided to the family.

Foreign Affairs will not normally contact the family without first receiving that consent.

If there was initial family contact or once consent has been provided, Foreign Affairs will contact the family and provide information about the case.

The efforts to assist the detainee upon release depend again on the circumstances. Services might include replacement of lost documents, for instance, or issuance of a temporary passport to allow the person to travel, return to Canada. Those kinds of services form part of the normal consular assistance that is provided.

In the event that there are extenuating circumstances, such as for instance medical issues, consular officers may take steps beyond the normal consular steps of providing documents and that kind of assistance and undertake

to, for instance, facilitate the return of the individual by advancing funds on an undertaking to repay. We may also facilitate medical care if necessary.

It is not DFAIT's or Foreign Affairs policy, nor was it at that time, to escort individuals released from detention, to escort them back to Canada.

COMMISSIONER IACOBUCCI: Do we know why that is the policy? Is there anything that we should know about why that is the policy?

MR. PEIRCE: First, it can provide an unreasonable sense of protection that simply isn't there. Consular officials can provide no measure of protection when they travel outside of the country to which they are assigned. Their authority is limited to acting within that country.

So it doesn't actually add anything in that respect and it can provide a false sense.

As well, there will be many detainees over time released, and it would be onerous to have to bring them all back, to accompany them, and there doesn't seem to be a basis for doing so. Certainly that wasn't the practice at the time.

There may have been exceptional circumstances in a particular instance in which that occurred, but it was not the general practice.

COMMISSIONER IACOBUCCI: I guess we are getting close to the closing time.

MR. PEIRCE: I can wrap up the next couple of ones fairly quickly and escape, save and except for questions that you may have.

COMMISSIONER IACOBUCCI: Yes, I have a couple of questions I would like to ask you.

MR. PEIRCE: Let me give you this then, the disclosure of information obtained by consular officials.

The disclosure of information obtained by consular officials is governed by the Privacy Act. If it is personal information, it will be protected by the Privacy Act and only may be disclosed within existing exceptions under the Privacy Act for consistent use, for purpose in accordance with an Act of Parliament, to specified investigative bodies who request the information for carrying out a lawful investigation, 8(2)(e), or for any purpose where the public interest and disclosure clearly outweighs the invasion of privacy or where disclosure would clearly benefit the individual to whom the information relates.

I will leave it at that. It is governed by the Privacy Act and by those specific provisions.

COMMISSIONER IACOBUCCI: There is reference in 143 -- this is one of my questions -- to operational significance:

> "... it might be of operational significance."

That's at paragraph 143.

MR. PEIRCE: That is in regard to the ability of CSIS or the RCMP to request information.

COMMISSIONER IACOBUCCI: Yes, but what does that mean? I know that, but what does it mean?

MR. PEIRCE: Operational significance. Is it information that would be operationally useful; that is to say, would it go to assessing the investigative steps that ought to be taken?

So it may reflect on the conditions of detention, and that is a factor to be weighed in determining the investigative steps to be taken, for instance.

That would be an example of where it would be operationally necessary.

It may reflect on the degree of the threat.

To clarify the point, though, that is just the trigger for CSIS -- and I appreciate you understand this.

COMMISSIONER IACOBUCCI: I understand.

MR. PEIRCE: But just to clarify it for the room, that is just the trigger for CSIS or the RCMP to be able to seek the information. It then falls to Foreign Affairs to determine whether it can disclose the information.

The reason for that dichotomy is that CSIS or the RCMP may not know in fact what the information is and whether it can be disclosed. So that is a judgment that falls within the organization that holds the information.

In regard to consular information, that would be Foreign Affairs. And then Foreign Affairs, if it is personal information, must look to those specific exceptions in the Privacy Act.

The last point I want to touch on very quickly is that Foreign Affairs in its Missions abroad plays a role beyond simply the provision of consular services. In fact, again provision of consular services may not even be the primary role that is carried out in a Mission abroad. Missions abroad are not even staffed exclusively with Foreign Affairs people. There may be people from many different government organizations in a Mission abroad.

The Head of Mission plays a coordinating role, then, in the conduct of activities by individuals in that country, conduct of activities by Canadian officials, if I didn't say it. There is a coordinating role to be played through the Mission.

So Foreign Affairs has that role.

It has additional roles in regard to national security or law enforcement matters because it receives information and assesses information about international circumstances and international conditions. So it also plays a role in that respect.

Subject to any questions you have, those are the submissions of the Attorney General.

COMMISSIONER IACOBUCCI: I think I know what your answer is going to be, but I would like to ask the

question anyway, and it is this: Suppose after all of these things are done -- the weighing of information and the context of the country concerned, the sharing of information, the participating questions, consular service -- serious mistakes occur, mistakes, errors, exacerbating the situation of a detainee and causing harm, who bears the consequence of that?

MR. PEIRCE: Mr. Commissioner, it depends on the nature of the error.

The error may be quite obviously borne by the individual in detention, for instance. The error may be one that is borne by all Canadians. It may be the result that the national security of the country is imperiled.

Those consequences are not restricted to the particular circumstance that transpires in regard to a consular visit, for instance. Those consequences are much more significant. They may not be consequences that are exclusively consequences for Canada. They may be consequences for the security of other nations which will affect the security of Canada, as we saw with 9/11.

Thank you.

COMMISSIONER IACOBUCCI: Thank you, Mr. Peirce.

Do my counsel have any questions to raise?

Thank you very much. You have been very helpful and I appreciate it.

Can we take a pause for 10 or 15 minutes?

THE REGISTRAR: Please stand. Veuillez vous lever.

--- Upon recessing at 11:22 a.m. /

Suspension à 11 h 22

--- Upon resuming at 11:43 a.m. /

Reprise à 11 h 43

THE REGISTRAR: Please be seated. Veuillez vous asseoir.

COMMISSIONER IACOBUCCI: I understand the Ontario Provincial Police will just be submitting its written submissions. Is that right?

Thank you very much. Thank you for your submissions.

Ms Kalajdzic...?

SUBMISSIONS ON BEHALF OF ABDULLAH ALMALKI

MS KALAJDZIC: Good morning, Commissioner, counsel.

COMMISSIONER IACOBUCCI: Good morning.

MS KALAJDZIC: For the record, my name is Jasminka Kalajdzic. I, along with Paul Copeland, are here to represent Abdullah Almalki.

My co-counsel and I have divided our time roughly equally, I hope. I will cover two areas briefly. First, the factual context for the questions posed in the Notice of Hearing. Second, something that was touched upon in our written

submissions and in some of the other intervenors' submissions but which, given what we heard this morning, I think merits fuller exploration, and that is the nature and effect of a preemptory norm or jus cogens, specifically the prohibition against torture.

I believe it is worth expanding upon this norm since it affects all of the other standards of conduct at issue here.

Mr. Copeland will then make submissions about information sharing and the potential for information sharing to, in effect, become opportunistic rendition.

Ms Jackman and Mr. Norris will address the issues raised by questions 2 through 5 of the Notice of Hearing.

Turning then first to the context, to be as helpful as we can be in making legal submissions on standards, we will focus our arguments --

COMMISSIONER IACOBUCCI: Excuse me, I'm very sorry, but is counsel for the AG of Canada --

MR. FLAIM: Yes. Mr. Peirce and Mr. Landry.

COMMISSIONER IACOBUCCI: I apologize. Thank you.

MS KALAJDZIC: To be as helpful as we can be in making legal submissions on standards, we will be focusing our arguments based on what we do know and in this way ground this discussion of standards to the context directly relevant to your mandate.

What we do know is derived from the public factual findings of Justice O'Connor in the Arar report. There is a helpful list of the salient facts in, amongst other places, Human Rights Watch's brief at pages 3 through 6.

I will add or emphasize the following facts all recorded in the Arar report. I have page references if you need them.

First, there was a pattern of investigative practices in the relevant time period. That pattern included Canadian agencies sharing information with foreign agencies, information that may be used by the foreign agency to detain or arrest a Canadian.

Second, Canadian agencies had a practice of sharing travel information with the United States and possibly others whenever a terrorism-related suspect travelled outside of Canada for any reason. The American practice at the time was to notify the country of destination.

Next, we know that Canadian agencies shared their entire investigation database with U.S. agencies without caveats and without vetting the file for accuracy or relevance.

We know that Canadian agencies sent questions to Syrian Military Intelligence via the Canadian Ambassador and consul with the request that the questions be put to Mr. Almalki during his interrogation.

We know that Canadian agencies received information from Syria, including a so-called confession from Mr. Elmaati, and that no reliability assessment was done to determine if torture had been involved in extracting that confession.

Justice O'Connor used the word "dismissive" when he described how Canadian officials reacted to allegations of torture.

We know that Canadian agencies continued to pursue investigations of our clients while they were detained in conflict with or to the prejudice of diplomatic efforts to have those Canadians detained abroad brought home.

We know that there was a practice of leaking information by Canadian officials to the media to accuse Mr. Arar, Elmaati and Almalki of links to al-Qaeda.

We know that all of our clients, as well as Mr. Arar, were interrogated and tortured in the same Syrian prison. And I say we know that they were tortured because that was the finding of Professor Toope. I recognize that that is not a finding that the government accepts for the purpose of this inquiry.

We know that Mr. Arar and Mr. Almalki were at Far' Falestin prison in Syria at the same time, most dual nationals of Syria, but while Canadian consular officials visited Mr. Arar on several occasions, they did not see Mr. Almalki once.

We know that Mr. Elmaati, who was not a Syrian national, did not have consular visits while in Syria. These

facts I think are relevant to the lengthy discussion we heard this morning about the issue of dual nationality.

We know that the Canadian Ambassador met with Syrian military officials more than once and organized meetings between the RCMP and the head of SMI.

Finally -- and this bears on the issue of imminent threat to national security which figured in the factors to be taken into account when dealing with a regime that has a poor human rights record -- we know that certainly before January 2003, and probably months earlier, though Justice O'Connor doesn't give a definitive date, there was no imminent threat to the security of Canada.

That is found at page 213 of his report.

For the purposes of the submissions that you will be getting from each of the three men's counsel, it is also important to bear in mind specifically that Canadian officials knew about Syria and Egypt's poor human rights record in the relevant time period, being 2001 to 2004.

That knowledge is detailed in, again, Human Rights Watch' s submissions, as well as Amnesty International's. There is an exhaustive survey of the state of Canada's knowledge of those human rights records contained in the Arar report, pages 235 to 250 of Volume 1.

But very briefly, DFAIT knew about the risk of torture. It prepared annual reports outlining Syria's poor human rights record and various officials within DFAIT who

testified at the O'Connor Commission expressed concern about torture in the relevant time period.

CSIS knew. In July 2002 a memo was sent to the Assistant Director reporting information that was identical to that contained in the U.S. State Department reports and Amnesty International reports. In particular, the memo reported that torture was most likely to occur at a detention center run by one of the security services.

This is a particularly important piece of information given that by that date, by July 2002, all Canadian agencies knew that Mr. Almalki was a Syrian detention center and that Mr. Elmaati had been in a Syrian detention center.

The RCMP knew about the poor human rights record.

Again, in July 2002 a Briefing Note was sent to the Commissioner of the RCMP stating that there were indications Mr. Elmaati had been exposed to "extreme treatment in Egyptian detention".

All of these facts bear on the submissions that we are making and in particular they bear on the overriding norm that should inform all standards to be defined by this Inquiry. The overriding norm is the prohibition against torture.

I will turn now to the notion of jus cogens, or jus cogens as some might pronounce it, in international law.

I will start first with what I hope is by now self-evident: the prohibition against torture is a preemptory norm.

The Supreme Court of Canada said so in Suresh. The International Criminal Tribunal for the former Yugoslavia confirmed that principle in 1998 in the case of Furundzija, and the House of Lords confirmed it as recently as 2005 in the seminal case A and Others.

What is the effect of the prohibition against torture being a preemptory norm?

To answer the question, it is helpful to go to the International Criminal Tribunal's decision in Furundzija to better understand the effect of the prohibition having a jus cogens status.

In that decision the court stated that the violation of jus cogens such as the prohibition against torture specifically had direct legal consequences for the legal character of all official domestic actions relating to the violation.

Quoting from paragraph 155 of the decision:

> "The fact that torture is prohibited by a peremptory norm of international law has effects at the interstate and individual levels. At the interstate level, it serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the jus cogens

value of the prohibition against torture, treaties and customary rules providing for torture would be null and void ... and then be unmindful of a State say taking national measures authorizing or condoning torture ..."

This is an important concept. Norms powerful enough to nullify treaty obligations surely must also impact the conduct at the national level. The main threat to the protection of a jus cogens norm such as the prohibition against torture does not result from bilateral and multilateral treaties that facilitate its perpetration, but rather from acts of state organs or officials towards individuals or groups.

The dictum in Furundzija that jus cogens binds the state both in its treaty obligations and with respect to acts of the legislature, executive and judiciary are apposite to all of the questions that you posed in the Notice of Hearing.

The impact of jus cogens norms on legal ordering has been commented on by jurists for many decades.

The International Court of Justice stated in the Barcelona Traction case that jus cogens are obligations towards the international community as a whole as opposed to bilateral obligations.

Quoting from that decision, paragraph 33:

"By their very nature, they are the concern of all states. In view of the

importance of the rights involved, all states can be held to have a legal interest in their protection."

Jus cogens are those rules from which states cannot derogate by agreement, even in their mutual interstate relations. This aspect of jus cogens is critical in the face of the Attorney General's submissions that Canadian officials were obligated to share information, send questions, et cetera, by virtue of their various commitments to fight terrorism.

If a jus cogens rule cannot be derogated by treaty, it cannot a fortiori be violated by unilateral act or omission. An act or omission which is contrary to a jus cogens rule is devoid of any legal effect. It cannot give place through recognition, acquiescence or prescription to a new legal regime as with violations of other rules of international law.

For that concept of acts and omissions, contrary to jus cogens being devoid of legal effect, you could go to the 1966 Conference on International Law held in Greece where this topic was specifically the concept of jus cogens in international law.

Jus cogens do not exist to satisfy the needs of individual states but in the higher interest of the whole international community. It is perhaps best stated in French, as typically things do sound better in French.

In 1953 the Yearbook of International Law Commission the French delegate wrote about jus cogens.

He said:

> "Cette conception provient immédiatement de l'idée que la volonté de l'État n'est pas la seule source du droit, bien au contraire. En dehors et au-dessus de la volonté de l'État, il y a d'autres principes -- d'une origine plus noble -- que l'État doit respecter parce qu'ils sont antérieurs et supérieurs a l'État."

It is the notion that jus cogens norms, like the prohibition against torture, are superior to that of the state.

In terms of the universal acceptance of jus cogens in both the East and the West, writers on international law are unanimous in their acceptance of the idea of an international jus cogens.

In 1963, at the 15th session of the International Law Commission of Geneva, members accepted the idea of jus cogens unanimously.

An understanding of the legal significance of jus cogens and the prohibition against torture is critical I submit in approaching the question of what standards of conduct were in effect in 2001 to 2004.

The sum total of the Attorney General's submissions, in my respectful submission, is that in the war on terror human rights may need to be sacrificed. That is the net

effect of those submissions and that cannot be the standard, not in 2001, not in 1990, not in 1939, remembering that following World War II the fundamental norms identified by Nuremberg, which included the prohibition of genocide, slavery and torture, are the direct ancestors of the fundamental norms we now recognize as jus cogens and have recognized as jus cogens for at least three decades.

The Attorney General has emphasized that obligations were unique, or that the obligations in question must be analyzed with respect to the unique period of history. There is nothing unique about 2001 to 2004 when you are considering the prohibition against torture.

The very nature of the war on terror, as it has been defined and conducted, is that it is unending. It has certainly not been declared over.

Your findings will have ramifications for the future conduct of that war and for future investigations.

The UN has defined how that fight against terror should be waged in various resolutions and reports that are as important in guiding as the ones referred to by the Attorney General when he outlined Canada's various obligations to fight terror.

The UN Secretary General wrote in his August 2002 report to the Security Counsel and General Assembly that:

"... terrorism deserves universal condemnation and the struggle against terrorism requires intellectual and moral clarity."

Further:

"... the protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. It must also be understood that international law requires observance of basic human rights standards in the struggle against terrorism."

Further:

"While we certainly need vigilance to prevent acts of terrorism and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities such as human rights in the process."

Finally, in the same UN report it is stated unequivocally that:

"... the various international instruments on human rights include clear limitations on the actions that states may take within the context of the fight against terrorism."

So when you are defining standards, those standards can be found in large part in the very international instruments and resolutions that the Attorney General relies upon in his submissions.

With respect to the argument about the limited territory -- I'm not pronouncing it properly -- territoriality of the Convention Against Torture, I believe Amnesty and Human Rights Watch will be dealing more fulsomely with those submissions, but I will say this: The CAT codifies the jus cogens obligations. Read as a whole, the CAT cannot be so inconsequential as my friend would have us believe.

The UN Special Rapporteur on Torture, in a statement dated June 26, 2006, reminded us that it is not so limited, that it is not limited to territoriality. He said this, and I quote:

> "The alleged justification for human rights abuses has been that a new brand of international terrorism is forcing us to think outside the box and that torture has the potential to make us safer. It does not. The notion that torture may save lives by securing information is fundamentally flawed."

I pause there to say that that is in stark contrast to what the Attorney General said in his closing remarks

about the consequences of an error. I believe his answer was that the consequences of an error might be borne by all Canadians.

The UN Special Rapporteur on Torture would remind us that the consequences of breaching human rights is that security is compromised.

Further in the quote from the UN Special Rapporteur:

> "The notion that torture may save lives by securing information is fundamentally flawed. Torture nurtures fear and hatred and undermines popular cooperation with police and intelligence services. On the practical level the result is a more, not less, dangerous world. On the moral and legal level torture is democracy's ultimate antithesis. I remind governments around the world that they are not only obliged to refrain at all times from using torture, they also have a duty not to transfer persons in their custody to countries where they are at risk of being tortured, a duty to refrain from encouraging torture anywhere in any way, and a duty to actively prevent

torture inter alia by bringing torturers to justice."

Looking at the torture convention itself, Mr. Peirce referred to Article 2. If you look to Article 4 and Article 5, there is no limitation on territoriality.

Article 4 of the Convention requires that acts of torture be made criminal offences and equates to acts of torture with an attempt to commit torture as an act by any person which constitutes complicity or participation in torture.

In our written submissions we discuss how complicity could be defined and that it would include wilful blindness.

Article 5 requires state parties to establish jurisdiction over torture in a number of broad scenarios, even where the torture has taken place outside the state's jurisdiction. It specifically says when the victim is a national of the state, if the state considers it appropriate it will take action. It will take jurisdiction.

Mr. Commissioner, as I hope I have emphasized, security cannot be achieved by sacrificing human rights. That is the message that this Inquiry needs to send.

Peace and security are furthered, not hampered, by respect for human rights. That is with the UN tells us. It is what the concept of jus cogens dictates in the context of these cases.

We submit that breaches of human rights in the cases of these three men, based only on the facts we already know, should be the impetus for the reaffirmation of standards of contact which direct that only by protecting the human rights of all citizens does Canada fulfil its internal obligations and respect the rule of law.

As recently as yesterday, a U.S. law professor was quoted in a Canadian newspaper describing Canada's international reputation as a protector of human rights. He warned that by not protecting human rights in a particular case, the government's ability to push for human rights issues in the future is damaged.

That notion I think bears on this concept of reciprocity greatly. The legacy of this Commission should be, in our submission, not the erosion of that reputation described by this professor, but rather the entrenchment of our respect for human rights as coextensive with our national security.

Those are the general opening comments and the overview of jus cogens that I had.

I would be happy to answer questions before turning the microphone over to Mr. Copeland.

COMMISSIONER IACOBUCCI: I have one question.

I have no issue with the statement of the jus cogens and the power of the Prohibition Against Torture and so

on. It's just your submission about information sharing with foreign regimes. It is paragraph 36 of your submissions.

I'm just concerned about the breadth of this proposition that:

> "Information sharing with foreign regimes that are reported to engage in torture or inhuman treatment of detainees violates international human rights law and the Criminal Code."

That sounds pretty absolute. Any kind of information sharing other than that, without anything else, is in your submission violative of international human rights law and the Criminal Code.

Can you help me out in saying why is that the case? What if there are conditions to it? What if there is reasonable inquiry? What if there are assertions, guarantees that things are not going to happen? Just the simple fact of information sharing.

MS KALAJDZIC: Well, I guess my first answer --

COMMISSIONER IACOBUCCI: Forgetting about travel itineraries, questioning people; just information sharing.

MS KALAJDZIC: I have a number of responses and Mr. Copeland will be supplementing them, because he is going to deal with information sharing more directly.

First, your question highlights the problem with our trying to make submissions about absolute standards or in general. We are here to address the context within which our clients, our three clients, found themselves.

We do acknowledge in our submissions in a much earlier paragraph that information obviously happens. But Justice O'Connor was very clear that it has to happen within certain parameters, including that the information is accurate to the smallest detail, that there has to be a consideration for the use to which the receiving agency or state is going to put the information; that there has to be vigilance for potential human rights abuses relating to the target of that information.

So we acknowledge that information sharing happens, but it has to happen, as you pointed out in your questions to Mr. Peirce, in a responsible and principled manner.

Now, when we talk about the Convention Against Torture, again referring to the context in which our clients found themselves, there was a real and credible and reliable basis for knowing, or that they ought to have known, Canadian officials ought to have known, that the men were going to be tortured as a result of the information that was being shared.

There was a credible basis for knowing and possibly expecting that sharing travel information would result in their detention.

And given the human rights records of those receiving states, it was improper and below the standard of care to

put these men in a situation where the risk of torture was very real.

MR. LASKIN: If I could perhaps just follow up because your last comment, your last few comments were helpful in trying to bring down to a formulation of a standard some of the abstract principles that you expressed when you spoke earlier on in your submissions about the effect of the norm is to delegitimize any authorization or condemnation of torture.

You have used words like complicity, wilful blindness, knew or ought to have known.

Is there anything more you can help us with -- and maybe your colleagues will be doing this -- by way of kind of operationalizing the standard that you are referring to?

Is it a "knew or ought to have known that something would result"? Is it, in the language of Article 3 of the Convention Against Torture, can we get beyond that where it says substantial grounds for believing that the person would be in danger of being subjected to torture?

How do these norms which I hear no one disagreeing with, translate into an operational standard in your submission?

MS KALAJDZIC: Well, I don't know that no one disagrees with it. I think that the submissions about the Convention Against Torture were disturbing in the sense that they were extremely limiting of the scope and impact of the Prohibition Against Torture as it was codified in the Convention.

Section 269 of the Criminal Code of course is our national embodiment of the Convention Against Torture, and I note I think in passing -- I would have to check, it has been a while. But I don't believe that there is a territoriality restriction in Section 269.

The idea of complicity in torture -- or the idea of complicity and aiding and abetting, being a party to an offence under the Criminal Code, is something that has received judicial consideration.

I think we touch upon that in our submission; that anybody who does or omits to do anything for the purpose of aiding any person to commit --

MR. LASKIN: That's a criminalized standard that requires an intention to assist essentially in torture. Is that --

MS KALAJDZIC: Intention or wilful blindness.

MR. LASKIN: And at what level? Do you have a submission about the circumstances or the definition of "wilful blindness" in this context?

MS KALAJDZIC: Well, certainly Professor Burns testified about wilful blindness to a material or real risk of torture during the Arar Commission. That is cited a paragraph 35 of our submissions.

If you could give me a moment?

--- Pause

MS KALAJDZIC: I would have to get the cite for you, but my recollection is that there is a case called Hill which discusses the meaning of subjective intent for the purposes of the Criminal Code and that it includes wilful blindness.

Sorry, it is not Hill; it is Roach.

COMMISSIONER IACOBUCCI: Would you mind sending the cite, the case as a supplementary undertaking?

MS KALAJDZIC: Sure. It may have been a case you sat on, Your Honour.

COMMISSIONER IACOBUCCI: That's what I'm thinking about when you said it.

--- Laughter / Rires

MS KALAJDZIC: Actually, I might even have the citation right here.

--- Pause

MS KALAJDZIC: Well, without wasting your time, while Mr. Copeland is making his submissions I will find the citation and bring it to your attention.

But certainly the concept of wilful blindness would bring you within the complicity or party to an offence provisions of the Criminal Code.

And obviously our security agencies and criminal enforcement agencies have to abide by that standard. They cannot, in the course of their investigations, act contrary to the Criminal Code. So I submit that that would be helpful in determining what those standards might be.

COMMISSIONER IACOBUCCI: We will look at the case. Wilful blindness does have a mens rea component to it. Wilful blindness. It's not just blindness; it is wilful, deliberate.

Anyway, we will follow that up.

Thank you very much.

MS KALAJDZIC: You are welcome.

SUBMISSIONS ON BEHALF OF MR. ALMALKI

MR. COPELAND: It will take me a moment or two to get set up here.

As my colleague said, we have tried to divide up the submissions between the four counsel.

At the outset I'm going to attempt to provide you -- and we did some in our submissions -- with the national and international context for the 2001 to 2004 period.

Before I start that, I want to stress -- and it has certainly been mentioned in many of the submissions -- the strangeness and the difficulty of this process, of making submissions in what is close to a factual vacuum.

We have the Arar Report certainly and that gives us some significant information. But as you know, we have not one factual word from your Inquiry yet. We have not heard or had the opportunity of cross- examining one witness. The only thing we have participated in as each counsel individually is the torture examinations of our own client.

The government is in a very different position. They have all the information. They have all the documents that have gone to you -- or I presume they have all of the documents that have gone to you.

My colleague, my co-counsel, referred you to Mr. Justice O'Connor's report on Syria's human rights reputation and I must say -- and I went through it again coming up on the train yesterday -- it is a most depressing read, in my submission. I can take you through it if you want. She covered parts of it.

It is my suggestion to you that there are many parts of that where CSIS and the RCMP, sometimes when they had the information, sometimes they just didn't bother to get the information. There was information out there that suggested that Syria had a terrible reputation for human rights, that Syria and the Syrian Military Intelligence in particular engaged in torture.

Really little was paid to that by Foreign Affairs, but even less by CSIS and the RCMP during the course of their dealing with things.

I'm not going to take you through the chapter. I have a highlighted copy and if you want, I will leave you that copy. It is both tabbed and highlighted there.

As I say, I don't think there was much attention paid to the human rights record of Syria, much to the detriment of my client and the other two men.

I would submit to you that the standards were in place in fact for how you deal with agencies that have an improper human rights record and that they are laid out in section 17 of the CSIS Act. They are laid out in the Guidelines. And nobody paid any attention to them.

They didn't comply with them is my impression.

Again, I'm operating very much in a vacuum. We made submissions before you in relation to the issue of whether or not there was a liaison agreement with Syria. I still don't know whether there was a liaison agreement with Syria. It would be my impression from several factors that there probably was one. It is my impression that there probably was a liaison agreement with Egypt.

I can tell you from one of the cases I was involved with that I know that a CSIS representative went over and trained with the Egyptian intelligence service fairly recently. And Egypt has as bad a record for human rights as Syria, in my submission.

The concept of information sharing is a very broad concept, and it may be one thing to say we have information that somebody is likely to come to your country and is likely to engage in terrorist activity there. That is one form of information sharing. It is a very different information sharing here.

I mean, that may have been part of it.

There is also the questions that were sent over. My recollection of those questions and of what we know about them is that the questions in fact contained answers.

Did Mr. Almalki sell to the Taliban? I mean, that was a question he was asked in Canada and it was contained in the questions that were asked again when he was in Syria.

So they are not in fact sharing information in that context. They are using the process to try and extract answers, and I think somewhere in their phrasing is truthful answers.

It is in effect, in my submission, a form of opportunist rendition. It's not like in Mr. Arar where they shipped him first to Jordan and then to Syria where, in the words of Mr. Hooper, the Americans could have their way with him. But it is not just the question of information sharing, and I think you have to bear that in context with looking at what happened.

We attempted in our submissions to outline some of the American context of what went on in this time period, because that is, in my submission, informative as to how to look at what the Canadians were doing and what the Canadians knew about that situation.

The horrors of Abu Ghaib are very well known at this point. Extraordinary rendition is well-known. And it is well known that it is something that started in the Clinton administration rather than in the Bush administration.

The concept of CIA black sites was very well-known during this time period. It is becoming better known now. The monitoring of CIA flights, including flights that apparently went through Canada of transporting people, that is known now.

In paragraph 13 of our submissions we point out that the American abuses are coming more to light now.

At paragraph 16 of our memorandum we have the Gonzales memorandum which contains, in my submission, a definition of torture that is so far beyond the pale that probably the people who wrote it should be up on some sort of charges. It is only torture if you are doing the equivalent of removing a vital limb, a limb or a vital organ.

I mean, it just seems to me that as well beyond the appropriate definition of torture.

The water-boarding of Abu Zubaida has received a great deal of attention recently and there is reference to it again in our submissions. That has become more in focus because of the CIA destruction of the tapes of the water-boarding of Abu Zubaida.

The Canadian context of what was done and what CSIS knew, and whether there was a liaison agreement, are set from paragraphs 39 to 49 of our material. The issue of whether there was a liaison agreement is covered there, and that is covered also on page 28 of the government's submission. They mention liaison agreement.

They mention it again in paragraph 80 of their submissions.

There is an extensive outline at paragraph 50 of our submissions as to various aspects of -- I'm sorry, I should stay somewhat near the microphone -- various aspects of what the Canadians knew or didn't conclude in fact.

There is the testimony of Ward Elcock before the Arar Inquiry as to whether Syria engages in torture. There is the testimony of J.P. in another matter. There is the comments of Mr. Hooper that were originally edited out of the Arar Inquiry about the U.S. wanting to have their way with Mr. Arar.

There are the comments from the SIRC Annual Report from 2004-2005 where they claim to SIRC that they were ensuring that nothing that they were putting in their information came from torture.

And the other comment again from the other CSIS representative who testified in one of the other cases, that they never asked -- he was an analyst and never asked a question at all about whether the information he was getting came from torture.

When you look at all of that, in my submission that gives you some context for the Canadian situation that you are looking at during this time period.

It is my submission, as well, that it is going to be very difficult for us to try and get that information actually factually before your Inquiry.

I'm not sure how we are going to attempt to do that, how we are going to make you aware of the facts that we put in here. I can provide you with transcripts if that is the appropriate way of doing it.

But it is my submission that those are factors that you should take into account when looking at what standards applied to CSIS.

The other factor of course is that I expect that there will not be one single possibility that we will ever get to cross-examine anybody from CSIS in this Inquiry to try and extract the type of information, and it is only by a fluke in many ways that we have any of the information that is provided in paragraph 50.

As well, there is in the 2005-2006 SIRC report which makes reference at page 13 -- about the middle of the page it says:

> "However, SIRC did note some concerns. First, it found that even though CSIS was fully compliant in providing certain information to a foreign agency, this could have contributed to the agency's decision to detain a Canadian citizen, who is also

a CSIS target, upon arrival in the foreign country."

We assume, perhaps incorrectly, that that was Mr. Almalki.

They go on to say in the next paragraph:

"SIRC also noted that questions submitted by CSIS to this agency via third party may have been used in interrogating a Canadian citizen in a manner that violated his human rights."

Again I would ask you to bear that context in mind when you are trying to assess what standards should have been in place.

Now again, my submission is that there were standards under section 17 and under the various guidelines.

On the issue of the government --

--- Pause

COMMISSIONER IACOBUCCI: Go ahead.

MR. COPELAND: In regard to the government's submissions, I'm not going to comment very extensively on them, but I want you to note the difference in tone and comments -- at least my interpretation is there's a difference in tone and comments -- in regard to the CSIS and RCMP section in regard to the DFAIT section.

I would refer you to paragraphs 94, 96, 128 and 148.

You might ask yourself why there is a difference in those standards. You may recall, Commissioner, the meeting we had in camera on September 17th where I raised the issue of whether or not government counsel, or the AG's counsel, was in a conflict of interest situation and I had asked -- and I'm only going to refer to my comments, not his comments at that -- whether he was speaking on behalf of the Government of Canada or on behalf of DFAIT or on behalf of CSIS or on behalf of the RCMP, or whether he was speaking on behalf of the members of those organizations.

You may recall what we were discussing was the protocols around the torture interviews.

Part of the issue that was being discussed was whether those men had been tortured.

I would ask you to consider when looking at the standards of conduct why there was a difference in their submissions in regard to CSIS/RCMP and DFAIT. I had expressed the concern before and I express it again: Where is the Harper government, the Government of Canada on the human rights issue?

They raise the human rights issue with China, but what about the human rights issues in relation to the Canadian agencies?

I followed up on those discussions in that meeting with a letter to Mr. Peirce on October 1st, and the very last question I put to him on page 3 of that letter was:

> "Would you please advise me as to the position that the Government of Canada takes in regard to whether or not my client Abdullah Almalki was tortured in Syria?"

I didn't receive a reply to that at all.

As you know, of course you have spent many days doing hearings to deal with that issue, and I would respectfully suggest part of that is because the Government of Canada takes no position in regard to whether or not the men were tortured. They acknowledge mistreatment and that's as far as they have gone.

I want to make some comments in regard to more specific aspects of this case.

Mr. Peirce talked about dual citizenship and my colleague talked about it a little bit and said well, they really couldn't deal with Mr. Almalki because of the dual citizenship issue. I want to make several comments on that.

One, it is my submission that his illegal imprisonment in Syria was most likely due to the sharing of Canadian information directly or indirectly with the Syrians. We take the view that it is very likely that Mr. Almalki's release was delayed by a whole variety of aspects.

One, the direct and indirect sharing of information with the SMI; requesting the SMI for direct interrogation; sending questions to the SMI; the Canadian government never requesting his release, as far as we know; and the delay by the Canadian government in responding to Mr. Edelson's request that they provide a letter to go to the Syrians saying he didn't have a criminal record and that there was no arrest warrant for him.

The Canadian government, in our submission, should not be able to use the dual citizenship excuse for relieving itself from its obligations to come to the aid, or at least come to some assistance for Mr. Almalki.

It would appear that what happened to Mr. Almalki was the result of the actions of the Canadian government. Our submission is they should have done everything to try and secure his release.

Our submission, as well, is that they should have considered the dual citizenship before they actually provided the information. It puts him at a much greater risk, in our submission.

In regard to Mr. Almalki, while there wasn't family contact early on, it is very apparent that the government knew that he was in custody fairly early on and they did nothing in relation to it.

In regard to their non-activity in working for his release, again we don't know anything about any efforts they

made to have him released, but we want to contrast that with Mr. Arar.

Mr. Arar is a dual citizen of Syria and Canada, very much like Mr. Almalki, in fact exactly like Mr. Almalki. The Canadian government worked to ensure the release of Mr. Arar. They pushed through many channels: Foreign Affairs Minister of Syria, SMI, and in fact the Syrian President and even the Arab League.

They thought about sending questions for Mr. Arar but they didn't do it.

They may well, in regard to the whole information sharing in the interrogation of Mr. Almalki, Canadians clearly shared just a ton of information with the Americans, totally without caveats applied and basically everything that they got on every disk that they could find, loaded it on a disk and passed it over to the Americans.

Either the Canadians or the Americans passed it to the Malaysians, that's clear, in our submission. And if it is the Americans who passed it along to the Syrians, in our submission the Canadian government should not be allowed to hide behind the American sharing of that information.

As well, the accuracy of the information that we shared is important, in our submission. One of the things that they provided to the Americans and probably to the Syrians was that our client was a high-level al-Qaeda person in Canada,

probably the highest level in Canada, and they actually provided a diagram that showed that.

Again, it is not your mandate -- and you have made that very clear to us. It is not your mandate to look at the quality of the investigation that was done of Mr. Almalki and see whether or not it was a justified investigation.

I would point out that Mr. Almalki was investigated now for nine and a half years by CSIS and the RCMP. There has never been a charge laid against him.

One of the questions you have to ask yourself on the standards of conduct is: What does it take to stop information sharing of the type that happened here?

It is our submission that CSIS and the RCMP, and on occasion some members of DFAIT, turned a blind eye to serious well-known poor human rights record. They turned a blind eye to Mr. Elmaati's statement to the Embassy officials in Egypt about his torture in Syria. They turned a blind eye to Mr. Elmaati's and Mr. Almalki's consular files that contained information that they were being tortured.

We don't know how DFAIT got that information.

They turned a blind eye to Mr. Arar's public statement about his torture in Syria.

They turned a blind eye to Mr. Arar's public statement about Mr. Almalki's torture in Syria.

They turned a blind eye to Mr. Nureddin's statement to Canadian officials about his release, after his release about his torture.

And even after all of that, they sent questions to the Syrians, one in February of 2004, the next one in March 2004. In the first one he was still in custody. The second set of questions was sent after his release.

Again, I commented on it earlier. They sent questions that had been asked of Mr. Almalki in Canada.

And in relation to Mr. Almalki -- and I believe Mr. Peirce touched on this a little bit -- it is clear that Mr. Almalki said he would continue to meet with CSIS but he wanted a lawyer present, and CSIS didn't follow up on that.

I believe that is accurate in relation to Mr. Elmaati as well.

--- Pause

MR. COPELAND: The hindsight issue is mentioned in the government submissions. It was mentioned by Mr. Peirce. In my submission, that is not something that you should give much weight to.

It is very clear from Mr. Hooper's comments that in 2002 they knew that the Americans were sending people to Jordan for the purposes of getting their way with them.

The effect of all of this -- and it is covered some in paragraph 22 of our submissions -- is that our client was

in custody in horrible conditions, tortured and spent 22 months in Syria as a result of the actions of the Canadian government.

It has had a huge and horrible impact on him. It has destroyed his business. It has been extremely difficult for his family, separated him from his children, and it has tarnished his reputation in a manner that I think none of us can really imagine.

In regard to the Attorney General's submissions, which seem to be that information sharing is almost fine in the 2001 to 2004 period, if that is the position of the Government of Canada, if that statement is setting out the responsibilities of Canadian agencies and officials towards Canadian citizens, in my submission it describes a country that I do not recognize.

Those are my submissions, subject to any question you have.

COMMISSIONER IACOBUCCI: I have a comment and then a question.

The comment is your reference to the American experience, to the present government's attitude is on certain issues relating to China and so on, I don't need any more work to do for this Inquiry so I am not going to follow-up on that.

MR. COPELAND: No, I wasn't asking you to.

COMMISSIONER IACOBUCCI: Well, I just wanted you to know I won't be following up on it because we have enough to do.

The other thing I wish to make quite clear. You say you may have difficulty getting information about certain events. Please, my understanding that invitation has been expressed any time you or your colleagues wish to give us information on anything relating to your clients, as we were willing to spend an awful lot of time with your clients, for which we are grateful, on the matter of mistreatment and torture, we would also welcome any kind of information from you and your clients and we would be much pursuing that with you.

MR. COPELAND: Okay. My question is -- and I probably shouldn't ask it in this forum -- is: If I am providing you with transcripts, is that a sufficient method of getting it before you?

COMMISSIONER IACOBUCCI: Well, I would like to pursue that with you and my counsel.

MR. COPELAND: Yes, okay. Thank you.

COMMISSIONER IACOBUCCI: Thank you very much.

MR. COPELAND: You are welcome.

MS KALAJDZIC: I'm sorry, I will be one minute. I found the reference and happily no amnesia on your part. It wasn't a case that you sat on, Your Honour.

It is an Ontario Court of Appeal case, Queen and Roach, 2003 192 CCC, where it talks about wilful blindness as grounding party liability in section 21 of the Criminal Code.

But I want to issue a caveat, if I could use that word.

When we are talking about wilful blindness in the context of complicity and liability for the purposes of a Criminal Code offence, that is very high standard for the purposes of a Criminal Code offence.

COMMISSIONER IACOBUCCI: Yes, exactly.

MS KALAJDZIC: I would not submit, and I hope that you don't take my submissions to suggest that only at that high standard would it be inappropriate to share information.

Certainly that is not the standard that we are saying was involved in a particular time period.

I would also suggest that the distinction needs to be made between information sharing sort of in the abstract. There has to be an assessment of the nature of the threat, perceived threat, and certainly different considerations would apply once a Canadian is detained.

Information sharing with the receiving state, the detaining state, then I think becomes a much higher standard. A much more protective standard in terms of human rights would apply in that circumstance because now the person has been detained.

MR. LASKIN: So if I could, how would you formulate the standard in that context?

Just to give you some help, we see in paragraph 36 of your submissions one expression of a standard follows the passage to which the Commissioner referred earlier, but it says:

> "So long as there is a real or material risk that torture may result from the sharing of information, Canada should not share that information."

Is that the standard? Is it different from that in the context that you were just discussing?

MS KALAJDZIC: No. I think "may result" is the standard.

COMMISSIONER IACOBUCCI: Thank you very much.

I guess we can break for lunch.

I must say, we seem to be on time. Could we break for lunch, would that be agreeable, and reconvene at 2 o'clock?

Is this room secure? No, okay.

Thank you very much. We will adjourn until 2 o'clock.

THE REGISTRAR: Please stand. Veuillez vous lever.

--- Upon recessing at 12:43 p.m. /

Suspension à 12 h 43

--- Upon resuming at 2:00 p.m. /

Reprise à 14 h 00

THE REGISTRAR: Please be seated. Veuillez vous asseoir.

COMMISSIONER IACOBUCCI: Thank you. Yes...?

SUBMISSIONS ON BEHALF OF AHMAD ABOU-ELMAATI

MS JACKMAN: Good afternoon. For the record my name is Barbara Jackman and I'm representing Ahmad Elmaati.

I may not take the whole hour and if I don't, I will give some of my time to Amnesty. I'm sure they could use it.

I would support the submissions of Amnesty International, Human Rights Watch, CARECAN and the other organizations, as well as those of Mr. Nureddin and Mr. Almalki. And I share the concern that has already been expressed to you about the fact that we are making submissions without having a factual summary from which to tie the principles that we discussed to the actual facts of the case.

And I would hope, Mr. Commissioner, that at the end of the day when the make final submissions to you that we can revisit some of these issues, if we feel it is necessary once we do have a factual summary.

COMMISSIONER IACOBUCCI: I couldn't hear that, Ms Jackman.

MS JACKMAN: That we would be allowed to revisit some of these issues if we feel it is necessary once we do

have a factual summary and we are involved in making further submissions, which I expect we will be able to make at some point.

I wanted to start off by just reiterating -- I'm not going to go through all the submissions that have already been filed or the reply, but reiterating the sort of general points that I had started off with in the Outline of Submissions that have been submitted to you.

I think I identified six points and I might now have a couple more to add to it.

The first general principle in terms of the questions asked is in our submission that Canadian officials are obligated to protect the human rights of those within its borders and its citizens abroad. There may be a debate about the degree of consular services, but certainly in the human rights context it is an expectation that is -- or a positive obligation that is rooted both in the Charter of Rights and Freedoms and in Canada's international human rights obligations.

Further, the Vienna Convention on Consular Relations does recognize that consular officials will represent the interests of its nationals abroad.

A concern that I had about the Attorney General's submissions in respect of human rights was that while the Attorney General made the submission that Canada does not continence torture and that it does factor into its assessment of what steps to take, it factors in human rights principles, or human

rights concerns, I didn't get a sense from Mr. Peirce this morning or in his written submissions as to the degree to which the human rights concerns framed the assessment.

Is it but one of many factors or is it a principal or significant factor? It is certainly our submission that it is a principal, if not a determinative factor, when you are talking about torture, not one of many factors.

The closest analogy is probably the Baker case where the Supreme Court -- you were probably on the panel -- recognized the best interest of the child as being a primary factor. Now, we thought it was determinative in that case. Certainly when you were talking about torture I think it is determinative.

But it is a gap in the government's submissions, in my submission.

The second point about human rights principles I think that arises from the discussion today in the written arguments is that when we are talking about standards of conduct, it is not those that have already been reduced to writing. Standards of conduct are ones that you draw from international legal obligations, human rights obligations, domestic and international, and it is not a question of whether we are bickering about the wording of the CAT, the Convention Against Torture, as Mr. Peirce was quick to point out that it doesn't cover the exact situation.

If you take the human rights regime as a whole, domestic and international, it is covered. It doesn't matter how the CAT is worded.

And I note that because that was the position that the government has -- that is a position that the government has taken on the Convention Against Torture in the past. Certainly it was the issue before the Federal Court of Appeal and the Supreme Court of Canada in the Suresh case, was their argument that the Convention Against Torture did not cover a return, a deportation of someone to torture because of the wording of the Convention.

I would ask or caution you against falling into a trap of analyzing the CAT to see whether or not the specific wording covers the exact situation. If you look comprehensively at the human rights regime, it covers it in terms of sharing information that may give rise to a real risk of torture or a credible risk of torture.

The second point that we had outlined in our submissions which I think is important to address, particularly given the emphasis that Mr. Peirce put on, is the timeframe between September -- between 2001 and 2004.

Mr. Peirce this morning indicated that September 11th changed the world. September 11th did not change the world. It certainly changed the U.S. approach to things, brought it out more in the open in terms of how it felt it had to advance its interest. There have been equally horrific, if

not more horrific, tragedies all over the world: the Rwanda crisis, the most recent, the Holocaust.

Those were all events which could be said for the people in those countries to have changed the world for them.

It is the very horrors of these kinds of things that led to the development of humanitarian law principles in times of war and human rights principles otherwise.

In that context of the international codification of human rights and humanitarian law, there have been specific and limited derogations.

I understand Mr. Neve is going to cover that in more detail in terms of when a state can rely on a derogation. But there is no derogation in terms of protection from torture.

It is of the utmost importance that you don't use a crisis like September 11th to justify human rights breaches. Non-democratic states do this and I think you have to understand -- I sound like I'm preaching to you; I'm sorry if I sound like that.

I think you have to understand the global context. Canada is seen as a democracy. Canada is seen as a state which respects human rights. One of the biggest problems throughout the world is impunity, impunity on the part of government officials that engage in human rights abuses.

It would be extremely troubling if this Commission were to find at the end of the day that Canadian

officials could act with impunity in a way that resulted in serious human rights abuses. Whatever message you give through this commission is going to be watched not just in Canada by Canadian officials who have to act in the future in a way that respects human rights, but by other states. If we are seen as a leader in human rights, it would be appalling for Canada to sanction human rights abuses because other states will use it: Canada allows this to happen, so why can't we. You can't criticize us because Canada does it.

I think that context has to be borne in mind because we are not living in an isolated country; we are living in a global context where there are a lot of states that abuse human rights.

The third point about the timeframe is not -- and again this comes down to the question of what standards were in place. I think it is clear that prior to September 11th there were human rights standards obligating officials in place already.

One of the examples is the Burns case where the Supreme Court of Canada -- and again I didn't check to see who the judges were on it, but you were likely on the as well, and I think you were on Suresh as well.

In those cases, in Burns in 1999 the Supreme Court indicated that it would only be in exceptional circumstances that a person could be returned to face the death penalty. Suresh, three months after September 11th, reaffirmed that principle in the context of torture.

If you are looking for a framework in terms of -- Mr. Peirce was talking about compelling reasons in his submissions; I think you asked him a question about that. The framework is there in Suresh and Burns and Rafi. There is a long tradition of the Supreme Court of Canada recognizing breaches of constitutional norms, not just human rights norms but constitutional norms, where there were exceptional reasons for doing so. The court itself has said all the way back to the Second World War that it is in times of crisis, national emergency.

We were not in a time of crisis, we were not in a national emergency, we were not in a state of war after September 11th. There was no justification for doing anything, taking any steps after September 11th that could result in the risk or that did result in persons being tortured as a result of it.

I don't agree with that exceptional circumstances. I think the right to be free from torture is an absolute right. There should be no derogation under any circumstances. But to the extent that domestic law recognizes that there may be a justification in some instances, that is the justification. It is a very high standard and is not met in these cases.

And the last point I would make about the timeframe is that we have our own sorry history of human rights abuses. The internments through World War I and World War II were not justified. These men should not have to wait 40 years for Canada to recognize that it over reacted after September 11th

the way the Japanese, the Italians, the Ukrainians never even did get an apology yet for what happened to them in World War I.

So I think that, if anything, we should learn from our own history that you can't do these kinds of things in times of crisis and then apologize later. It doesn't help reconstruct the lives of the people who have been destroyed by the practices.

The third principle that I had outlined in the submissions was that it is both the nature and the strength of the concerns about the person and the human rights records of other states that have to be taken into account. With respect to the concerns about the threat that the individuals posed, you have Justice O'Connor's report requiring that the evidence be reliable, accurate, relevant, objective, credible and not engage in inflammatory labels before it can be shared.

With respect to the concerns around -- and I would say that even if it is objective, credible, reliable, accurate and relevant, it still has to have some weight or some strength of concern as to the person being a genuine security threat to Canada or any other country.

But the second issue is the human rights issue in respect of the countries in which the persons find themselves. Clearly states that are involved in human rights abuses are ones that Canadian officials have got to exercise a caution about in terms of sharing information.

And I say this because we know the United States is involved. We know from the Arar Commission that caveats were down; that, holus bolus, all the information about Mr. Almalki and Mr. Elmaati was sent to the U.S.

The U.S. is a country within its borders that generally respects human rights. No country is perfect. But the U.S. has a long history and it is not just post-September 11, 2001, of engaging in torture and teaching other states to engage in torture.

I cited Alfred McCoy's book, very well documented in terms of the history of torture by American forces, the CIA in particular.

Canada ought to have exercised a caution with respect to giving information to the Americans because even if they didn't know that the Americans were initially engaging in renditions, they ought to have known that that could happen because of the past practices with respect to the U.S.

And it is important to recognize that states that do respect human rights in one context may not in others, and the United States hasn't outside its own borders. It hasn't since the 50s, since earlier than that.

But it is something that never appears to be sort of on the radar in terms of Canadian officials that they ought to have had a concern about sharing information with the Americans.

The issue about the limits in terms of sharing information, as I indicated, I think if you want to look to a test you look to test set out in Burns and Rafi and in Suresh.

The last point in terms of looking at the nature and strength of concerns and the human rights of the state is that I think you have to put it in the context of what Canada's practice has been and is.

When we made the arguments in Suresh that you not return a person to torture, Canada's position was that you could return people to torture. The Supreme Court told them otherwise. Canada made that statement through a Canadian lawyer acting for the Government of Canada before the UN Human Rights Committee when they were considering Canada's record in New York in 1999, that you could in fact return to torture.

That was the starting point that it was justifiable to do so.

Post Suresh, the Supreme Court of Canada, you look at every single one of those security certificate cases, and not just them. Alleged Tamil gang members who may have minor assault convictions or something, they have said in every single case that it is justified on the basis of exceptional circumstances to return people to torture.

So when Mr. Peirce makes the submission that Canada doesn't countenance torture, it is not there in the practice. The practice has been -- and you just have to read the

security certificate case law in the federal court to see that in every single case they have justified a return to torture. It is that context that you are dealing with and that makes it all the more important, Mr. Commissioner, that you send a clear message in terms of standards that we do not countenance torture under any circumstances.

With respect to sharing information or seeking information, the fifth principle, I think that there are two key points: first, it should be necessary; and, second, it should be lawful.

In these cases of Mr. Nureddin, Mr. Almalki and Mr. Elmaati, it wasn't necessary. The men were questioned when they were in Canada. They could have been questioned when they came back to Canada. Mr. Nureddin was questioned when he came back to Canada. Mr. Almalki and Mr. Elmaati said that they would undergo further questioning by CSIS officials with counsel present. They were not taken up on that.

So the question of whether it is necessary doesn't arise in these cases. It wasn't necessary to share information or to seek information. They could have asked them when they were in Canada.

With respect to the sharing of information, Mr. Peirce made the submission that Canada is a state that relies on other states for information. We don't have a CIA that goes out and collects information.

That is a question that Parliament should address if it's a problem. It is not a justification for sharing information with the state that engages in torture just because we don't have a system in place where they can get their own information.

Therefore, they have to rely on states that torture people to get that information. That is not a sufficient excuse. If he has a problem with that, he can go to Parliament and ask the government to change it instead of relying on it as an excuse for Canadian officials.

With respect to lawfulness, I think that there are several points.

First of all, why would Canadian officials need to seek or share information with a state that engages in torture unless they think that the information is reliable? Again, the practice is as important as the rhetoric.

I mean that's a little harsh to say rhetoric. I'm sorry, Mr. Peirce.

It's just as important to look at. They used Ahmad Elmaati's confession, obtained under torture, to obtain a warrant in Canada. They didn't tell the judge that there was a likelihood it could have been obtained by torture in order to obtain a warrant. The thing is that there is a concern there, a real concern on our part that Canada is using evidence obtained by torture.

It came up I think in Mr. Copeland's case with Harkat that the evidence of Abu Zubaida was being put forward. He was allegedly tortured quite severely over a long period of time, and again the information was being used.

So I think you have to be careful in terms of how you look at this kind of information.

I want to say something about torture because I think that a lot of people think -- and this may be what CSIS thinks and the RCMP -- that if you've got evidence that was obtained under torture it may be reliable. Now, we know in terms of the jurisprudence -- the House of Lords couldn't have been clearer in their case, their recent judgment on not using evidence received from torture -- that it is not reliable; it can never be reliable.

But one of the reasons I think that people misunderstand is it's not a question of the person being tortured and spontaneously coming out with the story that they wouldn't disclose otherwise. More often than not it is that the torturers have a story they want them to accept. So they say to the person, "How did you kill the person?" They want to frame the person for killing someone. "How did you kill him?" And the guy says, "I don't know." But he knows he has to say something because he's being tortured so he says, "I hit him with a stick." And they say, "No, it wasn't a stick. Wasn't it a rock?" And he says, "Yes, it was a rock."

That's how it works more often than not. They know what happened, they know what their agenda is and they torture the person to get them to agree with an already concocted story or with facts which they know that they think they want to fit the person into.

That's why it's not reliable. It's not a spontaneous confession because they have been forced into it.

I don't think that is something that Canadian officials have been sufficiently conscious of because certainly they seem to think evidence is reliable if it is obtained under torture, as in Mr. Elmaati's case.

The third concern about sharing and seeking information is I think that there is a real risk that it puts Canadian officials at risk of charges of complicity. The question of complicity has been dealt with in the Criminal Code, section 21, the aiding and abetting. And I'm not saying that the Criminal Code should apply here, but I think that there is one important distinction that can be taken or can be drawn from it.

In terms of the complicity in the Criminal Code, you may have a common intent to commit Crime A and in the course of committing Crime A another crime is committed, like you go to rob a house and instead a person ends up being murdered as well as robbing the house. One of the people didn't have an intent to commit murder, but he is bound by it because of the aiding and abetting and it was a likely risk. You go in with weapons to a house.

Canadian officials may have had an intention to get information through sending questions, for example, or sharing information. They may not have had an intention with respect to torture, but if it was a likely consequence it is the same concern as arising in the aiding and abetting concepts in the Criminal Code.

I have cited several of the complicity cases in the federal court and I know, Justice Iacobucci, from your time in federal court that you are familiar with some of that case law anyways.

Certainly I think if you look to the exclusion provisions in the Refugee Convention there is a wealth of jurisprudence around complicity outside the context of the Criminal Code, but just in terms of what people knew or ought to have known in respect of their conduct such that they were excluded, found to be excluded, or not, from the Refugee Convention.

I can provide you with a lot more cases on that point if you are interested in exploring the issue around complicity, because I think it is a real concern for Canadian officials and I don't think our government should be putting our police officers or our CSIS officers in a position where they are open to a charge of complicity in these kinds of instances.

COMMISSIONER IACOBUCCI: If you are volunteering to provide some authorities on this, I would like that.

MS JACKMAN: I just did a detailed factum on it so I'm right on top of it.

COMMISSIONER IACOBUCCI: Don't spend a lot of time on it.

MS JACKMAN: All right.

The other point about the need to share and seek information from other countries, as Mr. Peirce pointed out, was that many of those countries are countries that export terrorists. But I would caution in accepting that per se because there are also countries that perceive dissidents to be terrorists.

We had cited in our submissions to you the Senate back in 1987 talking about the concern around disinformation received from states that perceived dissidents to be criminals. You only have to look at the working group on arbitrary detention, their judgments in terms of -- or their decisions in terms of people who have been detained for speech but because they spoke, they were seen to be a terrorist and that's all they did, was speak.

So there is an equal concern, not just that terrorists are being exported but that disinformation is being provided or people are being labelled as terrorists when they are not; they are dissidents.

The last principle with respect to the sort of overarching concerns I think that have to govern an analysis around conduct of Canadian officials is the principle of non-discrimination. I think it is particularly important in these

kinds of cases because I think what was used here from what we know was a stereotype of a Muslim or an Islamic extremist.

We know at least clearly from Mr. Arar's case that he was labelled as an Islamic extremist. That kind of labelling stems from the stereotyping, from perceived assumptions about the person.

One of the biggest problems with that is it's that very stereotype that put them at risk of torture. You can't say someone is an Islamic extremist and that have him go to Syria, because Syria tortures Islamic extremists. So while they framed the stereotype, they failed entirely to take into account the fact that they put the person through that stereotype, through labelling on that stereotype, into a position where they would be most at risk.

If they had alleged that Mr. Elmaati, say, committed a criminal offence, he might not have been tortured in Syria. It's because they labelled him as an Islamic extremist that put him at that risk in Syria and in Egypt because those states -- when Mr. Peirce talked about the general human rights conditions in the specific, I agree.

In refugee law we deal with it every day. There are profiles of people who are more subjected to a risk of torture or persecution than others. A young male Tamil from Sri Lanka, you are a risk if you come from the north. Islamic extremist, you are at risk if you are in Syria or Egypt, now Saudi Arabia, a number of different countries.

That stereotype had to be taken into account in terms of the risk that people were being put at because they were in the specific profile of people most at risk of torture.

I would also note in respect of that, looking at the specific targeting of people in states that commit human rights abuses, that it requires, based on Mr. Peirce's acknowledgment that you have to look at the specific risks, it requires a case-by-case assessment.

You can't just use the general conditions in an overall sense and say we have an agreement now with Syria, therefore we can share information. You have to go back in each individual case and determine whether that individual case would give rise to a risk, whether or not there was a written standard that required that they do it. It is a necessary standard and was implicit in lawful conduct of Canadian officials.

Another point that I want raise as a result of Mr. Peirce's submissions is the transparency issue. Mr. Copeland touched on this in terms of not knowing what agreements are in place with respect to Syria or Egypt or countries like that. We haven't seen the agreements. We don't know what the standards are for sharing information. Those are general documents and they should not be secret.

One of the things that we are expected to have in relation to security concerns is trust that our officials will comply with the law in terms of the actions that they take. Trust doesn't come out of nothing. What you need is transparency

upon which to build the trust. If you don't know what the standards are for sharing information with Syria, how can you be expected to have confidence that Canadian officials are going to take into account the proper considerations with respect to those?

So I'm not even saying on an individual case that you necessarily have to have all the information, but there has to be transparency and how our government deals with other states for there to be confidence in the government that standards are being applied.

Mr. Peirce spoke of the ongoing review of these agreements, the caution that you have with respect to whether caveats are respected. With all due respect to Mr. Pierce -- and I'm not putting his integrity at issue by making this statement -- we just went through a case, Amnesty International was involved in it, Canadian Council for Refugees, on the Safe Third Country Agreement.

There is a specific statutory obligation to review the human rights records of a state that is declared to be a safe third country. The United States was declared to be a safe third country.

The answer of the government in the absence of a specific structure to undertake that review was that it was being done on an ad hoc basis just like he is saying it is being done with respect to these shared agreements. The judge in that case, Justice Phelan found it didn't amount to a review, an

ongoing review, because in the absence of a structure you can't be sure that in fact a person's concern about a caveat not being applied in one instance is going to get carried through the hierarchy so that it has some impact at the end of the day.

The two issues, the specific issues that I'm supposed to be dealing with --

--- Laughter / Rires

MS JACKMAN: I'm going to be short on my two specific issues.

-- are the questioning of Canadians, sending questions, or in actually examining Canadians.

I would say first that in these cases of Mr. Elmaati, Mr. Almalki and Mr. Nureddin there was no justification to send questions. There was no justification to attempt to examine them in another country, in Syria or in Egypt.

Both Egypt and Syria are notorious for engaging in egregious human rights abuses, and officials did not have sufficient information to present the men or to characterize the men as presenting any real threat of either criminal activity or a threat to the security of Canada or another country.

Having said that, though, I would say that in general it would never be appropriate for a Canadian official to send questions to be asked of a Canadian detained in a state which engages in torture or other forms of cruel, inhuman or degrading treatment. And it would never be appropriate in any

circumstances to engage in direct questioning or otherwise participate in the questioning of a person detained in such a state.

It is not appropriate for a number of reasons.

The first concern of course is that it opens up Canadian officials to a direct charge of complicity and that is because the person is at an increased risk of being tortured as a result of the questions being sent.

And there are increased risks of torture for a couple of reasons.

One, that it signals to the state that is abusing the person that the person is a real concern to Canadian officials. Justice O'Connor talked about mixed signals being sent in respect to Mr. Arar. There were no mixed signals here because, unlike Mr. Arar, there is no indication in these cases, at least in those of Mr. Elmaati and Mr. Almalki, that Canadians were trying to get him back to Canada. It was a single signal to the Syrian and Egyptian officials that Canada had a real concern about them, one which we say is completely unjustified, and that that real concern opened the door to further torture.

The second issue, not just in addition to the signal, is the fact that sending questions like that in a national security case elevates the concern about the person above what may be justified in the circumstances; that if Canadian officials take the opportunity to send questions or to try to go down there to ask questions, it has to be asked why couldn't they just ask when the person was in Canada? What is it about the person that

makes it necessary for them to ask the questions in the other state?

What the other state is going to take from that is that it's okay to torture them because that is the only way Canada can get the information. Because they wouldn't give it to Canada if they asked them in Canada, that must be why they are doing it abroad.

That is a very serious concern because there is no reason in these cases why officials could not have asked them any questions in Canada. In fact the men -- I know Mr. Nureddin, he was asked the same questions in Syria that he had already been asked in Canada.

It is not an excuse on the part of Canadian officials, in our submission, to take the position that they didn't know that Syria, Egypt or the United States would put the men in a position where their human rights would be abused. As I have already said, they ought to have known, given their obligations to respect human rights principles domestically and internationally.

Another concern that arises from either the sending of questions or the examining of Canadians detained in another state is again the issue of whether the information is reliable. You don't send questions to a state that engages in torture to get answers if you truly believe that tortured information is not reliable. You do send questions if you think that it is reliable, that tortured information is reliable.

So I ask you: What did Canadian officials think that they were going to get when they sent questions about Mr. Almalki? They were going to get answers. They did on him, they did on Mr. Elmaati and they used them with respect to Mr. Elmaati. Missing in their analysis was the fact that that is not reliable information.

I don't think Mr. Peirce has directly addressed that in his submissions on the part of the government.

The other point with respect to the questioning of Canadians detained in states that engage in torture is the issue around officials actually being present, the person not being tortured when officials are there. It is naive of a Canadian official who is going to attend an examination of a person in a foreign state that commits torture to believe that the person may not have been tortured -- I mean, just because the person is not being tortured when the officer is there that they are not going to experience torture otherwise.

Compliance, or making the person compliant for an interview with a Canadian official can involve torture. If the person is not sufficiently compliant or if the officials don't like the answers the person gave in the interview of the Canadian, it can result in punitive torture afterwards.

So Canadian officials participating in that way further endanger the person even if they are going down to ask the questions and the person is not being tortured when the official is there.

The Attorney General expressed a concern, and Mr. Peirce reiterated this morning, about not pressing for private visits or being careful how you press. Certainly that was a concern I know in these cases around publicity, that publicity might end up making it worse for them. It didn't.

Publicity, they didn't have the publicity. It was worse for them. Mr. Arar got out a lot sooner because of the publicity and so did Mr. Nureddin.

As I think we pointed out -- I can't remember in which submissions it was, whether it was the reply submissions or not -- those nationals that were held at one time or where their states did publicly take action to protect them are not in Guantanamo Bay any more. The Canadian that is still there, Omar Khadr, our state has not helped him at all and he is still there.

So state conduct and publicity may in fact assist a person.

But in addition Mr. Peirce talked about not wanting to endanger the person by pressing for visits. I guess the problem I have with that is how pressing for a visit with the person would endanger them but sending questions to ask that another state examine the person when you know that that state commits torture to get answers to questions, I don't see how they fit together.

The concern around not pressing for a visit, a private visit, is a hollow one when you are sending questions

that are going to cause the person to be tortured. It really doesn't make much sense, in my submission.

So with respect to those, I would ask that you take into account those considerations and those are my submissions essentially. I think I have covered everything.

--- Pause

MR. LASKIN: Just one question again for clarification, Ms Jackman.

In your oral submissions you reiterated something that you say in writing in paragraph 12 of your primary submissions:

> "It would never be appropriate for Canadian officials to send questions to be asked of a Canadian detained in a state which engages in torture or other forms of cruel, inhuman or degrading treatment."

Now that statement is made at the general level as opposed to the case-by-case level to which you referred.

You had indicated just a few minutes before you made that submission that you shared the perspective that Mr. Peirce put forward that determinations about these matters should be made on an individual rather than in a categorical basis.

MS JACKMAN: Maybe I should clarify that.

MR. LASKIN: Yes.

MS JACKMAN: My experience -- and I have done refugee work my entire professional career -- has been states that commit torture routinely commit it to get answers to questions. So even if the person is not within a profile, if you send questions down, Canadian officials send questions down and the routine practice to get answers to questions is torture, even if the person wouldn't have been tortured in the first place, they are going to be tortured to get answers to the questions.

And you find in those states it's not just -- if they want to get answers, they torture in many of the states, even if you are not within the profile. You can be an ordinary criminal and not be at risk of torture unless they want answers from you, in which case they torture.

So on that level I think you put a person at risk regardless if you are asking for answers to questions.

MR. LASKIN: In assessing whether a country falls into that category, the category of a country that, as you put it, routinely engages in torture to elicit answers to questions, what is the level of knowledge, in your submission, that Canada would need to have that a country fits into that profile?

MS JACKMAN: They wouldn't have to do anything other than what we do to do refugee claims: check out the human rights reports and read them.

MR. LASKIN: So does that translate into the substantial grounds for believing standard or some different standard?

MS JACKMAN: I mean, the international standard is substantial grounds for believing. There is a debate about what that standard is in Canada, whether it is more than a mere possibility or serious reasons for believing or whether it is a balance of probabilities.

I think that the balance of probabilities, more than 50 per cent is too high. I think if you look at the international application of substantial grounds for believing, it is less than a 50 per cent chance.

If a person has a 45 per cent chance of being tortured, that's enough, even if it's not a 51 per cent chance. Maybe a 2 per cent chance is too low, but certainly when you are in the range above more than a mere possibility it's substantial enough that the person shouldn't be put at risk.

MR. TERRY: So just to clarify, once you have that threshold you are saying when it comes to sending questions, you never do it. But when it comes to sharing information, then you would do it on a case-by-case basis?

MS JACKMAN: I would think it would be a case-by-case basis. If you've got someone where you have information, say, that the person is involved in people smuggling or something and they should face criminal charges as a result of it, I don't see that in the same way as sharing information that puts a person in a category that he is going to be tortured.

--- Pause

MS JACKMAN: Sorry. I just got a note passed up that DFAIT did warn the RCMP not to send questions because they knew there was a risk of torture in this case.

Anyway, I lost my train of thought.

MR. TERRY: I think you had answered the question in terms of in the sharing of information that there may be circumstances in a case-by-case basis in which sharing information would be appropriate.

MS JACKMAN: Right. I think that is where the profile is important if it's a profile of the group that is likely to be targeted.

It comes down to really understanding with the human rights practices are in the country, or abuse of human rights, what the practices are.

I know from doing refugee cases that we get reports where political dissidents are detained and tortured, but if you read the other human rights reports, especially the domestic human rights reports, you will see in those kinds of reports, that aren't associated with politics, that people are tortured to get answers to questions.

So that's why I'm saying that you can find most countries that abuse human rights, that's one of the most common abuses, that and impunity of their officials when they do it.

All right. Thank you.

COMMISSIONER IACOBUCCI: Thank you very much.

--- Pause

SUBMISSIONS ON BEHALF OF AMNESTY INTERNATIONAL

MR. NEVE: Good afternoon, Mr. Commissioner. My name is Alex Neve and I am the Secretary General of Amnesty International Canada.

Amnesty certainly welcomes the opportunity to make these submissions to you this afternoon because the questions that you have laid out in the Notice of Hearing touch upon crucial issues of concern to Amnesty International, to human rights activists everywhere, relevant in Canada but relevant in nations around the world.

I would like to begin by urging you, therefore, to maintain that global view in how you approach your deliberations, because at stake here are fundamental principles with respect to protecting human rights, safeguarding the rule of law and ensuring security. Canada's record in this regard must be stellar, both because the rights of those individuals impacted by Canadian security activities, such as Messrs. Almalki, Elmaati and Nureddin matter, but also because that is the international leadership role that is so very much required of Canada.

The starting point for Amnesty International here is straightforward. It is absolutely essential to ensure that the answers to the questions that have been asked take full

account of and be in scrupulous compliance with Canada's international human rights obligations.

Amnesty International's position is that Canada's security related obligations do matter. They do matter very much. And they should be adhered to. And this must be done in a manner that is in complete conformity with those human rights obligations.

Notably that is precisely the conclusion reached by Justice O'Connor in the Arar inquiry were at page 346 he notes:

> "The need to investigate terrorism and the need to comply with international conventions relating to terrorism do not in themselves justify the violation of human rights."

Well, Canada should most certainly enter into intelligence relationships with other countries and should agree to share intelligence information with other countries. Such relationships and sharing of information can often play an important role in forestalling acts of terrorism, in preventing human rights violations and in identifying and bringing to justice individuals suspected of committing serious human rights violations. But there are limits.

Justice O'Connor identified a number of those limits, particularly with respect to information sharing. Information that is shared should be relevant, accurate, reliable.

You have heard that in many presentations today. But of course, of critical importance to Amnesty International, intelligence relationships and sharing of information cannot be constructed or carried out in such a manner as to contribute to human rights violations.

Security does not trump human rights protection. The two must go hand in hand. It is not security or human rights. It is not security versus human rights. It absolutely must be a matter of security and human rights, security through human rights.

So at the heart of Amnesty International's submission lies our position that human rights standards absolutely must be at the very center of any government's approach to countering terrorist threats and ensuring and strengthening national security.

That's important for three critical reasons.

First, quite simply, legally that is what international law requires and Canada must comply with the full range of our international legal obligations. A limited number of internationally defined rights do inherently allow for some balancing with respect to national security considerations. Freedom of expression would be such example.

A certain number of rights do not allow such balancing, but do recognize the possibility of officially and publicly temporarily suspending such rights in tightly

circumscribed manners in cases of dire national emergencies. That's the case with fair trial rights, for instance.

And a core number of rights can never be restricted in any way. For our purposes, this most critically includes the right to be protected from torture and ill-treatment. You have heard that several times this morning.

When it comes to security considerations, therefore, the international legal framework is already very clear and Canada must comply with it.

Second, Canada must also guard against national security considerations serving as a justification for human rights violations because that is a dangerously slippery slope which seriously jeopardizes human rights protection in a wider sense. Decades of human rights reporting around the world have clearly demonstrated to Amnesty International that allowing wide latitude to governments, allowing any latitude to governments who argue national security concerns as an excuse for human rights violations simply leads to more and more violations.

But third, selling human rights short in efforts to bolster security does no favour to security either. Human rights violations leave victims, leave families, friends and communities of those victims and in doing so lay the ground for inequity, resentment and grievance, all of which are so easily fertile ground for violence, insurrection and terrorism.

Security practices that give full and due regard to human rights obligations stand a much better chance of creating a sense of security that is just and sustainable.

With this in mind, Amnesty International strongly urges you, Commissioner, to reject the government's troubling contention that the special circumstances of the national and global post-September 11th security environment should have any bearing on identifying the standards that are relevant and applicable to these three cases.

Standards are standards, regardless of the prevailing environment, regardless of how tragic or worrying the week's headlines may be. Treaties do not change and laws do not change on the basis of such events, no matter how tragic and consequential those events may be, unless governments choose to make changes.

If anything, such events are likely to be the time when it is more important than ever that standards and laws be respected. Events such as the September 11th terrorist attacks may have some relevance with respect to how a limited number of human rights standards are interpreted and applied, although that is not the case with, as I said, what is arguably the most important human rights concern at stake in these three cases, the protection against torture.

But events such as September 11th are not relevant to the initial fundamental question of determining what the standards are.

Many standards are at play in these cases. Amnesty International's submission focuses entirely on standards stemming from Canada's international human rights obligations. In particular, we highlight obligations binding on Canada by virtue of the fact that we are party to two important international human rights treaties, international covenants on civil and political rights acceded to by Canada in 1976 and the UN Convention Against Torture and other forms of cruel, inhuman or degrading treatment or punishment ratified by Canada in 1987.

In that regard two overarching principles are relevant. Simply stated: do no harm, do good.

Canada must avoid complicity in and must actively seek to promote and uphold the nation's binding human rights obligations. Both stem from Canada's obligation, well stated in Article 2(1) of the International Covenant on Civil and Political Rights, to both respect and to ensure to all individuals within its territory or those individuals subject to its jurisdiction the rights in the covenant.

Canadian citizens, such as these three men, most certainly are individuals subject to Canada's jurisdiction.

It is here that I would like to note that the ICCPR is not territorially limited in the way that some aspects, not all aspects, of the Convention Against Torture are. The ICCPR clearly applies to Canadian action outside Canada impacting on the rights of Canadian citizens abroad, including protection from torture.

It's also important to highlight, though, that aspects of the Convention Against Torture do still directly apply; and if they don't directly apply may nonetheless serve as an authoritative source for definitions. There is, after all, nowhere else more reliable than international law to look than the Convention Against Torture for the definition of torture and for interpretation and application guidance with respect to key standards.

Additionally, as has been highlighted, the ban on torture is a jus cogens norm, something that prevails over any treaty limitations and certainly prohibits any Canadian law or practice that furthers or tolerates torture.

As such, Canada must scrupulously respect the rights of these three men. Most particularly, Canadian law, policy and practice must not render Canada responsible for or complicit in human rights violations such as torture.

As Justice O'Connor stated at page 346 of his report:

> "Canada should not inflict torture, nor should it be complicit in the infliction of torture by others."

That prohibition is of course intransgressible.

Second, Canadian law, policy and practice must be such as to ensure to these three men their rights, including their right to be protected from torture. That entails

taking such positive steps as may be necessary to ensure that those rights are protected.

This most directly touches upon issues related to the provision of consular assistance which I will come back to later in my submissions.

So let me say a bit more on both of these points: do no harm; do good.

First is the question of what standards are relevant to determining whether the actions of Canadian officials may have in any way been responsible for the human rights violations, notably torture, experienced by these three men.

There are three possibilities here.

First, conduct that was so closely tied to the violations as to constitute direct responsibility for the violations.

Second, conduct indirectly tied to the violations but in a manner that would have constituted complicity.

Three, conduct so remote from the violations as to carry no legal responsibility for the violations.

I'm going to focus particularly on the issue of torture, and in that regard the starting point has to be to consider the internationally agreed definition of torture found in the UN Convention.

Article 1 of the convention talks of the intentional infliction of severe pain or suffering in a number of different circumstances and considers four possible dimensions of

culpable involvement: inflicting the torture; instigating the torture; acquiescing in the torture; or consenting to the torture.

Now, there is of course no suggestion let alone evidence, at least not known to me, that Canadian officials inflicted torture on any of these three men, but questions as to whether their actions may have constituted instigation, acquiescence or consent all remain open.

In those circumstances, if the facts fit the standard it is entirely possible that such conduct is tantamount not just to complicity here, but to participation in the actual torture.

It is also possible however that Canadian conduct, while falling short of direct participation pursuant to the UN definition of torture, was still of such a degree of involvement as to constitute complicity or aiding and abetting.

In that regard we refer you to Article 16 of the International Law Commission's draft articles on responsibility of states for intentionally wrongful acts. This particular article deals with aid or assistance in the commission of an internationally wrongful act. Torture obviously is an internationally wrongful act.

Many commentators, including the ILC itself, are of the view that this particular article may very well be reflective of customary international law.

Article 16 lays out a three-part test. Number one: Did one state provide another with aid or assistance in the

commission of an internationally wrongful act? Number two: Did they do so with knowledge of the circumstances of the internationally wrongful act? Number three: Would the act have been internationally wrongful if committed by the state that had provided the aid or assistance?

Also instructive here and I think helpful in sort of further interpreting the ILC's article is international criminal jurisprudence from the Yugoslav and Rwandan tribunals.

For instance, the International Criminal Tribunal in Rwanda in the Semanza case dealing with genocide talks of:

> "... acts of assistance or encouragement that have substantially contributed to or have had a substantial effect on the completion of the crime."

In Akayesu the Rwanda Tribunal notes that the accomplice need not wish that the principal offence -- there genocide, here torture -- be committed. In that regard the tribunal referred to a U.K. decision -- and we can certainly provide you with fuller copies of these -- in the National Coal Board versus Gamble, in which Justice Devlin stated:

> "An indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for

murdering a third, he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abetter."

Well, replace the gun with intelligence information or questions, replace murder with interrogation, replace indifference as to death with indifference as to torture and it leaves you with a clear analytical framework for assessing possible complicity in torture.

So how do these standards with respect to infliction, instigation, acquiescence, consent, aid, assistance apply to the questions that have been posed with respect to information sharing and cooperating with foreign intelligence and security agencies?

Well, we are of course seriously limited in our ability to engage deeply on this because of the lack of factual disclosure provided to date. But what do we know?

Well, the public record as to the prevalence and gravity of Syria's human rights violations associated with national security and counterterrorism cases, and very notably including torture in both Syria and Egypt during the time in question, was clearly and consistently documented by numerous credible sources. You have heard that repeatedly today.

That certainly included reports, if I may be so boastful as to consider ourselves credible, from Amnesty International, from Human Rights Watch, from the U.S. Department of State.

Here's just a few illustrations from our own materials.

Our annual report for Syria released in May 2001, six months before Ahmad Elmaati was arrested, stated:

> "Torture and ill-treatment of political detainees continued to be systematically applied in Tadmor Prison and other detention centers, including Palestine Branch and the Military Interrogation Branch in Damascus and other centers operated by the Political Security Department."

Our annual report for Egypt released in May 2002, a few months after Ahmad Elmaati was transferred there:

> "Torture continued to be systematic and widespread in detention centers throughout the country and the authorities failed to investigate reports of torture promptly and thoroughly. Torture victims came from all walks of life and included political activists and

people arrested in criminal investigations."

Our annual report for Syria released in May 2002, the month that Abdullah Almalki was arrested:

"Torture and ill-treatment continue to be inflicted routinely on prisoners, especially during incommunicado detention at the Palestine Branch and Military Interrogation Branch detention centers."

And finally, our annual report for Syria covering 2003, the year that Muayyed Nureddin was arrested:

"Torture and ill-treatment were widespread and allegations of such treatment were not investigated by the authorities."

Well, it is against that background that the standards must be applied.

Let me just consider two examples that are already part of the public record: the Almalki questions and the Elmaati telephone warrant, both of which have been referred to earlier today.

First, the questions that the RCMP sent to Syria to be used in interrogating Abdullah Almalki, here is what we know from the Arar inquiry.

On August 15, 2002 RCMP officers were advised that Mr. Elmaati had told Canadian consular officials in Egypt that he had been tortured in Syria. Over the following five months the RCMP and Foreign Affairs officials debated sending questions to Syrian Military Intelligence to be asked of Mr. Almalki.

There are indications that at a September 10th, 2002 meeting a Foreign Affairs official asked: "If you are going to send questions, would you ask them not to torture him." That official then wrote, in an October 10th internal memorandum that officials had:

> "... pointed out to the RCMP that such questioning may involve torture. The RCMP are aware of this, but have nonetheless decided to send their request."

The concern about torture in the context of the proposed questions was raised again in a meeting between Foreign Affairs and the RCMP.

Foreign Affairs officials were purportedly displeased in the aftermath of the meeting but plans to send a letter of protest about this to the RCMP apparently never materialized.

The questions were then eventually delivered first to the RCMP liaison officer based in Rome, then on to Canada's ambassador in Syria, on to a Canadian consular

official and of course finally into the hands of Syrian Military Intelligence on January 15, 2003.

Well, given what was known about the prevalence of torture in Syria at this time, given that at least one government official repeatedly raised concerns about the possibility that torture would accompany any such interrogation based on these questions, given that the decision was nonetheless taken to go ahead and forward the questions, and given whatever further factual findings may have come to light through your own interviews, the question will have to be asked as to whether this chain of events may have constituted either implicit consent on the part of Canadian authorities to Mr. Almalki being tortured or aid in assistance in the Commission of torture such that it constituted complicity.

The second incident took place in September of 2002. We know from the Arar inquiry that in an Ontario court application for a telephone warrant the RCMP referred to Mr. Elmaati's confession in Syria that he had accepted to be a suicide bomber and explode a truck bomb on Parliament Hill.

Justice O'Connor highlighted concerns that the information failed to provide significant information to the judge about this confession, including Syria's human rights record and specifically the fact that Syrian Military Intelligence was known to torture detainees held incommunicado at the Palestine Branch in order to get information from them.

The RCMP affidavit had dismissed any subsequent allegations about torture as being "damage control" by Mr. Elmaati.

There are two standards that should be considered here.

First is the very clear international legal ban on making use of information obtained under torture. You have heard this already this morning. Article 15 of the Convention Against Torture is crystal clear. 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.

Well, given the very serious patently obvious concerns there would have been that this confession was in fact quite likely a result of torture, you will obviously need to consider, Commissioner, whether enough was done to establish if it was in fact a product of torture.

I would like to refer you to the work of the UN Committee Against Torture in this regard which has had frequent opportunity to consider this issue.

In November 2002 in a case involving France, the Committee Against Torture established that once an individual has alleged that statements were obtained as the result of torture -- which is clearly what Mr. Elmaati did in his consular visit in Egypt -- the state party is the one, Canada, that then has the obligation to ascertain the veracity of such allegation. So the

burden shifts. Once the allegation has been made, it is then incumbent upon Canada to ascertain and verify that the confession was in fact torture free.

Well, that is the question of making use of the confession. But Amnesty International submits that it is also important to consider the standards with respect to the act of torture itself here to determine whether willingly receiving the fruits of interrogation in countries such as Syria or Egypt, where there is a very good chance that torture has been used and where it will be very difficult to reliably confirm that torture has not been used, constitutes tacit consent to such interrogations and the accompanying risk of torture going ahead.

This is precisely why there is a legal ban on making use of information obtained under torture, because allowing such information to be used does amount to encouragement to the torturer.

We do not know the full extent to which information from interrogations of any of these three men may have been provided to Canadian officials by Syrian and/or Egyptian officials or may in fact even have been actively sought by Canadian officials. But depending upon the circumstances, it is entirely possible that seeking and/or receiving the information from one interrogation would constitute instigation, consent, acquiescence, aid or assistance to subsequent interrogations and the clear consequent risk of torture.

The standards that I have outlined here are relevant to all of the questions in points one and two with respect to sharing information, travel plans, sending questions, et cetera.

Amnesty International's position is that such information should not be shared if it would be likely to constitute participation in torture or provide aid and assistance to the commission of torture. That is of course precisely the conclusion reached by Justice O'Connor.

In recommendation 14 to his report he puts it very simply and very clearly:

> "Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture."

Amnesty International would simply add -- and I know there have been a lot of questions this morning and this afternoon about what the threshold is, what the standard is, that the Convention Against Torture uses the threshold of substantial grounds to believe. Justice O'Connor has used "credible risk".

Whether or not those are exactly the same I suppose is a matter of semantics, but I would say they are certainly within the same ballpark.

Unfortunately, the government's submissions minimize this concern about information sharing. The government submits at paragraph 68 that it is the:

"... reality that the Government of Canada may have to engage in the sharing of information with countries that have poor human rights records."

There is nothing further offered, no indication as to what measures, if any, the government believes should be taken to avoid or at least minimize the possibility of Canada then consequently being complicit in resulting human rights violations.

The reality is that the information cannot be shared, be it with a country with a poor human rights record or a stellar human rights record, if there is a credible risk that it will cause or contribute to the use of torture. Other means must be used to seek whatever information is needed.

I would now like to move on to make some brief comments with respect to issues related to consular assistance.

MR. TERRY: Mr. Neve, if I could, again just a couple of questions of clarification.

You were referring earlier to Article 1 of the Convention Against Torture and the use of words "instigate", "consent" or "acquiesce" there.

Is there a jurisprudence arising either from committee reports, Committee Against Torture reports or other sources that we can use to try to get some assistance as to what

those words might mean in the context in which we are dealing with here?

MR. NEVE: I don't have that at my fingertips. I'm sure there is and I can certainly provide that to you.

MR. TERRY: The point you were just making about not sharing information where there is a credible risk of torture, is that an independent concern -- is that a concern that is independent from a concern about a violation of Article 1 where you are in violation of Article 1 where you inflict, instigate, consent or acquiesce?

Is that different than that or are you saying that that is an example where if that is done, it will result in an infringement of Article 1?

MR. NEVE: I think the starting point is to not share where there is a credible risk, and the reason being that in going ahead and sharing information where there is a credible risk there is a very good possibility of Article 1 being triggered and the Canadian action therefore coming within the context of that international ban on torture.

MR. TERRY: So just to be clear, in the framework of your submissions then, if information is shared where there's a credible risk of torture then you would be saying that that would amount likely to instigation, consent or acquiescence to torture within the meaning of Article 1?

MR. NEVE: What we are saying is you shouldn't share the information where there's the credible risk because of the very real possibility therefore that the result -- once it happens, it goes ahead -- will be tantamount to any of infliction, instigation, acquiescence or consent and therefore constitute a violation of the treaty.

MR. LASKIN: Without delving too far into semantics, you have adverted to the credible risk standard -- you have spoken about that -- the credible risk that could cause or contribute I think is the way you put it, quoting Justice O'Connor.

MR. NEVE: That it will cause or contribute to the use of torture is his words.

MR. LASKIN: That will cause.

And you have also adverted to the Article 3 standard from the Convention Against Torture itself.

MR. NEVE: Correct.

MR. LASKIN: And you have said that those, from your perspective, are in the same ballpark.

Do you have a submission on which of the two standards is the preferable one?

MR. NEVE: I'll have to admit to you I feel torn, because I certainly don't want to suggest that the work of a previous inquiry should not be given full and proper regard. I think Justice O'Connor's recommendation there is a very strong and solid one.

Amnesty International, simply because of who we are and the context from which we work, always bases ourselves precisely in what international legal instruments say, which is why I would come back to the wording of Article 3.

In doing so I'm not suggesting that it is necessarily significantly different from what Justice O'Connor has formulated and I can't offer an explanation as to why he chose those particular words.

Intuitively, I feel they are fairly similar. I'm sure we could have dictionaries out in comparing the wording and find some slight differences, but I don't think there is a large gap between the two.

MR. TERRY: If I could just put one more follow-up question, you referred also to the articles on state responsibility, the ILO articles and Article 16.

MR. NEVE: ILC.

MR. TERRY: Yes, ILC. Thanks very much.

And the possibility that there may be assistance in the commission of internationally wrongful act.

That's obviously an independent basis for finding international liability apart from the Convention Against Torture.

Is it broader or narrower or how do you see the two relating together?

MR. NEVE: Well, as I said, we think there are two levels at which misconduct needs to be considered. One

is at such a serious level of involvement as to come within -- I always forget the four words -- infliction, instigation, consent or acquiescence provisions in the actual definition of torture such that it would constitute participation in the act of torture, obviously not in the instances we know of, infliction, but the other areas of concern.

But the second is the possibility that it is not at that level of gravity but is nonetheless at the level of complicity, aiding or abetting, providing assistance. There has been some discussion this morning about sort of how to approach and understand complicity when it comes to torture.

A lot of that has talked about the Canadian legal standard, what does the Criminal Code have to say, some Canadian cases. I am pointing you to some international law sources, the ILC's work, some rulings from the Rwandan Criminal Tribunal which in our view provides some very helpful guidance as well.

MR. TERRY: All right. So if we look to Article 1 of the Convention Against Torture, if it doesn't fit within one of those four verbs or instances, then we can look secondarily to --

MR. NEVE: The question of complicity.

MR. TERRY: Complicity, which we would then, at least from your perspective, from the international perspective, look to the ILC rules on state responsibility.

MR. NEVE: And not that that is solely determinative of it, but we think it is a helpful source to consider.

MR. TERRY: Right. Thank you.

MR. NEVE: Shall I move on now to consular assistance?

COMMISSIONER IACOBUCCI: Yes.

MR. NEVE: Well, the Notice of Hearing obviously poses a number of specific questions, focusing in particular on the nature and frequency of such consular efforts as visits, attempts to ascertain place of detention, efforts to gain access to a detainee, efforts to secure a detainee's release.

In our submission, there really are no statistical quantifiable responses to the bulk of these questions. There is no magic answer that says visits should happen every 12 days, requests for access should happen every 2-1/2 weeks. Instead, the answer is that the nature and frequency of consular activities should reflect the nature and severity of the risk of human rights violations faced by any particular detainee. That risk would be dependent upon such factors as the country's human rights record, the particular profile of the individual with respect to that human rights record, the place of detention, ease of access, the possibility or not of private consular visits and other factors.

But there are three important principles that we believe should guide consular efforts.

The first is equality of treatment. All Canadian citizens, regardless of whether they are sole Canadian nationals or carry dual or multiple nationalities, regardless of where they are detained, regardless of the accusations against them, regardless of their race, their religion or their ethnicity, are entitled to the same level of effort from Canadian consular staff, both during and after detention.

That does not of course mean a guarantee that those consular efforts will succeed, for that ultimately is beyond Canada's control, but there is a right to equal effort on the part of Canadian officials. It should not be the case therefore, for example, that attempts are made to gain consular access to one detained Canadian but not to another.

The second principle is that consular assistance should be viewed as an important tool in Canada complying with its positive obligation -- this comes from my opening references to the ICCPR -- to ensure that the rights of Canadian citizens are protected, particularly the right to be protected from torture.

The government's submission argues that most consular services are provided as a matter of discretion except for those that are expressly provided by statute. While that may be the case, it may well be only or at least primarily through the provision of such services that Canadian officials are able to take action to try to protect a detained Canadian from torture.

As such, in our view those services then become a matter of obligation, not discretion. That sense of obligation, of a duty to protect against human rights violations through consular assistance, has notably begun to gain recognition in courts around the world, including in Germany, the United States and Australia.

And we refer to those cases in our submission.

The third principle is that when an individual is detained in circumstances where there is good reason to believe that he or she is at risk of being tortured, the operating premise for Canadian officials involved in seeking to provide consular assistance should be that torture is happening.

Now, that does not mean rushing to make accusations of the foreign officials, but it should inform the frequency and intensity of the consular efforts. Officials should not await clear confirmation of corroboration of torture before deciding to intensify consular activities in these kinds of circumstances, particularly given the difficulty of doing so if a prisoner is held incommunicado are not allowed private consular visits.

The government's submissions come close to the suggestion that if authorities of a detaining state are not likely to agree to a particular request from Canada, such as to recognize dual Canadian nationality or to grant a request for a private

consular visit, Canadian officials should not bother to pursue such a request or should not do so with particular zeal.

At paragraph 113, for instance, it is noted that a private visit would be ideal but would not have been a realistic option; the implication being, then, that it is not worth pressing for that private visit.

It is Amnesty's submission that a particular course of action, particularly one that can help bolster human rights protection, should not be discounted simply because it is felt to be unlikely to succeed. That doesn't mean of course to do so in a confrontational or belligerent manner; it simply means not to shy away from making the effort.

The government's submission also makes frequent reference to consular services being constrained by local laws. It is noted, for instance, that consular officials seek to ensure due process consistent with the domestic law of the country of detention and treatment that is at least consistent with nationals in that state. Preferential treatment will not be sought simply because someone has Canadian citizenship.

The guiding principle, however, I would submit to you, Commissioner, should not be domestic laws and it should not be simply ensuring that Canadians are treated the same way as imprisoned nationals. The applicable standards must derive from international human rights obligations.

To insist that a Canadian citizen not be tortured, even if nationals in the same prison are regularly

tortured, or that a fair trial be provided even if detention without charge is the norm in that country, does not constitute inappropriate interference with domestic affairs. It is simply demanding compliance with binding international human rights standards.

Last, a word about the presumption of innocence.

International law and Canadian law are of course very clear. Article 14(2) of the ICCPR, for instance:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

Our own Charter provides the same protection.

This standard is of crucial importance with respect to both dimensions of the conduct of Canadian officials being examined in this case, the nature of relationships with foreign governments and the provision of consular services.

These three men have been the subject of a variety of allegations, accusations, suspicions and leaks, but they have never been charged or tried, let alone convicted, with respect to any of those accusations.

It is vitally important, therefore, that the manner in which information may have been shared about them with foreign governments was entirely consistent with the

presumption of innocence, especially given the human rights record of the Syrian and Egyptian governments with respect to dealing with individuals labelled as terrorists.

Equally, it is crucial that the presumption of innocence be adhered to in the provision of consular assistance. It cannot be replaced with the presumption of guilt and a consequent reduction or lack of enthusiasm in consular effort or concern.

So let me briefly sum up by highlighting what I believe are eight key points.

First, Canada should, in fact must, cooperate with foreign governments in counterterrorism efforts, including by sharing information.

Second, all such activities and practices must scrupulously conform to Canada's international human rights obligations.

Third, minimizing the importance of human rights as a central overriding tenet in Canada's security practices would lead only to injustice and to undermining the long-term goal of durable security.

Fourth, torture is one particular human rights concern that can never be justified and therefore Canadian officials can never commit or be complicit in activities which there are substantial grounds to believe may lead to torture.

Fifth, if Canadian conduct constitutes infliction, instigation, consent or acquiescence, such as through

providing or receiving information to or from a foreign agency known to commit torture, it may reach a level tantamount to participation in that torture.

Sixth, if Canadian conduct offers aid or assistance to foreign officials who commit torture in such a manner as to make a substantial contribution to the commission of torture, it may reach a level tantamount to complicity.

Seventh, through consular assistance, Canada is able to meet its duty to act to ensure that the right of Canadian citizens to be protected from torture is upheld. Consular assistance should proceed in that spirit and should be provided to all Canadians on an equal basis.

Finally, number eight, recognizing the sensitivity of and the potential devastating human rights impact of being labelled a terrorist, the long-established legal and human rights safeguard of being presumed innocent until proven guilty must govern both with respect to cooperation with foreign agencies and providing consular assistance.

Protection from torture, avoiding complicity in human rights violations, non-discrimination, the presumption of innocence. Commissioner, these are fundamental bedrock human rights standards that were in place not just many months or years but decades before the tragedy of September the 11th, standards that governments have long recognized provide the blueprint for a world that is just and a world that is secure, standards that must be at the heart of your own deliberations.

Thank you. Those are my submissions.

COMMISSIONER IACOBUCCI: Thank you. Those were very helpful submissions.

MR. NEVE: Thank you.

--- Pause

COMMISSIONER IACOBUCCI: I am conferring with my counsel because unfortunately the representative of Human Rights Watch, Mr. Bhuta, is still in Toronto and arrangements have been made I understand for telephonic participation. Is that right?

Should we take our break now and then reconvene in 15 minutes for that participation and that submission?

Thank you.

THE REGISTRAR: Please stand. Veuillez vous lever.

--- Upon recessing at 3:35 p.m. /

Suspension à 15 h 35

--- Upon resuming at 3:50 p.m. /

Reprise à 15 h 50

THE REGISTRAR: Please stand. Veuillez vous asseoir.

COMMISSIONER IACOBUCCI: Do we have Mr. Bhuta on the line?

MR. BHUTA: Yes.

COMMISSIONER IACOBUCCI: Can you hear me?

MR. BHUTA: Yes, I can.

COMMISSIONER IACOBUCCI: Great. We can hear you. Thank you for joining us by telephone. I'm sorry about your travel delays.

MR. BHUTA: Yes. Well, thank you for accommodating me. I had every intention to be there in person. I'm sorry that I couldn't be.

COMMISSIONER IACOBUCCI: All right. We can then turn it over to you.

MR. BHUTA: All right. Thank you.

One of the consequences of not being able to be there in person is that I am unable to hand out a binder of authorities which I had intended to bring with me. However, they have been sent to Mr. Terry's office to Torys in lieu of my ability to actually bring them to you. So I am going to try to make this presentation in the absence of -- I was hoping to be able to direct you to some authorities, but unfortunately I won't be able to do so.

COMMISSIONER IACOBUCCI: We will make sure that gets distributed.

MR. BHUTA: Yes. I will certainly distribute them through the Commission. The intention was to provide two copies.

COMMISSIONER IACOBUCCI: Sure. We will distribute it if you send it to us, please.

MR. BHUTA: All right. Terrific. Thank you very much.

COMMISSIONER IACOBUCCI: Thank you.

SUBMISSIONS ON BEHALF OF HUMAN RIGHTS WATCH

MR. BHUTA: Our written submissions I think are relatively comprehensive in terms of the issues that Human Rights Watch wishes to address in this part of the proceedings. I unfortunately have not had the benefit of being able to listen to the other submissions today, so if there are areas in which it would be useful for me to elaborate further on some elements of our submissions, I would certainly appreciate some direction from the Commissioner.

COMMISSIONER IACOBUCCI: Let me just say that if you are able to get -- we will have a transcript.

MR. BHUTA: Yes.

COMMISSIONER IACOBUCCI: We will have that sent to you and if you wish to supplement anything that you have already provided us with additional commentary, we would be grateful to receive it.

MR. BHUTA: All right. Thank you very much.

So in sum, our submissions on the question of standards really can be summed up into three propositions.

The first proposition is simply that the obligation not to commit, to be complicit in or to otherwise acquiesce in torture is one recognized as having jus cogens status in international law and is binding on Canada both by customary international law and by virtue of the Convention Against Torture and International Covenants on Civil and Political Rights, two treaties which Canada has ratified.

So the nature of the norm prohibiting torture gives rise to some particular obligations which are perhaps somewhat special even in the realm of human rights law.

The first basic proposition is that everyone has a right not to be tortured, including the three individuals whose treatment is the subject of this Inquiry. The corroborative duty that goes with that right is a duty not to torture. It is a duty on a state not to conduct torture, not to commit torture through its agents. It is a duty not to be complicit in torture as per the guidance given to us by the Convention Against Torture Committee at paragraph 17 of its General Comment No. 2.

That is extracted at paragraph 27 of our written submissions.

There is an additional obligation, however, which is the obligation to forestall or prevent or preempt torture, and that is the aspect of our submissions that I would like to stress in these oral submissions.

So if I could direct the Commission to paragraph 18 of our written submissions, that is page 8 of the

version that is filed, we set out some propositions which are found in the decision of the International Criminal Tribunal for the former Yugoslavia in the case of the Prosecutor against Furundzija.

The ICTY's jurisprudence in this respect has considerable weight. It is an International Criminal Tribunal created by the Security Council. Its judges are recognized as eminent jurists of international law.

In that decision the court held that the obligation which flows from the customary international norm prohibiting torture is an obligation not only to prohibit and punish torture but also to forestall its occurrence. Because of the nature of the suffering that is inflicted by torture, it is insufficient merely to intervene after the infliction of torture where the court says:

> "... when the physical or moral integrity of human beings has already been irremediably harmed. States are bound to put in place all those measures that may pre-empt the perpetration of torture."

And, as a result:

> "International law intends to bar not only actual breaches but also potential breaches of the prohibition against torture."

So the nature of this duty is a nature which flows from the right not to be tortured and the strength of that right in international law.

It has been recognized similarly by the European Court of Human Rights as giving rise to special obligations under the European Convention on Human Rights in the well-known case of Soering and the United Kingdom.

In this respect I would ask you to turn to page 13 of our written submission where we discuss the Soering decision.

At this stage what I would like to draw to your attention is one of the bases for the Soering decision -- and I'm sure the Commissioner is familiar with the decision. But it concerned the question of whether or not there was an obligation not to extradite Mr. Soering because he may face a violation of Article 3 at the hands of another state.

In reaching the decision that it did, that Article 3 of the Convention prohibited the extradition of Mr. Soering, the European Court stressed that one of the reasons for this is because of the special importance of the Prohibition Against Torture or Cruel, Inhuman or Degrading Treatment.

It noted that:

> "... in view of the serious and irreparable nature of the alleged suffering --"

I'm quoting here from paragraph 90 of the decision which is extracted at paragraph 45 of our submissions.

> "... in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article 3..."

It was necessary for a state to have regard to whether or not the extradition of someone to another state would expose that person to conduct which would violate the norm against torture or cruel, inhuman or degrading treatment.

So the implication is that the nature of the norm requires measures that will preempt or forestall the perpetration of torture.

All of this goes, in our submission, to the question of the nature of the duty that is imposed upon Canada in light of its obligations both on the customary international law and under the two treaties that it has ratified: the Convention Against Torture and the ICCPR.

In our view, what this gives rise to is a broader obligation, which is an obligation to ensure that the state through its conduct does not expose an individual to a substantial foreseeable individualized risk of torture. That obligation, the obligation not to expose, is not, in our view, limited to the circumstances of extradition. That is one instance in

which the obligation has arisen, and it is the instance that is most clearly recognized in the cases.

But in our submission, the obligation and the general proposition is a broader one and that proposition is articulated by the European Court of Human Rights in the case of Ilascu and Moldova.

At paragraph 317 of that case -- and this paragraph is set out in paragraph 50 of our submissions at page 15 -- the European Court noted that:

> "A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the European Convention on Human Rights, even if those repercussions occur outside its jurisdiction."

So, in our view, the relevant standards which apply to the questions which are set out in the Commission's Notice of Hearing first of all must at least have as a minimum standard Canada's binding human rights obligations.

And we address one specific set of those binding human rights obligations, those pertaining to the prohibition against torture.

The nature of the duty is a duty not only not to torture, but a duty of due diligence to forestall or preempt potential acts of torture, and that duty of due diligence extends to

situations where the torture may be perpetrated at the hands of another state or in another territory where there is some basis to think that specific individuals face a real foreseeable individualized risk of torture due to the conduct of Canada or Canadian officials, irrespective of whether those individuals are on Canadian territory or not.

In the material that we have set out in our written submissions we provide additional authority for those propositions and for the interpretation of treaty obligations which, in our view, support that position.

Now, I'm happy to go further into some of those questions but that in essence is the heart of our submissions.

MR. TERRY: This is John Terry. I have just one question.

In paragraph 52 you use the term "due diligence" and "the obligation of due diligence". Does that wording flow specifically from the case law or from the Nowak text there? Where does that term come from?

MR. BHUTA: Well, the obligation of due diligence in that instance I have picked up from Professor Nowak's commentary. However, I think it is fair to say that the tenor of other authoritative documents, such as General Comments, has reflected that language.

For example, if I can refer you back to paragraph 17 of General Comment No. 2 where the CAT

Committee refers to the obligation to adopt effective measures to prevent public authorities from committing, instigating, inciting, and so on, that is considered as an instance of the due diligence obligation.

So due diligence is a gloss, as it were, on the obligation to ensure, an obligation which arises specifically under Article 2 of the ICCPR and also under the Convention Against Torture.

MR. TERRY: Thank you.

MR. BHUTA: Actually, if I could just elaborate a tiny bit further on that, which is the obligation to ensure is a positive obligation. Again, I would direct you to the Nowak text which I would have provided you a copy of had I been there.

You will note that in Article 2 of the ICCPR there are two obligations that are imposed on states parties; an obligation to respect and an obligation to ensure.

The conventional interpretation of this phrase is the obligation to respect is the obligation to not violate directly. The obligation to ensure is to take positive steps to protect the right, if necessary including against the actions of third parties.

COMMISSIONER IACOBUCCI: Just a question I have generally.

Paragraph 16 of your submissions is a pretty important statement.

MR. BHUTA: Yes.

COMMISSIONER IACOBUCCI: I just want to get sort of its origin and providence because there is a lot in it.

The statement that you have there about the central legal question posed by the Notice of Hearing and the explanation of "what were and are Canada's international human rights obligations towards Canadian citizens who face a credible, substantial and individualized risk of torture and ill-treatment", where it is reasonably -- can you just give me the genesis of that?

Where did it all come from? I know that some of it is explained later on.

MR. BHUTA: Yes.

COMMISSIONER IACOBUCCI: But can you just encapsulate basically what is the legal support, the legal legs for all of that?

MR. BHUTA: Okay. Commissioner, as we conceded in our submissions, we understand that the factual findings of the Arar Commission do not bind this inquiry. Our concern was merely to try to narrow the range of questions that we wanted to address.

COMMISSIONER IACOBUCCI: Right.

MR. BHUTA: We relied upon the Arar Inquiry factual findings in order to narrow the scope of our submissions.

So it is quite open to me I think, to take this as a hypothetical scenario, to suggest well, let's assume a situation

in which Canadians may be detained on the basis of information gathered and provided by Canadian officials. That is reasonably foreseeable.

Second, that those Canadians are detained and Canadian officials continued to seek means of pursuing investigations.

Now, the question then is specific to the obligations on Canada under the ICCPR and under the Convention Against Torture: what do we need to know?

The answer to that question, which I think is elaborated upon in our submissions, is if there is a basis to be concerned or to reasonably foresee that those individuals have faced a substantial individualized risk of torture, then that is going to place limitations or circumscribe what is permissible for Canadian officials to do.

So let me first take you to the question of the wording of "substantial individualized risk of torture".

Am I going in the right direction here, Commissioner, because I want to make sure I'm answering your question properly.

COMMISSIONER IACOBUCCI: You are explaining it, so I am grateful for that. That is probably the right direction if you are helping me understand it.

MR. BHUTA: Right. So we have used language here which in a sense mirrors the language of what we say are the relevant human rights obligations.

COMMISSIONER IACOBUCCI: Right.

MR. BHUTA: I can take you to some of this language and show you the basis for it.

We have asserted that these human rights obligations become relevant in a context where there is a substantial individualized risk of torture. Now that language, the language of substantial individualized risk of torture, is essentially the language of non-refoulement to torture.

COMMISSIONER IACOBUCCI: Right.

MR. BHUTA: So the test in the non-refoulement cases, as you might be aware -- and we addressed this on page 16 of our submissions at footnote 52.

The test of the circumstances of when a country may not return an individual or extradite an individual or deport an individual because of the risk of torture is when that individual faces a real foreseeable and personal risk.

So in our submission that obligation, the obligation of non-refoulement to torture, is in the context of the ICCPR one instance of a broader obligation, the obligation not to expose an individual to those risks.

In our view, support for that latter proposition comes from Soering so I would direct you to --

COMMISSIONER IACOBUCCI: No, I get that.

MR. BHUTA: Yes.

COMMISSIONER IACOBUCCI: I understand that this is by analogy --

MR. BHUTA: That's right.

COMMISSIONER IACOBUCCI: -- to the extradition jurisprudence.

MR. BHUTA: Exactly. So that is the first proposition: that the obligation to ensure Article 7 rights under the ICCPR extends to an obligation not to do things which might expose an individual to a real risk.

COMMISSIONER IACOBUCCI: Right.

MR. BHUTA: The second proposition is: Well, what kind of action then may be encompassed by that obligation? What kind of state conduct may be burdened with that obligation?

In our view, it would extend and include situations where an individual might be detained upon information or other contributing conduct of Canadian officials.

So, hypothetically, if there is knowledge or a real reasonable foreseeable risk, which is individualized, that someone would be detained by state authorities of another country where there is a practice of torture, where there is a real risk of torture, also in light of that individual's profile, then sharing information which contributes to that or makes more likely detention at the hands of that third state in our view would be a breach of the obligation not to expose someone to the risk of torture.

COMMISSIONER IACOBUCCI: Yes.

MR. BHUTA: In terms of the second proposition, 16(b), if the individual is in fact detained, the obligation not to contribute to further exposure, not to undertake acts which may instigate, which would have as a foreseeable consequence the exposure of that individual to torture at the hands of the authorities of a third state, would also apply.

So transmitting questions with the knowledge or where it is reasonably foreseeable that answering those questions may in fact result in torture, the attempt to make someone answer those questions may result in the application of torture by third state authorities, is similarly a violation of that obligation.

COMMISSIONER IACOBUCCI: That's very helpful. That helps me. I appreciate that.

MR. BHUTA: As I said, in our view, that flows. As you say, it is an analogy but in our view it is a very close analogy. This is not, in our view, much of an extension of the basic principles set out in Soering, because the language in Soering is broader than merely the language of extradition.

It refers to liability which is given rise to under the Convention by virtue of the foreseeable consequences of the state's conduct.

As I said, in the subsequent case of Ilascu and Moldova, the European Court of Human Rights elaborated the proposition in a more general form with the notion that a state

can be responsible for the proximate repercussions of it its conduct, even if those repercussions occur in another territory.

So in our submission this general obligation not to take steps which would reasonably foreseeably expose an individual to torture is merely one instance of the broader protection which provided by these human rights treaties.

COMMISSIONER IACOBUCCI: Again, thank you for that.

--- Pause

COMMISSIONER IACOBUCCI: We are just looking at each other. We don't have any further questions.

MR. BHUTA: All right.

I guess the only other issue which we do address in some length is this question of jurisdiction and the meaning of whether someone is within jurisdiction.

I don't know whether you want me to elaborate on that or whether that is of any assistance.

COMMISSIONER IACOBUCCI: Sure. Yes, we would, please.

MR. BHUTA: All right.

The first observation is that the jurisdictional provisions of the Convention Against Torture and the jurisdictional provisions of the ICCPR are somewhat different. We note in paragraph 24 of our submissions that Article 2 of the CAT requires State Parties to take:

"... effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

Now, we note that in the interpretation of the Committee and I think in the interpretation of other authorities, such as the International Court of Justice, a territory comes under the jurisdiction of a state wherever it exercises effective control. So as the CAT Committee points out in General Comment No. 2, territory under the jurisdiction of a state will include military bases, embassies, detention facilities, even if those facilities and properties are in the de jure territory of another state.

So to take an obvious example, Guantanamo Military Bay is without question a territory under the jurisdiction of the United States for the purpose of the Convention Against Torture, even though de jure it is under the jurisdiction of Cuba.

The territorial focus of the CAT in a sense reflects the extent to which it is concerned with providing a machinery of effective prohibition and prosecution of torture. We note Lord Browne-Wilkinson's observation in the Pinochet decision that the torture convention was agreed not to create an international crime but to provide an international system under which the international criminal, the torturer, could find no safe haven.

So for those reasons a lot of the machinery in the Convention Against Torture is concerned with situations or issues such as establishment of universal jurisdiction and explicit obligations which would allow, and indeed in some cases obligate, a state party to exercise criminal jurisdiction over torture.

But it is noteworthy that in General Comment No. 2, the CAT Committee indicated very firmly that the Convention applies to all public authorities of the state.

In our submission, that would extend to public authorities acting outside the territory of the state.

So where in paragraph 17 of General Comment No. 2 the Committee observed that States Parties must "adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating in" acts of torture, in our submission that is not limited to the territory of the state.

That would apply to public officials acting in other territories in their official capacity.

So the obvious example that comes to mind here is consular and embassy officials.

But we also observe in our submissions that the CAT cannot be taken as exhausting the legal obligations which flow from the prohibition against torture. That much is made clear both by the Committee Against Torture in General Comment No. 2, at paragraphs 15 and 27, but also in Soering in

the United Kingdom where the court noted that in the context of European Convention on Human Rights, merely because the European Convention on Human Rights did not contain an explicit prohibition on non-refoulement and the CAT did, it did not imply that the protection provided by the European Convention was somehow lesser than or narrower than that provided by CAT or vice versa.

As I said, the Committee has confirmed this in General Comment No. 2.

So for that reason it is necessary to look also at Article 7 of the ICCPR which contains the broad prohibition that no one shall be subjected to torture or to cruel, inhuman or degrading treatment.

As we note in our submissions, the applications clause of the ICCPR is broader than that of the Convention Against Torture. It applies to all persons within a state's territory and subject to its jurisdiction. So a state is obliged under the ICCPR to respect and ensure the right that no one shall be subjected to torture or to cruel, inhuman or degrading treatment to all persons within its territory and subject to its jurisdiction.

It is now settled as a matter of law that the phrase "within its territory and subject to its jurisdiction" comprises two alternative bases for the application of the ICCPR. These are not cumulative conditions.

COMMISSIONER IACOBUCCI: They are disjunctive.

MR. BHUTA: That's right.

I would like to read, if I may, the relevant paragraph from the decision of the International Court of Justice in its Advisory Opinion in the Wall case which was handed down in 2004.

Again, I would have liked to have been able to provide a copy to you, but I will have to settle for reading it.

In paragraph 109 the International Court of Justice addressed the question of the territorial application of the ICCPR.

It said:

> "The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.
>
> The constant practice of the Human Rights Committee is consistent with

this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina ... It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany..."

Just to interrupt myself for a moment, what is noteworthy here I think is that it didn't matter whether Uruguay was conducting these acts legally or illegally on the territory of another state. What mattered was that it engaged in acts which had consequences for the rights of Uruguayan citizens, albeit outside the territory of Uruguay.

Just to continue the quote:

"The travaux préparatoires of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national

territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence ..."

The holding of the International Court of Justice essentially confirmed the jurisprudence of the Human Rights Committee, and we set that out in paragraphs 38, 39 and 40 of our written submissions.

I just want to draw your attention to the quote from Lopez Burgos and Uruguay which we set out in paragraph 38 of our submissions.

In that decision, which concerned the conduct of Uruguayan agents in what would become known as Operation Condor of abducting suspected Uruguayan dissidents outside of the territory, in this case Mr. Lopez Burgos was abducted in Argentina, arguably with the consent of the Argentinean authorities. In this case the Human Rights Committee observed that:

"Article 2(1) of the Covenant places an obligation upon a State party to respect and ensure rights 'to all individuals within its territory and subject to its jurisdiction', but 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 ... In line with this, 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."

So as I noted, this approach to the covenant and the meaning of jurisdiction under the covenant and its application as a protective instrument to ensure that states can be held responsible for their conduct which violates obligation under the treaty, even if that conduct occurs outside their own territory, that this interpretation has been accepted by the ICJ essentially in the form that it was articulated by the Human Rights Committee.

The passport cases to which the ICJ referred and which will be included in the authorities which I will be submitting to you, clearly indicate that merely because an individual is outside of the territory of a state it does not mean

that official state conduct in that third state cannot give rise to a responsibility under the covenant.

The example in the passport cases was one in which Uruguayan nationals who had fled Uruguay were denied renewal of their passports by the Uruguayan embassy in the countries in which they now lived. So these individuals were clearly outside the territory of Uruguay, and the harm that they suffered was suffered as a consequence of the conduct of Uruguayan diplomatic officials acting entirely within their powers as diplomats in the territory of another state. Yet it was still regarded by the Human Rights Committee as a basis to hold Uruguay responsible for violation of Article 12, which is the right to enter, to return or to leave one's own country.

By denying unreasonably the renewal of a passport of Uruguayan nationals outside of Uruguay, this was still held to be conduct which was within the jurisdiction of Uruguay for the purposes of the covenant.

COMMISSIONER IACOBUCCI: Maybe put it in another way, this is not an unlawful extraterritorial application of laws by a state. This is in accordance with international law by virtue of the nature of the international covenant's reach.

MR. BHUTA: That's right.

COMMISSIONER IACOBUCCI: Is that a way I can understand it properly?

MR. BHUTA: Yes. If I understand your question, Commissioner, you are asking in a sense whether by applying the covenant obligations to a state's --

COMMISSIONER IACOBUCCI: Yes.

MR. BHUTA: -- conduct in the territory of a third state, is there some sort of interference, some sort of breach of comity as it were vis-à-vis that third state.

Is that --

COMMISSIONER IACOBUCCI: I mean, we grew up studying that some countries more than others resorted to extraterritorial application of their laws, notably the United States --

MR. BHUTA: Yes.

COMMISSIONER IACOBUCCI: -- would be, you know, extraterritorial application of its foreign policy. Canadian companies who are subsidiaries of American companies couldn't trade with Cuba, those kinds of issues, antitrust.

This is not in violation of accepted norms of extraterritorial limits of a state.

MR. BHUTA: No.

COMMISSIONER IACOBUCCI: You are saying that this is really giving full faith and credit to, if you like, the covenant, international covenant civil political rights.

MR. BHUTA: Yes. So in a sense there are two questions there.

The first question is: Why should we read the covenants as extending in this manner?

The second question is: If we do read the covenant as extending in this manner, is this somehow an impermissible application of law extraterritoriality?

COMMISSIONER IACOBUCCI: Yes, that's right. Those are the underlying questions.

MR. BHUTA: Right. So the first question I think is answered clearly by virtue of reference to the objects and purposes of the covenant.

COMMISSIONER IACOBUCCI: Yes, right.

MR. BHUTA: Again, I would refer the Commissioner to paragraphs 109 and 110 of the international Court of Justice decision in the Wall case and in the material that is set out in our submissions concerning the object and purpose of the treaty as elaborated by the Human Rights Committee in its General Comment No. 24.

COMMISSIONER IACOBUCCI: Right.

MR. BHUTA: As we note in our submissions, that is consistent with the European Court's understanding of the objects and purposes of the European Convention, one of the reasons upon which it regards it as acceptable to develop the obligation not to expose an individual to a certain kind of illegal conduct, even if that conduct occurs extra-territorially.

So the first question is answered simply by saying it is in the nature of this treaty that it should be interpreted and developed in a manner which as far as possible serves its objects and purposes of providing a set of protections to individuals; that it is inconsistent with the nature -- if I can once again paraphrase the language of the Human Rights Committee in Lopez Burgos, it would be unconscionable to interpret the covenant in a way that permits a state party to do something outside its territory which it couldn't do inside its territory.

That flows from the nature of the covenant. This is not a contractual undertaking as between states in order to protect their own interests. It is an undertaking that states have made unilaterally to each other to protect the rights of individuals. So it should be interpreted accordingly.

The second question is: Well, would this be an impermissible interference in the jurisdiction of another state if one were to apply these obligations to state officials of the state party acting in the third state?

The answer there is clearly no.

First of all, it is hard to understand how there could be any impermissible extraterritorial effect. The concern here is to understand the responsibility of the officials of the state party.

Now the state party is not obliged to do in the third territory something that it could not otherwise do under international law. For example, again, there is an obligation to

respect and to ensure the right not to be tortured. This has to be interpreted in a manner which can be made realistic in a way, consistent with what the state party can reasonably do in the territory of another state.

So it is unlikely that the state party can actually control the conduct of another state's security forces, and there is no obligation that it should do so. That indeed would be an infringement of the sovereignty of another state.

But it doesn't mean that the state party doesn't have to do anything, and for that reason the state party can be seen as having an obligation not to do anything which would acquiesce in, be complicit in or otherwise expose an individual to a further risk.

So if it is interpreted in this way, it is difficult to see how it could amount to any kind of impermissible extraterritorial effect.

Finally, I would just refer the Commission to the decision of the International Court of Justice in Nicaragua and the United States where, I believe it is in paragraph 217, the International Court of Justice notes that the international law norm of nonintervention is not breached if the acts committed by another state is something which is consistent with international law and its international law obligations.

In effect, I think there is some discussion of this question in the recent decision of the Supreme Court of Canada in The Queen versus Hape.

MR. TERRY: Mr. Bhuta, it's John Terry again. One final question I have that I was wondering if you could briefly address, which is we of course are concerned here about the standards of conduct for Canadian officials. Your submissions of course are focusing on international treaty provisions which are binding on Canada as a state and in order to bring these provisions, if they can be brought, into domestic law, to inform domestic law, do you have any submissions as to how that would occur?

Are we talking, for example, about informing constitutional norms or administrative norms or tort causes of action under Canadian law?

MR. BHUTA: Well, it could be all of those things. Under the obligation to respect and to ensure and under the obligation to comply with a state's binding human rights obligation, the state simply has to do what is necessary in accordance with its own constitutional legal system.

And this again brings us back to the question of due diligence. The state must take those steps which are necessary under its own legal system to ensure compliance with the norm. So that would include, if necessary, formulation and application of the appropriate policies.

The state does not, as it were, get off the hook merely because individual officials say that they weren't aware of the state's obligations. That is still a question ultimately that would resolve into a violation of the state's obligation.

MR. TERRY: Thank you.

COMMISSIONER IACOBUCCI: Thank you very much. Is there anything else you wish to add?

MR. BHUTA: Once again, because I haven't heard the submissions of other parties, unfortunately I'm not in a position to speak to any specific issues raised by individuals today. But I would take up your opportunity to review the transcript and perhaps submit written comments in due course if there is anything to respond to.

I just want to make sort of two concluding observations, one which follows on from Mr. Terry's question and one which is sort of a more general nature.

One of the implications of our submissions I think is that as legal standards the failure of a state to adopt the necessary policy or the failure of a state to have due regard to what its obligations might be in a given situation is not a reason to say that the standard couldn't apply to them.

It certainly wouldn't be a reason under international law for the state to mitigate or diminish its responsibility. So in that sense we just want to point out that the absence of specific policies or procedures which adequately incorporate these obligations is in a sense not a reason to conclude that these obligations were not in force at that time.

In essence, it is simply a failure of the state to conduct itself with the necessary due diligence.

That leads me to the more general observation, which is the tenor of the written submissions I think of the Attorney General was that because of the new circumstances faced by Canada, certain kinds of relationships, certain kinds of interactions which previously might have been eschewed now become necessary.

Now, the observation that I want to make about that is, even if we were to accept that that is true, what that would imply is that the international human rights obligations which bind the state, irrespective of the new circumstances and which cannot be derogated from by virtue of their jus cogens status, must also then be fully referred to, considered and implemented in any policies or responses which are formulated in response to these new circumstances.

So there is nothing in the nature of these new circumstances, and there is certainly nothing that I have seen in the nature of the international legal framework which suggests that human rights obligations somehow therefore become dispensable or derogable and that is clearly not the case, particularly with the obligations attaching to the Prohibition on Torture because these are jus cogens status and cannot be derogated from.

I guess our concluding observation would simply be that if hypothetically there is a situation in which a state is increasingly finding itself believing itself required or seeing itself as having to deal with states that might practise

torture, or that routinely practise torture, then that in many ways heightens the obligation upon the state under these treaties to ensure that it conducts itself with the necessary due diligence so that it does not violate its obligations not to expose individuals to torture.

You know, in a sense the more you are engaged in this kind of conduct, the heavier the burden becomes upon you to make sure that you comply.

COMMISSIONER IACOBUCCI: Well, you may wish to amplify that once you see the transcript, because there has been a little bit of discussion about that today.

MR. BHUTA: Right.

COMMISSIONER IACOBUCCI: Thank you very much.

MR. BHUTA: All right. Thank you and I very much appreciate the facility.

COMMISSIONER IACOBUCCI: We appreciate your participating under these circumstances, and I hope that the transcripts will provide you with an opportunity to supplement if you think that is worthwhile.

Again, thank you very much.

MR. BHUTA: Thank you.

--- Pause

COMMISSIONER IACOBUCCI: The whispering was simply counsel talking about reply submissions. I will ask if anyone is anticipating reply submissions?

MS JACKMAN: We are going to discuss it tonight, but we may have a couple of comments in reply (off microphone).

COMMISSIONER IACOBUCCI: That's fine. My purpose in raising it was to try to give you as much notice as possible if you are going to exercise the option, not to ruin your evening but to try to give you as much notice as possible.

MR. COPELAND: We will consult as well.

COMMISSIONER IACOBUCCI: So we will hear the results of your consultations tomorrow morning.

We will adjourn until tomorrow morning. Thank you.

Thank you all.

THE REGISTRAR: Please rise. Veuillez vous lever.

--- Whereupon the hearing adjourned at 4:45 p.m.,
to resume on Wednesday, January 9, 2008 at
9:00 a.m. / L'audience est ajournée à 16 h 45,
pour reprendre le mercredi 9 janvier 2008
à 0900

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