

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:**

Bytown Lounge  
111 Sussex Drive  
Ottawa, Ontario

Wednesday, January 9, 2008

**Tenue à:**

salon Bytown  
111, promenade Sussex  
Ottawa (Ontario)

le mercredi 9 janvier 2008

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--- Upon commencing the hearing on Wednesday,  
January 9, 2008 at 9:00 a.m. / L'audience  
débute le mercredi 9 janvier 2008 à 9 h 00

THE REGISTRAR: Please stand. Veuillez vous  
lever.

COMMISSIONER IACOBUCCI: Good  
morning.

THE REGISTRAR: Please be seated. Veuillez  
vous asseoir.

COMMISSIONER IACOBUCCI: Good  
morning, everyone.

Reflecting on some of the submissions made  
yesterday, my counsel and I were discussing some aspects of the  
submissions and we have heard through the submissions the legislative  
mandate, the policies and practices of government departments and  
officials relating to these issues. Brief reference was made to the Charter  
and then of course very full submissions on international human rights  
and conventions and treaties, and so on.

On reflection it was the Charter area that was not  
as explored much as the others, not as fully discussed. And it occurred  
to us -- and I was going to ask John Terry to comment on this -- that we  
might want to think about the Charter ramifications of this, not to  
complicate matters but in fact to make sure that we are covering all of the  
possible ramifications that relate to the issues that are before us.

1                   As I said, I know, Ms Jackman, you raised it but  
2 you didn't develop it in a way -- and I'm not faulting you for that. One of  
3 the reasons I am raising it is that maybe we should take the time to think  
4 about that point that you raised more fully.

5                   Maybe John Terry, you could pursue that.

6                   MR. TERRY: I don't know if I have too much to  
7 add to that, Mr. Commissioner, other than as you said yesterday, there  
8 are security and liberty interests at stake in this case and it seemed to us  
9 on reflection we had spent a lot of time talking about the potential role of  
10 international law in determining and in affecting the standards that would  
11 be applied here.

12                   There are ways that you can look at this from a  
13 tort law perspective in terms of duty of care that's owned by government  
14 officials and consequences that flow from actions. But it also seemed  
15 that one frame of reference is the constitutional frame of reference in this  
16 case.

17                   It raises questions of not only whether section 24  
18 of the Charter is engaged or section 7 is engaged, but also if it is engaged  
19 then are we into some sort of proportionality, at least drastic means analysis,  
20 either within section 7 or within section 1?

21                   It seemed to us that this was an issue that was  
22 worth addressing, bearing in mind that we are raising this at the  
23 beginning of the second day and that it may not be possible for people to  
24 address this in any detail today, and the Commissioner may want to make  
25 a statement about the possibility for follow-up submissions on this point.

26                   COMMISSIONER IACOBUCCI: Yes, I would.

1                   Again, if all the participants and intervenors wish  
2 to think about this question and then upon reflection provide some  
3 submissions on the matter, we would be again appreciative of that, and  
4 that obviously would include all of you.

5                   I appreciate your collaboration in this respect. If  
6 that is your wish, collaboration would be encouraged.

7                   MR. COPELAND: I'm wondering, sir, in relation  
8 to that whether you want to consider having somebody file first and  
9 somebody to reply to issues or do you just want to have us all do our  
10 own part?

11                  COMMISSIONER IACOBUCCI: I don't think  
12 that's necessary in this case, Mr. Copeland. But I mean if you find  
13 something that upon your filing or someone else and you want to add,  
14 I'm not worried about -- I don't want to be too technical in this and you  
15 can supplement it.

16                  MR. COPELAND: Thank you.

17                  COMMISSIONER IACOBUCCI: I realize that's  
18 an open-ended invitation never to stop the supplementation procedure, but  
19 I know you will all use common sense and I will try to do the same.

20                  Mr. Norris...?

21 SUBMISSIONS ON BEHALF OF MUAYYED NUREDDIN

22                  MR. NORRIS: Good morning,  
23 Mr. Commissioner, counsel. I won't claim any responsibility for the fog  
24 having finally lifted this morning.

25                  I will be addressing the questions of consular  
26 access, in particular Questions 3 and 4 of the Notice of Hearing. I will

1 be dealing with Question 5 to a much lesser extent. I think the answers  
2 that I am suggesting in the framework that I am proposing in relation to  
3 Questions 3 and 4 will largely suggest the answers to Question 5 as well.

4 I would echo the comments that I understand that  
5 my colleagues made yesterday and as we made in our written  
6 submissions around the difficulties of addressing the question of  
7 standards in the absence of a factual foundation. I know that we are all  
8 going to try to do the best we can in these circumstances, but from time  
9 to time I will find myself and you will find me referring to the specifics  
10 of these cases because of my respectful submission that is the most  
11 helpful way to address the question of standards.

12 So we have some information on the public  
13 record. It is adverted to in our written submissions. So I am going to, to  
14 the best that I can, try to ground my submissions in the particulars of  
15 these cases while acknowledging that there will be nuances that may  
16 come to light at a later date.

17 With respect to the role of consular officials, in  
18 my submission, as a matter of customary international law it is the role of  
19 consular officials to represent the interests of Canadian citizens abroad.

20 Now, the interests of Canadian citizens will be  
21 myriad and the role of consular officials can range from the quite  
22 mundane to the utterly profound, from replacing a lost or stolen passport  
23 to assisting somebody arrested in say the state of Florida on a public  
24 drunkenness charge during spring break to the sorts of profound  
25 circumstances and very troubling circumstances in which the three men

1 whose circumstances you are inquiring into found themselves in Syria  
2 and in Egypt.

3 As was mentioned in your opening comments  
4 about perhaps some further submissions on the Charter, we are dealing  
5 with circumstances where liberty and security of the person are most  
6 clearly implicated.

7 It is our submission that it is an essential aspect  
8 of consular officials that where there are grounds for concern that the  
9 liberty and security of the person, of Canadian citizens, may be adversely  
10 affected, it is absolutely incumbent upon those officials to take whatever  
11 measures are necessary to protect the interests of Canadian citizens  
12 abroad, in particular detained in foreign countries.

13 This aspect of customary international law is to  
14 some degree, I would suggest, reflected in the legitimate expectations of  
15 Canadian citizens who are travelling abroad. Canadians I think will  
16 generally expect that if they get into trouble, they can turn to consular  
17 officials in an embassy in the country where there are travelling and can  
18 find assistance from those officials, and that that assistance will be  
19 rendered in the interests of the Canadian citizen and not contrary to those  
20 interests.

21 Whether those legitimate expectations continue to  
22 be held as a matter of empirical fact is perhaps open to debate because  
23 the more publicity there is about cases such as Mr. Arar's or the three  
24 men before you today, perhaps the less sanguine Canadians are becoming  
25 about how much help they can expect from their consul. And that is  
26 most regrettable, in my respectful submission.

StenoTran



1                   One of the overarching questions that this  
2 Commission must address -- and I understand that it was discussed at  
3 length yesterday -- is from what sources should we draw the standards  
4 against which conduct is being measured?

5                   In the particular context of consular access I  
6 would suggest at least the following sources. The first is the norms  
7 prevailing under international law at the time of the conduct in question,  
8 and according to the questions as you posed it is from 2001 to 2004.

9                   In my submission, notwithstanding the events of  
10 September 11, 2001, nothing much changed when it came to the norms  
11 that govern consular conduct either before September 11th or after  
12 September 11th, and certainly nothing has been pointed to in the  
13 materials before you to suggest that September 11th made any difference  
14 whatsoever to how consular officials ought to conduct themselves and at  
15 a more general level to the norms of international law.

16                  The second source that I would suggest the  
17 Commission should look to is the best practices that prevailed at the time.  
18 This is a matter into which you will of course inquire from informed  
19 individuals, but we will know from the sorts of training that is provided  
20 to consular officials, from the guidance that they receive from their  
21 superiors, from the positions taken by senior members of DFAIT, both  
22 publicly and internally, it should be possible to identify these best  
23 practices and to measure what happened in these individual cases against  
24 those standards.

25                  I would also suggest, third, that it is not  
26 inappropriate to judge the conduct of DFAIT officials with the benefit of

1 hindsight, from the position of wisdom that we now have today, with all  
2 of the information available to us, with an appropriate comparison of  
3 comparable cases, and to see whether the conduct was found wanting by  
4 today's standards because at the end of the day, in my submission, that is  
5 what matters for the purpose of future guidance: What ought the  
6 standards to be? Where they complied with and how may they be  
7 complied with in future?

8                                 So I would suggest that there are these three  
9 sources of standards from which the Commission may draw and there is  
10 really no unfairness, in my submission, in the sort of what might be  
11 pejoratively called Monday morning quarterbacking that this Commission  
12 could be seen to be engaged in by applying today's standards at the very  
13 least because, in my submission, there has not been a material change in  
14 those standards.

15                                 A key consideration when it comes to  
16 international law and the role of consular officials is of course the Vienna  
17 Convention on Consular Relations.

18                                 I have quoted from Article 36 of that Convention  
19 in the submissions that I prepared on behalf of Mr. Nureddin. That is at  
20 page 7 of those submissions, paragraph 18.

21                                 If I could ask you to turn that up, it may be of  
22 some assistance because there are a number of aspects to that article that  
23 I wish to focus on.

24                                 Canada and Egypt and Syria have all acceded to  
25 this Convention, so there is no issue as to the respective rights and

1 obligations of the three countries that you are concerned with in this  
2 Inquiry.

3 Article 36(1) deals with a number of aspects of  
4 the facilitation of the exercise of consular functions.

5 I would like to begin by highlighting the final  
6 sentence of subparagraph (b). After outlining a number of the rights that  
7 a detained individual has, Article 36(1)(b) concludes by saying:

8 "The said authorities shall inform the  
9 person concerned without delay of his  
10 rights under this subparagraph."

11 I would draw an analogy with the Charter of  
12 jurisprudence that I'm sure the Commissioner and his counsel are very  
13 familiar with, and that is the jurisprudence under section 10(b) of the  
14 Charter, where the right to counsel is a meaningless right unless you are  
15 told upon arrest or detention what your rights are.

16 The Supreme Court of Canada was very careful to  
17 develop a very rich informational component to that right to ensure that  
18 there could be effective exercise of that right.

19 I would suggest that the same sorts of rationale  
20 underlie the last sentence of subparagraph (b). How many people upon  
21 detention in a foreign country will really know what rights they have, to  
22 have access to consular assistance in particular? And unless they are told  
23 of those rights, they won't know that they can request them and exercise  
24 them.

25 So it makes perfect sense that the Convention will  
26 have included the provision.

1 Regrettably it seems --

2 MR. TERRY: Mr. Norris, could you just clarify a  
3 couple of points?

4 MR. NORRIS: Yes, of course.

5 MR. TERRY: The first point: What is your  
6 position as to whether the Vienna Convention applies to dual nationals?

7 I know that Canada's position is that it carries out  
8 consular services on behalf of dual nationals, but since you are focusing  
9 on the Vienna Convention, and others did yesterday, I'm just wondering  
10 what your position is on that.

11 Also, with respect to paragraph (b), the one you  
12 are looking at, it seems to be directed to the authorities of the receiving  
13 state.

14 MR. NORRIS: Yes.

15 MR. TERRY: I just want to have some  
16 clarification as to how that paragraph reflects on obligations Canada may  
17 have.

18 MR. NORRIS: We will come to that.

19 But yes, on the question of dual nationals, in my  
20 submission that is a red herring and ought not to distract the Commission  
21 from its work. It is completely irrelevant when it comes to Mr. Nureddin  
22 in Syria and Mr. Elmaati in Syria, and it is only engaged with respect to  
23 Mr. Almalki in Syria and Mr. Elmaati in Egypt.

24 In my submission, their dual nationality when it is  
25 engaged does not relieve either Egypt or Syria of their obligations under  
26 the Convention.

1 I can provide you with a reference to a recent  
2 paper by Professor Craig Forcece where he discusses this and argues  
3 that if at one time a long time ago the dual nationality question was a real  
4 one that might relieve a state of its obligations under the Convention, that  
5 is no longer the prevailing view and is not the preferred view among  
6 international law scholars.

7 The first question is: Does Syria, for example,  
8 have lesser duties with respect to Mr. Almalki because of his Syrian  
9 nationality? My submission is no, it does not; that it is equally obliged  
10 or the obligation is just a strong to inform Canada because of the reality  
11 of his Canadian citizenship and the much stronger connection he now has  
12 to Canada, or at the time of his detention.

13 COMMISSIONER IACOBUCCI: I would like to  
14 take you up on your offer of the Cacesce(ph). Is it Cacesce?

15 MR. NORRIS: No, it's Forcece.

16 COMMISSIONER IACOBUCCI: Oh, I thought  
17 you said Cacesce, I'm sorry.

18 MR. NORRIS: Yes. Also a well-known  
19 international scholar.

20 COMMISSIONER IACOBUCCI: That's why  
21 I --

22 MR. NORRIS: Yes, picked up on it.

23 So I would say on the facts of these cases it  
24 generally doesn't matter. Even when there is a live question of dual  
25 nationality between Canada and the detaining country, the first question

1 is: Does it relieve the detaining country of any obligation under the  
2 Convention?

3 In my submission, no, it does not. As I say, I rely  
4 on Professor Forcese's article and I will give you that reference.

5 That just makes sense as a matter of policy, in my  
6 submission.

7 On the question of obligations of the receiving  
8 country, I take that as the starting point because that is what begins the  
9 process of access to consular assistance.

10 So I acknowledge that at the moment we are not  
11 talking about responsibility of Canadian officials. We are trying to get  
12 Canadian officials in the door, as it were. So the starting point is that the  
13 receiving country or the detaining country has these obligations under  
14 subparagraph (b) to inform the individual of his or her rights and, once  
15 so informed, the individual can make an informed choice about whether  
16 to attempt to exercise those rights or not.

17 Another aspect of the Convention obligations is  
18 that it appears that neither Syria nor Egypt lived up to those obligations  
19 with respect to these men. That in and of itself could ground a complaint  
20 by Canada on a diplomatic level.

21 Whether that has been done or not, that is for you  
22 to determine.

23 Mr. Laskin...?

24 MR. LASKIN: I'm just going back to a point you  
25 made someone earlier in your submission about legitimate expectations.

26 MR. NORRIS: Yes.

1 MR. LASKIN: What is your submission as to  
2 the source of those expectations?

3 For example, do those expectations include or do  
4 they derive in part from communications from the Government of Canada  
5 about the scope of consular services, the publication to which the  
6 Attorney General has referred, DFAIT's guide for Canadians detained  
7 abroad. Is that a source?

8 If so or if not, what other sources do you say  
9 form these legitimate expectations?

10 MR. NORRIS: I think that we have to look at  
11 two different aspects of that.

12 One is the reasonable expectations of a Canadian  
13 citizen. That would be the fully informed individual who has examined  
14 all of the sources like publications by DFAIT, international law treaties  
15 and things of that nature so that the paradigmatic reasonable person who  
16 turns his or her mind to this question.

17 So that would draw from all of those sources.

18 The other aspect as an empirical matter, as a  
19 matter of fact, what do people generally expect when they go travelling  
20 abroad?

21 In my submission, we shouldn't look so much at  
22 that question, in part because we just don't know unless you start  
23 surveying people, but I would also be concerned about the possibility of  
24 those expectations being seriously diminished by government  
25 publications that continue to cut back on what international law says  
26 Canada should be doing for its citizens.

1 MR. LASKIN: So at the end of the day is it  
2 really a matter of legitimate expectations or is it a matter of these  
3 international law norms about which you are making submissions now?

4 MR. NORRIS: In my submission, the focus  
5 should be on the expectations of the reasonable persons informed by  
6 international law norms, because that is what ought to govern the conduct  
7 of the officials. It shouldn't be tailored to the actual expectation of  
8 individuals because people may simply be ill-informed.

9 MR. LASKIN: Again, this may be somewhat  
10 semantic, but why worry about expectations and why not just go directly  
11 to the norms and focus on those?

12 MR. NORRIS: I'm happy to do that, yes.

13 MR. LASKIN: I'm just not sure how focusing on  
14 expectations really advances things.

15 MR. NORRIS: Because to some degree,  
16 undoubtedly Canadians as a matter of fact do travel abroad expecting  
17 assistance from consular officials, and assistance that is to a degree  
18 encouraged by the very publications that you adverted to.

19 What is worrying, though, is where there is some  
20 slippage between what people know their rights to be and what  
21 international law says their rights are.

22 MR. LASKIN: Is it part of your submission that  
23 the communications from Canada to Canadian citizens travelling abroad  
24 don't fully reflect the rights of Canadians under international law norms?

25 MR. NORRIS: I'm not going that far, no. I'm  
26 just cautioning against placing too much weight on those sorts of



1 publications, because to a degree they are self-serving: that, you know,  
2 we will limit our degree of responsibility to whatever degree we want  
3 simply by publishing something. That is certainly a relevant factor but it  
4 shouldn't be seen as determinative.

5 COMMISSIONER IACOBUCCI: In reading  
6 your submissions and hearing what you are saying this morning, are you  
7 saying that the Convention on its face talks about -- obviously it is a state  
8 to state, amongst states arrangement obviously, but the beneficiaries of  
9 the rights that are in there are Canadian citizens.

10 MR. NORRIS: Absolutely.

11 COMMISSIONER IACOBUCCI: That's part of  
12 your --

13 MR. NORRIS: Yes. Yes.

14 COMMISSIONER IACOBUCCI: And it's not  
15 explicit that there is maybe perhaps standing for a citizen to demand --  
16 and a general sense it is discretionary. But implicit in the beneficiary  
17 concept is that there is a sort of recognition of a benefit for Canadian  
18 citizens to obtain consular services.

19 MR. NORRIS: I agree, yes.

20 COMMISSIONER IACOBUCCI: So from an  
21 implicit standpoint there is a norm that you can develop of argument from  
22 that treaty.

23 MR. NORRIS: Yes, I agree. I agree entirely.

24 COMMISSIONER IACOBUCCI: Is that what  
25 your --

26 MR. NORRIS: Yes.

1                                   One of the concerns in the facts of these  
2 particular cases is the initial question of whether the men were informed  
3 of their rights under the Convention, and you will have some evidence on  
4 that at some point, I trust.

5                                   But we must also be very careful not to blame the  
6 victims if they, even being aware of their rights under the Convention  
7 through some other source, did not attempt to exercise them or delayed  
8 the exercise of them; that they did not immediately request consular  
9 assistance or did not immediately request the assistance of a lawyer or  
10 something of that nature, because that question has to be assessed with  
11 due regard to the very special circumstances in which the men found  
12 themselves and that a request for consular access from them could very  
13 well have been self-defeating or contrary to their interests.

14                                  It could also come from a recognition, if they did  
15 not make such a request, that it would simply be denied or ignored in any  
16 event.

17                                  Mr. Terry...?

18                                  MR. TERRY: Mr. Norris, in looking at the  
19 obligations of the government here, you of course just made the point  
20 that we shouldn't, as you said, blame the victim for not requesting  
21 assistance.

22                                  What about the family of the victim? Should it be  
23 taken into account in assessing whether DFAIT properly exercised  
24 consular service in these cases? Should the actions of the family weigh  
25 into that analysis?

1 MR. NORRIS: Yes. You raise a very important  
2 point, I would suggest respectfully, and that is part of what we are  
3 concerned about in evaluating the conduct of DFAIT. When can officials  
4 be fixed with the knowledge that a Canadian has been detained in a  
5 foreign country?

6 The Convention speaks to that directly because of  
7 the obligation on the receiving country to notify let's say Canada that a  
8 Canadian citizen has been detained in the country. So they there is no  
9 problem, if the Convention is respected. Canada will be fixed with the  
10 knowledge because the receiving country will discharge its obligations  
11 and will inform Canada and Canada can then take the steps that are  
12 appropriate.

13 The challenging cases are ones where the  
14 receiving country does not live up to its obligations under the Convention  
15 and so information that a Canadian citizen has been detained abroad is  
16 coming to DFAIT officials through other channels, and one of those  
17 channels is obviously going to be the family.

18 A spouse or family member knows about the  
19 person's travel plans and they know they got on one plane but they didn't  
20 get off when they were expected to. They were supposed to come out of  
21 the arrivals gate on a certain day and they didn't and the person has  
22 literally disappeared.

23 And families, quite properly, will turn to DFAIT  
24 for help.

1                                   That sort of information, if not fixing DFAIT with  
2 the knowledge that the person has been detained, at least puts them on  
3 notice that it is necessary to begin making inquiries.

4                                   I acknowledge that DFAIT must operate within  
5 the parameters of the Privacy Act and respect for the privacy of the  
6 missing person, and I acknowledge that the Government of Canada in its  
7 submission has underscored that quite heavily and emphasized the  
8 limitations on the ability of DFAIT to share information with family.

9                                   But I would suggest that this very much has to be  
10 a matter of judgment and good common sense and that it should not be  
11 countenanced that DFAIT officials will simply shelter behind privacy  
12 laws in order not to have to make inquiries and to not discharge their  
13 obligations. Clearly there will be times when a Canadian citizen  
14 travelling abroad has not informed their family of their plans. They want  
15 to keep it private and it would be wrong for government officials to blow  
16 their cover, as it were.

17                                   But there will be other cases where the travel  
18 plans are well-known and there are good reasons to be concerned about  
19 the person's welfare and that fixes, in my submission, DFAIT with the  
20 obligation to begin making inquiries.

21                                   MR. TERRY: What about a situation where the  
22 family is aware of travel plans and for whatever reason the family  
23 chooses not to inform DFAIT?

24                                   MR. NORRIS: Well, then we have to look at  
25 what other information -- sorry, the question then following from that

1 then is: When is information going to be shared with the family are what  
2 are the obligations on DFAIT?

3 MR. TERRY: Essentially how does it affect  
4 Canada's obligations to provide consular services if the family is aware of  
5 someone's travel plans and that someone has been detained or is not  
6 where they should be but the family chooses not to inform DFAIT?

7 MR. NORRIS: Yes. Once again, looking at it  
8 from the perspective of DFAIT, I would suggest that -- and this may not  
9 be the most helpful answer -- it has to be judged on a case-by-case basis  
10 was good common sense and with a sensitivity to the interests that are at  
11 stake. Those interests of course are liberty and security of the person  
12 when we're talking about countries like Egypt and Syria with the sorts of  
13 human rights records that they have.

14 And it may well be that the family, for very sound  
15 reasons, isn't prepared yet to trust DFAIT, because the concern will be  
16 that DFAIT itself is part of the process that has led to the family  
17 member's disappearance or detention.

18 But the mere fact that there is this lack of trust  
19 that informs the decision not to contact DFAIT directly in my submission  
20 does not relieve DFAIT of its obligations if they are aware of the  
21 potential for the detention of a Canadian citizen from other sources yet  
22 again.

23 MR. TERRY: Thank you.

24 MR. NORRIS: This brings up the very difficult  
25 but important question of the sorts of efforts that ought to be made by

1 DFAIT to locate a missing Canadian citizen and, once having located that  
2 person, to gain consular access to them.

3 In my submission, the lack of a request for  
4 consular access should not excuse DFAIT from its responsibilities at the  
5 very least when dealing with countries such as Syria and Egypt with the  
6 human rights records that they have.

7 With respect to how to find a missing person and  
8 what sorts of efforts should be put in, I acknowledge that this is a matter  
9 that must be handled with great care and sensitivity, because those efforts  
10 could prove to be counterproductive if pursued in the wrong way.

11 But I would emphasize two points.

12 The first is that the officials we are speaking of  
13 are, after all, diplomats and they are presumably trained in and skilled at  
14 the management of delicate situations precisely like this.

15 But I would also emphasize, second, to pick up on  
16 a theme that the Government of Canada developed again and again in its  
17 submissions, that these are, if not exactly unique cases that this  
18 Commission is looking at, they are highly, highly unusual ones and there  
19 is no excuse in such circumstances for the matter not to be handled at the  
20 very highest levels within DFAIT.

21 It's not as if there is a floodgate that would open  
22 if cases like these were being brought to the attention of the Minister and  
23 the very highest officials within the ministry. These are few and far  
24 between in the government's on submission, and in such circumstances  
25 there is absolutely no reason not to bring them to the attention of the very  
26 highest officials so that guidance for Canadian officials could be

1 obtained from those levels and also so that the sort of state to state  
2 relations and communications could be conducted at the appropriate level.

3                                 Similarly, once the person has been found and  
4 efforts are being made to establish contact with them and to have access  
5 to them, the same considerations ought to apply. Yes, these are delicate  
6 situations; yes, handling it the wrong way can be counterproductive. But  
7 with good judgment, with good common sense that is fully informed by  
8 the country conditions in which the person finds him or herself, and with  
9 the appropriate diplomacy, there should be no difficulty with Canadian  
10 officials discharging their responsibilities and ensuring that the interests  
11 of the Canadian citizen are protected, particularly when the interests are  
12 as fundamental as the right not to be tortured or arbitrarily detained.

13                                 Once again, there is no reason why these matters  
14 cannot be guided from the very highest levels.

15                                 One thing that is quite striking when one  
16 compares the circumstances of individual cases is that the government's  
17 general rationale for why it can be difficult sometimes to get access to  
18 people, while undoubtedly true in general, doesn't seem to have a lot of  
19 traction in these cases when one compares, for example, Mr. Arar's  
20 circumstances, as they are known on the public record, and the sort of  
21 regular consular access that he had in contrast with Mr. Almalki, who  
22 detained in the very same facility over much of the same period of time,  
23 had little or no consular assistance provided to him.

24                                 Their circumstances appear to be very similar and  
25 yet the differential treatment cries out for some explanation.

1 I would note that the question of dual nationality  
2 doesn't offer any explanation because they are in identical circumstances  
3 in that respect.

4 Given what is at stake, given the sort of interests  
5 that are affected by a detention in a country such as Syria or Egypt, it is  
6 to be expected, in my submission, that Canadian officials will pursue the  
7 matter with the diligence necessary to afford the maximum degree of  
8 protection that is possible for those individuals.

9 The government emphasizes that it is not the role  
10 of Canadian officials to lobby for the release of a detained individual.  
11 Again, while that is true on a general level, one must look at the particular  
12 circumstances of the cases, not even just the circumstances of these men  
13 but any individual who has been detained.

14 Undoubtedly it must be the obligation of  
15 Canadian officials to seek to secure the release of a person who has been  
16 arbitrarily detained. It is not the role of Canadian officials to seek the  
17 release of a person who has been charged and is being dealt with  
18 appropriately by let's say the criminal justice system of the country in  
19 question.

20 The lobbying that is to be done is to ensure that a  
21 person who is being detained is dealt with according to the rules of the  
22 legal system of the country.

23 MR. LASKIN: Mr. Norris, when you say  
24 undoubtedly it is the obligation to seek to secure the release of someone  
25 who has been arbitrarily detained, sometimes propositions that are  
26 expressed as "undoubtedly" actually raise some questions.



1 MR. NORRIS: Yes.

2 MR. LASKIN: What is the basis for your  
3 statement?

4 MR. NORRIS: Because of the fundamental  
5 human right not to be arbitrarily detained and that it is under whatever  
6 international standard you want to look at or convention or declaration of  
7 human rights.

8 MR. LASKIN: So this is part of the obligation.  
9 Is it your submission that it is part of the obligation to ensure treatment  
10 in accordance with laws?

11 MR. NORRIS: Yes. So Syria, lets say, has an  
12 obligation not to arbitrarily detain someone. But at the same time Canada  
13 has an obligation to prevent or stop the arbitrary detention of a Canadian  
14 citizen.

15 MR. LASKIN: Is arbitrariness there to be  
16 measured in a manner that takes into account the local law of the  
17 detaining state?

18 MR. NORRIS: So long as it conforms with  
19 minimum standards of international law, yes. But if local law simply  
20 allows for the arbitrary detention of anybody at any time for any  
21 reason --

22 MR. LASKIN: The Attorney General has drawn  
23 to the Commissioner's attention, for example, the fact that there were  
24 emergency laws in place in these countries at the relevant time.

25 MR. NORRIS: Emergency laws of quite long  
26 standing.

1 MR. LASKIN: Indeed. Indeed.

2 MR. NORRIS: But yes.

3 MR. LASKIN: How does that factor into it, if at  
4 all?

5 MR. NORRIS: Well, the question then becomes  
6 whether those emergency laws meet basic international law standards.  
7 Our submission would be that they don't and that even those emergency  
8 laws provide for the laying of charges and the bringing of people before  
9 courts so that charges can be disposed of, and that certainly did not  
10 happen in the case of Mr. Nureddin or in the case of Mr. Elmaati, as I  
11 recall.

12 The efforts should be directed, in my submission,  
13 to the release of an arbitrarily detained person or to ensuring that that  
14 person is dealt with according to law provided that the local law meets  
15 minimum international standards. Again, those efforts should be made  
16 with equal vigour whether the person is of dual nationality or not. We  
17 ought not to countenance any sort of second-class treatment of dual  
18 nationals when that is engaged. But, as I suggested earlier on in my  
19 submissions, that is largely a red herring in the circumstances of these  
20 individual cases.

21 When it comes to the sharing of information by  
22 DFAIT officials with other Canadian agencies or other parties, again this  
23 is going to be an issue with many nuances and will be guided by various  
24 aspects of Canadian law, but also I would suggest by good common  
25 sense and by the responsibility to always be acting in the interests of the  
26 detained Canadian citizen.



1 that are appropriate for the detained person to ensure that he or she  
2 understands that well, you know, much of what you tell me is going to  
3 remain confidential unless you agree that I can share it with certain  
4 people. But there are some things that you might tell me that I can share  
5 even without your consent. That is very important for the detained  
6 person to understand so that he or she can make an informed decision  
7 about what information to share.

8 COMMISSIONER IACOBUCCI: Are you going  
9 to be continuing on with this facet or this part of your submissions to  
10 deal with this operational significance issue that the Attorney General has  
11 raised in terms of the sharing; that information can be shared if it's  
12 operationally significant according to the standards that are in the Privacy  
13 Act?

14 MR. NORRIS: I was not going to address that  
15 directly. At this point I was simply establishing or emphasizing the  
16 importance of establishing the ground rules for communication between  
17 the consular officials and the individual.

18 But on this --

19 COMMISSIONER IACOBUCCI: Go ahead.

20 MR. NORRIS: No, no.

21 COMMISSIONER IACOBUCCI: I'm just trying  
22 to understand the thrust of the point because if one is going to inform an  
23 individual there are limits, then it seems to follow, I would have thought  
24 from your argument, that you would have to at least briefly explain what  
25 those limits are.

26 MR. NORRIS: Yes.

1 COMMISSIONER IACOBUCCI: Does that  
2 mean you go into an explanation of what does operationally significant  
3 mean for disclosure to other agencies?

4 In other words, how far does this disclosure go  
5 along this?

6 MR. NORRIS: The question at this juncture is  
7 how far does the laying of the ground rules go. I suppose it would be  
8 enough for the DFAIT official to in lay terms explain that there are  
9 certain types of information that I can share with police agencies or  
10 intelligence agencies under the Privacy Act and without necessarily  
11 having to spell out exactly the parameters of that, so that there is at least  
12 the red flag raised --

13 COMMISSIONER IACOBUCCI: Yes.

14 MR. NORRIS: -- so the person can make an  
15 informed decision and not enter into the discussion under the  
16 misapprehension that this is all going to remain confidential.

17 COMMISSIONER IACOBUCCI: I'm not trying  
18 to get from you a code, a test. I'm just trying to alert all of us to what  
19 would be involved in that, keeping in mind the context of a person who is  
20 in detention in a foreign country is not exactly going to be in the best  
21 position to coolly and objectively understand a lot of technical details.

22 MR. NORRIS: Quite so. And who may well be  
23 troubled by a lot of doubts about whether the person sitting across from  
24 them is really there to help them are not. It truly is a horrendous  
25 situation to be having to make those sorts of decisions.





1 potential negative effects that may have, of being too vigorous in  
2 requesting access, of being too demanding in seeking private visits,  
3 because after all that could work against the interest of the detained  
4 person.

5                                   While those are valid concerns undoubtedly, it is  
6 perhaps ironic that such concerns seemed to be much less pressing when  
7 it came to sharing information that led to the individual's detention in the  
8 first place as it is our submission occurred in these cases.

9                                   DFAIT officials may well have been genuinely  
10 concerned about taking a misstep that would be detrimental to the  
11 interests of the detained Canadians, but from what is known of the  
12 experiences of these three men, I would suggest that there is another  
13 perhaps more sinister explanation, and that is the consular officials may  
14 have held back were been held back because the interests of other  
15 agencies were considered more pressing in the handling of these cases.

16                                   That, I would suggest, is a very troubling prospect  
17 indeed.

18                                   Subject to any further questions, those are my  
19 submissions.

20                                   COMMISSIONER IACOBUCCI: Thank you  
21 very much. These have been very helpful.

22                                   MR. NORRIS: Thank you, Mr. Commissioner.

23                                   COMMISSIONER IACOBUCCI: I thank you.

24                                   Is the International Civil Liberties Monitoring  
25 Group representative here?

26                                   There you are. Mr. Allmand...?



1 SUBMISSIONS ON BEHALF OF INTERNATIONAL CIVIL  
2 LIBERTIES MONITORING GROUP

3 MR. ALLMAND: Thank you,  
4 Mr. Commissioner.

5 As you pointed out, I'm here representing the  
6 International Civil Liberties Monitoring Group, which is a coalition of  
7 approximately 30 NGOs, trade unions, faith groups, and so on.

8 Commissioner, as you stated in your ruling of  
9 October 2, 2007, what is at issue in this Inquiry is the conduct of  
10 Canadian officials with respect to the three individuals involved in this  
11 matter: Messrs. Elmaati, Almalki and Nureddin. At the time you said you  
12 were directed by the Terms of Reference to ensure that the serious  
13 concerns raised by those terms are dealt with effectively,  
14 comprehensively and independently.

15 Today and yesterday you have invited  
16 submissions from the participants concerning the standards that the  
17 Commissioner should apply in determining the matters set out in  
18 paragraph "A" of the Inquiry's Terms of Reference.

19 In other words: What standard should apply to  
20 Canadian officials regarding the sharing of intelligence information with  
21 foreign countries, in particular Syria and Egypt, and then were the actions  
22 of Canadian officials deficient with respect to these standards; also, what  
23 standards should have applied to the provision of consular services for  
24 the three men in security in Syria and Egypt; and were the actions of  
25 Canadian officials deficient with respect to these standards.



1 foreign agencies and the interpretation of collected information was badly  
2 done.

3                               The major example was the description of Mr.  
4 Arar and his wife as branding them as extreme Islamists linked with  
5 al-Qaeda. This was an interpretation of facts that were gathered, not facts  
6 in themselves.

7                               Considering what happened to these three men,  
8 Messrs. Almalki, Elmaati and Nureddin, we have to ask whether the same  
9 deficiencies that happened in the Arar case were repeated here.

10                              During the Arar hearings we argued that Arar  
11 with the three other cases constituted a pattern which needed to be  
12 investigated and of course now it is. In any case, all the standards  
13 applied by Judge O'Connor in the Arar Commission should apply here,  
14 not just hard law -- that is, our Charter and Canadian law -- but also  
15 internal guidelines, directives and policies, plus international human  
16 rights standards.

17                              With respect to the sharing of information, Judge  
18 O'Connor pointed out that there were 24 federal agencies either directly  
19 or indirectly in Canada involved in the security and intelligence business  
20 and that there were 247 sharing agreements between Canadian and other  
21 national and foreign agencies. So in considering standards, one would  
22 have to examine the mandates and policies of all the Canadian agencies  
23 that might be involved in these particular cases.

24                              Since we don't know what the factual inquiry has  
25 revealed, we don't know which of these agencies, these 24 agencies, might  
26 have been involved.

1 In his report Judge O'Connor referred to the  
2 following standards which should apply in a general way to the sharing  
3 of information.

4 First, information to be shared must comply with  
5 policies requiring screening for relevance, reliability and accuracy and  
6 with relevant laws respecting personal information and human rights.

7 Two, information to be shared must comply with  
8 policies to attach written caveats. Without these caveats shared  
9 information could be re-shared to many other agencies on an ongoing  
10 basis and the information used in a way never intended.

11 Third, the sharing agency must be given clear and  
12 unambiguous direction on how to share information with foreign  
13 agencies.

14 Four, in any particular case there must be active  
15 and clear communication between the several Canadian agencies which  
16 might be involved with intelligence gathering and sharing in that case.

17 By the way, in the Arar matter he found there was  
18 often several agencies working on that case and they weren't even talking  
19 to each other.

20 Fifth, when briefing senior officers and  
21 government officials on individual cases, the investigating and sharing  
22 agency should report the whole story omitting no key facts.

23 Six, the officials in investigative and sharing  
24 agencies should be properly trained for national security investigations  
25 and in addressing human rights and cultural sensitivity issues.

1                                 Seven, labels such as terrorist should not be used  
2 unless they fully comply with policy criteria.

3                                 Eight, sharing cases should be subject to senior  
4 approval and oversight.

5                                 Nine, written policies on sharing should only be  
6 changed in accordance with proper procedures and never verbally.

7                                 Ten, the sharing of intelligence information and  
8 its consequences must be subject to obligations under the Canadian  
9 Charter of Rights, the Convention Against Terrorism, the International  
10 Covenant on Civil and Political Rights, Universal Declaration of Human  
11 Rights and other relevant human rights instruments.

12                                 In my written brief I listed other international  
13 instruments which touch on this matter.

14                                 Finally, number 11, it is never legitimate to share  
15 information when there is general knowledge that it could result in torture  
16 and other serious violations of human rights.

17                                 Mr. Commissioner, at this point I would like to  
18 deal with some of the arguments put forward by the Attorney General in  
19 his written submission and in his statement here yesterday to the effect  
20 that, one, Canada has an international obligation to share information with  
21 foreign agencies in virtue of UN treaties, UN resolutions, G8, NATO and  
22 OAS declarations and so on.

23                                 Second, that it was important to consider the  
24 environment that existed in the post 9/11 period in judging officials.

25                                 Mr. Commissioner, first of all, we agree that it is  
26 essential and legitimate to share information to fight terrorism, but

1 always subject to certain conditions. General provisions in the UN,  
2 NATO and OAS Charters obliging cooperation to pursue and maintain  
3 peace certainly do not take precedence over specific provisions in human  
4 rights treaties outlawing torture and arbitrary arrest, nor do General  
5 Provisions in General Assembly and Security Council resolutions  
6 requesting cooperation to fight terrorism.

7                                   The same can be said with similar resolutions of  
8 NATO or the G8. Not only are such resolutions not considered part of  
9 international law, resolutions of the General Assembly, of NATO, of the  
10 Security Council not considered part of international law, but they must  
11 be read subject to human rights and other binding treaty obligations.  
12 Such resolutions can never negate or override either customary or  
13 conventional international law.

14                                   According to Article 4 of the International  
15 Covenant on Civil and Political Rights, certain provisions of that covenant  
16 may be suspended in times of national emergency. But this is subject to  
17 special procedures and never includes torture.

18                                   In Article 4 it specifically excludes torture from  
19 the suspension and certain other articles.

20                                   Finally, one can never derogate from jus cogens  
21 rules of law.

22                                   Article 53 of the Convention on the Law of  
23 Treaties states -- Mr. Commissioner, I am going to refer to a textbook,  
24 International Human Rights in Context by Henry J. Steiner and Philip  
25 Alston in referring to this matter.

26                                   Citing Article 53, it says that:

1 "A treaty is void if at the time of its  
2 conclusion it conflicts with a peremptory  
3 norm of general international law. For the  
4 purposes of the present convention, a  
5 peremptory norm of general international  
6 law is a norm accepted and recognized by  
7 the international community of states as a  
8 whole as a norm from which no derogation  
9 is permitted and which can be modified  
10 only by a subsequent norm of general  
11 international law having the same  
12 character."

13 Commenting further in the text, the authors say  
14 that:

15 "States may by and within the limits of  
16 agreement between themselves vary or even  
17 dispense altogether with most rules of  
18 international law. There are however a few  
19 rules from which no derogation is  
20 permissible. The latter, rules of jus cogens  
21 or peremptory norms of general  
22 international law, have been defined in  
23 Article 53 of the Vienna Convention on the  
24 Law of Treaties 1969, for the purposes of  
25 that Convention, as norms accepted and  
26 recognized by the international community

1 of states as a whole as the norm for which  
2 no derogation is permitted..."

3 And so on.

4 Further commentary, they state:

5 "Not all human rights norms are  
6 peremptory norms ..."

7 That is jus cogens norms.

8 "... but those set out in clauses (a) to (f) of  
9 this section are jus cogens and an  
10 international agreement that violates them  
11 is void."

12 (As read)

13 They are listed as follows, (a) to (f): (a)  
14 genocide; (b) slavery; (c) the murder or causing the disappearance of  
15 individuals; (d) torture or other cruel inhuman or degrading treatment or  
16 punishment; (e) prolonged arbitrary detention; (f) systematic racial  
17 discrimination.

18 And that's it, (a) to (f).

19 Well, Mr. Commissioner -- just one second here.

20 Consequently, in referring to these rules of jus  
21 cogens, it goes without saying that a simple interpretation of the  
22 international environment, let's say in the period between 2001 and 2004,  
23 can never -- in other words, the environment in which we are living can  
24 never justify derogations in international law and in particular  
25 international human rights law.





1 I'm not primarily interested in repeating the  
2 information that has already been presented so I'm taking a different tact  
3 on this. But there are issues that have been raised that I feel I need to  
4 address.

5 Mr. Peirce, on behalf of the Attorney General of  
6 Canada, described the 9/11 events as unprecedented and stating that while  
7 the government operates with the benefit of hindsight, the officials in the  
8 government should not be judged with hindsight.

9 I believe that you cannot have it both ways.

10 It is important to note, I take his words that they  
11 are genuinely put forward when he said that as when he watched the  
12 airplanes fly into the buildings in New York that he was worried about  
13 the security of his children. Well, that kind of reaction may be  
14 understandable for a few hours, but cooler heads, especially in  
15 government, have to prevail, especially in intelligence and police services.  
16 We expect that from them.

17 It is important to note that the impact of security  
18 issues in North America are not unprecedented. Major ones have  
19 happened before. They have impacted on the Arab and Muslim  
20 community previously. They impact on Canadian society and the  
21 Government of Canada has had to deal with these things.

22 For example, put yourself in the shoes of the  
23 Arab and Muslim community at the time of the Oklahoma City bombing  
24 when the Murrah Building was destroyed, 168 people were killed and  
25 more than 800 injured. And all eyes, pundits and the like, were turning  
26 their attention to the Muslim and Arab communities in North America.

1                               So this is something that we had to deal with.  
2   Thankfully, it wasn't anyone to do with any of these communities. But  
3   the point is that society has been primed to focus on the Arab and  
4   Muslim communities and to very aggressively impose security measures.

5                               When Air India was blown out of the sky in 1985,  
6   329 people were killed, 136 children, and 280 of that large number were  
7   Canadian citizens. Aside from the race and economic class of the people,  
8   the victims involved, one would think that the Government of Canada  
9   would have been moved in a major way to rejig its approach to security  
10  issues at that point.

11                              And if you want to talk about the impact on the  
12  shake-up within the system, one would think that a flight taking off from  
13  Canada and the loss of so many Canadians would have had that effect.

14                              Security efforts have long been conducted in  
15  Canada along ethno-racial lines. Now, we have this from the first world  
16  war when it was Ukrainian Canadians who were rounded up. During the  
17  second world war it was Japanese Canadians and Italian Canadians, and  
18  all without merit. There was no security threat from these communities.

19                              In 1991 during the first Gulf War, I happen to  
20  have been President of the Canadian Arab Federation at the time, and we  
21  had to deal with an unprecedented impact on our community by CSIS  
22  agents entering into our community and demanding interviews at people's  
23  places of work. This is an attack on a person's ability to maintain  
24  employment, to have livelihood, to support their family. In other words,  
25  it is a threat on a very fundamental level to a community that struggles to  
26  get along as an immigrant community.

1                               We didn't have that much in the way of trouble  
2 from the RCMP at that time because after the MacDonald Commission  
3 the RCMP was confirmed not to be reliable to do this kind of work and  
4 CSIS was created for that purpose.

5                               So our primary experience was actually with  
6 CSIS.

7                               But to say that security issues of this nature are  
8 unprecedented is really unfair. It was so great that within a week of the  
9 war we had to produce this civil liberties brochure entitled "When CSIS  
10 Calls" so that Arab and Muslim Canadians could contribute to the  
11 security of Canada without endangering themselves or the fabric of the  
12 community.

13                              The experience of the Arab and Muslim Canadian  
14 community is documented in a book entitled "The Gulf Within" by  
15 freelance journalist Zuhair Kashmeri. So this information is out there  
16 and we would just invite the Commission to be aware of that.

17                              It is only when ethno-racial groups such as  
18 Ukrainian Canadians or Japanese and Italian Canadians are finally  
19 accepted and become a respected part of Canadian society that the  
20 vulnerability and predisposition for arbitrary measures disappears.

21                              I want to shift my comments to something that  
22 often comes up, and I anticipate may come up in the next presentation,  
23 with regard to democracies having to compromise on their civil liberties,  
24 on their standards, so that they can protect society.

25                              I would begin with a quote from Ben Franklin.  
26 Benjamin Franklin stated that:

StenoTran

1 "Any society that would give up a little  
2 liberty to gain a little security will deserve  
3 neither and lose both."

4 It is a false presentation that in our society, and  
5 especially in a conflict about values, that you can undermine the values of  
6 our society and expect that you are going to gain ground on an enemy.

7 What we ultimately need to do is preserve our  
8 values as a society.

9 Now, when we look at the examples that we have  
10 encountered before historically, I would state that there is a real  
11 relationship between labelling and stereotyping as it impacts on entire  
12 communities. There is the work of Reem Bahdi, a law professor from the  
13 University of Windsor who describes the most powerful stereotypes of  
14 Arabs in particular as "billionaires, belly dancers and bombers". They  
15 are very powerful and often contradictory stereotypes.

16 The important part in this, though, I am referring  
17 in this context to the aspect of bombers and the propensity to violence  
18 that is stereotype to the Arab and Muslim community. This is something  
19 that greatly stigmatizes an entire community and it should be something  
20 that's taken into account when the government is doing its work.

21 The Government of Canada, the Attorney General  
22 has indicated that there should be an application of known standards.  
23 We agree. But we would suggest that while there was a great deal  
24 presented in the way of criteria, it was also stated that no single factor  
25 trumps all the others.

1 This is the presentation from the Attorney  
2 General.

3 We would state that in that context it is long on  
4 criteria but there are no standards; that ultimately there are no standards.  
5 It is arbitrary and subjective in every case.

6 When you are working in that kind of a vacuum  
7 and you are dealing with stereotypes, for example, then you are certainly  
8 going to find that you are going to have difficulty with your policing.

9 I think Mr. Arar and the case of the three men are  
10 examples of that. I await the facts and then we will all know more on  
11 that.

12 Recognition that the work has to be done in the  
13 context of jus cogens, the International Covenant on Civil and Political  
14 Rights and the Convention Against Torture, we believe that completely --  
15 also section 7 of the Charter which we have described before, security of  
16 the person, is very important.

17 These standards are unchanged from before 9/11,  
18 during the three years after 9/11 and even today. We understand from  
19 the criteria that was presented that we are looking at a framework of  
20 caveats, many criteria, but including the assertion of caveats, the human  
21 rights records of various countries and the impact on the safety of  
22 individuals.

23 We think these three in particular are particularly  
24 useful for consideration, but we point out that the Department of Foreign  
25 Affairs and International Trade issued a warning to CSIS specifically

1 stating that if you ask questions in the context of a country like Syria  
2 specifically, then torture will be the result.

3 Mr. Hooper, CSIS' own Mr. Hooper stating that  
4 Mr. Arar, in his own speculation in an internal document, that Mr. Arar  
5 was likely sent to Jordan so that the United States could have their way  
6 with him.

7 It is a clear indication that they are putting him in  
8 a context where there will be an eroded human rights context.

9 The Amnesty International report from May 2001,  
10 before 9/11, naming the routine use of torture, even naming the building  
11 in which prisoners are likely to end up, Far' Falestin, which is exactly  
12 where the three gentlemen and Mr. Arar ended.

13 This is all foreseeable. The use of torture in  
14 Syria and in Egypt and through the Amnesty International reports, it's  
15 essentially general knowledge that this is what will happen to somebody  
16 who is being labelled or tagged in a security context.

17 If somebody is described as a suspected terrorist  
18 or an Islamist or a Muslim extremist or a supporter, terms that are very  
19 ill-defined and interchangeable, often interchangeable, creates a real  
20 danger for the person involved. But it is a virtual guarantee that if you  
21 label somebody one of these things and you pass that information to  
22 Syria or Egypt that there are going to be -- that there will be torture  
23 involved. And if it is done in the context of the foreknowledge that I  
24 described earlier, then it essentially has the potential of making  
25 Canadians or Canadian officials full partners in the practice of torture.

1 In effect, we are subcontracting our torture of  
2 Canadian citizens to these countries.

3 I would like to turn my attention to consular  
4 assistance or the issue of consular assistance. I don't want to exaggerate,  
5 but I --

6 MR. TERRY: Mr. Kafieh...?

7 MR. KAFIEH: Yes.

8 MR. TERRY: Just one point of clarification.

9 Submissions have been made of course about the  
10 U.S. State Department reports and the Amnesty International reports,  
11 Human Rights Watch reports that were available at the time.

12 MR. KAFIEH: Yes.

13 MR. TERRY: You were just making the point  
14 that particularly in the context of labelling, if someone is labelled as an  
15 extremist and similar words, they are more likely to be tortured.

16 Can we see in any of those reports, the U.S. State  
17 Department, Amnesty International, et cetera, that specific reference to the  
18 fact that if someone is labelled or someone is likely to be seen as an  
19 individual who falls in that category they are more likely to be tortured?

20 I'm just wondering if you can assist us at all with  
21 anything.

22 You are saying that it was known at the time that  
23 that was the case. What are the sources of information?

24 MR. KAFIEH: We have the O'Connor report that  
25 connects the dots specifically between his being labelled an Islamist to



1 the Americans and the Americans deciding that he should be sent to Syria  
2 so that he could be interrogated.

3 MR. TERRY: But what I'm getting at is more:  
4 What was there generally available at the time that a person, a Canadian  
5 official for example, could have reference to which would enlighten them  
6 to the fact that if someone was labelled or seemed to fall into that  
7 category they would be more likely to be tortured in Syria or Egypt?

8 MR. KAFIEH: I don't have the documents in  
9 front of me but, for example -- and I will follow up by providing you  
10 with this information.

11 For example, Egypt for decades and Syria for  
12 decades, Syria has had emergency legislation for decades and they have  
13 been fighting Islamists for decades. The Syrian government destroyed  
14 an entire city called Hama, just shelling it because it was a stronghold of  
15 Islamist resistance to the regime.

16 They have been very serious and dedicated to  
17 eradicating Islamist movements and violating human rights wholesale in  
18 the process. So the idea of identifying somebody or labelling somebody,  
19 a Canadian who is going into that part of the world, is a very serious  
20 thing.

21 The implications are obvious in the context of --  
22 certainly for an Arab Canadian it's obvious and I believe that with the  
23 material I will send you that it will be obvious that by associating  
24 somebody in that context that's going there, you are endangering them.

25 MR. TERRY: Thank you.

1 COMMISSIONER IACOBUCCI: We will wait  
2 for the copy.

3 MR. KAFIEH: I don't want to put too much on  
4 what Mr. Peirce said, but my understanding is that he was to some extent  
5 putting an onus on the prisoner to assert his rights. So I'm going to take  
6 it a bit further just to be clear. In other words, I am not basing this  
7 entirely on what was said, but it has to be understood that this is  
8 nonsense in the context of Syrian or Egyptian detention; that there is a  
9 concept of being a nation of laws, not men.

10 Well, the rule of law -- when it comes to security  
11 issues, the rule of law is an entirely alien concept in these countries.  
12 Lawyers and judges and courts have no role, have no role except as  
13 servants of the state. So, for example, family members are no substitute  
14 for embassy staff diligence. You know, if you have family members who  
15 come to advocate or argue for you, or even a lawyer, a lawyer is likely to  
16 end up in the cell beside you. That's the only predictable result. They  
17 have no real power because they have no status.

18 Only with diplomatic immunity do you have a  
19 chance of having a serious conversation.

20 Only an assertive foreign government official with  
21 diplomatic immunity has the security to intervene on behalf of a detainee,  
22 and consular intervention should not have to be triggered by the request  
23 of a detainee.

24 Now, to answer a question that was erased earlier,  
25 if the embassy has no reasonable way of knowing that there is a problem,  
26 that somebody is detained, I don't expect DFAIT to be faulted in that

1 context, if they had no real way. Nobody notified them and they have no  
2 real way of knowing. It's not their fault until they cross the line where  
3 they should have reasonable -- where it was reasonable for them to have  
4 had knowledge, where someone brought it to their attention.

5 But the most family can do is to tip off the  
6 Canadians so that they can intervene. But the family themselves, there  
7 are no effective internal remedies for an individual detained.

8 It's important to note that all detainees are  
9 innocent until proven guilty and all, even if they are guilty, are equally  
10 deserving of consular service. Judges are trained to take into account  
11 cultural factors in applying their judgments. For example, there is  
12 equality of treatment as a principle that should be understood, but you  
13 have to put this in the context of the situation.

14 For example, if you are -- just let's do it as an  
15 individual basis. Put yourself -- when you want to ask yourself the  
16 question when you deal with this later and you want to deal with the issue  
17 of what is the reasonable standard that you would expect from your own  
18 government, put yourself in that dungeon, that 1 metre by 2 metre cell,  
19 where you don't know who knows, you know, about what your condition  
20 is.

21 Certainly you would want to have the Canadian  
22 government doing everything it could to ensure that you had the full  
23 benefit of international law, the International Covenant on Civil and  
24 Political Rights, the Convention Against Torture.

25 Certainly you would want to be assured that the  
26 government is doing everything they can to protect your rights, and the

1 last thing you want to find out is that you are in that predicament  
2 precisely because of conditions that were set up, essentially a trap  
3 possibly set up by Canadian security agents. That is the last thing you  
4 want to find out.

5                                 So this is very important for the Government of  
6 Canada to when it's organizing its work and adopting its standards and  
7 when you are doing your work that you need to assess it but in the  
8 context of that individual Canadian, regardless of his background, that is  
9 sitting in that dungeon, that 1 metre by 2 metre dungeon. That's the only  
10 context where you can be clear-headed enough to know what to expect of  
11 the Canadian government.

12                                 In Syria and Egypt due process is extremely  
13 unlikely. In civil litigation yes, depending on who you are and if you are  
14 not going to high in the social structure. But in security measures, it's  
15 completely lost. People are totally dependent on the embassy staff to  
16 protect their rights.

17                                 It's as simple as this. You can't expect somebody  
18 who is being detained to discuss section 9 of the International Covenant  
19 on Civil and Political Rights with their torturer, or to discuss the finer  
20 points of the Vienna Convention with their torturer. It simply is  
21 nonsense.

22                                 In terms of sharing of information, it has to be  
23 seen that information sharing is necessary, but it is a question of whether  
24 it can be done in a way that doesn't endanger individuals and you do have  
25 to take into account the human rights reports for the individual countries.



1 torture and that really what we are looking at is suspicion. We are  
2 concerned that essentially the RCMP and CSIS were really panicked that  
3 they would be embarrassed if something happened that they didn't know  
4 about. This is the main concern that I think was driving this. But again,  
5 we await the facts from the Commission.

6 One of the things that comes out in the OPP's  
7 submission again, and in the Attorney General's submission, is that they  
8 were working not from the standpoint of specific knowledge but lack of  
9 information and that certainly there was no knowledge of specific threats.

10 To wrap up, I want to talk about the media  
11 releases that have been done. They were done in the case of Mr. Arar,  
12 they certainly have been done here.

13 There is no security benefit through a media  
14 release. That's just a publicity stunt. It's an attempt by government  
15 officials to show and wave to the Canadian people: look how we are  
16 protecting you. But it actually doesn't do anything to enhance Canadian  
17 security.

18 It has a devastating effect on the lives of the  
19 individuals who are named, but beyond that it has a massive defamatory  
20 impact on the communities that are associated with the individual, such as  
21 the Muslim and Arab communities in this case.

22 Subject to the questions of the Commission, that  
23 concludes the presentation.

24 COMMISSIONER IACOBUCCI: Thank you  
25 very, very much.

26 MR. KAFIEH: Thank you.

1 COMMISSIONER IACOBUCCI: Mr. Harris...?  
2 SUBMISSIONS ON BEHALF OF CANADIAN COALITION FOR  
3 DEMOCRACIES

4 MR. HARRIS: Good morning, Commissioner.

5 COMMISSIONER IACOBUCCI: Good  
6 morning.

7 MR. HARRIS: And counsel staff.

8 My name is David Harris and I appear today as  
9 counsel to the Canadian Coalition for Democracies, the CCD, a  
10 non-profit, multi-ethnic and multi-religious human rights organization  
11 dedicated to a free, tolerant and secure Canada.

12 The Canadian Coalition for Democracies would  
13 like to begin by expressing appreciation for the openness with which this  
14 Inquiry has been conducted given the very sensitive nature of its subject  
15 matter. The CCD believes that the conduct of this Commission could  
16 serve as a model for comparable efforts aimed at examining those  
17 security and intelligence realms upon whose integrity the lives and safety  
18 of our people depend.

19 I have two main areas to address. One is perhaps  
20 mildly prescriptive; the other is more a matter of coloration, of  
21 background and context for an evaluation of standards of conduct.

22 First, for the purposes of information sharing as  
23 regarding section 1(a) of the Amended Notice of Hearing, the CCD  
24 supports the principle of systematizing, including structuring and  
25 updating on a reasonably formal basis country assessments. These  
26 would assist our intelligence and other authorities in taking into account

1 various countries and foreign agencies' records with regard to human  
2 rights, respect for our intelligence caveats and other considerations  
3 bearing on the transmittal of information.

4                                 However, flexibility is required if we are not to  
5 hamstring our defences at a time when we have had war thrust upon us.

6                                 As to the second area of concern, Commissioner,  
7 this involves the background to our thinking about standards of conduct.  
8 The CCD is frankly uneasy that the specific nature, scope and extent of  
9 the terrorist threat receives little emphasis in representations about civil  
10 liberties in an age of terror. The CCD's view is that the threat is insistent  
11 and that no conclusions about standards of conduct can meaningfully be  
12 reached without due recognition of what it is we face.

13                                To that end, it is perhaps worth remembering how  
14 Canada has been targeted -- and this is very, very briefly.

15                                We know that Mr. bin Laden threatened Canada  
16 by name in 2002. Mr. Al-Zawahiri threatened us as second-rate  
17 crusaders in September 2006. Mr. Raouf, also of al-Qaeda, told us  
18 Canada was in for a London or Madrid kind of attack. Canadian  
19 petroleum interests were threatened by an al-Qaeda cell less than a year  
20 ago.

21                                This is all in the public domain and sources can  
22 be provided.

23                                On a worldwide basis the sheer scale of potential  
24 trouble can be gauged from an extended interview given by the  
25 International Atomic Energy Agency's Mohamed ElBaradei, hardly an  
26 advocate of U.S. or other specific western strategic interests. He looked



1 at nuclear weapons and other prospects and declared that "we are moving  
2 towards an abyss" of al-Qaeda and dirty bombs, radiological bombs.

3 He said:

4 "Sometimes I think it's a miracle that it  
5 hasn't happened yet".

6 Clearly we must not undermine our capacity to  
7 evaluate, anticipate and respond to threats.

8 Now, in determining standards in connection with  
9 civil liberties it is therefore important to remember that should our  
10 services be unduly constrained or stymied, including by a legal regime  
11 that might too readily criminalize security and intelligence personnel, the  
12 risk of successful mass destructive, mass casualty terrorist strikes arises.  
13 With this, so too does the risk of reactive public and governmental  
14 responses that could turn the clock of civil liberties very, very far back,  
15 apart from which the memory of our 24 Canadian 9/11 dead reminds us  
16 that to revel in security of the person and our other human rights, we  
17 must first be alive to enjoy them.

18 Subject to further questions, Mr. Commissioner,  
19 these are our submissions.

20 COMMISSIONER IACOBUCCI: Thank you  
21 very much, Mr. Harris.

22 MR. HARRIS: Thank you very much, sir.

23 COMMISSIONER IACOBUCCI: I understand  
24 that there will be two individuals making reply submissions.

1 I am prepared to take a short break for all of us  
2 and then perhaps both of the repliers will have more time to gather their  
3 thoughts.

4 We will take a 15-minute break, please.

5 THE REGISTRAR: Please stand. Veuillez vous  
6 lever.

7 --- Upon recessing at 10:40 a.m. /

8 Suspension à 10 h 40

9 --- Upon resuming at 11:05 a.m. /

10 Reprise à 11 h 05

11 THE REGISTRAR: Please stand. Veuillez vous  
12 lever.

13 Please be seated. Veuillez vous asseoir.

14 COMMISSIONER IACOBUCCI: I understand  
15 there are now three individuals. I don't think I'm going to call another  
16 break because there may be four after that break.

17 Ms Kalajdzic, would you like to start off and then  
18 Mr. Neve and then Mr. Peirce.

19 REPLY SUBMISSIONS ON BEHALF OF ABDULLAH ALMALKI

20 MS KALAJDZIC: Thank you,  
21 Mr. Commissioner.

22 I have several very brief responses to specific  
23 comments made yesterday, sort of traditional reply, but I also want to use  
24 the brief time that I have to go back to an area that appeared to be the  
25 subject of considerable interest by Commission counsel yesterday when  
26 we were talking about how we are going to articulate standards, the

1 standard in terms of when the threshold is met, where information  
2 sharing is no longer appropriate because of human rights concerns.

3                                 There were several exchanges between  
4 Commission counsel and various participants on that issue.

5                                 The counsel group regrouped last night and tried  
6 to come up with an articulation that we hope will be of some use to you,  
7 so I will spend a bit of time on.

8                                 Mr. Peirce said yesterday that Canada has  
9 accepted all of Justice O'Connor's recommendations in his opening  
10 remarks, and we would simply observe in response that the majority of  
11 those recommendations have not been implemented. I think that is worth  
12 noting now, well over year after those recommendations were made.

13                                 Mr. Peirce stated that you are limited to looking  
14 at what the standards were in 2001 to 2004, not what they should have  
15 been. Commissioner Iacobucci rightly asked whether it was not open to  
16 this Inquiry to find that the standards fixed at the time were deficient.  
17 Our answer to that question is of course yes, that is well within the Terms  
18 of Reference.

19                                 I also remark that there may be a confusion or  
20 conflation of terms here. Standards are not practices. Just because  
21 Canadian officials had a practice of sharing information with certain  
22 foreign states does not mean that the standard of conduct permitted it.

23                                 The question is: What were the legal standards  
24 that governed those practices?

25                                 You heard extensive submissions yesterday about  
26 the source of those legal standards; namely, various international and

1 domestic laws, agreements, the legislative mandate and, again, as you  
2 rightly pointed out this morning, there is also the constitutional sources  
3 for those standards which we will concentrate a little bit more on in my  
4 reply but also in our subsequent written submissions.

5                                 We go further of course and say that the legal  
6 standards in the time period in question were no different than on  
7 September 10, 2001 and no different than today insofar as human rights  
8 obligations are concerned, especially the Prohibition Against Torture.

9                                 Now, everyone focused almost exclusively on the  
10 Prohibition Against Torture yesterday, and in part it is because of what  
11 we know about the cases of the three men. It is also because of the  
12 higher status or "special importance" of that prohibition as a jus cogens  
13 norm which I and Human Rights Watch and others spent considerable  
14 time emphasizing.

15                                I took you through some of the legal and UN  
16 commentary on jus cogens to drive home the point that this principle, the  
17 duty not to engage in torture, to prevent torture, "to refrain from  
18 encouraging torture in any way", as the Special Rapporteur framed it,  
19 must inform all other standards of conduct and how we interpret other  
20 obligations, laws and treaties.

21                                I want to make clear that we are not only  
22 concerned about torture here. Our clients' rights were breached in other  
23 ways and those other rights also deserved protection and consideration  
24 when Canadian officials conducted themselves.

25                                These other rights include: the right to be free  
26 from inhuman, cruel or degrading treatment; not to be subjected to

1 arbitrary detention; not to be held in inhuman conditions; and the right to  
2 a fair trial.

3 Now, all of these essentially are reflected in  
4 Article 9 of the International Covenant. I would note -- and this is  
5 perhaps appropriate in light of your invitation this morning,  
6 Commissioner -- that they are akin to at least one of our Charter rights,  
7 section 7.

8 I was grateful for Mr. Allmand's submissions this  
9 morning because he also rightly pointed out that when we are talking  
10 about jus cogens and peremptory norms, torture is not the only one.  
11 Arbitrary detention is another one. And that of course figures largely in  
12 all of these cases.

13 It is important to keep these points in mind I  
14 submit when formulating the precise standard. That brings me to  
15 language.

16 You are searching for language or guidance on  
17 the threshold at which information sharing would no longer be  
18 permissible.

19 I spoke about this at the de minimis level in my  
20 closing comments yesterday when I submitted that Canadian officials'  
21 conduct certainly cannot amount to party liability as that is understood in  
22 section 29 of the Criminal Code. I referred you belatedly to the Roach  
23 case by the Ontario Court of Appeal, which states that:

24 "One aids in the commission of an offence  
25 when one has actual knowledge or is

1 willfully blind to the offence to be  
2 committed."

3 But that is a subjective standard that obviously  
4 applies -- while that is a subjective standard and it does apply, we submit,  
5 in the context of our cases, because we know questions were sent despite  
6 expressed concern that those questions would lead to torture, that is not  
7 the only standard.

8 Other language offered by Ms Jackman and Mr.  
9 Neve I think is also helpful, but I want to summarize where we stand on  
10 the formulation of that threshold.

11 There is a range of standard that would be  
12 applicable depending on the context. We don't say that Canada should  
13 never share information with a country that has a poor human rights  
14 record.

15 That is reflected in paragraph 24 of Mr. Almalki's  
16 original submissions.

17 But we do not agree with the other extreme that  
18 Canada should always share information with a country with that kind of  
19 a record no matter what the circumstances. So we are falling somewhere  
20 in between those poles.

21 I think we all agreed that there are parameters,  
22 criteria to be taken into account when determining when information  
23 sharing is permissible. The AG calls them factors, sort of a grab bag of  
24 factors that you take into account, with potential human rights abuses of  
25 the target being one factor that would be considered. But because we are

1 framing legal standards, we submit it is more useful to talk about them as  
2 preconditions to sharing information with such states.

3 Here is our attempt -- and perhaps it's not a  
4 complete one at this juncture -- of what those preconditions are.

5 First, the information must be accurate. We  
6 emphasized this subparagraph 25 of Mr. Almalki's submissions. Justice  
7 O'Connor emphasized the need to be precise, to be accurate, et cetera, at  
8 pages 103 to 112 of the report.

9 At page 114 of his report he says this:

10 "The need to be precise and accurate when  
11 providing information is obvious.  
12 Inaccurate information or mislabeling, even  
13 by degree, either alone or taken together  
14 with other information, can result in a  
15 seriously distorted picture. It can fuel  
16 tunnel vision, the phenomenon on which  
17 Justices Kaufman and Cory commented in  
18 the Morin and Sophonow inquiries, which  
19 led investigators astray. The need for  
20 accuracy and precision when sharing  
21 information, particularly written  
22 information in terrorist investigations,  
23 cannot be overstated."

24 That is an irrefutable standard, and our  
25 submission.

1                                   The second precondition. There must be an  
2 assessment done as to the use to which the receiving state would put the  
3 information.

4                                   You have to take into account, for example, the  
5 safety of the individual involved of course and what might happen if the  
6 person travelled to the state which is receiving the information.

7                                   As an aside, I will note when we are talking about  
8 DFAIT sharing information it should be concerned not only about  
9 information it receives from the detainee, but also the information that it  
10 receives from the detainee's family and that there must be an assessment  
11 by DFAIT as to the use that will be put of that information from the  
12 detainee's family.

13                                  I think that is appropriate or relevant certainly in  
14 the context of Mr. Elmaati's case where his family was asked by DFAIT,  
15 it is my understanding, to confirm his Egyptian citizenship while he was  
16 in Syria and sometime thereafter he has been transferred to Egypt.

17                                  The third precondition. The information must be  
18 relevant.

19                                  We don't know exactly what information was  
20 shared about our clients, but Justice O'Connor, in describing Mr. Almalki  
21 in the report, for example, said he was "educated in the Koran".

22                                  Well, is this relevant information for the purposes  
23 of intelligence sharing? How will the receiving state interpret that  
24 so-called innocuous piece of information? Is the basis for judging  
25 relevance itself deficient because it is discriminatory or founded on  
26 stereotypes?



1 Fourth, the information must be reliable.

2 Here we get into something that in the Air India  
3 Inquiry has been called circular intelligence. Using questionable  
4 information to confirm other questionable information does not satisfy  
5 the reliability requirement. Any doubts about reliability should be  
6 flagged and of course no use should be made of information that there is  
7 reason to believe was derived from torture.

8 Fifth, sharing must be lawful.

9 Where information could lead -- and I'm going to  
10 get into what "could lead" means. Where information could lead to  
11 serious human rights abuses on an individual, including to their  
12 detention, torture, et cetera, there is no obligation to share. Quite the  
13 opposite, there is an obligation not to share because it would be unlawful  
14 to do so under human rights law.

15 Sixth, once a person is detained there is a much  
16 stricter legal standard that would apply, perhaps approaching an absolute  
17 prohibition because of the mixed signal phenomenon described by  
18 Justice O'Connor in respect of Mr. Arar and what Ms Jackman described  
19 as the single signal with respect to Mr. Almalki and that no efforts were  
20 being made to secure his release at the time but plenty of efforts were  
21 being made to give information to SMI, receive it, and generate questions  
22 to produce or dictate further information.

23 Once a person is detained, what information is  
24 shared has to be much more strictly controlled, much more scrupulously  
25 assessed, in our submission.

1                   Once these preconditions are met, the sharing of  
2 information would be permissible, though human rights concerns must  
3 continue to be a consideration as facts and events unfold. There must be  
4 a constant reevaluation of whether information sharing is still  
5 appropriate.

6                   Two points about what we are calling information  
7 sharing.

8                   First, it does not include sending questions. In  
9 our view, sending questions is quite different than sharing information. I  
10 think in the Notice of Hearing you rightly make a distinction between the  
11 two.

12                  Second, when we talk about travel plans as  
13 information, the AG says -- I hope I'm summarizing accurately -- that  
14 that is relevant information to share because there is some obligation to  
15 know the whereabouts of a target. Even if you accept that, it means that  
16 travel plans would always have caveats; that the receiving state is not to  
17 detain the person based on that information because this would amount to  
18 arbitrary detention by proxy, in our view.

19                  I will also make this observation.

20                  Once Mr. Elmaati was detained as a result of the  
21 information that was shared about his travel plans, it was patently obvious  
22 that detention would be the result of sharing travel information about Mr.  
23 Almalki and Mr. Nureddin. Human rights considerations ought to have  
24 been determinative in that context.

25                  Turning then to the threshold or what we mean by  
26 "could lead to torture or detention", the other human rights abuses.

1                   As I said, the subjective standard that I referred to  
2 briefly in the Criminal Code context is too high. There ought to be an  
3 objective standard.

4                   Now, there are various formulations of that  
5 objective standard.

6                   First, we could talk about substantial grounds to  
7 believe that the person would be in danger. Again, it is in danger of  
8 being tortured, detained, treated inhumanely, et cetera. That is a  
9 formulation that we see in the international human rights instruments.

10                  Second, there is a substantial risk of torture,  
11 detention, et cetera. This terminology was used interchangeably with  
12 substantial grounds to believe in a variety of cases, including in Suresh.

13                  Third, a real or material risk of torture, detention,  
14 et cetera. This is used in the non-refoulement context.

15                  Professor Burns testified in Arar that to require  
16 several standards of proof in interpreting real or material risk would not  
17 be in compliance with the CAT. He referred to the House of Lords  
18 decision in Bolton v Stone that said all that is required is a real risk,  
19 something less than a probability.

20                  I believe there was a reference in a text we looked  
21 at yesterday, the name of which I can't remember, where it was referred to  
22 as less than the balance of probabilities but more than the flimsy  
23 possibility.

24                  We will get that reference for you.

25                  Real or material risk might also be akin to a  
26 "reasoned risk".

1                               There is some exploration of that, the definition  
2 of that term, in a 2001 Supreme Court of Canada case called Queen and  
3 Sharp. Of course, that is a very different context. There it was the  
4 constitutionality of child pornography laws and the law was upheld.

5                               Parliament was targeting clear forms of child  
6 pornography, did not seek to catch all material that would harm children  
7 but only material that posed a reasoned risk of harm to children. The  
8 court of course in that case stated that this was an objective standard. It  
9 could not be a risk that a small, incidental or tenuous was the terminology  
10 used. But also, it was not one that required scientific proof based on  
11 concrete evidence; rather a reasoned apprehension of harm was said to  
12 suffice.

13                              So again, by analogy there might be some utility  
14 to looking at cases along that line.

15                              A fourth formulation we can look to is in the torts  
16 context. Mr. Terry alluded to that earlier.

17                              Reasonable foreseeability, know or ought to know  
18 that torture might result, I think has some attractiveness to it because we  
19 are talking about deficient conduct, not culpable conduct. Tort cases  
20 speak to the distinction between operational decisions and policy  
21 decisions.

22                              If the policy is, as the AG has stated, we don't  
23 countenance torture, if the policy is that we abide by our international  
24 human rights obligations, including those in the international covenant,  
25 then the standard would be one to take reasonable care not to cause or  
26 contribute to harm.





1 All of the material I referred you to regarding jus  
2 cogens substantially predated 2001. I refer to a 1966 conference at  
3 Lagonissi where there was unanimity about the import of jus cogens  
4 norms.

5 UN bodies have stated within that time period,  
6 2001 to 2004, that treaty obligations like CAT must continue to be  
7 respected while pursuing terrorism investigations.

8 It is entirely misleading I think to suggest that  
9 CAT did not apply in that time period or that somehow there was a  
10 difference in standards in relation to the Prohibition Against Torture in  
11 that time period.

12 On the question of whether Canada permits  
13 private visits between detained foreign nationals and his or her consular  
14 official, the answer is yes. From Ms Jackman's experience working with  
15 refugees, the practice has been that Canada provides private visitation  
16 with consular officials.

17 With respect to the state of domestic laws when  
18 assessing whether a detention is an arbitrary one, something that was  
19 posed today, we say it is no answer to say that emergency laws of the  
20 detaining state might permit it.

21 I would urge you to look at paragraph 30 of our  
22 submissions and the directive of the Human Rights Committee  
23 specifically on this point: that emergency laws or security measures taken  
24 in the name of fulfilling obligations to combat terror are no excuse for  
25 arbitrary detention and the like.

1 In response to the questions about general  
2 knowledge, the consequences of political labels to receiving state like  
3 Syria and Egypt, I think it was something posed of Mr. Kafieh by  
4 Mr. Terry, I have been told by those who attended the Arar hearings that  
5 there were a number of witnesses who testified about that issue, among  
6 them Mr. Gar Pardy.

7 In his testimony on October 24, page 12188, he  
8 specifically spoke to the issue of there being general knowledge and  
9 awareness of what political labels would mean to a receiving state like  
10 Syria and Egypt.

11 Finally, to supplement what Mr. Norris said today  
12 about the obligations of family members or the detainee himself to take  
13 steps to get consular protection, I would say this: Putting the onus on a  
14 family member is as problematic as putting the onus on the victim. In  
15 both cases there is of course a real possibility that they lack information,  
16 a legal awareness of what those rights are.

17 Looking at it from a principled perspective, it  
18 simply cannot be the case that there is a kind of onus placed on the victim  
19 or his family. What if the victim has no family, for example? Is it then  
20 the case that DFAIT is relieved of any kind of responsibility? Of course  
21 not.

22 If the family is not informed and does not know  
23 of their rights regarding DFAIT assistance, is it then the case that those  
24 rights are more apparent than real?

25 This is an access to justice issue. We talk about  
26 access to justice in the domestic context all the time. It is accepted and



1 well documented that the lack of legal information and awareness is a  
2 serious barrier to justice, and I would say it is a profound concern and  
3 consideration in this context when you are talking about the liberty of the  
4 individual.

5 I would also note that pressure by the receiving  
6 state not to go public is also a very real possibility and, finally, that  
7 however DFAIT learns that a person has been detained, whatever the  
8 source of information, be it family or the victim -- and unlikely I would  
9 submit given the realities -- if the source is other Canadian agencies,  
10 DFAIT cannot sit on its hands with that information.

11 Those are the extent of my reply submissions,  
12 subject your comments or questions.

13 In terms of Suresh and the questions that were  
14 posed this morning about the constitutional framework, Ms Jackman of  
15 course argued that case and might have some very helpful additional  
16 comments to make about that.

17 COMMISSIONER IACOBUCCI: Do you want  
18 to make them now or do you want to make them under further  
19 consideration?

20 MS JACKMAN: I don't mind just making them  
21 now.

22 COMMISSIONER IACOBUCCI: Thank you  
23 very much.

24 --- Pause

25 REPLY SUBMISSIONS ON BEHALF OF AHMAD ELMAATI

1 MS JACKMAN: With respect to my friend just  
2 pointed out the implications in terms of Suresh and Burns for conduct of  
3 Canadian officials that has some causation effect on the person, I would  
4 note that I think first of all in Suresh this court -- not this court, the  
5 Supreme Court of Canada recognized --

6 --- Laughter / Rires

7 MS JACKMAN: It's at paragraph 54.

8 The argument was that Burns had dealt with  
9 extradition; this was deportation.

10 What the court said is the governing principle was  
11 a general one, namely that the guarantee of fundamental justice applies  
12 even to deprivations of life, liberty or security affected by actors other  
13 than our government if there is a sufficient causal connection.

14 So it didn't matter what the form took. What  
15 mattered was the governing principle.

16 If you look at it this way, that Canada sends a  
17 person on a plane to be tortured by another state, that was Suresh, or face  
18 the death penalty, that was Burns, here the person is already on the plane.  
19 They are sending the information that results in torture in the other  
20 country. It is still the conduct of the Canadian official which is  
21 significant, regardless of the form of the action itself.

22 But the second part I think that comes from  
23 Burns and Rafay is this question of -- you asked the question about  
24 arbitrary detention and the emergency laws in Egypt and Syria at the  
25 time.

1                               As I read Burns and Rafay and the Suresh case,  
2 the fact that the treatment in the other country was lawful was not a  
3 relevant factor. What was relevant was whether that lawful conduct under  
4 the laws of the other country would breach a person's human rights  
5 principles.

6                               So in Burns and Rafay it was lawful in the United  
7 States to inflict the death penalty. That didn't stop the Supreme Court  
8 from saying you still can't send the person back there, extradite without  
9 assurances.

10                              In Suresh the court indicated -- and I think it is  
11 paragraph 52 -- some punishments or treatments will always be grossly  
12 disproportionate, will always outrage our standards of decency, for  
13 example, the infliction of corporal punishment.

14                              Now, we know corporal punishment is lawful in a  
15 number of countries, lashings, cutting off hands, but it doesn't mean that  
16 that treatment, even if it is lawful in the country, is not contrary to human  
17 rights norms.

18                              They did say I think in Burns -- I'm just trying to  
19 see if I have the provision.

20                              They said regardless of whether or not the  
21 conduct of the country is lawful -- it is paragraph 53 and it is in Suresh.

22                              The court, citing from the Schmidt case, citing  
23 Justice La Forest, recognized that:

24   "... in some circumstances the manner in  
25   which the foreign state will deal with the  
26   fugitive on surrender, whether that course

1 of conduct is justifiable or not under the  
2 law of that country, may be such that it  
3 would violate the principles of fundamental  
4 justice..."

5 I take from that, first of all, that Canadian  
6 officials are required to go behind the laws of another state to determine  
7 if the laws are in breach of a person's human rights norms. So it is not  
8 satisfactory to say they have a law which permits arbitrary detention. It's  
9 not even true. In Elmaati's case there were three court release orders  
10 which weren't complied with in Egypt. But they are required to go  
11 behind it.

12 So I would draw from those cases, first, that  
13 Canadian officials cannot take steps which would result in the human  
14 rights breach as a reasonably foreseeable consequence when they are  
15 sending information, for example; but secondly that they must take steps  
16 to assist the person. It doesn't matter if it's lawful in the person's country  
17 because how can you say on the one hand that our officials cannot take  
18 steps to send the information because the laws may be lawful in that  
19 country, or indefinite detention or torture for that matter might be lawful  
20 in that country. So it is not all right for our officials to send information,  
21 but it is all right for our officials to do nothing once they are there.

22 It is the same unlawful laws, or laws that are in  
23 breach of human rights norms. So if one set of officials can't send  
24 information, the other set, once the person is there, is obligated by virtue  
25 of a positive obligation to prevent torture to take steps.

26 That's all I would say about those cases.

1 COMMISSIONER IACOBUCCI: I guess just to  
2 understand, are you really in effect submitting that when Canadian  
3 officials are abroad they take the Charter with them?

4 MS JACKMAN: Yes, they do. They have to.

5 COMMISSIONER IACOBUCCI: And that their  
6 conduct has to be judged by the Charter. Isn't that what you are in effect  
7 saying?

8 MS JACKMAN: I am saying that. I don't see  
9 how you can distinguish between --

10 COMMISSIONER IACOBUCCI: It may mean  
11 there is a reality of local law that is there, but it doesn't displace the  
12 comportment of Canadian officials to Canadian constitutional norms.

13 MS JACKMAN: Right. You could have the  
14 situation where Mr. X is in Canada and can't send the information but  
15 then takes the plane himself to Syria, and once he's in Syria he doesn't  
16 have to do anything?

17 I mean, it's the same person applying the same  
18 standard.

19 COMMISSIONER IACOBUCCI:  
20 Notwithstanding your helpful comments, I would also appreciate any  
21 written --

22 MS JACKMAN: We will.

23 COMMISSIONER IACOBUCCI: Will you?

24 MS JACKMAN: We will.

25 COMMISSIONER IACOBUCCI: Thank you.

1 MS JACKMAN: Also we may -- this question of  
2 the standard that Ms Kalajdzic went through is -- I'm sorry, Jasminka --  
3 there are other sources too. There is Frau Modsen(ph) and one of the  
4 cases that is used in refugee law all the time is Ex Parte Fernandez. You  
5 might be familiar with that --

6 COMMISSIONER IACOBUCCI: Yes.

7 MS JACKMAN: -- about how you assess future  
8 risks. I don't remember exactly what they said about the standard, but I  
9 think it was an extradition case Ex Parte Fernandez.

10 So those cases we can provide as well.

11 COMMISSIONER IACOBUCCI: Thank you  
12 very much, Ms Jackman.

13 Did you want to ask a question? Sorry. Let's get  
14 back.

15 MR. LASKIN: I was just going to say that the  
16 specific follow-up that I think would be of most help is to see how those  
17 standards might or might not fit into a Charter analytical framework, not  
18 so much with respect to application of the Charter which was largely the  
19 subject of Ms Jackman's submissions, but with respect to the application  
20 of the Charter, how the standards might or might not reflect the Charter  
21 analytical framework under sections 7 and 1, in particular.

22 Not too obviously preempt the question of  
23 whether the Charter applies, which may be one as to which, Mr.  
24 Commissioner, your other submission.

25 COMMISSIONER IACOBUCCI: Well, I would  
26 like some guidance on that as well actually.

1 I'm not asking for a treatise, but just, you know,  
2 you have been consistent with succinctness in other submissions, and  
3 that's the sort of thing we would like, with the case authorities that you  
4 have mentioned in particular.

5 Mr. Neve...?

6 I apologize for mispronunciation of names. I  
7 don't need to tell you, you can take judicial notice of the  
8 mispronunciation I have lived through in my life.

9 --- Laughter / Rires

10 MR. NEVE: I commiserate with you as a soul  
11 mate. One syllable or multiple syllables, there are many pronunciations  
12 possible of many names.

13 REPLY SUBMISSIONS ON BEHALF OF AMNESTY  
14 INTERNATIONAL

15 MR NEVE: Thank you very much,  
16 Commissioner. I will just have very brief remarks on one particular  
17 point.

18 Many of us yesterday addressed the government's  
19 troubling assertion that the UN Convention Against Torture did not apply  
20 to concerns about Canadian officials sharing information with foreign  
21 governments and the substantial risk of that possibly leading to torture,  
22 because the resulting torture would not occur within Canadian territory.

23 The unstated implication seems to be that conduct  
24 by Canadian officials leading to torture outside Canada would therefore  
25 not be problematic from the perspective of international human rights  
26 law.

1 I would like to briefly clarify and draw together  
2 some of the points you heard in response to this.

3 The basis for this assertion is Article 2's wording,  
4 Article 2 of the Convention Against Torture, which of course require  
5 states to take effective measures to prevent acts of torture in any territory  
6 under its jurisdiction.

7 The government seems to infer from this wording  
8 that there is therefore no obligation on Canada's part to refrain from  
9 activities that might lead to or contribute to torture outside of Canada.  
10 This is a dangerous and troubling proposition that would undermine the  
11 very strong and comprehensive international legal framework that lies  
12 behind the absolute ban on torture.

13 The UN Convention Against Torture is not itself  
14 the source or the genesis of the global ban on torture. I think we have to  
15 start by reminding ourselves of that. The ban long predates the 1987  
16 adoption of the Convention Against Torture, including the Universal  
17 Declaration of Human Rights in 1948 and the adoption of the  
18 International Covenant on Civil and Political Rights in 1966. That is of  
19 course strengthened and amplified by the fact that the ban on torture has  
20 become a norm of customary international law with the status of being a  
21 *jus cogens* norm.

22 And that too is nothing new or recent. In that  
23 regard, for instance, here are the words of a U.S. federal court judge in  
24 the 1980 case of *Filartiga versus Pena-Irala* simply noting, 27 years ago,  
25 that "the torturer has become like the pirate and the slave trader before  
26 him *hostis humani generis*, an enemy of all mankind".



1                   The UN Convention Against Torture is simply in  
2 addition, a very important addition to that well settled legal reality, and  
3 the convention provide some specific and detailed legal legislative,  
4 administrative and other measures meant to strengthen and give effect to  
5 the international ban.

6                   Article 2 therefore does impose specific  
7 obligations on governments to take positive steps to prevent torture  
8 within -- for Canada's purposes -- Canadian territory. But that does not,  
9 cannot mean that Canadian officials are free to engage in activities that  
10 may lead to torture elsewhere. Absolutely not.

11                  The UN Convention Against Torture itself is  
12 actually instructive here. Number one, it is worth noting that the UN  
13 Committee Against Torture, the expert body that supervises the  
14 Convention, has been increasingly expansive in its view as to the  
15 territorial limitations of Article 2 and has broadened and broadened that  
16 over recent years.

17                  But beyond that I think it is important to a  
18 highlight that Article 1, which I and others referred to in our submissions  
19 yesterday, which defines torture, does not include any territorial  
20 limitation, nor does Article 4, which is the provision requiring states to  
21 criminalize all acts of torture, all acts of attempting to commit torture,  
22 whether those acts constitute participation or complicity.

23                  We then also have the International Covenant on  
24 Civil and Political Rights, Article 2, which I and others referred to  
25 yesterday, which clearly and fully applies to people subject to Canadian  
26 jurisdiction. Obviously that includes Canadian citizens.



1 COMMISSIONER IACOBUCCI: Thank you  
2 very much.

3 Mr. Peirce...?

4 REPLY SUBMISSIONS ON BEHALF OF THE ATTORNEY  
5 GENERAL OF CANADA

6 MR. PEIRCE: Mr. Commissioner, I can be very  
7 brief in my reply.

8 I believe my friends have in fact confirmed my  
9 argument, which is there is no existing standard, certainly not one from  
10 the period 2001 to 2004 and certainly not one derived from international  
11 law that governs information sharing. They are hard at work coming up  
12 with a standard for 2008 that they would seek to have you apply in the  
13 2001 to 2004 period.

14 I should go on to say that the submission that the  
15 CAT, for instance, does not create an international legally binding  
16 standard that governs information sharing is not to say that standards  
17 prohibiting torture such as we see in the CAT or in the ICCPR are not  
18 relevant considerations. In fact, they are both relevant and very important  
19 considerations and that was outlined in my submissions previously.

20 It is that collection of considerations that form the  
21 standard that governs on a case-by-case basis.

22 I only have one other submission I would like to  
23 make and that is very briefly to clarify the statements that have been  
24 taken out of context, I believe, or perhaps mischaracterized, about the  
25 impact of the events of September 11th on the standards to be applied.

1 In no way was I suggesting that the events of  
2 September 11th create an exception to the standards; that somehow the  
3 standards to be applied are set aside because of those events. Rather, my  
4 submission was this: that those events do set a context which has to be  
5 taken into consideration in applying the standards that govern that period.

6 Those are my submissions.

7 COMMISSIONER IACOBUCCI: Do you have  
8 any questions?

9 Thanks very much.

10 Well, this concludes our hearing on standards. I  
11 would like to end by saying something that I feel is important to say, and  
12 it is this: This has been very helpful to me in fulfilling the mandate that I  
13 have and it has been perhaps difficult for you, some of you, in terms of  
14 what you have said about a factual background and so on. But I can only  
15 say that in my opinion this has been most helpful and instructive, and I  
16 think it will be more so when I get further submissions that have been  
17 undertaken to be provided to the Inquiry.

18 For those comments that I would make about my  
19 feeling helped greatly by all of you, I thank each and every one of you  
20 for both your written and oral submissions that you have obviously  
21 worked hard on and I greatly appreciate it.

22 Thank you all very much.

23 THE REGISTRAR: Please stand. Veuillez vous  
24 lever.

25 --- Whereupon the hearing concluded at 11:50 a.m./

26 L'audience se termine à 11 h 50

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