

**Commission d'enquête
sur les actions des
responsables canadiens
relativement à Maher Arar**



**Commission of Inquiry into
the Actions of Canadian
Officials in Relation to
Maher Arar**

Audience publique

Public Hearing

Commissaire

L'Honorable juge /
The Honourable Justice
Dennis R. O'Connor

Commissioner

Tenue à:

Salon Algonquin
Ancien hôtel de ville
111, Promenade Sussex
Ottawa (Ontario)

le lundi 6 juin 2005

Held at:

Algonquin Room
Old City Hall
111 Sussex Drive
Ottawa, Ontario

Monday, June 6, 2005

APPEARANCES / COMPARUTIONS

| | |
|--|--|
| Mr. Paul Cavalluzzo M ^e Marc David Mr. Brian Gover | Commission Counsel |
| Mr. Ronald G. Atkey | <i>Amicus Curiae</i> |
| Mr. Lorne Waldman Ms Marlys Edwardh Ms Breese Davies Ms Brena Parnes | Counsel for Maher Arar |
| Ms Barbara A. McIsaac, Q.C. Mr. Colin Baxter Mr. Simon Fothergill Mr. Gregory S. Tzemenakis Ms Helen J. Gray | Attorney General of Canada |
| Ms Lori Sterling Mr. Darrell Kloeze Ms Leslie McIntosh | Ministry of the Attorney General/ Ontario Provincial Police |
| Mr. Faisal Joseph | Canadian Islamic Congress |
| Ms Marie Henein Mr. Hussein Amery | National Council on Canada-Arab Relations |
| Mr. Steven Shrybman | Canadian Labour Congress/Council of Canadians and the Polaris Institute |
| Mr. Emelio Binavince | Minority Advocacy and Rights Council |
| Mr. Joe Arvay | The British Columbia Civil Liberties Association |

APPEARANCES / COMPARUTIONS

| | |
|--|--|
| Mr. Kevin Woodall | The International Commission for Jurists, The Redress Trust, The Association for the Prevention of Torture, World Organization Against Torture |
| Colonel M ^e Michel W. Drapeau | The Muslim Community Council of Ottawa-Gatineau |
| Mr. David Matas | International Campaign Against Torture |
| Ms Barbara Olshansky | Centre for Constitutional Rights |
| Mr. Riad Saloojee Mr. Khalid Baksh | Canadian Council on American-Islamic Relations |
| Mr. Mel Green | Canadian Arab Federation |
| Ms Amina Sherazee | Muslim Canadian Congress |
| Ms Sylvie Roussel | Counsel for Maureen Girvan |
| Ms Catherine Beagan Flood | Counsel for the Parliamentary Clerk |

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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Monday, June 6, 2005 at

3 10:00 a.m. / L'audience débute le lundi

4 6 juin 2005 à 10 h 00

5 THE REGISTRAR: Please be seated.

6 Veuillez vous asseoir.

7 THE COMMISSIONER: Mr. Gover?

8 MR. GOVER: Good morning,

9 Mr. Commissioner.

10 Mr. Commissioner, just some
11 housekeeping matters, first of all to alert you to
12 what lies ahead in the next four days.

13 Today you will be hearing
14 testimony from two expert witnesses about the
15 legal implications of dual nationality. The
16 witnesses who are here now are Maurice
17 Copithorne Q.C. and Professor Craig Forcese.

18 Tomorrow you will hear evidence
19 from Julia Hall of Human Rights Watch and Stephen
20 Yale-Loehr, a U.S. immigration law expert, about
21 the practices of rendition and extraordinary
22 rendition, and also about the American law
23 governing Mr. Arar's removal to Syria.

24 We expect that will take the whole
25 day tomorrow, and we expect then Wednesday morning

1 to start with the evidence of Professor Peter
2 Burns, dean emeritus from the University of
3 British Columbia, Faculty of Law, who will testify
4 about Canada's obligations under the Convention
5 Against Torture and other international legal
6 instruments.

7 You will also hear on Wednesday
8 from Mr. Donald Payne, who is a psychiatrist
9 practising in Toronto, with very extensive
10 experience in conducting psychiatric assessments
11 of victims of torture.

12 Finally, on Wednesday, you will
13 hear from Professor Richard Ofshe from the
14 University of California at Berkeley, who is an
15 acknowledged expert in relation to false
16 confessions.

17 Finally for the factual inquiry
18 this week, you will hear evidence on Thursday
19 about the impact of the events of September 11th,
20 2001, and their aftermath on Canada's Muslim and
21 Arab communities, and specifically how those
22 events were perceived and are perceived by members
23 of those communities, and have been for the months
24 and years since 9/11.

25 So just by way of introduction,

1 that is what you will expect. It is largely
2 contextual evidence you will be hearing this week,
3 Mr. Commissioner, and we start today with the
4 evidence of Mr. Copithorne and Professor Forcese.

5 THE COMMISSIONER: All right.
6 Would you like to be sworn or
7 affirmed?

8 MR. COPITHORNE: Sworn.

9 MR. FORCESE: Affirmed.

10 SWORN: MAURICE COPITHORNE

11 AFFIRMED: CRAIG FORCESE

12 MR. GOVER: Thank you.

13 Mr. Commissioner, might the volume
14 before you and before each of the witnesses and
15 each of counsel attending today be marked as the
16 next exhibit? This is entitled "Reference
17 Materials Compiled in Relation to the Evidence of
18 Professor Maurice Copithorne Q.C. and Professor
19 Craig Forcese".

20 THE REGISTRAR: P-119.

21 THE COMMISSIONER: That will be
22 P-119.

23 EXHIBIT NO. P-119: Volume of
24 Documents entitled "Reference
25 Materials Compiled in

1 MR. COPITHORNE: Yes.

2 MR. GOVER: In the course of your
3 career you held a position known as Legal Advisor
4 and Director of Legal Affairs. Is that correct?

5 MR. COPITHORNE: Yes.

6 MR. GOVER: The term "legal
7 advisor" is something that may require some
8 description. Can you tell us what your duties
9 entailed as legal advisor with the Department of
10 External Affairs?

11 MR. COPITHORNE: Well, the legal
12 advisor was and remains -- because the position is
13 still in existence -- the senior legal officer in
14 the department, and I guess you could say the
15 responsibilities are twofold: one is to oversee
16 the operations of the legal bureau of the
17 department, which is quite an extensive operation;
18 and second, to provide personal input and to
19 participate in meetings of senior management
20 within the department, by which I mean meetings
21 that were traditionally chaired by, in my
22 terminology, the undersecretary of the time,
23 sometimes called the morning prayers. There would
24 always be the legal advisor there in anticipation
25 of legal issues that were emerging.

1 MR. GOVER: In addition to your
2 time as legal advisor and director of legal
3 affairs for the Department of External Affairs as
4 it then was, you had a career within the
5 department as a diplomat.

6 Is that correct, sir?

7 MR. COPITHORNE: That is correct.

8 MR. GOVER: Can you tell us about
9 that, please?

10 MR. COPITHORNE: The Canadian
11 foreign service has never been large enough, as,
12 let's say, the Americans or the British do, to
13 justify a self-standing legal career, a
14 self-standing cadre of legal officers who are
15 employed fulltime by that particular department.
16 So countries like Canada, Australia and a number
17 of other countries have a specialty within the
18 foreign service.

19 In my case, and in the case of
20 many of my colleagues, it turned out that when we
21 were in Ottawa we did a spell of time in the legal
22 bureau, and when we were abroad we normally did a
23 non-legal function.

24 MR. GOVER: Your diplomatic
25 postings, I understand, included acting as

1 Canadian ambassador to Austria and the United
2 Nations agencies in Vienna.

3 Is that correct, sir?

4 MR. COPITHORNE: That is correct.

5 MR. GOVER: And you did that for
6 the period 1979 through 1982?

7 MR. COPITHORNE: That is right.

8 MR. GOVER: You were also
9 Assistant Under Secretary of State for Asia and
10 the Pacific in 1982 and 1983. Is that correct?

11 MR. COPITHORNE: Yes.

12 MR. GOVER: And you were Canadian
13 Commissioner to Hong Kong from 1983 to 1986?

14 MR. COPITHORNE: That is correct.

15 MR. GOVER: I understand that you
16 retired from the foreign service in 1986. Is that
17 correct?

18 MR. COPITHORNE: That is correct.

19 MR. GOVER: And you then took up a
20 teaching career at the University of British
21 Columbia, Faculty of Law?

22 MR. COPITHORNE: That is correct.

23 MR. GOVER: Do you continue to
24 teach international law there?

25 MR. COPITHORNE: Yes, I do.

1 MR. GOVER: And I understand, sir,
2 that you have also held a variety of external
3 appointments, including acting as the United
4 Nations special rapporteur on the human rights
5 situation in Iran. Is that correct?

6 MR. COPITHORNE: That is correct.

7 MR. GOVER: You did that during
8 the period of 1985 to 2002?

9 MR. COPITHORNE: Yes.

10 MR. GOVER: I will turn now to
11 you, Professor Forcese.

12 I understand, sir, that you are
13 licensed to practice law in the State of New York
14 and the District of Columbia. Is that correct?

15 MR. FORCESE: Correct.

16 MR. GOVER: You are also a member
17 of the bar of the Province of Ontario.

18 MR. FORCESE: Correct.

19 MR. GOVER: You have a bachelor of
20 laws degree from the University of Ottawa. Is
21 that correct?

22 MR. FORCESE: That is correct.

23 MR. GOVER: And you acquired that
24 degree in 1997.

25 MR. FORCESE: Correct.

1 MR. GOVER: Thereafter, you
2 attended Yale Law School at Yale University.
3 is that correct, sir?

4 MR. FORCESE: Correct.

5 MR. GOVER: You graduated from
6 that institution with a Master of Laws degree in
7 2001.

8 MR. FORCESE: Correct.

9 MR. GOVER: And I understand, sir,
10 that while at Yale University you garnered awards
11 that included the Raphael-Lemkin Prize for best
12 paper in the field of international human rights.

13 MR. FORCESE: Correct.

14 MR. GOVER: The Thomas Emerson
15 Prize for most distinguished paper on a subject
16 related to legislation.

17 Is that correct sir?

18 MR. FORCESE: Correct.

19 MR. GOVER: And further, sir, I
20 understand that you were awarded the Yale Law
21 School Scholarship in 2000.

22 MR. FORCESE: Correct.

23 MR. GOVER: And you were also
24 awarded a Social Science and Humanities Research
25 Council Doctoral Fellowship in 2000.

1 Is that correct, sir?

2 MR. FORCESE: Correct.

3 MR. GOVER: Currently you hold the
4 position assistant Professor at the Faculty of Law
5 at the University of Ottawa. Is that correct?

6 MR. FORCESE: Correct.

7 MR. GOVER: And you currently
8 teach courses in topics that include international
9 law and national security law. Is that correct?

10 MR. FORCESE: Correct.

11 MR. GOVER: In the course of your
12 career you have also been an associate at a law
13 firm in Washington, D.C. between 2001 and 2003.

14 MR. FORCESE: Correct.

15 MR. GOVER: And during that time
16 your practice included asylum law on a pro bono
17 basis. Is that correct?

18 MR. FORCESE: Correct, one case.

19 MR. GOVER: And you are a former
20 law clerk, in that you clerked for the Federal
21 Court of Canada in 1997 and 1998.

22 Is that correct, sir?

23 MR. FORCESE: Correct.

24 MR. GOVER: You have published on
25 a variety of topics. Is that right?

1 MR. FORCESE: Yes.

2 MR. GOVER: Those topics include a
3 book which is forthcoming in this year with Aaron
4 Freeman entitled "The Laws of Government: The
5 Legal Foundations of Canadian Democracy".

6 Is that correct?

7 MR. FORCESE: That is correct.

8 MR. GOVER: That will be published
9 by Irwin Law Books?

10 MR. FORCESE: Yes, on June 20th.

11 MR. GOVER: And further, in terms
12 of your articles and notes, you have a forthcoming
13 article in this year entitled "Clouding
14 Accountability: Canada's Government Secrecy and
15 National Security Law Complex", to be published in
16 the Ottawa Law Review.

17 Is that correct, sir?

18 MR. FORCESE: Yes, it is.

19 MR. GOVER: And recently
20 published, and you provided me with a copy just a
21 moment ago, is your article "Shelter from the
22 Storm: Rethinking Diplomatic Protection of Dual
23 Nationals in Modern International Law", published
24 in the George Washington International Law Review.

25 Is that correct, sir?

1 MR. FORCESE: Yes.

2 MR. GOVER: You have spoken at a
3 number of conferences and seminars, including in
4 April of 2005 you spoke in Washington, D.C. on
5 "Extraordinary Rendition and Diplomatic Protection
6 of Dual Nationals in the War on Terror".

7 Is that correct, sir?

8 MR. FORCESE: Yes, it is.

9 MR. GOVER: That was at a faculty
10 colloquium at the Washington College of Law at the
11 American University in Washington, I understand.

12 MR. FORCESE: Yes, it was.

13 MR. GOVER: Without addressing
14 each of the topics on which you have written in
15 the more popular media and in which you have been
16 interviewed, you have authored an article in The
17 Globe and Mail in 2004 also dealing with dual
18 citizenship entitled "Canada Versus Iran: Dual
19 citizenship, duelling rights", published July
20 16th, 2004.

21 Is that correct sir?

22 MR. FORCESE: Yes, it is.

23 MR. GOVER: Mr. Commissioner,
24 those are the questions I ask now in relation to
25 the qualifications of these two gentlemen as

1 experts. I don't know if any of my friends
2 present have any questions at this point.

3 THE COMMISSIONER: Any questions
4 or submissions on the issue of qualifications?

5 MS PARNES: No, I don't.

6 MS McISAAC: I don't have any
7 either, sir.

8 THE COMMISSIONER: I am content on
9 the basis of the questions asked that both of the
10 professors, in reading their impressive CVs, are
11 qualified to express opinions in the area that you
12 indicated at the outset.

13 MR. GOVER: Thank you very much,
14 Mr. Commissioner.

15 Professor Copithorne, I note that
16 you have written a paper on consular protection
17 and dual nationality which is found at tab 4 of
18 the exhibit before you, Exhibit 119.

19 Is that correct, sir?

20 MR. COPITHORNE: Yes, it was more
21 of a presentation than a paper. It was a
22 presentation that I was asked to subsequently
23 render to this forum, which is now going to be
24 published in the Proceedings of the Canadian
25 Council of International Law.

1 MR. GOVER: Professor Forcese, you
2 have written a paper "The Capacity to Protect",
3 which is found at tab 3 of Exhibit 119.

4 Is that correct?

5 MR. FORCESE: Yes, I authored that
6 at the beginning of May, was submitted to the
7 European Journal of International Law. I have not
8 received a response on publication. It builds on
9 the George Washington article we mentioned.

10 MR. GOVER: Your article asks
11 whether international law presents a barrier to
12 countries like Canada extending diplomatic
13 protection to their rendered dual nationals.

14 Is that correct?

15 MR. FORCESE: Yes, it is.

16 MR. GOVER: And your article
17 concludes -- by the way, we will deal with it more
18 extensively than this -- but your article
19 concludes that:

20 "The old laws precluding
21 protection in a contest
22 between two States of
23 nationality ..."

24 That is two States of which the
25 person is a citizen.

1 "... are no longer a part of
2 international law."

3 Is that correct, sir?

4 MR. FORCESE: Yes, it is.

5 MR. GOVER: And you conclude that:

6 "Dual nationality is not a
7 legal bar to diplomatic
8 protection of persons swept
9 up in extraordinary
10 renditions."

11 MR. FORCESE: Correct.

12 MR. GOVER: Now, to take a few
13 steps back, Professor Copithorne, I will ask you
14 to describe to us the conduct of Foreign Affairs
15 and how the conduct of Foreign Affairs is an
16 incident of the role of the Canadian government at
17 history and in international law?

18 MR. COPITHORNE: The Canadian
19 practice follows that of the United Kingdom, with
20 British constitutional practice in particular, and
21 that is that over many centuries the powers of the
22 sovereign were gradually delegated to the
23 legislature, to Parliament. Those powers, those
24 residual powers, which have never been delegated
25 to Parliament, are called the Royal prerogative,

1 the exercise of the Royal prerogative.

2 The principal one -- the only one
3 of which I am personally aware, although I believe
4 there are others of these remaining powers, called
5 the prerogative powers -- is the power to conduct
6 all matters to do with foreign affairs.

7 In Canada this was most recently
8 reasserted in letters patent of 1947; that is to
9 say, letters patent of 1947 indicated what powers
10 had been delegated to the Governor General of
11 Canada.

12 The result of this is that the
13 exercise of Foreign Affairs powers in all aspects
14 remain in the exclusive prerogative of the
15 executive of Canada. The way the Royal
16 prerogative is exercised in Canada, a group of
17 ministers make a submission to the Governor
18 General in Council who, together with a draft
19 Order in Council, the Governor General in Council
20 approves of it and the Governor General then signs
21 it, and that is the way a Royal prerogative is
22 exercised in terms of international affairs.

23 In the meantime, of course, there
24 has been an Act some years ago, an International
25 Affairs and Foreign Trade Act, which does set out

1 certain powers, and one now has the route of
2 arguing either that a particular Act is under the
3 statute or is part of the residual Royal
4 prerogative.

5 MR. GOVER: Is it correct then to
6 speak of a right of consular protection?

7 MR. COPITHORNE: No, I don't think
8 so. I think the precedents, both in England and
9 Canada, suggest that it is a discretionary duty,
10 if you will, of the government.

11 MR. GOVER: And just by way of
12 illustration, you have brought to my attention the
13 case which is reproduced in Exhibit 119 at tab 16,
14 and you have it before you --

15 MR. COMMISSIONER: Which tab, tab
16 6?

17 MR. GOVER: Tab 16.

18 Professor Copithorne, this is the
19 case of Omar Ahmed Khadr and the Minister of
20 Foreign Affairs. Is that correct, sir?

21 MR. COPITHORNE: Yes.

22 MR. GOVER: By way of summary,
23 this was a pleadings motion in litigation that was
24 brought on behalf of Mr. Khadr against the
25 Minister of Foreign Affairs.

1 Is that correct?

2 MR. COPITHORNE: That is correct.

3 MR. GOVER: It was asserted there
4 that the Government of Canada had the obligation
5 to extend consular and diplomatic services to
6 Mr. Khadr, who was then detained at Camp Delta in
7 Guantanamo Bay.

8 Is that correct?

9 MR. COPITHORNE: That is correct.

10 MR. GOVER: Can you tell us what
11 the result of this case was, and I will ask you,
12 when you have done that, to tell us whether this
13 changes your understanding of the Royal
14 prerogative in the conduct of international
15 affairs.

16 MR. COPITHORNE: Yes, indeed. I
17 would estimate that this line of judgment, if it
18 is appealed and if it is confirmed on appeal,
19 would then declare that consular protection comes
20 under heading 1 of the relevant section of the Act
21 and is no longer a part of the Royal prerogative.
22 In other words, it has been delegated to
23 Parliament.

24 Whether that will happen, I don't
25 know. I have found no trace of appeal action with

1 regard to this. I don't know whether my colleague
2 has or not. No.

3 So we are unaware of any prospects
4 for appeal on this matter at the moment.

5 MR. GOVER: Right. Professor
6 Forcese, any comment in relation to the Khadr case
7 and its implications?

8 MR. FORCESE: Well, the other
9 dimension to this discussion is whether there is a
10 right at international law to diplomatic
11 protection. I don't know if you want to ask that
12 question now?

13 MR. GOVER: Well, why don't we
14 address that: the right of an individual at
15 international law to diplomatic protection.

16 MR. FORCESE: The issue is to
17 whether -- typically, in international law, the
18 view was, and has been, that diplomatic protection
19 was at the discretion of the State. The State
20 would choose whether to extend diplomatic
21 protection in its various manifestations to their
22 national. There is no affirmative obligation that
23 it did so. There is no human right diplomatic
24 protection, in other words.

25 That said, there is a practice at

1 play in many countries, not least those of the
2 former Soviet bloc where, in their constitutions,
3 they affirmatively indicate that their citizens
4 have a right to diplomatic protection.

5 There are other examples of such
6 State practice where States have undertaken,
7 either in their constitutional fabric or by virtue
8 of their statutes, to extend diplomatic protection
9 to their nationals abroad.

10 One example in the United States,
11 there is a statute from the 19th century which
12 indicates that if an American is held hostage by a
13 foreign power, the President is obliged to do
14 everything short of use of force to secure the
15 release of that individual.

16 So there is a mixed practice
17 internationally. But to say that there is an
18 international legal principle that obliges the
19 extension of diplomatic protection goes too far.

20 MR. GOVER: Professor Copithorne,
21 perhaps I can return to you and the more general
22 issue of the conduct of Foreign Affairs being part
23 of the Royal prerogative.

24 One often hears about ratification
25 of treaties. Can you comment on what is entailed

1 by ratification, both in international law and in
2 domestic law, and how Canada might compare to
3 other countries in terms of its domestic law
4 regarding ratification?

5 MR. COPITHORNE: Ratification is
6 one of those terms that is subject to a great deal
7 of confusion because it has two quite discrete
8 meanings internationally and nationally.

9 Internationally, it is part of the
10 act of "making" a treaty. Parties "make" a treaty
11 between themselves.

12 One way of doing this is through
13 signature, followed by a subsequent ratification.
14 Another way of doing it is by accession, which is
15 a single act. You just sign up.

16 Normally, the steps of signature
17 followed by ratification are followed when you are
18 part of the original crowd. You joined the party
19 which produced the convention.

20 Accessions or adherence tend to
21 come after by people who were not there, States
22 who were not there, and they have the power to
23 join in through a single act of accession,
24 normally.

25 So there is no legal difference

1 whether you become a party through signature plus
2 ratification or accession. It means you have come
3 from a different starting point.

4 With regard to the obligations,
5 there are certain obligations on a State as soon
6 as they sign. It is obligation that is basically
7 to act in good faith with regard to this. But a
8 legal obligation doesn't arise until they have
9 ratified it.

10 Ratification consists of entering,
11 submitting an instrument of ratification.

12 So this is the international
13 concept.

14 At national law, ratification is
15 often used to mean what the legislature might be
16 asked to do with regard to an international
17 obligation. In Canada, the better term that is
18 actually used is either the implementation, where
19 a Canadian statute follows upon the entry into
20 force of the convention in order for Canada to
21 fulfil its commitments, or sometimes a resolution
22 of approval by Parliament; that is to say, it is
23 approving the act of the executive in entering
24 into particular agreements.

25 This procedure is not widely used.

1 It is used for highly -- I don't want to say
2 symbolic, but treaties which are also symbolic,
3 such as the United Nations Charter, NATO. A
4 number of these sorts of very significant treaties
5 have been submitted by the executive to Parliament
6 for the resolution of approval.

7 This is not a legal action; this
8 is a political action. The government wishes to
9 establish the degree of political support for,
10 let's say, joining the United Nations.

11 MR. GOVER: What you have
12 described as a process compares then to -- or I
13 would ask you to compare it to the process of
14 ratification in the United States.

15 For example, later this week the
16 Commissioner will hear about the United States'
17 government's ratification through the Senate of
18 the Convention Against Torture and Other Cruel and
19 Inhuman and Degrading Treatment, and that there
20 was express reservation made at that time by the
21 Senate on behalf of the U.S. government.

22 Can you comment on that?

23 MR. COPITHORNE: There are a whole
24 variety of different practices in different
25 countries. One principle of international law is

1 that you are not responsible for knowing the
2 constitutional requirements of your treaty
3 partner, because that would be a very, very high
4 hurdle for treaty States to enter.

5 The United States is of course
6 very important for us, because they are our
7 neighbour.

8 It would be incorrect, coming from
9 where I come, international law, to use the term
10 "ratification" by the Senate. Under the U.S.
11 Constitution, it is given the advice and consent
12 of the Senate. It is the State Department which
13 then issues the instrument of ratification on the
14 basis of that advice and consent and submits that
15 instrument of ratification to what is known as the
16 depository.

17 The depository is the agency,
18 often the United Nations itself these days, which
19 collects everything in one place, and publishes a
20 list of parties, et cetera.

21 MR. GOVER: Professor Forcese, why
22 don't we turn to an international instrument, the
23 Vienna Convention On Consular Relations. Could
24 you please walk us through what is known as the
25 consular protection aspect of that convention

1 relating to nationals.

2 I understand you will be taking us
3 to Article 36 of the Vienna Convention On Consular
4 Relations, which appears at tab 10 of Exhibit 119.

5 MR. FORCESE: The Vienna
6 Convention consular relations, and also a fairly
7 similar international treaty called the Vienna
8 Convention on Diplomatic Relations, both of them
9 allude very early in their text to one of the
10 functions of consular officials, and also
11 diplomatic officials, being to oversee and
12 preserve the interests of their nationals while
13 those nationals are in the foreign jurisdiction.

14 The Vienna Convention On Consular
15 Relations includes a much more emphatic
16 description of the role the consular officials
17 might play when one of their nationals is
18 detained, and that is found in Article 36.

19 Article 36 specifies at the outset
20 that consular officers have an ability, or are
21 free, to communicate with their nationals and to
22 have access to them, and that the nationals also
23 have a reciprocal right, if you will, to contact
24 consular officials.

25 There are two aspects to Article

1 36 worth noting in particular.

2 The first is that when a person is
3 detained by a foreign State, when a foreign
4 national is detained by that foreign State, that
5 foreign State is obliged, without delay, to inform
6 that person of their right to contact consular
7 officials. So that is the first right, if you
8 will.

9 Also if that person, if that
10 foreign national, requests access to a consular
11 official, once again that foreign State is obliged
12 to grant that access, or at least inform in this
13 case the Canadian consular official that access
14 has been requested.

15 Both those provisions of Article
16 36 have been characterized both as international
17 rights owed by State parties to the consular
18 convention to each other and also as individual
19 rights that individuals have when travelling
20 internationally.

21 MR. COPITHORNE: Mr. Gover, could
22 I add to that?

23 MR. GOVER: Of course.

24 MR. COPITHORNE: I would like to
25 supplement what was just said.

1 It appears in my presentation on
2 tab -- I am not keeping track of tabs.

3 MR. GOVER: It would be tab 4.

4 MR. COPITHORNE: Four. And that
5 is that this was one of the most controversial
6 issues in the negotiation of the Vienna Consular
7 Convention.

8 The issue arose in the following
9 terms: who owns this right of protection, the
10 right to protect?

11 There were two perspectives: one
12 that it was owned by the country of nationality;
13 and the other that it was owned by the detainee.

14 What became clear in the course of
15 this extended debate was that there were a variety
16 of people in categories who didn't want anything
17 to do with their own government. They might have
18 been political refugees; they might be people who
19 were fleeing the law. There were half a dozen
20 categories identified in the course of that debate
21 of people who didn't want anything to do with
22 their own government representatives.

23 Therefore, in this sense, the
24 right should belong to the detainee rather than to
25 the government.

1 The compromise that was eventually
2 reached, and which allowed the whole convention to
3 come to a final draft, was this rather complex
4 wording that the initial obligation rests on the
5 receiving government to advise all detainees of
6 their right to access to a consular official, and
7 only if they request does an obligation arise for
8 the receiving State to tell the consular official
9 that they have somebody in jail and you have a
10 right to see him.

11 MR. GOVER: And that is a point
12 that you address in your paper at pages 5 and 6,
13 once again at tab 4 of Exhibit 119.

14 I note that you go so far as to
15 say in your paper that the drafting conference
16 came close to foundering on this issue of whether
17 consular access was the property of the sending
18 State or the detainee?

19 MR. COPITHORNE: That is my
20 understanding.

21 MR. GOVER: While we are at it, if
22 we could speak about these terms, which appear
23 rather odd: sending State and receiving State.
24 Can you help us with a definition there?

25 MR. COPITHORNE: Well, they are

1 terms of art, and that doesn't mean that they are
2 necessarily easy to grasp the logic of.

3 But "sending" is basically the
4 State that is sending its representative out, or
5 it is sending its nationals out. So the sending
6 State, let's say in the Arar case, would be
7 Canada; the receiving State is the one who has the
8 person detained, in that case Syria.

9 The terminology arose with regard
10 to the broader purpose of both the Vienna Consular
11 Convention and the Vienna Diplomatic Convention:
12 that is to say, the State that sends its diplomats
13 and consuls into the other country, and the State
14 that receives those diplomats and consuls from the
15 sending State.

16 MR. GOVER: Professor Forcese.

17 MR. FORCESE: If I could just
18 comment on this phrase "without delay" in Article
19 36, the issue of without delay, how long a delay
20 must there be before notification of these rights,
21 was actually at issue. It has been an issue in a
22 case before the International Court of Justice
23 World Court, called Avena, which involved a
24 contest between Mexico and the United States where
25 the United States was alleged to have violated

1 Article 36, obligations in relation to Mexicans
2 held on death row and subsequently convicted of
3 capital crimes.

4 In the Avena case, the court said
5 that the obligation to inform an individual of
6 their right arises immediately upon the receiving
7 State authorities being aware that that person is
8 a foreign national, or suspecting that that person
9 is a foreign national.

10 Which, in practice, I would
11 hazard, imposes a much more serious and immediate
12 obligation on individuals at ports of entry,
13 immigration authorities, who would have access to
14 a person's passport and would then be alerted to
15 their foreign nationality than it would, say, be
16 for a police officer in Manhattan.

17 The Avena court concluded that the
18 United States had violated its obligations to
19 inform an individual without delay of their right
20 to consular access by waiting 40 hours before so
21 notifying an individual. So they waited 40 hours
22 after they were alerted to the Mexican nationality
23 of an individual. That, in the International
24 Court of Justice's view, was too long.

25 MR. GOVER: So we are clear on

1 this the Avena case had implications far beyond
2 Mr. Avena himself.

3 MR. FORCESE: In the Avena case I
4 believe there were some 50 Mexican nationals whose
5 status was at issue.

6 MR. GOVER: You have emphasized,
7 as does the article, that this right to be
8 informed of consular access comes about
9 immediately upon detention. Forty hours was
10 obviously too much a time in the Avena case --

11 MR. FORCESE: Sorry. Not
12 detention. Upon the receiving State being aware
13 of the foreign nationality once they have detained
14 an individual.

15 MR. GOVER: Right. If that event
16 happens in a third country and one is a dual
17 national, is there any law or practice in the
18 international sphere that recognizes which of the
19 two countries of nationality is to be notified?

20 MR. FORCESE: We can talk about
21 this in greater detail, but the view on diplomatic
22 protection of dual nationals is that either
23 country of dual nationality is in a position to
24 exercise diplomatic protection. That's the
25 pronouncement that comes out of the International

1 Law Commission's recent draft articles on
2 diplomatic protection. I don't know if you want
3 me to describe those at this point.

4 But the view is in international
5 law, the prevailing view, is that either State of
6 dual nationality is in a position to exercise
7 diplomatic protection vis-à-vis a State, a
8 non-national State.

9 MR. GOVER: We will return to that
10 later.

11 Professor Copithorne?

12 MR. COPITHORNE: Just a footnote
13 on the numbers we are dealing with, or the United
14 States is dealing with.

15 There was a case in the United
16 States, Sorensen versus the City of New York. A
17 Danish national sought punitive and compensatory
18 damages for the failure of the New York Police
19 Department to inform her of her right to consular
20 notification.

21 What I am really interested in
22 pointing out in this case, it came out in evidence
23 that over 53,000 foreign nationals had been
24 arrested by the NYPD during 1997 alone, and of
25 those 53,000, something called the NYPD Alien

1 Notification Log registered just four of them.

2 So you can see there's a huge --
3 what shall I say? -- black hole, or whatever, here
4 in an international environment, cosmopolitan
5 environment like the United States.

6 MR. GOVER: Professor Forcese, to
7 return to this concept of dual nationality, can
8 you tell us what, according to Statistics Canada,
9 is the total number of dual nationals in Canada.

10 MR. FORCESE: Statistic Canada, on
11 the basis of information provided in the 2001
12 Census, indicates that there are 552,880 citizens
13 of Canada who are also citizens of at least one
14 other country, so basically half a million
15 Canadians who are citizens of one other country,
16 and then an additional 4,000 Canadians who are
17 citizens of two other countries, two or more.

18 MR. GOVER: I understand that it's
19 appropriate for us to make a cautionary note in
20 that respect, in that they were actually operating
21 on the base of self-identification there?

22 MR. COPITHORNE: That's right, in
23 my view, yes. This is operating on the basis of
24 how people identify themselves on the last census.

25 MR. GOVER: Let's turn then to

1 diplomatic protection in a broader sense, and I
2 will ask you, Professor Forcese, to define for us
3 the concept "espousal of claims".

4 MR. FORCESE: Diplomatic
5 protection is a very ancient term in international
6 law, and it includes what we have been talking
7 about thus far, consular access, consular
8 protection, but, more broadly it also includes
9 something called espousal of claims.

10 The notion of espousal of claims
11 is that when a State perpetrates some
12 international wrong on the national of another
13 State, that's a violation of duties owed the
14 sending State, and that sending State is able to
15 step into the shoes of the wronged individual and
16 essentially espouse their claim.

17 In practice that means bring a
18 case before, say, the World Court, the
19 International Court of Justice, before some
20 arbitral panel, assuming in either instance they
21 can achieve jurisdiction, which is another issue.

22 The basic concept of espousal
23 claims is that the State can step into the shoes
24 of a wronged national and essentially take up
25 their case.

1 MR. GOVER: Professor Copithorne,
2 any comment on this concept of stepping into the
3 shoes of the wronged individual?

4 MR. COPITHORNE: Well, one of the
5 side effects of stepping into the shoes is that
6 internationally the claim is considered to be the
7 claim of the government and that the government
8 has an absolute right to do with it what it
9 wishes.

10 There is precedent both in Canada
11 and in the United Kingdom to state that the
12 government is under no obligation to actually
13 pursue the claim internationally. It's a
14 discretionary right.

15 MR. GOVER: Coming back to that
16 basic point that you made at the outset of your
17 testimony.

18 MR. FORCESE: That point was
19 articulated very clearly in a case called
20 Barcelona Traction from the World Court, which
21 actually involved a situation where Canada
22 declined to espouse the claim of a corporation
23 incorporated in Canada which had some troubles in
24 Spain. The ICJ in that case said very clearly
25 that Canada's failure to do so, its decision not

1 to pursue that case, was its own decision.

2 MR. GOVER: And Professor Forcece,
3 you discuss this concept of espousal of claims at
4 tab 3 of Exhibit 119, at pages 8 and 9.

5 Is that correct?

6 MR. FORCESE: Yes, it is.

7 MR. GOVER: Could I ask you,
8 Professor Copithorne, to tell us what the
9 prerequisites are for diplomatic protection in
10 international law?

11 MR. COPITHORNE: Diplomatic
12 protection writ large?

13 MR. GOVER: Yes.

14 MR. COPITHORNE: They consist
15 primarily of exhaustion of local remedies, which
16 basically means that you have attempted to do it
17 within the legal system of the country.

18 Now, bear in mind, this concept
19 arose largely in the context of foreign
20 expropriations of property; in other words,
21 whether it was the Barcelona Traction -- in fact,
22 there are a number of companies comparable to
23 Barcelona Traction. There was Brazilian Traction;
24 there were a number which involved Canadian
25 companies whose property was essentially taken

1 over.

2 Brazilian Traction was a little
3 different, but there was a period when Canadian
4 investment money was going out to many parts of
5 the world. Then the issue often arose as to
6 whether the Canadian government would espouse the
7 cause of that company.

8 And what the government, what the
9 officials looked at were the two things. They had
10 exhausted their remedies in Spain, and in fact
11 that aspect is considered an Nottebohm case, and
12 the court in that case found that the Spanish
13 courts were not acting at arm's length with regard
14 to the claim that the Barcelona Traction owners
15 had brought with regard to the taking over of
16 their property.

17 And the other thing is
18 nationality. So on the one hand the exhaustion of
19 local remedies.

20 The other thing is that you are a
21 national both at the time of the taking and the
22 time of the claim.

23 MR. GOVER: Professor Forcese?

24 MR. FORCESE: If I could just
25 supplement that by saying that it is also

1 considered a prerequisite of diplomatic protection
2 that there be an internationally wrongful act.
3 So, it's not just any act committed by a State
4 against a foreign national that will give rise to
5 diplomatic protection, it has to be
6 internationally wrongful.

7 What that consists of, of course,
8 is a matter of some dispute, a violation of
9 international human rights would meet that
10 requirement. So, too, obviously would be a
11 violation of an Article 36 obligation under the
12 Vienna Consular Relations Treaty. That would be
13 an internationally wrongful act giving rise to the
14 possibility of espousal claims.

15 On exhaustion of remedies, I would
16 also point this out: that typically it is true
17 that the wronged individual must pursue their
18 domestic remedies first, very much like an
19 administrative law concept in terms of judicial
20 review here in Canada, but that notion of
21 exhaustion of domestic remedies does not apply to
22 a violation of Article 36 of the Vienna Convention
23 On Consular Relations.

24 In the Avena case the World Court
25 was quite emphatic that when Article 36 is

1 violated, that's a violation of an obligation a
2 State has to other States, and it's simply
3 illogical and improper to insist that those other
4 States pursue a remedy in the domestic courts of
5 the violating State.

6 So violation of Article 36, no
7 requirement that remedies be exhausted
8 domestically.

9 MR. GOVER: With the background we
10 have now in the international law and practice
11 surrounding diplomatic protection, I ask you
12 initially, Professor Forcese: What does the
13 international law tell us about nationality and
14 dual nationality?

15 MR. FORCESE: Obviously
16 nationality is a key concern for diplomatic
17 protection. It is one of the prerequisites of
18 diplomatic protection as Professor Copithorne was
19 indicating.

20 International law, however, is not
21 robust in the area of nationality. Traditionally,
22 for many, many generations, for many decades, the
23 question as to how a State accords nationality has
24 been left to States to decide for themselves.

25 As an illustration of this, there

1 is a convention that dates from 1930 on
2 nationality called the Hague Convention. It's not
3 all that important in its own right, because it
4 has very few ratifications, but it does illustrate
5 the concept that nationality is a matter to be
6 determined by States themselves. In Article 1 --

7 MR. GOVER: Perhaps I could
8 interrupt you just to provide a reference to the
9 1930 Hague Convention, which is in Exhibit 119 at
10 tab 5.

11 And pardon me for the interruption
12 Professor Forcese, but you were just about to
13 refer to Article 1.

14 MR. FORCESE: Correct. Article 1
15 says:

16 "It is for each State to
17 determine under its own law
18 who are its nationals."

19 And as I say, the Hague Convention
20 in its own right is not that important, but that
21 concept is readily recognized in international
22 law.

23 Now, it is subject to certain
24 caveats.

25 MR. GOVER: Can you explain those

1 to us, please?

2 MR. FORCESE: There is this
3 follow-up passage in Article 1 that talks about
4 the law shall be recognized -- the law of the
5 State according nationality shall be recognized:

6 "... insofar as it is
7 consistent with international
8 conventions, international
9 custom, and the principles of
10 law generally recognized with
11 regard to nationality."

12 That's a bit of an opaque phrase,
13 but it does acknowledge that there are certain
14 circumstances where international law will step in
15 and say: Hey, you have accorded nationality
16 improperly. That's going too far. You are now
17 into an area where international law will take a
18 position.

19 The Nottebohm case, which is a
20 decision from the 1950s of the World Court is a
21 clear manifestation of that. I don't know if
22 you --

23 MR. GOVER: Professor Copithorne
24 mentioned the Nottebohm case a few moments ago.
25 Could you now, having mentioned it as well,

1 explain that case to us?

2 MR. FORCESE: The facts of
3 Nottebohm, they stem from the Second World War.
4 Mr. Nottebohm was a German national residing in
5 Guatemala. At the outset of the war he felt it
6 expedient to not be a German national for fear
7 that he would be interned during the course of the
8 Second World War as an enemy national by
9 Guatemala.

10 So he went to Liechtenstein, a
11 country with whom he had only the most peripheral
12 contacts, and in a span of a very brief period,
13 under circumstances that were a little bit suspect
14 in terms of Liechtenstein's own domestic law, he
15 acquired Liechtensteinian nationality. He then
16 went back to Guatemala. Guatemala said we are
17 going to treat you like a German national. He was
18 interned.

19 After the Second World War he went
20 to Liechtenstein and said, "Please espouse my
21 claim against Guatemala. I was wrongly interned."
22 The question the ICJ had to decide was: Was he a
23 legitimate national of Liechtenstein, such that
24 Liechtenstein could bring such a case, espouse
25 such a claim, on behalf of Mr. Nottebohm against

1 Guatemala?

2 As a consequence in that case, the
3 ICJ was obliged to examine exactly what is
4 required as a matter of international law for the
5 proper bestowal of nationality, at least bestowal
6 of nationality on the basis of naturalization:
7 someone who wasn't born somewhere.

8 MR. GOVER: You discuss the
9 Nottebohm case at pages 16 through 18 of your
10 paper, which once again appears at tab 3 of
11 Exhibit 119.

12 Is that correct?

13 MR. FORCESE: Correct.

14 MR. GOVER: Professor Copithorne,
15 I note that Professor Forcese's paper suggests
16 that there's an outer limit to the deference
17 international law accords States in determining
18 their own national rules as is reflected in
19 Article 1 of the 1930 Hague Convention.

20 Do you have any comment in that
21 regard?

22 MR. COPITHORNE: Well, I guess I
23 would only state that international law is a law
24 that applies when it is legislated. In other
25 words, a State is free essentially to do anything

1 it wants if there's no rule against doing that
2 act.

3 This means that in this case,
4 States were busily doing what they wanted with
5 regard to nationality, but then those outer limits
6 began to appear, and the outer limits are not set
7 out anywhere. They are a collection of practice
8 and some jurisprudence saying that it must be done
9 in good faith, saying it can't be a fraudulent
10 act.

11 In the Nottebohm case, as my
12 colleague has just said, says it must, in that
13 sort of case, a naturalization case, must reflect
14 some degree of attachment to the country
15 concerned, which was not fulfilled by a stay in
16 Vaduz, the capital of Liechtenstein, for 18 or 19
17 days.

18 The Nottebohm case is a little
19 different because the parties to the litigation
20 were not both claiming nationality. Liechtenstein
21 was suing Guatemala and Guatemala did not consider
22 him to be a national. So it can be distinguished
23 on those grounds.

24 MR. FORCESE: Just to complete the
25 thought on Nottebohm, because his holding become

1 very relevant for the analysis of diplomatic
2 protection of dual nationality.

3 The ultimate holding in Nottebohm
4 was that in order to espouse a claim, at least in
5 relation to a person who has been naturalised,
6 that nationality will only be recognised if
7 there's what is called effective nationality, or a
8 genuine connection, as Professor Copithorne
9 indicated, between the State according the
10 nationality and the individual.

11 And the measure of whether there
12 is effective nationality, a genuine connection,
13 depends on such things as domicile, where you went
14 to school, what your family connections are, what
15 language do you speak -- the sort of indicia,
16 frankly, one would look at for the purposes of,
17 say, tax law in deciding where one's domicile was
18 for tax law.

19 So those factual indicia
20 determined whether you got a sufficiently genuine
21 connection to the State that it is accorded its
22 nationality properly.

23 MR. GOVER: Returning to the 1930
24 Hague Convention on conflict of nationality laws,
25 can you give us some idea about how well

1 subscribed to the 1930 Hague Convention was,
2 Professor Forcese?

3 MR. FORCESE: At its peak I
4 believe it had 20 members. Canada was actually a
5 party to the Hague Convention up until 1996, and
6 we renounced, in 1996, for reasons I don't know.
7 But we did stop being a party in 1996.

8 MR. GOVER: Professor Copithorne,
9 any comment in relation to that?

10 MR. COPITHORNE: I was just going
11 to add that there is a statement in a United
12 States-Iran Claims Commission finding for this
13 reason, the Convention should be treated extremely
14 cautiously. And in their view, as was reflected
15 in the substantive side, the merit side of their
16 judgment, it simply was no longer the case that
17 States could not espouse the cause of an
18 individual who was a dual national against his
19 other nationality.

20 MR. GOVER: Professor Forcese, an
21 important issue for us to consider is the
22 consequences of dual nationality while in the
23 other country of which the Canadian citizen is a
24 national.

25 Does the 1930 Hague Convention say

1 anything about that?

2 MR. FORCESE: The important
3 provision of the Hague Convention on that issue is
4 Article 4.

5 I want to make a point about the
6 Hague Convention. The Hague Convention, because
7 it only had 20 members, was not considered the
8 most robust international treaty in the world.

9 However, there are provisions of
10 the Hague Convention that people have claimed over
11 the years reflect customary international law,
12 which is sort of, for lack of a better expression,
13 the common law of international law. If so, if it
14 is customary international law, then it's binding
15 in all States, irrespective of their membership of
16 any treaty.

17 Article 4 of the Hague Convention
18 manifests what is popularly known as the
19 non-responsibility rule. The non-responsibility
20 rule says that one State of nationality cannot
21 bring a claim or cannot claim diplomatic
22 protection as against the other State of
23 nationality.

24 So when you have a dual
25 nationality, you have person who has two

1 nationalities, one State of nationality cannot
2 protect them against the other State of
3 nationality. That's the non-responsibility rule.

4 And as I say, people have argued
5 that it's customary international law. I don't
6 agree with that assessment. I can talk about why
7 that is in a moment.

8 MR. GOVER: Before I ask you to do
9 that, I note that Article 4 of the 1930 Hague
10 Convention, again at tab 5 of the exhibit, states,
11 and I quote:

12 "A State may not afford
13 diplomatic protection to one
14 of its nationals against a
15 State whose nationality such
16 person also possesses."

17 Professor Forcese, can you comment
18 on the positions taken by Canada and Syria, so far
19 as you understand them in relation to Mr. Arar,
20 and whether the positions taken by both countries,
21 or either of them, are, or is, consistent with
22 this notion of non-responsibility as you have
23 described it?

24 MR. FORCESE: I would preface my
25 comments by saying that I don't have as great a

1 command of the record as everyone else in this
2 room.

3 But I have seen statements in some
4 documents prepared by Foreign Affairs, and also in
5 statements that Foreign Affairs officials have
6 made before parliamentary committees, suggesting
7 that there were some difficulties in accessing
8 Mr. Arar, at least in the outset, that stem from
9 Syria's view that it had sort of principal
10 jurisdiction over Mr. Arar.

11 That view, that it had principal
12 jurisdiction over Mr. Arar, that Canada had no
13 place, would be consistent with the
14 non-responsibility doctrine.

15 MR. GOVER: Now, you have
16 commented a moment ago that this concept, which is
17 embodied in Article 4, is described as the
18 non-responsibility doctrine.

19 First of all, did that term have
20 some sort of currency in international law or is
21 that a term that you use?

22 MR. FORCESE: It's a shorthand
23 that appears in the literature by others, not just
24 me.

25 MR. GOVER: And you have said that

1 the 1930 Hague Convention isn't a robust statement
2 of international law in that it was only signed
3 initially by 20 countries, and that Canada for one
4 has since renounced it some nine years ago.

5 In your view, does the
6 non-responsibility rule or doctrine embodied in
7 Article 4 represent the international law today?

8 MR. FORCESE: No, for two reasons.

9 First, there is a fairly
10 persuasive literature suggesting that even at the
11 time of the 1930 Hague Convention, it was not
12 customary international law. So the Hague
13 Convention was not codifying principle that was
14 out there as customary international law. I
15 discuss some of that in my paper.

16 MR. GOVER: We will be addressing
17 that in some greater detail.

18 MR. FORCESE: But the second
19 reason, and probably the more important reason, is
20 that things have moved along quite a bit since
21 1930 and we now have this doctrine articulated by
22 the Nottebohm case which we have just discussed,
23 this notion of genuine connection or effective
24 nationality, and there are a number of
25 international arbitral decisions which invoke that

1 concept of effective nationality to allow the
2 espousal of claims, to allow diplomatic protection
3 between two States of nationality.

4 The Iranian-U.S. Claims Tribunal
5 case called A-18, a case from the Second World
6 War, an Italian-U.S. case, called Mergé, and in
7 several cases the tribunal has said: Look, this
8 notion, this ancient notion, that when you have
9 two states of nationality contesting a claim, that
10 you can't do that, there's no jurisdiction, that
11 has fallen away.

12 What we will allow to happen is
13 that when one State has a closer tie to that
14 person who has been wronged, then because of that
15 closer tie, they can espouse the claim, they can
16 extend diplomatic protection as against the other
17 State.

18 So they have relied on this
19 effective nationality, this genuine connection
20 jurisprudence.

21 That concept has been endorsed by
22 the International Law Commission. The
23 International Law Commission is a group of 34
24 experts. The body itself dates from the late
25 1940s. It is essentially the branch of the United

1 Nations that convenes experts for the progressive
2 codification of international law, and they
3 regularly prepare what are known as draft
4 articles, attempting to codify the current status
5 of international law. In many instances those
6 draft articles are then the template for an
7 international convention.

8 The most recent example I can
9 think of is the International Criminal Court.

10 They have just completed in the
11 last two or three years what they call draft
12 articles on diplomatic protection, and those draft
13 articles reject non-responsibility. Those draft
14 articles specify quite clearly that so long as the
15 espousing State, so long as the plaintiff State,
16 if you will, has the closer or the predominant
17 link to the individual who has been wronged, in
18 that circumstance they can step toward and extend
19 diplomatic protection.

20 MR. GOVER: In essence, in
21 answering the question as you just have, you have
22 summarized pages 26 through 30 of your paper that
23 appears at tab 3.

24 Is that correct?

25 MR. FORCESE: Correct.

1 MR. GOVER: Professor Copithorne,
2 any comment?

3 MR. COPITHORNE: I share
4 completely those views.

5 MR. GOVER: Is it correct to speak
6 of a change in the law, or are we now concerned
7 with a discernible trend towards effective
8 nationality, or dominant nationality?

9 MR. FORCESE: The ILC characterize
10 it as two competing tendencies in international
11 law, the one that said non-responsibility, the one
12 that said you could have diplomatic protection in
13 relation to dual nationals. They have said that
14 they are the two competing tendencies in
15 international law. They view the notion that you
16 can have diplomatic protection of dual nationals
17 as having sort of trumped, as having sort of
18 prevailed.

19 MR. GOVER: You have spoken about
20 the work of the International Law Commission and
21 the draft article. What is the status of that,
22 Professor Copithorne?

23 MR. COPITHORNE: Well, this is the
24 legislative draftsmen of the United Nations, the
25 International Law Commission, and it's been

1 engaged since -- actually it was one of the very
2 first agencies. I think it was -- you have said
3 late 40s maybe. I would have said at the latest
4 the late 40s. It was up and running very quickly.

5 It was the principal but not the
6 only draftsmen, or drafting body, of the United
7 Nations.

8 It tended to deal with expert
9 areas such as these. Other more political
10 instruments would be drafted in other bodies of
11 the United Nations. But nevertheless it was
12 intended to be the principal drafter of
13 U.N.-sponsored conventions and has become quite
14 active in this regard once again.

15 They appoint one of their members
16 as a special rapporteur who is the principal
17 drafter. He has an interest in this subject, and
18 each year they meet for six, eight weeks in
19 Geneva, in June-July. They go over his report.
20 They may accept the report the way it stands, that
21 is to say usually in the form of some draft
22 articles, and they add it to their list of
23 articles that is gradually growing, or they may
24 say, "We don't like your ideas. Go back and try
25 again."

1 Gradually they build up a draft
2 document, and somewhere near the end, but not at
3 the end, they decide to test the waters, and they
4 send the draft out to all member States.

5 For example -- is it the State
6 responsibility that is sent for June '07 answers?
7 Something like this.

8 There are a couple of these
9 conventions now in the hands of member States
10 inviting their comments. And there have been some
11 cases of convention texts which have been worked
12 through this thorough and rather tedious process
13 of going back and forth with the special
14 rapporteur that have been rejected by governments,
15 primarily for political reasons. They just were
16 not in the mood to legislate in that area at that
17 time.

18 MR. GOVER: Professor Forcese?

19 MR. FORCESE: On the diplomatic
20 protection articles, I believe States are obliged
21 to respond by January 2006, somewhere in 2006.

22 Just to follow up on that thought,
23 the draft articles are not in their own right
24 binding, but they do reflect the honest and
25 determined efforts of experts in international law

1 who -- during the course of their work, States
2 have been intervening and making statements all
3 along the way -- these experts in international
4 law to pronounce on what the status of
5 international law is.

6 So they are not binding in their
7 own right, obviously, but they are quite
8 persuasive and authoritative as to where
9 international law stands at present.

10 And they are supplemented with
11 commentary. There is commentary in each of the
12 articles where the ILC justifies its position.

13 I have one final point on the
14 rejection of non-responsibility. The one fly in
15 the ointment in terms of my analysis is actually
16 the Avena case, which I mentioned earlier.

17 In the Avena case, the United
18 States tried to defend the non-extension of
19 Article 36 rights to Mexican nationals by arguing
20 that some of those Mexican nationals were dual
21 nationals, that they had U.S. and Mexican
22 citizenship. And the United States argued that
23 when the receiving State is also a State of
24 nationality of that person, that receiving State
25 need not accord Article 36 rights to that

1 individual.

2 MR. GOVER: Did the International
3 Court of Justice address that argument?

4 MR. FORCESE: Not squarely. It
5 didn't reject it on the law. It said, "Be that as
6 it may, the United States, you have not adduced
7 any evidence suggesting that these individuals
8 were in fact dual nationals. Therefore we don't
9 have to address it. Therefore, you have still
10 violated Article 36."

11 Nevertheless, because the element
12 of uncertainty now, the ICJ didn't outright reject
13 this, it just turned to the facts and said, "on
14 the facts we don't have to address this".

15 But I feel it important to
16 acknowledge that there's a fly in the ointment in
17 terms of my argument.

18 MR. GOVER: Judges are known to do
19 that from time to time, decide the case on the
20 facts.

21 --- Laughter / Rires

22 MR. GOVER: Professor Copithorne?

23 MR. COPITHORNE: I just wanted to
24 add one omission. I think it's important the way
25 the discussion has gone.

1 How do you get draft articles of a
2 convention into the final form which you sign?

3 And that is a subsequent step.

4 Once we have got the International Law Commission
5 and States, both in terms of responding
6 individually, as they are invited to do, and
7 through their comments, rude or supportive in the
8 sixth committee of the General Assembly, the next
9 step is that the text is then adopted.

10 That means that the text is
11 placed -- I don't want to say in stone or in
12 concrete, but no more amendments at that point.
13 You have a fixed text.

14 And the same resolution of the
15 General Assembly which adopts the convention also
16 declares it will be open for signature, et cetera,
17 et cetera, and who the depository should be, where
18 you should send your signature.

19 So that is the critical step that
20 turns drafting into a legal instrument.

21 But it only becomes a legal
22 instrument when enough people have signed up for
23 it. It comes into force at that point. It is an
24 unimplemented treaty until that point.

25 MR. GOVER: You have given two

1 reasons, Professor Forcese, about why the
2 non-responsibility rule or doctrine may no longer
3 be part of international law, and you have spent
4 some time elaborating on the point that the
5 non-responsibility rule may have been replaced as
6 part of international law by the dominant or
7 effective nationality principle. You have also
8 pointed out that it's questionable whether Article
9 4 of the 1930 Hague Convention reflected
10 prevailing international law at the time.

11 I would like to give you an
12 opportunity to elaborate somewhat on that point as
13 well.

14 MR. FORCESE: Sure. I can make
15 that more concrete.

16 In this situation, we are talking
17 about a person who is a dual national of Canada
18 and Syria. As I understand it, Mr. Arar had not
19 been to Syria for some time. He emigrated with
20 his family when he was quite young. He was a
21 resident in Canada, his family was in Canada -- I
22 am not sure of his educational background, but I
23 believe he had education here in Canada.

24 In those circumstances he had
25 quite robust ties to Canada. He had no such ties

1 to Syria, beyond sort of a residual citizenship.
2 We can talk a little bit about residual
3 citizenship in a second.

4 In those circumstances, were
5 Canada to bring a claim against Syria and espouse
6 his claim or claim diplomatic protection under
7 Article 36, in that circumstance, Mr. Arar is
8 clearly more predominantly linked to Canada than
9 to Syria.

10 Under the rule articulated by the
11 ILC which rejects non-responsibility, Canada would
12 be in a position to espouse his claim, to extend
13 him diplomatic protection. His links are closer
14 to Canada.

15 MR. GOVER: Right. Now, in your
16 paper, Professor Forcese, at page 23 and
17 following, you discuss diplomatic protection of
18 dual nationals and its implications in the war on
19 terror. Part of what you discuss there is a
20 concept that I understand you have termed -- you
21 have coined a phrase to describe, and that's
22 "clinging nationalities".

23 Can you explain to us what you
24 mean about the problem of clinging nationalities
25 in this context of diplomatic protection of dual

1 nationals and its implications in the war on
2 terror?

3 MR. FORCESE: Sure. Just as
4 international law says very little about
5 circumstances in which a State may accord
6 nationality, international law says very little
7 about the circumstances in which one should be
8 free to rid oneself of a nationality one no longer
9 wishes.

10 While there are some sort of
11 principles out there suggesting one should be free
12 to change one's nationality -- you see that
13 principle articulated in Article 15 of the
14 Universal Declaration of Human Rights -- it's not
15 clear that that notion is truly international law
16 at this point.

17 That means that, generally
18 speaking, there's no international right that you
19 have to renounce a citizenship. That means you
20 can be stuck with a citizenship. That citizenship
21 can cling to you as a matter of international law.

22 Where does it become a problem in
23 relation to the war on terror?

24 Many of the countries -- in fact
25 all of the countries, to the best of my knowledge,

1 to which the United States has been rendering
2 individuals as part of the war on terror,
3 including Syria, put significant bars in the
4 place -- put bars essentially restricting the
5 capacity of their citizens to renounce
6 nationality.

7 Those bars take various forms. In
8 many instances if the State does allow you to
9 renounce citizenship it requires permission from,
10 in one case, the President of the State; in other
11 instances very high-level administrative bodies,
12 all of which are significant impediments, one
13 would assume, to renouncing citizenship.

14 In the case of Syria, the Syrian
15 government told the U.S. government -- the U.S.
16 government conducted a survey on the circumstances
17 in which one can renounce citizenship --

18 MR. GOVER: If I might interrupt
19 you, does that survey appear at tab 13 of the
20 exhibit?

21 MR. FORCESE: Yes, it does.

22 MR. GOVER: This is the United
23 States Office of Personnel Management
24 Investigation Service document entitled,
25 "Citizenship Laws of the World", dated March 2001?

1 MR. FORCESE: Yes, it is. You
2 have extracted the survey data that the U.S.
3 government collected for various countries. I
4 assume the selection was based on countries to
5 whom persons have been said to be rendered.

6 MR. GOVER: Canada is in there as
7 well.

8 MR. FORCESE: Canada is in there
9 as well. Canada and the United States, and then a
10 number of middle eastern countries.

11 MR. GOVER: Right.

12 MR. FORCESE: You also include
13 Syria, which is on the very last page of that
14 exhibit. It's not sequential, but 192 just before
15 tab 14.

16 And if you look under the heading
17 "Loss of Citizenship: Voluntary", it says:

18 "Though voluntary
19 renunciation of Syrian
20 citizenship is permitted by
21 law, the Syrian Information
22 Office stated that it is so
23 complicated that it is best
24 not to attempt the process.
25 In effect, according to that

1 Office, the process is
2 complicated in order to
3 discourage renunciation of
4 Syrian citizenship. Former
5 citizens of Syria probably
6 maintain an unofficial dual
7 citizenship status and would
8 be subject to Syrian law as
9 citizens should they return
10 to Syria."

11 Notice also, under "Exception":
12 "Persons of military service
13 age are not permitted to
14 renounce citizenship."

15 So anyone who is in military
16 service, as a matter of Syrian law, cannot
17 renounce citizenship. Even if you are allowed
18 under Syrian law to renounce citizenship, don't
19 bother, says the Syrian Information Office, we
20 won't let you do it.

21 MR. GOVER: Professor Copithorne?

22 MR. COPITHORNE: Are we on
23 Canadian renunciation at this stage?

24 MR. GOVER: We are just about
25 there. Before I ask about Canadian renunciation

1 though, can I ask you, Professor Copithorne: Is
2 there any international instrument that seems to
3 recognize our right to change nationality?

4 MR. COPITHORNE: Well, there are
5 the statements in the Universal Declaration, and
6 the term of art is the right of expatriation.

7 But I am not aware of any
8 translation of this objective into a legal
9 instrument.

10 MR. GOVER: When you refer to the
11 Universal Declaration, are you referring to the
12 Universal Declaration of Human Rights?

13 MR. COPITHORNE: Yes.

14 MR. GOVER: It appears at tab 12.

15 In particular, Professor
16 Copithorne, does your evidence that you had given
17 a moment ago, relate to Article 15?

18 MR. COPITHORNE: Yes.

19 MR. GOVER: And Article 15,
20 subsection (1), provides:

21 "Everyone has the right to a
22 nationality."

23 Subsection (2):

24 "No one shall be arbitrarily
25 deprived of his nationality

1 nor denied the right to
2 change his nationality."

3 MR. COPITHORNE: That is the
4 wording that my colleague used, the right to
5 change the nationality. Somewhere else, perhaps,
6 they used specifically the right of expatriation,
7 but I don't think -- that's terminology.

8 MR. GOVER: Right. Although this
9 concept of the right to change nationality, or the
10 right of expatriation, appears in the Universal
11 Declaration of Human Rights, is that a principle
12 of international law that has a strong basis?

13 MR. COPITHORNE: I think you can
14 get a short and very long answer to the status of
15 the universal declaration, not something you
16 necessarily want to go into. But as my colleague
17 has mentioned, the Canadian government, for one,
18 has indicated it to be customary now to achieve
19 the status of customary international law.

20 I am not sure that's a widely
21 articulated point of view. By and large both the
22 Charter and the Universal Declaration were putting
23 forward objectives to be achieved, hortatory in
24 nature, rather than obligatory. That's where we
25 should be going.

1 So I think it is open to make a
2 case that the declaration has now achieved the
3 status of international customary law. I have not
4 seen any jurisprudence that has been successful on
5 that ground.

6 MR. GOVER: When we refer to the
7 Charter in this context --

8 MR. COPITHORNE: The U.N. Charter.

9 MR. GOVER: Professor Forcese, any
10 comment in relation to the evidence that Professor
11 Copithorne has given?

12 MR. FORCESE: What's notable is
13 this notion that one has a right to change
14 nationality. While it appears in the declaration,
15 it was not subsequently incorporated into the
16 binding international instruments, particularly
17 the International Covenant on Civil and Political
18 Rights. There was an omission there, for reasons
19 I can't explain.

20 In the 1930 Hague Convention we
21 have been talking about, there is a passage or an
22 article which suggests that where one has dual
23 nationality in circumstances where one acquired
24 each nationality involuntary -- I will give you a
25 concrete example. One has German parents and one

1 was born in Canada. Under Canadian law, one
2 acquires nationality in Canada. Under German law,
3 one is also a German national. In both instances
4 those nationalities are involuntary. You can't
5 help where you were born or to whom you were born
6 from.

7 In those circumstances, the Hague
8 Convention says you should have the right to
9 renounce one of those citizenships.

10 That principle, as best I know, is
11 not customary international law, but that's
12 basically the extent of it in terms of a formal
13 international obligation that one be able to
14 renounce citizenship. It would not apply in
15 circumstances where one has nationality through
16 naturalization, because that's not involuntary;
17 that's a voluntary act.

18 MR. GOVER: Professor Copithorne,
19 could I ask you to comment on renunciation of
20 citizenship and perhaps even renunciation of
21 Canadian citizenship?

22 MR. COPITHORNE: Yes, certainly.
23 I first of all would say that the description of
24 Canada's renunciation in this United States
25 document on tab 13 is plain wrong. This predates

1 the 1976 Canadian Citizenship Act, which removed
2 all distinction between naturalized and
3 natural-born Canadian citizens.

4 In particular, the second one
5 disappeared at that time; that is to say,
6 naturalized Canadian who has spent more than 10
7 years living abroad.

8 Basically the principal changes in
9 the 1976 Act were making it totally neutral with
10 regard to what you were before; that is to say,
11 British nationals, British subjects -- people who
12 were already British nationals had a preference to
13 Canadian citizenship. Natural-born Canadians had
14 a preference or had a -- what do you call it? -- a
15 preferred position, a superior position, to
16 naturalized Canadians.

17 And there were a number of very
18 out-of-date discriminatory measures in the
19 Citizenship Act which were eliminated at that
20 time.

21 Now, what does the Act currently
22 provide for renunciation? It says in section 9 of
23 the Canadian Citizenship Act:

24 "A citizen may, on
25 application, renounce his

1 citizenship if he
2 (a) is a citizen of a
3 country other than Canada
4 or, if his application is
5 accepted, will become a
6 citizen..."

7 In other words, he cannot become a
8 stateless person. He's got to have another
9 citizenship. The first thing he has to submit is
10 evidence of another country of which he is a
11 citizen.

12 "(b) is not that subject of a
13 declaration by the Governor
14 In Council made pursuant to
15 section 20;"

16 Section 20 has to do with --
17 what's happened to section 20? Here we are,
18 "Declaration":

19 "Notwithstanding ... shall
20 not be granted a person ...
21 to believe ... will engage in
22 an activity described in
23 paragraph..."

24 It appears to be security
25 considerations.

1 "For security considerations
2 it is viewed by the
3 government that this person
4 should not be allowed to
5 renounce citizenship."

6 This is the same provision,
7 section 20, under which the government can step in
8 and block someone acquiring citizenship.

9 "(c) is not a minor."

10 So no children can renounce.

11 "(d) is not prevented from
12 understanding the
13 significance of renouncing
14 citizenship by reason of the
15 person having a mental
16 disability;"

17 Must understand the consequences
18 of his act.

19 "(e) does not reside in
20 Canada."

21 You cannot renounce your
22 citizenship if you are actually residing in
23 Canada.

24 So that is a bit of a thicket to
25 get through if you want to renounce, but

1 obviously, you can do it.

2 MR. GOVER: And Professor
3 Copithorne, can you tell us about the approach
4 taken by the Canadian government, in all of its
5 emanations concerning dual citizenship, and in
6 particular whether standing committees have
7 addressed dual citizenship.

8 MR. COPITHORNE: Yes, in all its
9 emanations, including the legislature.

10 The Standing Committee on
11 Citizenship and Immigration has addressed the
12 Citizenship Act on many occasions. There have
13 been, I would estimate, six attempts to legislate
14 change over the past ten or twelve years. It was
15 always one of those subjects that fell off the
16 legislative timetable, to the frustration of the
17 committee.

18 About ten years ago, you may
19 remember, there was some concern, particularly
20 expressed in the media, about something called the
21 phenomena of passport babies, whereby women in
22 advanced states of pregnancy arrived in Canada,
23 gave birth to a Canada, and got a plane to go back
24 as soon as they got a birth certificate for the
25 child showing it had been born in Canada.

1 And the reaction to that, and
2 other what were considered to be abuses of the
3 Canadian Citizenship Act, was set out in a report
4 of the Standing Committee on Citizenship and
5 Immigration dated June 22nd, 1994. That document
6 was called "A Declaration of Canadian
7 Citizenship".

8 And on the issue of dual
9 nationality, it developed, if I may read just a
10 couple of sentences:

11 "Prior to 1977, the Act
12 provided the Canadian
13 citizen, while outside of
14 Canada, who voluntary
15 acquired another citizenship
16 other than by marriage,
17 ceased to be a Canadian
18 citizen."

19 So there was a provision in the
20 Act, prior to 1977, which provided that a person
21 would automatically cease to be a Canadian under
22 certain circumstances.

23 Secondly, in the committee report:
24 "Some of the witnesses before
25 the committee were not

1 concerned about dual
2 nationality. They pointed to
3 the convenience of travel
4 that multiple passports may
5 provide, some spoke
6 understandably of their
7 abiding love of their former
8 homelands..."

9 Third, and I think this is the
10 crucial conclusion:

11 "On the other hand, the
12 committee finds persuasive
13 the arguments of most of our
14 witnesses who expressed
15 concerns about the current
16 practice of allowing dual
17 nationality. They questioned
18 how it is possible to swear
19 loyalty and allegiance to
20 more than one country and
21 believe the practice
22 diminishes the value of our
23 citizenship."

24 In its recommendations, the
25 committee recommended three things.

1 First of all:
2 "The government should
3 explore the possibility of
4 providing that the new
5 Citizenship Act require that
6 a Canadian citizen, who is an
7 adult formally and voluntary
8 acquires nationality of
9 another country, except by
10 marriage and adoption, ceases
11 to be a Canadian citizen."
12 In other words, going back to the
13 pre-1977 approach.
14 Secondly:
15 "The new Citizenship Act
16 should establish the
17 principle that Canadian
18 citizens who hold dual
19 citizenship, by virtue of
20 events beyond their control,
21 must, while living in Canada,
22 accord primacy to their
23 Canadian citizenship."
24 I don't think that fact concerns
25 us here.

1 And finally:

2 "Naturalized Canadians should
3 be required to declare, as a
4 condition of receiving their
5 citizenship, that they will
6 accord primacy to their
7 Canadian citizenship over all
8 other citizenships."

9 This report, as I have indicated,
10 was never taken up legislatively.

11 And to give you an idea where
12 things stand today, the last report I have seen of
13 this committee is November 2004. It's called
14 "Updating Canada's Citizenship Laws: Issues to be
15 Addressed".

16 Among the issues to be addressed,
17 dual nationality does not appear. So I can assume
18 it's fallen off the table.

19 MR. GOVER: And perhaps a final
20 question before we take our morning break for you,
21 Professor Forcese: In your view, should countries
22 accept the non-responsibility doctrine in relation
23 to dual nationals?

24 MR. FORCESE: No. There's strong
25 legal basis, as I have indicated, suggesting that

1 non-responsibility is no longer, if it ever was, a
2 correct articulation of international law.

3 In those circumstances, my
4 personal view is that every citizen, irrespective
5 of whether they also have citizenship of another
6 country, every citizen should be entitled to the
7 same rights. And in those circumstances, if the
8 Government of Canada takes the view that it will
9 extend diplomatic protection to Canadians, it
10 should argue that point forcefully, irrespective
11 of any dual nationality status, is my view.

12 MR. GOVER: Mr. Commissioner, I
13 wonder if this might be a convenient time.

14 THE COMMISSIONER: Yes. We will
15 rise for 15 minutes, take the morning break.

16 THE REGISTRAR: Please stand.

17 --- Upon recessing at 11:29 a.m. /

18 Suspension à 11 h 29

19 --- Upon resuming at 11:48 a.m. /

20 Reprise à 11 h 48

21 THE REGISTRAR: Please be seated.

22 Veuillez vous asseoir.

23 MR. GOVER: Thank you,

24 Mr. Commissioner.

25 In the materials, Professor

1 Forcese, that is, in Exhibit P-119, we have
2 information gleaned from the websites of the
3 Governments of Canada, the United States, Great
4 Britain and Australia concerning dual citizenship.

5 Is that correct?

6 MR. FORCESE: Yes, we do.

7 MR. GOVER: What I would ask you
8 to do is to briefly take us initially to what the
9 Canadian government says about consular and
10 diplomatic actions that are taken, or can be
11 taken, in cases of Canadians of dual nationality
12 who are detained in the other country of
13 nationality.

14 I will take you initially to tab
15 6, and in particular to page 4 at tab 6, and the
16 first full paragraph.

17 This provides:

18 "If a Canadian has legal or
19 other difficulties outside
20 the country, Canadian
21 diplomatic or consular
22 representatives in that
23 country can try to help.
24 However, if the Canadian in
25 difficulty in another country

1 is also a citizen of that
2 country, Canadian officials
3 may be entirely unable to
4 help. That country will be
5 dealing with one of its own
6 citizens and probably will
7 not welcome outside
8 interference. Indeed,
9 foreign authorities will
10 definitely consider you as
11 one of their citizens,
12 especially if you choose to
13 travel under their passport."

14 I will stop there and ask you for
15 your comment in relation to that aspect of the
16 information from Citizenship & Immigration
17 Canada's website, which is found at tab 6 of the
18 exhibit.

19 MR. FORCESE: I think that's an
20 important articulation of the practical
21 difficulties any State might have, in this case
22 Canada might have, in extending diplomatic
23 protection in its various manifestation to dual
24 nationals while that dual national happens also to
25 be in their second country of nationality.

1 As a practical matter, because of
2 the prevalence of a non-responsibility doctrine
3 concept, at least in popular wisdom, these are
4 important practical difficulties.

5 One thing I would underscore in
6 the statement that the Government of Canada makes,
7 is as far as I can tell -- and I have never seen
8 this -- I have never seen the Government of Canada
9 assert that it's legally barred from extending
10 diplomatic protection. Here it's pointing out the
11 practical difficulties.

12 That's quite different -- well,
13 pointing out the practical difficulties is
14 something other States do. You mention that we
15 have extracts from the web pages of other
16 diplomatic services from other countries, and all
17 of them, if you look at them, the U.S., the U.K.,
18 Australia, they all point to this practical
19 difficulty.

20 The U.K. is sort of unique in the
21 sense that the United Kingdom, unlike the other
22 States, actually asserts that legally it may have
23 difficulty extending diplomatic protection. It's
24 alluded to indirectly in the materials you have
25 here. I believe you --

1 MR. GOVER: We will come to that
2 in a moment.

3 Professor Copithorne, do you have
4 any comment in relation to that aspect of the
5 information on the Citizenship & Immigration
6 Canada website to which I have referred Professor
7 Forcese?

8 MR. COPITHORNE: And that
9 particular paragraph?

10 MR. GOVER: Yes.

11 MR. COPITHORNE: I think it's
12 appropriate that the public receive such a
13 warning. I think I would have nuanced it a bit
14 more myself, if it was a paper for an inquiry like
15 this.

16 As I suppose I will be speaking to
17 later on, there are situations in which the
18 government of the other country may agree
19 informally to allow what amounts to consular
20 access.

21 So there may be local arrangements
22 that can be made on the spot in the circumstances,
23 which depend on a variety of sometimes extraneous
24 factors, which maybe we will come to.

25 MR. GOVER: Professor Forcese, let

1 me take you then to tab 7. This is information
2 from the U.S. State Department Services Dual
3 Nationality website.

4 Here the U.S. State Department, in
5 the third paragraph, starting with the second
6 sentence, states as follows:

7 "The U.S. Government
8 recognizes that dual
9 nationality exists but does
10 not encourage it as a matter
11 of policy because of the
12 problems it may cause.
13 Claims of other countries, on
14 dual national U.S. citizens
15 may conflict with U.S. law
16 and dual nationality may
17 limit U.S. government efforts
18 to assist citizens abroad.
19 The country where a dual
20 national is located generally
21 has a stronger claim to that
22 person's allegiance."

23 And I will stop there.

24 Comment, Professor Forcese, on
25 what the American government represents on this

1 website, as compared to what the Canadian
2 government says.

3 MR. FORCESE: Well, the practical
4 difficulties they allude to are very similar. I
5 think there is a difference in tone in this web
6 page. The Americans, for a long time, have been
7 quite preoccupied about this allegiance concept
8 and the implications that dual nationality has to
9 allegiance. The allegiance, obviously, of a
10 citizen is -- the concept is that one owes an
11 allegiance to one's country of nationality. That
12 concept might be diluted if one has more than one
13 nationality.

14 For a long time, the Americans in
15 their legislation and in their practice were very
16 hostile to dual nationality for that very reason.

17 That residual hostility, even
18 though the U.S. now recognize dual nationality,
19 that residual hostility I think is reflected in
20 here. Again, it's to whom do you owe the loyalty
21 as a citizen? If you have multiple nationality,
22 that question is confused.

23 MR. GOVER: Professor Copithorne?

24 MR. COPITHORNE: You could pick
25 that up from the regime which lasted only until

1 about ten or twelve years ago, the American
2 regime.

3 If you ran for public office in
4 the other country, this was a grounds for being
5 deprived your American citizenship. If you joined
6 the armed forces of another country, that was
7 another grounds.

8 There was an enumerated list of --
9 I am not sure how many -- at least half a dozen
10 grounds in which you would be considered to
11 compromising what my colleague has said, and that
12 is your sense of allegiance.

13 MR. GOVER: Moving on then with
14 our comparison, if I could take you to tab 8, here
15 we have information from the United Kingdom
16 Foreign and Commonwealth Office website dealing
17 with help for dual nationals, and under the
18 heading "Dual Nationality" we see this:

19 "British Consuls protect the
20 interests of Britons abroad.
21 If you are British and also a
22 national of another country,
23 then you are a dual national.
24 Being a dual national can
25 affect the level of consular

1 help you receive. This page
2 explains what dual nationals
3 can expect from a British
4 Consul."

5 And then picking up toward the
6 bottom of the page, with the heading "If you are a
7 dual national in the country of your other
8 nationality":

9 "If you are a British
10 national and you are in the
11 country of your second
12 nationality, the British
13 Consul cannot formally help
14 you. There are legal limits
15 to what we can formally do in
16 such circumstances. The
17 authorities of your other
18 nationality are entitled to
19 take the view that Her
20 Majesty's Government has no
21 standing in this matter. If
22 under the law of that country
23 you are liable for any
24 obligation such as military
25 service, the fact that you

1 are also a British national
2 does not provide exemption.
3 However, even if we are
4 unable to act formally, we
5 will always do everything we
6 can to help informally."

7 Professor Forcese.

8 MR. FORCESE: Yes, what's quite
9 notable about this passage from the Foreign
10 Office -- and also there's an even more emphatic
11 passage on the web from the Home Office -- I
12 believe the Home Office.

13 Essentially they are abandoning
14 the claim that non-responsibility is bad
15 international law. They are simply acknowledging
16 that there's this body of law out there called the
17 non-responsibility doctrine. It precludes us
18 offering you assistance if you are a dual
19 national. Be aware of that.

20 That's a much more emphatic
21 statement about legal limits than we see in any of
22 the other web extracts, and I have to believe that
23 it reflects, on the part of the U.K., an
24 acceptance of non-responsibility, which is
25 probably not warranted, as we have already seen by

1 at least customary international law.

2 MR. GOVER: You referred a moment
3 ago to the Home Office website, which goes
4 further.

5 Is that correct?

6 MR. FORCESE: It says essentially
7 that international law precludes us from offering
8 consular assistance or diplomatic protection.
9 It's even more emphatic than this passage.

10 MR. GOVER: The Home Office, of
11 course, being concerned with domestic matters
12 within the United Kingdom.

13 MR. FORCESE: Correct.

14 MR. GOVER: If we could now turn
15 to tab 9, this is information from the Australian
16 Government's website dealing with dual
17 nationality.

18 I will take you to page 3 of 4,
19 under the heading "Consular assistance to dual
20 nationals". We see these words:

21 "Australia seeks to extend to
22 all its citizens, including
23 dual nationals, the full
24 range of consular assistance.
25 However, under international

1 law, countries are not
2 obliged to recognize dual
3 nationality.

4 - A country may not
5 permit Australian
6 consular assistance to be
7 given to Australian
8 citizens who, according
9 to its laws, it considers
10 and treats as its own
11 nationals.

12 - Or, a person might not
13 be regarded as being an
14 Australian if that person
15 is not travelling on
16 their Australian
17 passport."

18 Comment from you, Professor
19 Forcese, in relation to that excerpt?

20 MR. FORCESE: I would describe
21 this as a halfway position between, say, the
22 position articulated by the Government of Canada,
23 which is pointing to practical difficulties, and
24 that articulated by the United Kingdom Government,
25 which is to point to legal difficulties.

1 Here the Australians say that
2 under international law, countries are not obliged
3 to recognize dual nationality, which is true. It
4 doesn't then go on to say that, where there is
5 dual nationality, diplomatic protection may not be
6 extended, which is what the U.K. essentially does.

7 So it's taking sort of an
8 intermediate position on the legal implications.
9 It's invoking international law, but not then
10 going on and saying non-responsibility is good
11 law.

12 MR. GOVER: Professor Copithorne,
13 do you have any comment in relation to the
14 British, the Australian or the American government
15 websites as they relate to dual nationality and
16 consular assistance?

17 MR. COPITHORNE: No.

18 MR. GOVER: I will turn to you
19 next, Professor Copithorne, in relation to a
20 concept that you referred to a moment ago and that
21 you also address in your paper, which we of course
22 have at 4ab 4 of Exhibit P-119, and that is the
23 role of bilateral consular agreements and
24 bilateral consular treaties as a means of giving
25 effect to the dominant nationality principle.

1 Can you explain that to us,
2 please?

3 MR. COPITHORNE: Yes. Let me
4 start by putting in context the relationship of
5 bilateral treaties to the Vienna Consular
6 Convention.

7 There were bilateral treaties,
8 many of them -- bilateral consular agreements --
9 prior to the arrival of the Vienna Consular
10 Convention. They, to my knowledge, all continue.
11 In other words, they were not overtaken by the
12 consular convention.

13 Second, there continue to be new
14 bilateral consular treaties concluded, and the
15 consular convention appears to be able to live
16 with that too.

17 Obviously bilateral consular
18 conventions tend to relate to problems which are
19 particular to those two countries. On the other
20 hand, many of the countries also try to get some
21 standardized format, so that the way their
22 citizens are recognized or non-recognized will be
23 consistent across the board.

24 Canada has had several consular
25 agreements, and I am not familiar with -- I think

1 you would have to ask someone from the department
2 who was closer to the total number of consular
3 agreements that we have.

4 But it is possible to contemplate
5 a consular agreement which speaks directly to dual
6 nationality.

7 I guess the one case in that that
8 we know about is a consular understanding,
9 arrangement, treaty -- I have not seen it; I don't
10 know what its legal status is -- between Canada
11 and China, modeled on a similar agreement between
12 the United States and China, as I understand it,
13 which says that where a dual national travels on
14 the passport in State A, is in trouble in State B,
15 State B will recognize his first nationality.

16 That is, a Canadian, let's say
17 born in China who emigrates to Canada, goes back
18 to China on a Canadian passport. The Chinese
19 government is now committed to recognizing his
20 Canadian nationality in China.

21 So this is one approach to much of
22 the dual nationality conundrum, challenge,
23 whatever you want, that the dominant act should be
24 the choice of travel document. And I must say,
25 this is not -- the literature says there are other

1 cases of this in the past in bilateral
2 relationships.

3 And I now want to clarify what I
4 said. I said when he travels on his Canadian
5 passport. What I should have said is when the
6 Chinese government accepts his Canadian passport
7 and puts an entry stamp, or some other indication,
8 into the Canadian passport, then China will not
9 seek to apply his Chinese nationality.

10 MR. GOVER: Professor Forcese, any
11 comment then in relation to these bilateral
12 agreements and how they might give expression to
13 the concept or principle of dominant nationality?

14 MR. FORCESE: Only to say that the
15 United States has a number of the these treaties
16 of peace, friendship, and commerce -- that is
17 probably the wrong parlance -- with which they
18 have entered into with countries such as Iran, for
19 instance. And amongst other things these treaties
20 sometimes specify in the case of a dispute
21 concerning the special arrangements that we have
22 arrived at bilaterally, the World Court, or some
23 other arbitral body, will settle the matter. So
24 not only do they give rise to new substantive
25 rights, they also create jurisdiction for an

1 international dispute settlement.

2 MR. GOVER: Professor Copithorne,
3 why do other countries enter into these agreements
4 in allowing someone who arguably is one of their
5 nationals to be treated as a Canadian national?

6 MR. COPITHORNE: Well, I think
7 that they realize there is a problem here and that
8 maybe in the name of commerce, maybe in the name
9 of tourism, there could be a variety of factors
10 which influence, let's say, the Government of
11 China to agree to such an arrangement.

12 MR. GOVER: Even though this may,
13 in a sense, constitute a compromise on
14 sovereignty?

15 MR. COPITHORNE: Well, yes. I
16 don't think they are thinking in those terms. I
17 think they are seeing all those tourist dollars
18 and the commercial investment.

19 I mean, the number of tourists of
20 Chinese ethnic tourism into China is very big.
21 The amount of overseas Chinese investment in China
22 is very big. And there are stories from time to
23 time of overseas Chinese businessmen being lured,
24 for example, from Hong Kong and then promptly
25 arrested in China.

1 So I think this is probably one
2 way also of addressing this sort of conduct by
3 local officials, that there should be such an
4 arrangement at the national level.

5 MR. GOVER: Are you aware of any
6 policy on the part of the Department of Foreign
7 Affairs and International Trade to negotiate these
8 bilateral agreements on a priority basis having
9 regard to particular problems with other
10 countries?

11 MR. COPITHORNE: I am not aware of
12 such a policy.

13 MR. GOVER: Professor Forcese, any
14 comment in that respect?

15 MR. FORCESE: I am not aware of
16 any policy.

17 MR. GOVER: You mentioned a moment
18 ago the idea that there may be some ability to
19 have a dispute resolution mechanism in one of
20 these side agreements or bilateral agreements.
21 Let's address an aspect of the Vienna Convention
22 On Consular Relations, and in particular the
23 optional protocol.

24 I will turn first then to
25 Professor Forcese, and I will ask you to take us

1 to tab 10, and in particular starting at page 55.

2 Page 55 appears to set out the
3 Optional Protocol to the Vienna Convention On
4 Consular Relations concerning the compulsory
5 settlement of disputes.

6 Professor Forcese, first of all,
7 is Canada a party to the optional protocol?

8 MR. FORCESE: No, it's not. Just
9 to describe the importance of the optional
10 protocol, on several occasions Professor
11 Copithorne and I have mentioned the International
12 Court of Justice, the World Court. Court is
13 probably an overstatement; it is an international
14 arbitration body. And like arbitration bodies the
15 world over, it depends on the consent of the
16 parties who appear before it in order to have
17 jurisdiction.

18 That consent is manifested in
19 different ways. The most logical, or the most
20 evident, way is that in the case of a dispute
21 between two countries, those two countries agree:
22 Well, we can't settle this matter through
23 negotiation. Let's send it to the ICJ.

24 So it's sort of an ad hoc
25 jurisdiction.

1 The second way is that countries
2 will enter what is known as a declaration of
3 compulsory jurisdiction, where they agree that in
4 any dispute, international legal dispute, they
5 agree that the World Court can settle the matter
6 as against another State that has also agreed to
7 this sort of standing jurisdiction.

8 The third way, and the way that's
9 presented by the optional protocol, is that there
10 may be treaties out there to which States have
11 become party that in their own express terms
12 indicate that disputes under that treaty or
13 disputes in relation to that treaty can be settled
14 at the International Court of Justice.

15 That's what the optional protocol
16 does. It essentially is an add-on to the Vienna
17 Convention on Consular Relations. It says that if
18 a dispute concerning the application or
19 interpretation of the Vienna Convention Consular
20 Relations arises as between parties to that
21 convention and also parties to this optional
22 protocol, the matter can be settled by the World
23 Court.

24 That's how the Germans got the
25 Americans into the International Court of Justice

1 in a case called Le Grand, involving Article 36 of
2 the Vienna Convention. That's how the Mexicans
3 got the Americans before the International Court
4 in Avena, and there was also an earlier case
5 involving Paraguay.

6 The Americans are a member, Canada
7 is not. The Americans were a member actually up
8 until March, then they withdrew from the optional
9 protocol because they lost too many cases.

10 MR. GOVER: The Avena case, by the
11 way, was decided, I understand, March 31st, 2004.

12 MR. FORCESE: Correct.

13 MR. GOVER: And the United States
14 of America withdrew from the optional protocol on
15 March 9th, 2005.

16 MR. FORCESE: Correct.

17 MR. GOVER: Professor Copithorne,
18 can you comment on the denial of a forum to
19 resolve consular disputes arising from Canada's
20 failure to ratify the optional protocol?

21 MR. COPITHORNE: Well, before I do
22 that, just let me say that I have a number of
23 parties, the parties to the convention proper,
24 167. The number of parties to the optional
25 protocol is currently 45.

1 Not only for the Vienna Consular
2 Convention, but for conventions in general there
3 is a desire to put a dispute resolution mechanism
4 in it, partly because of the type of reason that
5 my colleague referred to: that the International
6 Court of Justice is not necessarily an ideal
7 creature to take it to under its general dispute
8 resolution jurisdiction. It is better if you put
9 a clause in saying you will take a dispute to the
10 International Court of Justice, or there can be
11 many other ways. There can be ad hoc arbitration
12 on how to decide.

13 In general, the lawyers on any of
14 these delegations will start off with the
15 proposition that we need a dispute resolution
16 provision right in the convention, and then they
17 negotiate from there as to what will be the most
18 appropriate for the substance.

19 So I am not at all surprised at
20 this.

21 And if you look again at the
22 legislative history of this convention and the way
23 the Americans have approached it, they were
24 leaders in the negotiations for this convention
25 and they were very keen on getting that dispute

1 resolution mechanism, because they saw the group
2 that was in the most danger of running afoul were
3 their own nationals, and they wanted this access
4 to the International Court in order to give them
5 recourse.

6 MR. GOVER: Professor Forcese, has
7 Syria accepted the compulsory jurisdiction of the
8 International Court of Justice?

9 MR. FORCESE: No, it hasn't, nor
10 has it accepted the optional protocol. Finding a
11 hook by which you could obtain jurisdiction in the
12 ICJ for Syria would be quite difficult, at least
13 in relation to, say, consular conventions. There
14 are possibilities that exist in relation to the
15 torture convention, the U.N. Convention Against
16 Torture.

17 I don't know if you want to talk
18 about that.

19 The U.N. Convention Against
20 Torture provides that if there is a dispute that
21 is prolonged and you have not been able to settle
22 it through mediation concerning the interpretation
23 of that torture convention, the ICJ, the World
24 Court, can hear the matter.

25 Once again, that's a voluntary

1 provision. When the ratifying States choose
2 whether they will accept this potential ICJ
3 jurisdiction of the torture convention, Syria
4 became a member of the torture convention in 2004,
5 much to my surprise.

6 Also rather surprisingly, in the
7 course of becoming a member to the torture
8 convention they didn't preclude ICJ jurisdiction.
9 So in theory, a State with a dispute concerning
10 the interpretation of the torture convention
11 against Syria could ultimately end up before the
12 ICJ, and the ICJ could have jurisdiction.

13 MR. GOVER: Professor Copithorne,
14 any comment in relation to that?

15 MR. COPITHORNE: Not really.
16 There's a big difference between the theory which
17 is there and the way the system was intended to
18 work.

19 But I would just say that when the
20 statute of the International Court of Justice was
21 drafted, the proposition was the world wasn't
22 ready for compulsory, binding, third party dispute
23 resolution, and therefore if there was going to be
24 any third party dispute process, it had to be
25 optional. And that is what we have seen as the

1 dominant system.

2 MR. FORCESE: Can I just make one
3 additional follow-up point on the importance of
4 this mandatory jurisdiction that would exist under
5 treaties?

6 MR. GOVER: Please.

7 MR. FORCESE: I have mentioned
8 that the U.S. has entered into bilateral
9 arrangements, these friendship, commerce, and
10 peace bilateral relationships with many countries
11 which provide for settlement of disputes under
12 those treaties by an arbitral panel. As Professor
13 Copithorne has indicated, the U.S. was a very
14 enthusiastic participant in this optional protocol
15 to consular relations up until very recently.

16 I would note that those two
17 treaties, the optional protocol and then its
18 friendship, commerce relationship or treaty with
19 Iran, both those two heads of jurisdiction were
20 employed by the U.S. in the Tehran hostage taking
21 case, which you may recall from the late 1970's.
22 So the Americans were basically able to sue Iran
23 in the World Court, and ultimately prevail,
24 because of the jurisdiction accorded that court by
25 this bilateral arrangement and then this optional

1 protocol.

2 Now the Americans have withdrawn
3 from the optional protocol, again a bit surprising
4 from my perspective because the Americans send
5 people and capital abroad like no one else and, as
6 Professor Copithorne suggested, stand to benefit
7 enormously where there is such compulsory
8 settlement of disputes.

9 MR. GOVER: Largely our focus up
10 until now has been in relation to the ability of a
11 country of nationality to provide consular
12 protection to a dual national while in the other
13 country of nationality.

14 I would like to shift the focus
15 somewhat now to the question of consequences of
16 dual nationality while in what I might call third
17 countries, that is, countries of which the
18 Canadian citizen is not a national.

19 Professor Forcese, would you lead
20 the discussion there, please.

21 MR. FORCESE: Dual nationality is
22 irrelevant. It's irrelevant on several different
23 levels.

24 To make it more concrete, a
25 Canadian citizen who is a dual citizen with

1 Canada-Syria who is in the United States has no
2 nationality link to the United States. The United
3 States -- well, the Hague Convention from 1930
4 suggests that the United States is to treat that
5 individual as a national of the country with whom
6 he has the closest ties, him or her has the
7 closest ties.

8 The ILC, in its draft articles on
9 diplomatic protection, those draft articles that I
10 talked about earlier, the ILC goes even further
11 and says either country of nationality. So Canada
12 or hypothetically Syria is entitled to extend
13 diplomatic protection as against the United
14 States, as against that third party state to whom
15 there is no tie of nationality. So it's an open
16 field.

17 MR. GOVER: Professor Copithorne?

18 MR. COPITHORNE: While agreeing
19 with that completely, I do want to say that there
20 are threads that appear from time to time saying
21 it would depend on which passport that person was
22 using for protection in the third country.

23 I am not talking about being in
24 the countries of nationality. I am talking about,
25 for example, India would recognize a person coming

1 in to India on an American passport and would then
2 look to that country, the government of that
3 country, to be the protector of that person.

4 I don't want to suggest that this
5 has the status of any form of rule or practice,
6 but there is in the literature evidence that from
7 time to time some governments have applied that
8 rule. It depends on which passport they use to
9 come in the country.

10 MR. GOVER: Thank you.

11 Professor Forcese, in your paper
12 you discuss this issue of dual nationality and
13 third party states at pages 30 and 31. Again,
14 this is the paper entitled "The Capacity to
15 Protect: Diplomatic Protection of Dual Nationals
16 in the 'War on Terror'" at tab 3.

17 At pages 30 and 31 you address
18 this subject, and on page 31 in particular, you
19 say about this case:

20 "Arar's dual nationality
21 should not preclude a
22 Canadian complaint based on
23 Article 36 of the Vienna
24 Convention On Consular
25 Relations against the United

1 States or a broader claim
2 that minimum treatment of
3 obligations were not met in
4 Arar's removal to torture.
5 The Hague Convention itself
6 provides, in Article 5, that
7 within a third state, 'person
8 having more than one
9 nationality shall be treated
10 as if he had only one... [A]
11 third state shall ...
12 recognize exclusively in its
13 territory either the
14 nationality of the country in
15 which he is habitually and
16 principally resident, or the
17 nationality of the country
18 with which in the
19 circumstances he appears to
20 be in fact most closely
21 connected.' "

22 You continue:

23 "If this principle reflects
24 customary international law,
25 it requires third party

1 states to assess the
2 effective nationality of the
3 dual national, and treat them
4 as a single national of the
5 country with whom they are
6 most closely tied.
7 Diplomatic protection may be
8 extended by this latter
9 nation."

10 And then of course you refer to
11 the International Law Commission's draft articles.

12 My question is this -- and I know
13 that you have summarized your evidence in this
14 respect already: But insofar as we are concerned
15 with the facts as they pertain to Mr. Arar and his
16 treatment while in the United States, your view is
17 that there was not compliance with Section 36 of
18 the Vienna Convention.

19 MR. FORCESE: Again, my command of
20 the record is limited. There have been allusions,
21 certainly in the record before this Commission,
22 suggesting -- at least Arar's counsel has
23 suggested that Mr. Arar may have asked for
24 consular assistance right at the outset, right
25 when he was first accosted upon entering the

1 United States.

2 If that was the case and he did
3 actually ask for consular assistance, he was not
4 provided with that consular assistance for some
5 days, and I would say that there would be a good
6 Article 36 issue at play.

7 I believe also there might well be
8 an Article 36 issue at play in the sense that
9 Mr. Arar, as best I know -- and again I don't know
10 the record -- as best I know he was never informed
11 of his entitlement to ask for consular access. I
12 believe that he was given a phone call. He chose
13 to call his relatives, and his relatives then got
14 in touch with the Canadian authorities.

15 So, again, not knowing the facts
16 well enough to pronounce definitively, there were
17 certainly questions in my mind as to whether
18 Article 36 was complied with.

19 MR. GOVER: Professor Copithorne,
20 do you have any comment in that respect?

21 MR. COPITHORNE: No, except that I
22 am not surprised that he wasn't, given the
23 statistics I quoted from this earlier case of the
24 New York Police Force of 57,000 people and only
25 four entries in their aliens log.

1 MR. FORCESE: Also remember that
2 he was entering the country on a Canadian
3 passport, he was entering the United States. It
4 was abundantly clear to the U.S. authorities that
5 he was a foreigner, he was an alien.

6 Remember what I mentioned before
7 about Avena. In the Avena case, the Court said
8 that failing to notify an individual of their
9 rights to consular access -- you know, in that
10 case, waiting 40 hours was a violation of Article
11 36.

12 So in this case where it was
13 abundantly clear to the American authorities right
14 at the outset, that requirement that they inform
15 him of his rights immediately, or without delay,
16 would obviously apply.

17 MR. GOVER: A final word, then,
18 Professor Copithorne.

19 The focus of the paper that you
20 have written relates to diplomatic protection,
21 again in the context of dual nationals. You
22 emphasize the value of bilateral agreements.

23 Is there anything you wish to add
24 in relation to the protection of dual nationals?

25 MR. COPITHORNE: Yes. I prefer a

1 looser wording, if I may. It seems to me that
2 bilateral agreements can be useful in particular
3 circumstances. They are, to my mind, very
4 circumstance-dependant. And where they can have
5 an advantage, as in the case of China, obviously
6 they should be pursued to supplement, if you will,
7 these various provisions we have been talking
8 about; what happens in dual nationality.

9 So that's all I want to say on it.

10 MR. GOVER: Thank you. And some
11 final words from you, Professor Forcese. I note
12 that you have written in your paper, you conclude
13 that:

14 "The old rules precluding
15 protection in a contest
16 between two states of
17 nationality are no longer
18 part of international law."

19 I know that you have testified
20 that countries should not accept the
21 non-responsibility doctrine.

22 Some final words from you,
23 Professor, about the concept of dual nationality
24 in international law in the war on terror?

25 MR. FORCESE: Well, just to

1 reiterate the question that you asked me before we
2 broke.

3 I believe that it's incumbent upon
4 the Government of Canada to take a very firm
5 position on this. There will always be a question
6 as to whether Canada can obtain jurisdiction, say
7 in the World Court, in actually prosecuting such a
8 claim. That's always going to be an issue.

9 But in every other forum,
10 certainly Canada must take a very firm view on its
11 right to extend consular assistance and diplomatic
12 protection to its nationals, irrespective of their
13 dual nationality status.

14 I would also, if I had my
15 druthers, I would be very interested in seeing
16 Canada relying on that torture convention
17 provision which does allow Canada to potentially
18 bring a case against Syria at the World Court for
19 torturing Mr. Arar.

20 I would also encourage Canada to
21 consider what is known as an interstate complaint
22 under the torture convention against the United
23 States, an interstate complaint that would be
24 brought to the Committee Against Torture, which is
25 the administrative body established by the torture

1 convention, which has some adjudicative
2 responsibility.

3 So there are venues in which
4 Canada could pursue these matters, and I have not
5 seen much evidence that these issues have arisen
6 in conversations.

7 MR. COPITHORNE: May I have a
8 final final point?

9 I am sorry, I didn't see you
10 coming with that word "final". It was very quick.

11 MR. GOVER: Of course.

12 MR. COPITHORNE: I just want to
13 add what's in my article, and that is that
14 sometimes there can be side deals which will
15 settle individual cases. And while you would have
16 to get this from people much more closely
17 associated with Canadian consular activities, I
18 would even go so far as to speculate that it may
19 be that many more people with dual nationality are
20 in fact accorded de facto the things that we
21 describe as consular access without an admission
22 by the government that it is obliged to do so.

23 The case of which I am aware I
24 quote in my paper, concerning China, which China
25 was prepared -- it may be 20 years ago -- to

1 accord to Canadian consular representatives the
2 rights -- not the rights -- what they had
3 requested in terms of access on the clear
4 understanding this was not a right they were
5 accepting but, rather, in terms of friendship and
6 good relations with Canada.

7 So that is also always in the
8 background, that sort of thing.

9 The other one I want to mention is
10 that some States might be prepared to quietly give
11 you access, but they don't want to allow it on the
12 record because it will set precedents for other
13 people. So they will do an under-the-table deal
14 which will give you what you want.

15 That's all.

16 MR. GOVER: Thank you very much.

17 Those are my questions.

18 THE COMMISSIONER: Ms Parnes?

19 MS PARNES: Thank you,
20 Commissioner. Let me set up for a moment.

21 THE COMMISSIONER: Take your time.

22 EXAMINATION

23 MS PARNES: Good morning. I am
24 Brena Parnes, and I am one of the counsel for
25 Mr. Arar.

1 I am going to be addressing some
2 of the questions to one or the other of you, but
3 please feel free to add in any comments that you
4 might have if I don't address the question
5 specifically to you.

6 Professor Forcese, you identified
7 in your evidence two aspects to Article 36 of the
8 Vienna Convention. The first was the obligation
9 to inform the foreign nationals their right to
10 consular access as soon as there was an awareness
11 that the person is a foreign national; and,
12 second, if the person requests access, to accord
13 them the opportunity to exercise that right.

14 Is that correct?

15 MR. FORCESE: The second, I would
16 probably characterize it as a requirement to pass
17 on that information or pass on that request to the
18 consular officials.

19 MS PARNES: Okay, that's fair.
20 But aren't there two aspects to that second right?
21 One would be the receiving State must notify the
22 sending State without delay; and, second, that the
23 person concerned also has a right to pass on
24 communications to the consulate, the sending
25 State?

1 MR. FORCESE: Yes, if you are a
2 foreign national and you have triggered your
3 consular right, you have requested consular
4 access. In that circumstance, there's language in
5 36 suggesting that you must be free to continue
6 that communication.

7 Does that answer your question?

8 MS PARNES: Yes, that does. Thank
9 you.

10 Would you agree with me, to give
11 effect to notification of the right to consular
12 access, there also definitely must be the right to
13 effect that access?

14 MR. FORCESE: Well, certainly you
15 are entitled to be notified of your right. I
16 think you are asking whether, you know, the right
17 would be circumvented if you were held
18 incommunicado and weren't allowed to actually
19 communicate with a consular official.

20 MS PARNES: Correct.

21 MR. FORCESE: Certainly, in my
22 view, if you were held incommunicado and not
23 allowed to communicate with a consular official,
24 that would violate Article 36.

25 MS PARNES: Thank you.

1 Professor Copithorne, do you have
2 anything to add to that?

3 MR. COPITHORNE: Not at all.

4 MS PARNES: Okay. Thank you.

5 One of the areas I had anticipated
6 would be covered in evidence -- and please forgive
7 me if I am overstepping into something that you
8 are not familiar with, and this is also addressed
9 to Professor Forcese.

10 I had anticipated that the U.S.
11 law relating to the country in which a person
12 would be deported to would be covered.

13 Are you familiar with U.S. law on
14 deportation?

15 MR. FORCESE: I have a passing
16 familiarity with the Immigration and
17 Naturalization Act and its provisions. I don't
18 purport to be an expert in U.S. immigration law.
19 I had one pro bono case that didn't deal with
20 this.

21 My understanding is that you are
22 having a U.S. immigration lawyer appear before
23 you. I could speculate, but I think you are
24 better off talking to him.

25 MS PARNES: Okay. So I will leave

1 those questions for another time.

2 It occurs to me that under
3 international law, the Canadian government could
4 have taken three different approaches in
5 Mr. Arar's case, and I will list those approaches
6 and either of you can comment on whether you would
7 see those as being three different approaches or
8 whether there are additional approaches or one of
9 them is not an appropriate approach.

10 The first would be: Mr. Arar is a
11 dual national. He's on your territory, therefore,
12 under Syria's jurisdiction, and consular access is
13 a privilege that Syria can choose not to grant.

14 MR. COPITHORNE: Excuse me,
15 counsel, if I could just ask: this is vis-à-vis
16 Syria, is it, not the United States now?

17 MS PARNES: For the purposes of
18 this question, I am just asking vis-à-vis Syria.

19 MR. COPITHORNE: Okay. Thank you.

20 MS PARNES: But I would welcome
21 your comments as well on the U.S.

22 The second approach could be:
23 Mr. Arar is a dual national. Neither of his
24 citizenships take precedence over one another, and
25 therefore Canada is entitled to some consular

1 access, but the Syrians are entitled to put
2 conditions or limitations on that access.

3 And the third approach would be:
4 Mr. Arar is a dual national, but he's a resident
5 of Canada. He was travelling on a Canadian
6 passport. There are other indicia that his
7 dominant or effective nationality is Canadian.
8 Furthermore, Syria does not have an effective
9 means for renouncing Syrian citizenship.
10 Therefore, Canada is fully entitled to consular
11 access.

12 Would this be a fair assessment of
13 the different approaches Canada could take?

14 MR. FORCESE: Number 3 is
15 obviously the one that -- I have already expressed
16 the opinion -- I believe that international law
17 does allow Canada to take that position. I think
18 that would be, as you have described it, a
19 reasonable position for Canada to take.

20 Number 2, some consular access
21 but, you know, we can't figure out who's got the
22 closer tie. We will accept some limitations?
23 That would be a deal struck between the Government
24 of Canada and Syria, not mandated by international
25 law. It would be suspect on the facts, as far as

1 I understand them. It would be a dubious
2 approach, and from a legal perspective I don't
3 view it as necessary.

4 Number 1, diplomatic protection is
5 a privilege that needn't be accorded for any
6 reason, really. In your case, you suggested
7 because he is a dual national.

8 Well, we have already had a
9 discussion suggesting that diplomatic protection
10 in international law is a matter of discretion on
11 the part of the sovereign state. The sovereign
12 state can pick and choose the circumstances in
13 which it will extend diplomatic protection.

14 Within Canadian domestic law,
15 Professor Copithorne has already mentioned the
16 Khadr case, which suggested that that may not be
17 the case. But in international law, you can pick
18 and choose, and the grounds on which you pick and
19 choose are subject to no constraints. So if
20 Canada picks and chooses and says, "We are not
21 going to extend diplomatic protection because you
22 are a dual national," as a matter of international
23 law, it would be free to take that position.

24 I think it would be a dubious
25 position. I don't think Canada is obliged to take

1 that position. But could you challenge it as a
2 matter of international law? No.

3 MS PARNES: Would the first
4 approach be more consistent with the
5 non-responsibility model?

6 MR. FORCESE: Yes.

7 MS PARNES: Okay. And the third
8 position would be --

9 MR. FORCESE: A rejection --

10 MS PARNES: -- consistent with a
11 predominant or effective nationality approach.

12 MR. FORCESE: Correct.

13 MS PARNES: Your evidence today
14 was that the third model is the one that, in your
15 opinion, most closely accords with the current
16 state of international law?

17 MR. FORCESE: Yes, that you are
18 entitled to extend diplomatic protection as
19 against a dual national even in relation to a
20 country whose nationality that person also has, so
21 long as you, the espousing state, have the closest
22 links, the predominant link, to the person who has
23 been injured.

24 MS PARNES: Professor Copithorne?

25 MR. COPITHORNE: The only thing I

1 would add is in the final analysis, it's almost a
2 tactical decision by those in charge of getting
3 that person out of jail or getting access or
4 whatever the immediate objective is. I think it
5 turns less on law than what works in a particular
6 fact pattern. Therefore, that speaks to the need
7 to have a highly experienced official running with
8 this, who can make a suitably informed tactical
9 judgment.

10 MR. FORCESE: I wonder if I might
11 add also on that same point.

12 Strategically, from the
13 perspective of actually securing the release of
14 individuals, you might want to temper how
15 emphatically you assert your rights as a country
16 to extend diplomatic protection.

17 I know that in some -- not,
18 obviously, in the case of Mr. Arar, but some other
19 detainees in Syria, the Government of Canada was
20 fairly silent on this issue and ultimately secured
21 the release of individuals. One would assume that
22 part of that silence was motivated by a desire not
23 to peeve the Syrian officials.

24 Another situation where Canada
25 might be expected to take a much firmer stand and

1 advocate very openly and in a very determined way
2 its rights to extend diplomatic protection might
3 be the Kazemi case, the Canadian-Iranian
4 journalist who was killed in Iran.

5 You are not going to secure her
6 release; she was killed. In that circumstance, it
7 seems that there's not necessarily the
8 countervailing consideration of, "How are we going
9 to secure this person's release?" That's a
10 circumstance where the Government of Canada, as a
11 diplomatic measure, might be expected to take a
12 very firm line.

13 MS PARNES: Right. But you are
14 not necessarily suggesting that Canada -- you are
15 suggesting that Canada be tactful in its approach,
16 but you are not necessarily suggesting that Canada
17 therefore then would have to take the
18 non-responsibility model in doing that?

19 It would just be a way of maybe
20 more tactfully putting it to the Syrian
21 authorities.

22 MR. FORCESE: I believe Canada
23 should be unequivocal on what the law is. The
24 venues in which it asserts that unequivocal state
25 of the law, it might have to pick and choose for

1 reasons of securing the ultimate objective;
2 namely, to secure someone's release.

3 MS PARNES: Thank you. Please
4 correct me if I am wrong. My understanding is the
5 premise of the non-responsibility model is
6 premised upon the voluntary return of the dual
7 national to one of his countries of nationality.
8 Therefore, if return is involuntary and contrary
9 to the stated desire of the national, as in
10 Mr. Arar's case, it strikes me that the
11 non-responsibility approach, even if it still
12 exists in international law, could no longer apply
13 in those circumstances?

14 MR. FORCESE: I am not sure I
15 would conflate the non-responsibility doctrine,
16 which is essentially a standing rule. It says
17 that you don't have standing to espouse the claim
18 or to bring diplomatic protection as against a
19 state whose nationality that person also has.
20 That's a standing rule.

21 I don't know if I would conflate
22 that with the rules on removal and deportation,
23 which I think is where your question is going.

24 MS PARNES: Mm-hmm.

25 MR. FORCESE: I think it would be

1 quite a dubious body of international law that
2 obliged a state to automatically remove someone to
3 a country of nationality because, of course, a
4 number of refugees could be wrongfully removed to
5 their countries of nationality from which they are
6 fleeing.

7 So I think there's a whole bunch
8 of different principles of law in play when you
9 talk about deportation.

10 Non-responsibility is about
11 standing. Can you actually assert, say, consular
12 protection, and if a person is injured, can you
13 actually bring a claim for compensation for that
14 individual who has been wronged?

15 MS PARNES: I think my question --
16 and maybe I shouldn't have brought in the
17 non-responsibility model.

18 But I think my question relates
19 more to, does it matter whether a foreign national
20 voluntarily returns to a country of their second
21 nationality or whether that return is involuntary
22 or contrary to their stated desire?

23 MR. FORCESE: I am sorry, I
24 misunderstood your question.

25 What you are proposing is two

1 scenarios. Mr. Arar is removed from the United
2 States to Syria. What kind of impact does that
3 have on dual nationality and non-responsibility in
4 relation to Syria versus, say, Mr. Arar voluntary
5 travels to Syria on a Syrian passport, something
6 like that?

7 Are those the two scenarios?

8 MS PARNES: Correct.

9 MR. FORCESE: I think it would
10 make a difference. It would make a difference
11 certainly practically.

12 The legal issue that might arise
13 in those circumstances -- remember what I have
14 been saying about non-responsibility.
15 Non-responsibility doesn't apply so long as the
16 national has a closer link to the espousing
17 country, the genuine nationality concept.

18 Well, if you are travelling to
19 that second country of nationality, the receiving
20 State, on that receiving State's passport, I would
21 assume that the possibility of you arguing
22 successfully that you have a closer tie to the
23 sending State would be undermined; that you are
24 acting as if you have a closer tie to the
25 receiving State.

1 That might be an issue, say, in
2 the Kazemi scenario, where Ms Kazemi was
3 travelling on an Iranian passport. She had some
4 family in Iran, she would some connections to
5 Iran. There, the issue as to which country is she
6 most closely linked would be much more muddy than
7 in the Arar scenario where Mr. Arar was clearly
8 very closely tied to Canada and he wouldn't have
9 gone to Syria except for the intervention of the
10 Americans.

11 MS PARNES: Right. But even if
12 Mr. Arar, for instance, voluntary had entered
13 Syria on a Canadian passport, not on his Syrian
14 passport, as a Canadian, I think -- and correct me
15 if I am wrong -- there would still be a
16 distinction of him choosing to go back to the
17 country and subject himself to the laws as opposed
18 to him involuntary being forced to go back to the
19 country and then being subjected to laws of those
20 countries?

21 MR. FORCESE: I think certainly as
22 a practical matter. As a legal matter, confronted
23 with those facts, a Court would say, ooh, this is
24 a slightly different scenario. The person has
25 been removed against their will. In terms of how

1 we weigh the calculus as to who has the greater
2 connection, that's one of the variables we take
3 into account.

4 I don't think if I can go much
5 further than that.

6 MS PARNES: Thank you. Professor
7 Copithorne?

8 MR. COPITHORNE: Well, there are
9 cases on record of, for example, the United States
10 kidnapping people, nationals, that they wanted
11 before their courts. So people being removed from
12 one jurisdiction to another by force does exist.
13 And as I think we discussed, the American courts,
14 the Supreme Court, has taken the view that this
15 doesn't taint the evidence.

16 MR. FORCESE: Although it is very
17 clearly a violation of international law.

18 MS PARNES: I think the testimony
19 today was to the effect that when a dual national
20 is in a third country, either States may extend
21 diplomatic protection to that dual national; is
22 that a fair assessment of what was discussed
23 today?

24 MR. COPITHORNE: In principle,
25 yes, with the condition that there's some

1 suggestions around that primacy should be attached
2 to the government of the country under which he
3 entered -- on the passport on which he entered the
4 third country.

5 MS PARNES: And is it possible to
6 have both consuls advised? Would that be contrary
7 to international law if both were, if someone
8 said, "I want to seek consular protection of both
9 of my nationalities"?

10 MR. COPITHORNE: To my knowledge,
11 there is quite a bit of active cooperation among
12 consuls in terms of detainees abroad where more
13 than one country has an attachment, a connection,
14 a claim to this person, as a practical matter.

15 I don't know -- what do you think?
16 Is there a legal consideration?

17 MR. FORCESE: It wouldn't be
18 precluded as a legal matter. It would be
19 practical coordination problems. But I am not
20 aware of any principle of international law that
21 says you wouldn't be entitled to that fact. The
22 principles that do exist from the ILC and
23 elsewhere suggest quite emphatically that either
24 country can extend diplomatic protection, and I
25 would read "either" as including both.

1 But I can't go beyond that.

2 MS PARNES: Thank you.

3 But I would suggest to you that it
4 would be important for the Canadian consulate to
5 know, for instance, if Mr. Arar had asked also to
6 be notified of the Syrian consul so that they
7 could coordinate efforts.

8 Would that be a fair statement?

9 MR. FORCESE: I am certain that it
10 would be helpful to the Canadian consulate to know
11 that. I am not sure that the American
12 authorities, in the scenario you are painting,
13 would be obliged to tell Canada.

14 MS PARNES: Okay. In this case, I
15 would suggest to you that Mr. Arar's actions at
16 the airport in New York, where he asked that the
17 Canadian -- and there's no evidence that he asked
18 for the Syrian consul to be notified of his
19 detention. Mr. Arar made it clear that he was
20 seeking diplomatic protection of Canada alone.

21 Mr. Arar similarly, in other ways,
22 clearly expressed that he was not seeking
23 diplomatic protection from the Syrian government.

24 For instance, it's not only that
25 he did not request notification of the Syrian

1 consul but also it goes beyond that to an
2 expression of fear of being sent to Syria, and he
3 expressed this to the Canadian consul in New York,
4 that this was something he had been threatened
5 with on at least one occasion.

6 So when Mr. Arar expressed fear of
7 being sent to Syria while in the United States,
8 did Canada, in your opinion, owe him any
9 additional obligations or safeguards in terms of
10 diplomatic protection?

11 MR. FORCESE: A couple of levels
12 of analysis in that question.

13 I mean, there's the domestic law,
14 there's the international law.

15 The international law, I don't see
16 it. I don't see -- as I have said, international
17 law is discretionary as to whether a State extends
18 diplomatic protection. That is international law.

19 As a matter of domestic law, I am
20 sure that we could think -- the people in this
21 room are all domestic lawyers, and I am sure we
22 could all come up with all sorts of arguments as
23 to why, in that circumstance, Mr. Arar might be
24 entitled to some real strong affirmative action by
25 the Government of Canada.

1 The Khadr case being sort of a
2 case in point.

3 But as an international legal
4 matter, I don't think so. I mean, I don't think
5 the fact that the Canadian government knew that he
6 might be tortured in Syria compounded the non-duty
7 that it had to extend diplomatic protection. It
8 didn't have a duty to extend diplomatic protection
9 as a matter of international law.

10 MS PARNES: What about in this
11 case, as in this case, where Canada decides to
12 extend diplomatic protection? We know on the
13 facts of this case Mr. Arar was visited by the
14 Canadian consul in New York. So it was definitely
15 not a case where there was no diplomatic
16 protection extended.

17 MR. FORCESE: As a matter of
18 international law, a person doesn't have a right
19 to diplomatic protection. As a matter of
20 international law, there is no human rights to
21 diplomatic protection.

22 Diplomatic protection is a right
23 you have -- Article 36 obligations are rights you
24 have against the receiving State. They don't
25 empower some extra duty you have vis-à-vis your

1 own country of nationality, the sending State.

2 That's the best I can do.

3 MS PARNES: My next question would
4 be: What are Canada's obligations towards dual
5 nationals who are unable to renounce their second
6 citizenship, or its virtually impossible for them
7 to renounce their second citizenship?

8 MR. COPITHORNE: Well, I can't off
9 the top of my head think of why it would have an
10 obligation to a dual national who was unable to
11 renounce his or her other citizenship, because the
12 two jurisdictions of the two countries operate in
13 a parallel form.

14 It is at least improper for the
15 Canadian government to tell a dual national, "You
16 have got to give up your other citizenship."

17 Now, the proposal I read from the
18 committee gets close to that, saying that when
19 they get Canadian citizenship they must agree to
20 renounce their citizenship of origin. But that
21 didn't go anywhere.

22 I think, as the law stands now --
23 and it would be almost improper for the Canadian
24 government to suggest that a person -- if I am
25 still on track --

1 MS PARNES: No, I don't think my
2 question is should the Canadian government insist
3 that a person renounce their citizenship. What I
4 am actually getting at -- and maybe my question
5 wasn't clear -- was if a person wants to renounce
6 their second citizenship --

7 MR. COPITHORNE: And can't?

8 MS PARNES: And can't.

9 MR. COPITHORNE: I don't think
10 that concerns Canada. Canada looks after Canadian
11 citizenship. Country X looks after country X
12 citizenship.

13 MS PARNES: Would this go to the
14 issue of dominant or effective nationality? So
15 if, for instance, someone tried to renounce their
16 citizenship and couldn't, would that be a further
17 indicia that perhaps the person's dominant or
18 effective nationality was Canadian, for instance?

19 MR. COPITHORNE: Maybe after the
20 event but not before the event. In other words, a
21 person who had succeeded in renouncing the
22 citizenship of origin would certainly be another
23 indicia that it was no longer the dominant
24 citizenship.

25 MS PARNES: I guess I am talking

1 about the situation where it's difficult or
2 impractical to do that.

3 MR. COPITHORNE: The Syrian
4 situation.

5 MR. FORCESE: Let's assume that we
6 are before the World Court and we are arguing as
7 to whether Canada can espouse a claim on behalf of
8 Mr. Arar as against Syria and I can point to this
9 survey data saying it's just impossible to get rid
10 of Syrian citizenship.

11 I think that would be a fact
12 amongst many that the World Court could properly
13 look at in deciding who has the closest tie to
14 Mr. Arar. So you would look at residence, family,
15 education, employment, and possibly the fact that
16 you couldn't rid yourself of this other
17 citizenship that's claiming nationality, as I call
18 it. It would be a fact among many in this factual
19 soup.

20 Your first question was, is there
21 any circumstance -- one way of looking at the
22 first question you asked, is there any
23 circumstance in which a country might be obliged
24 to extend diplomatic protection?

25 In the early drafting days of

1 these draft articles from the ILC, the rapporteur
2 on diplomatic protection proposed that diplomatic
3 protection should be mandatory where the person is
4 suffering an injury that's called jus cogens. A
5 jus cogens is a very high level of international
6 law, for the constitutional principle of
7 international law.

8 So if there's a violation that
9 implicates jus cogens, the special rapporteur
10 suggested in that circumstance a State should be
11 obliged to extend diplomatic protection.

12 That was an extremely contentious
13 view and was debated at the ILC. As best I
14 know -- and I haven't got the passage with me. As
15 best I know, it was not picked up by the ILC in
16 its final version of the draft articles, but I
17 would have to confirm that.

18 So that is the only circumstance,
19 and it was fervently debated. It was the only
20 circumstance in which that issue as to whether you
21 have a duty to extend diplomatic protection came
22 up, as best I know.

23 MS PARNES: Thank you. Because
24 Canada has not signed the optional protocol to the
25 Vienna Convention, if Canada wanted to bring a

1 case against the United States or Syria, is the
2 only way Canada could do it by consent or by using
3 another international legal instrument, like the
4 Convention Against Torture?

5 MR. FORCESE: Yes. If Canada
6 wanted to bring a claim with relation to Article
7 36, because neither Canada nor the U.S at this
8 point are members of the optional protocol, there
9 is no mandatory jurisdiction on the part of the
10 World Court.

11 In order for the World Court to
12 get jurisdiction, you would have to essentially
13 get the agreement of the Americans. Same with
14 Syria.

15 That said, as I have mentioned,
16 there are other substantive principles that you
17 could toy with or that you could invoke under the
18 convention that might give you jurisdiction in
19 some place or another.

20 I have already mentioned those.
21 That is probably the only opportunity available
22 right now.

23 MS PARNES: Those are my
24 questions. Thank you.

25 THE COMMISSIONER: Thank you,

1 Ms Parnes.

2 Ms McIsaac? How long do you
3 expect to be? I know we are approaching the lunch
4 hour. Do you want to --

5 MS McISAAC: Well, I don't know.
6 Maybe 20 or 30 minutes?

7 THE COMMISSIONER: Are you happy
8 to try to finish?

9 MS McISAAC: I am happy if the
10 witnesses are happy, because I am sure they will
11 be happy to finish.

12 THE COMMISSIONER: You are fine?
13 Okay. If hunger overtakes, let us know.

14 MR. COPITHORNE: You will see us
15 collapse.

16 MR. FORCESE: I notice this is
17 padded so ...

18 EXAMINATION

19 MS McISAAC: My name is Barbara
20 McIsaac and I am counsel for the Attorney General.

21 What I would like to do,
22 gentlemen, is just clarify a few matters which I
23 believe certainly confused me a little bit and may
24 have confused others.

25 I would like to start by just

1 clarifying that, as I understand it, the right of
2 consular access provided for in Section 36 of the
3 Vienna Convention has an obligation on the part of
4 the receiving State to notify the individual of
5 the right of consular access.

6 Would that be the first step?

7 MR. FORCESE: Yes.

8 MS McISAAC: And then the second
9 step would be to notify the sending country.

10 In the case of Mr. Arar, that
11 would be Canada? No?

12 MR. COPITHORNE: No, you missed
13 the intermediary step, which is that the detainee
14 has to --

15 MS McISAAC: I am sorry, has to
16 request consular access. And then the receiving
17 State would notify the sending State. In this
18 case, we take Mr. Arar, that is Canada of the
19 right of consular access.

20 The next step, though, that I
21 gather is not covered in the convention itself --
22 and I will come back to this in a minute -- is the
23 obligation of the sending State, i.e. Canada, to
24 actually provide consular access. Is that
25 correct?

1 There is no obligation under the
2 Vienna Convention to provide consular access?

3 MR. COPITHORNE: Well, it's
4 silent.

5 MS McISAAC: Silent. However,
6 there may be a developing jurisprudence
7 domestically, as evidenced by the Khadr case,
8 where there will be an administrative law right of
9 a Canadian citizen to expect and to enforce
10 domestically against the Canadian government a
11 right to be afforded consular services?

12 MR. FORCESE: Correct.

13 MS McISAAC: And that's emerging
14 case law because of course the Khadr case is
15 simply a pleadings motion at this stage. All
16 right.

17 Now, let's deal then with the
18 question of the dual national.

19 We have in the case of Mr. Arar an
20 individual of dual nationality, Canadian
21 citizen/Syrian citizen, incarcerated in Syria.

22 What is the international law
23 obligation under the Vienna Convention to Syria in
24 those circumstances? Does Syria have any
25 obligation to recognize any consular rights of

1 Mr. Arar to be notified, or any rights of Canada
2 to provide consular access?

3 Professor Copithorne?

4 MR. COPITHORNE: It need not
5 recognize any such rights.

6 MS McISAAC: So international law
7 does not require Syria to recognise --

8 MR. COPITHORNE: You are saying
9 the convention now.

10 MS McISAAC: The Vienna Convention
11 does not require it?

12 MR. FORCESE: Well, this is the
13 crux of the non-responsibility doctrine, right.

14 MS McISAAC: No, no -- sorry. I
15 am not talking about Canada's obligation to
16 espouse the right. I am talking about Syria's
17 obligation to extend consular access to Canada in
18 respect of a dual national such as Mr. Arar.

19 MR. FORCESE: Right. Syria would
20 say that the non-responsibility doctrine means we
21 need not accord Mr. Arar any international rights
22 as if he were a Canadian under the Vienna
23 Convention or anything else.

24 If Syria were taking a
25 non-responsibility doctrine approach, it would say

1 Vienna Convention Article 36 does not apply. We
2 are not obliged to meet any kind of international
3 obligations towards Mr. Arar because he's a Syrian
4 national, plain and simple.

5 MS McISAAC: But Canada,
6 conversely, may take the view, as it did in this
7 case, that notwithstanding the dual nationality,
8 it would assert consular rights with respect to
9 Mr. Arar?

10 MR. COPITHORNE: Yes.

11 MS McISAAC: But under the Vienna
12 Convention, Syria need not recognize those?

13 MR. FORCESE: No, the Vienna
14 Convention --

15 MR. COPITHORNE: It's silent.

16 MR. FORCESE: The Vienna
17 Convention doesn't say anything about dual
18 nationality.

19 MS McISAAC: It doesn't impose any
20 obligations on Syria in that regard.

21 MR. FORCESE: Well, the
22 obligations it does impose are -- if it's a
23 foreign national, there are Article 36
24 obligations. Syria would take the view, as did
25 the United States in the Avena case, that Article

1 36 does not apply to dual nationals.

2 The Vienna Convention doesn't say
3 anything about that, but that would have been --
4 that was a U.S. argument based on this separate
5 concept of non-responsibility.

6 MS McISAAC: And I understood you
7 to say in the Avena case that the Court didn't
8 actually pronounce itself on that because there
9 was a lack of evidence for it to determine that
10 any of these individuals were actually dual
11 nationals?

12 MR. FORCESE: That's correct.

13 MS McISAAC: So would I be correct
14 then in saying that the international law at the
15 moment, in its interpretation of the Vienna
16 Convention on consular access, there is no
17 jurisprudence which would state that a receiving
18 state, who has in its custody an individual who is
19 a dual national, one of those nationalities being
20 that of the receiving state, has an obligation to
21 grant consular access?

22 MR. FORCESE: I am not aware of
23 any case that says that affirmatively or
24 emphatically. Just the broad repudiation of
25 non-responsibility that I have been talking about

1 in relation to --

2 MS McISAAC: All right.

3 Now, I am slightly confused about
4 the concept of diplomatic protection. The concept
5 of diplomatic protection, as it is defined in the
6 report of the International Law Commission that
7 you referred to, it defines diplomatic protection
8 as consisting of:

9 "resort to diplomatic action
10 or other means of peaceful
11 settlement by a State
12 adopting in its own right the
13 cause of its national in
14 respect of an injury against
15 that national arising from an
16 internationally wrongful act
17 of another State."

18 So that concept does not speak in
19 terms of consular access; correct?

20 MR. FORCESE: It doesn't
21 emphatically identify consular access, but
22 traditionally consular access has been included
23 within the ambit of international protection.

24 MS McISAAC: Right. What I am
25 trying to determine here is the distinction

1 between the ability of Canada, as the sending
2 state in the Arar case, to obtain consular access
3 if Syria says, "No, he's a Syrian. We don't
4 recognize his Canadian citizenship," and some
5 other right Canada may have, or ability Canada may
6 have, to bring a claim against Syria at some
7 subsequent point for breach of some kind of
8 international law right.

9 And there is a distinction, as I
10 understand it.

11 MR. COPITHORNE: I think that
12 clause that you quoted says that Canada must be
13 recognized as the legitimate espouser of the cause
14 of its nationals; in other words, if again
15 thinking that those claims were largely of an
16 expropriation nature --

17 MS McISAAC: Yes.

18 MR. COPITHORNE: -- that the
19 country to bring the claim internationally is the
20 country of the nationality of the owner of the
21 property or the associale, if it's a company.

22 MS McISAAC: What I am trying to
23 address here is the actual facts of the Arar case:
24 Mr. Arar being incarcerated in Syria, he's an
25 individual with dual Canadian-Syrian nationality.

1 And I think you have told me that
2 there is no jurisprudence at the international
3 level saying Syria must grant Canada consular
4 access.

5 However, if there's no rule of law
6 saying Syria must grant Canada consular access,
7 what claim would a country like Canada be
8 espousing, assuming there were a forum -- and I
9 gather there's probably no forum for doing it --
10 as to breach of section 36 rights under the Vienna
11 Convention?

12 MR. FORCESE: Well, it would be a
13 contested issue. To say that there's no
14 jurisprudence on one of the countries of
15 nationality according a dual national consular
16 access vis-à-vis the other country, to say there's
17 no jurisprudence in international law is not all
18 that persuasive. There's very little
19 international jurisprudence, period.

20 I fully acknowledge, and I believe
21 Professor Copithorne would agree with me, that if
22 this issue were ever adjudicated -- let's say that
23 Canada found a venue in which essentially to sue
24 Syria for not providing consular access in a
25 timely fashion. The issue of dual nationality

1 would be a contested issue.

2 There, the World Court would have
3 to decide, or any other international arbiter body
4 would have to decide, whether non-responsibility
5 doctrine applies or non-responsibility doctrine
6 doesn't apply.

7 My view is that the international
8 jurisprudence generically, or the international
9 literature generically, points towards
10 non-responsibility no longer being, if it ever
11 were, a good principle of international law in all
12 contexts, including in relation to consular
13 access.

14 MS McISAAC: "Non-responsibility"
15 being a rather confusing term in and of itself
16 because basically what it means is not having a
17 right as opposed to not having a responsibility.

18 MR. FORCESE: Well, that's true.
19 It's a point of view on standing. You don't have
20 standing.

21 MS McISAAC: But I also understood
22 you both to have said that even assuming Canada
23 wished to bring, on behalf of Mr. Arar some kind
24 of case to deal with the failure on the part of
25 Syria to provide timely notification of right to

1 consular access, there is no forum in which that
2 could presently be done without consent of Syria;
3 correct?

4 MR. COPITHORNE: Mm-hmm.

5 MR. FORCESE: Certainly in
6 relation to the Vienna Convention.

7 MS McISAAC: Are either of you
8 aware of the fact that Syria did in fact grant
9 Canada consular access?

10 MR. FORCESE: I am aware of that.

11 MS McISAAC: How important in face
12 of -- now, this tapered off at the end. How
13 important an issue is the lack of timely
14 notification on the part of the receiving State if
15 in fact the individual does end up with consular
16 access within some period of time?

17 That was dealt with in the Avena
18 case, was it?

19 MR. COPITHORNE: Yes. And before
20 the Avena case, we didn't know what "promptly", or
21 whatever the wording, meant. The Avena case was
22 the first clear international jurisprudential
23 statement of what it meant.

24 MS McISAAC: That was decided
25 when?

1 MR. FORCESE: 2004. In the Avena
2 case, recall that one of the individuals was
3 notified of his rights to consular access after 40
4 hours. That was viewed as a violation of the
5 "without delay" requirement in Article 36.

6 You are asking in that
7 circumstance is it somehow cured given that he
8 ultimately had consular access? Well, it's still
9 a violation of Article 36, so concluded the
10 International Court of Justice.

11 It would become particularly
12 important, I would assume, if some detriment could
13 be traced to the absence of consular access.

14 MS McISAAC: What is the remedy,
15 assuming there is a forum, against either the
16 United States or Syria?

17 So assume there is a forum where
18 Canada could espouse the claim on behalf of
19 Mr. Arar for lack of timely notification to the
20 right to consular access, and one overcame, in the
21 case of Syria, the difficulties related to the
22 dual nationality. What would the remedy be?

23 MR. COPITHORNE: In the Avena and
24 related cases, this is what they were addressing
25 after they had made a finding as to delinquency.

1 The question really came down to: Should they
2 order a retrial in the United States after
3 consular notification had been granted?

4 Professor Forcese may correct me,
5 but my impression is that, on the question of
6 remedy, the International Court sent it back
7 saying, "You figure out what the remedy should
8 be." This was picked up in one case immediately.
9 There was an Oklahoma case of the Court of Appeal
10 or Supreme Court of Oklahoma, which found, I
11 think, that it was necessary to retry in the light
12 of this.

13 MS McISAAC: Would there be --
14 sorry, please. Go ahead.

15 MR. FORCESE: The Avena case
16 actually said there was an obligation to
17 reconsider. But the Avena case was specific.
18 These people were on death row; they were about to
19 be executed. So the remedy there was, well, we
20 want to make sure you get it right and we want to
21 make sure that there was no taint associated with
22 the absence of consular access.

23 So there was sort of mushy
24 language from the ICJ about reconsideration.

25 Of course, the Arar situation

1 would be very different. There I think the body
2 of law that would pertain would be what's known as
3 the body of law of State responsibility.

4 State responsibility anticipates,
5 among other things, reparations, damages, in the
6 event that someone suffered an international
7 cognizable injury.

8 In the Arar case, I think that
9 principle of law which anticipates compensation
10 would be much more appropriate or more on point
11 than Avena.

12 MS McISAAC: But would the injury
13 have to be presumably traced back to the lack of
14 notification to consular access, or would there be
15 damages in the abstract, such as punitive damages?

16 MR. FORCESE: It's hard to answer
17 that definitively. The Article 36 breach would be
18 a breach of an obligation owed Canada: You didn't
19 notify Canada without delay. That's a breach,
20 plain and simple.

21 How would you compensate that
22 breach? How would you measure that breach? Could
23 you measure it with reference to the harm that
24 befell Mr. Arar irrespective of any close causal
25 connection between the absence of consular access

1 and torture, say? I can't answer that.

2 But the right to a remedy for
3 Canada would arise upon the breach of Article 36,
4 irrespective of any subsequent injury that befell
5 Mr. Arar.

6 But I hazard, I am guessing here
7 that Mr. Arar's injury would have some bearing
8 into how you quantify that damage. Whether there
9 would have to be a close causal link, I can't
10 answer that.

11 MS McISAAC: So this would be an
12 emerging area of international law, I understand,
13 or certainly the facts would be unique in terms of
14 the jurisprudence that's been dealt with to date?

15 MR. COPITHORNE: There's very
16 little in international jurisprudence that deals
17 with the remedies available for the, shall I say,
18 non-monetary or non-easily-quantifiable damages of
19 international standards, international norms.

20 MR. FORCESE: But to say that this
21 is an emerging area of international law -- well,
22 most international law is emerging. There's very
23 little international dispute settlements.

24 MR. COPITHORNE: It's taken a long
25 time, too.

1 MS McISAAC: I am trying to get a
2 handle on the practicalities.

3 Just to go back to assuming we
4 accept that Canada has the standing to bring some
5 kind of case with respect to the failure of the
6 United States to recognize Mr. Arar's right under
7 section 36 to be notified immediately of his right
8 of consular access. I understood you to say that
9 there is no forum, absent consent, for Canada to
10 espouse that claim in respect of Mr. Arar.

11 Would that be correct?

12 MR. FORCESE: On these facts.

13 MS McISAAC: And similarly with
14 Syria, assuming again that one were to get over
15 the other hurdles of whether Syria actually had an
16 obligation under the Vienna Convention given the
17 dual nationality and Canada had the right to
18 espouse the claim, again, there is no forum in
19 which that claim could be espoused subject to
20 there being consent on the part of both parties.

21 MR. FORCESE: In relation to the
22 Vienna Convention, although I would reverse the
23 order. The issue would be jurisdiction first, and
24 then the substantive question as to whether Canada
25 can espouse a claim.

1 MS McISAAC: Thank you very much.

2 THE COMMISSIONER: Mr. Gover, do
3 you have re-examination?

4 MR. GOVER: I have none. Thank
5 you.

6 THE COMMISSIONER: Does anybody
7 else wish to examine?

8 Let me just make a couple of
9 comments before we wind it up.

10 I am very appreciative of your
11 coming and giving evidence and the time that you
12 put in to prepare it. I found your exposition of
13 the law very clear and very helpful. It's not an
14 area that certainly I am particularly familiar
15 with and I am sure others aren't, and I think the
16 way that both of you explained it was very useful
17 and demonstrated your expertise.

18 So we are fortunate to have people
19 with your expertise come forward.

20 My second observation is I think
21 you should take this show on the road.

22 --- Laughter / Rires

23 MR. COPITHORNE: To Damascus?

24 MR. FORCESE: The road to
25 Damascus.

1 --- Laughter / Rires

2 THE COMMISSIONER: When we deal
3 with experts who are so highly skilled, there is a
4 bit of a challenge in working together on a panel,
5 in a format where counsel are examining and
6 cross-examining. And I thought it worked
7 brilliantly well and you complemented one another
8 extremely well.

9 So thank you very much.

10 MR. COPITHORNE: Thank you very
11 much, Mr. Commissioner.

12 THE COMMISSIONER: We will rise
13 and I think tomorrow is 9:30, is it?

14 MR. GOVER: May I suggest 9:30 as
15 the starting time tomorrow, Mr. Commissioner.

16 THE COMMISSIONER: All right. We
17 will rise until 9:30 tomorrow.

18 THE REGISTRAR: Please stand.

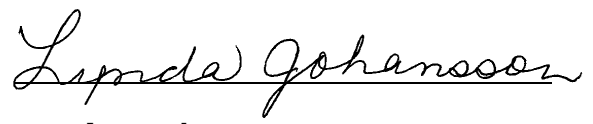
19 --- Whereupon the hearing adjourned at 1:13 p.m.,
20 to resume on Tuesday, June 7, 2005, at
21 9:30 a.m. / L'audience est ajournée à 13 h 13,
22 pour reprendre le mardi 7 juin 2005 à 09 h 30

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Lynda Johansson,

C.S.R., R.P.R.

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