

**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 mercredi 8 juin 2005

**Held at:**

Algonquin Room  
Old City Hall  
111 Sussex Drive  
Ottawa, Ontario

Wednesday, June 8, 2005

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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Wednesday, June 8, 2005

3 at 9:33 a.m. / L'audience débute le mercredi

4 8 juin 2005 à 9 h 33

5 THE REGISTRAR: Please be seated.

6 Veuillez vous asseoir.

7 THE COMMISSIONER: Good morning.

8 Mr. Gover?

9 MR. GOVER: Good morning,  
10 Commissioner. Our first witness today is  
11 Professor Peter Burns, and we have prepared a book  
12 of reference materials in relation to Professor  
13 Burns' testimony.

14 I would ask that that be marked  
15 now as the next exhibit, please.

16 THE COMMISSIONER: Is that 123?  
17 126? I must have been sleeping for the last ones.

18 --- Laughter / Rires

19 EXHIBIT NO. P-126: Book of  
20 Documents entitled "Reference  
21 Materials Compiled in  
22 Relation to the Evidence of  
23 Professor Peter Burns"

24 THE COMMISSIONER: Do you wish to  
25 be sworn or affirmed?

1 MR. BURNS: Either. Swearing is  
2 fine.

3 THE COMMISSIONER: Would you stand  
4 and take the Bible in your right hand, please?

5 SWORN: PETER THOMAS BURNS

6 THE COMMISSIONER: Your full name?

7 MR. BURNS: Peter Thomas Burns.

8 THE COMMISSIONER: Thank you.

9 MR. GOVER: Commissioner, I will  
10 be asking at the end of my preliminary questions  
11 that you qualify Professor Burns as an expert in  
12 the fields of international criminal law and  
13 international human rights law, and especially the  
14 prohibition against torture.

15 EXAMINATION

16 MR. GOVER: Professor Burns, your  
17 curriculum vitae appears at tab 1 of what has just  
18 been marked as Exhibit P-126, and I understand,  
19 sir, that you graduated from law school at Otago  
20 University in New Zealand in 1963.

21 Is that correct, sir?

22 MR. BURNS: That is correct.

23 MR. GOVER: You also acquired a  
24 Master of Laws degree from Otago University in New  
25 Zealand.

1 Is that correct, sir?

2 MR. BURNS: That is correct.

3 MR. GOVER: You began your career  
4 as a law teacher in that year, 1963?

5 MR. BURNS: Yes.

6 MR. GOVER: You subsequently moved  
7 to the province of British Columbia and you first  
8 took up teaching duties at the University of  
9 British Columbia faculty of law in 1968?

10 MR. BURNS: Yes.

11 MR. GOVER: And you then rose  
12 through the ranks of assistant professor and  
13 associate professor, and you became a full  
14 professor in July 1971?

15 MR. BURNS: Yes.

16 MR. GOVER: You served as Dean of  
17 Law at the University of British Columbia from  
18 1982 through 1991?

19 MR. BURNS: Yes.

20 MR. GOVER: And in all, I  
21 understand you taught law at the University of  
22 British Columbia for some 37 years.

23 MR. BURNS: Yes.

24 MR. GOVER: Your areas of special  
25 interest include criminal law, international



1 criminal law and international human rights.

2 Is that correct, sir?

3 MR. BURNS: That is correct.

4 MR. GOVER: Your professional  
5 activities have included service in the  
6 international society for the reform of criminal  
7 law?

8 MR. BURNS: Yes.

9 MR. GOVER: And in addition, you  
10 became involved in the work of United Nations as  
11 it relates to the prohibition against torture.

12 Is that correct, sir?

13 MR. BURNS: That is correct.

14 MR. GOVER: Can you tell us what  
15 that worked entailed.

16 MR. BURNS: The seven so-called  
17 universal human rights treaties that are sponsored  
18 by the United Nations have committees which are  
19 elected by State parties that are responsible for  
20 ensuring their enforcement, and these are  
21 sometimes referred to as monitoring bodies or  
22 treaty reporting bodies.

23 In 1987, I was the Canadian  
24 nominee to the Committee Against Torture, which  
25 was the formal body administering the Convention

1           Against Torture, of which Canada was a party.

2                               We received reports, State  
3           reports, from countries as they ratified the  
4           Convention. We investigated allegations of  
5           systematic torture on the ground, assuming that a  
6           State has not reserved on that particular part of  
7           the Convention, and we received individual  
8           complaints, assuming that they came from countries  
9           that had opted into the individual complaints part  
10          of the Convention.

11                              All in all, our task was to ensure  
12          that the terms of the Convention were observed by  
13          the State parties.

14                              MR. GOVER: I understand that you  
15          were first elected in 1987 to the Committee  
16          Against Torture and that you were subsequently  
17          reelected in 1991, 1995 and 1999.

18                              Is that correct, sir?

19                              MR. BURNS: Yes, that is correct.

20                              MR. GOVER: And in fact you  
21          chaired the committee from 1998 through the end of  
22          your term in 2003.

23                              MR. BURNS: Yes.

24                              MR. GOVER: In your role as a  
25          member of the Committee Against Torture, in

1           addition to what you have already described, you  
2           also took part in the drafting of what is known as  
3           General Comment No. 01, I understand.

4                         MR. BURNS:  Yes.

5                         MR. GOVER:  We will deal with that  
6           in the course of your testimony, but it is found  
7           at tab 5 of Exhibit P-126.

8                                 Is that correct?

9                         MR. BURNS:  Yes.

10                         MR. GOVER:  In addition to the  
11           work that you carried out as a member of the  
12           Committee Against Torture, you also served as a  
13           country rapporteur.

14                                 Is that right?

15                         MR. BURNS:  A country rapporteur  
16           for many of the State reports, yes.

17                         MR. GOVER:  Can you tell us, sir,  
18           what the role of a country rapporteur is?

19                         MR. BURNS:  Yes.  A country  
20           rapporteur is responsible for ensuring that the  
21           State report is analyzed fully, that relevant  
22           issues are teased out from it, and that a whole  
23           series of questions that are regarded as relevant  
24           to the ultimate question "is the country actually  
25           implementing the terms of the Convention?" are

1 made available to the committee at the time of the  
2 actual hearing with the State delegation.

3 As well as that, the country  
4 rapporteurs tended to be those that met with and  
5 analyzed information from non-governmental  
6 organizations as well.

7 MR. GOVER: I understand, sir,  
8 that you have taken the time to write various  
9 articles about the Convention Against Torture.

10 Is that right?

11 MR. BURNS: Yes.

12 MR. GOVER: If we turn to your  
13 curriculum vitae, at page 8 of the publications  
14 record which is appended to your curriculum vitae,  
15 just to refer to a few of the many publications  
16 that appear there, on page 8 the third-last entry  
17 I see there is entitled, "The Convention Against  
18 Torture and Other Cruel, Inhuman or Degrading  
19 Treatment or Punishment", (with Joseph Voyame) in  
20 The Manual on Human Rights Reporting for the  
21 U.N.O. Centre for Human Rights.

22 Is that correct, sir?

23 MR. BURNS: That is right.

24 MR. GOVER: In addition, at the  
25 bottom of that page appears the publication "The

1 United Nations Convention Against Torture and  
2 Other Cruel, Inhuman or Degrading Treatment or How  
3 it is Still Better to Light a Candle than Curse  
4 the Darkness". And that was an article written  
5 with Obiora Okafor.

6 Is that correct?

7 MR. BURNS: That is correct.

8 MR. GOVER: That article in fact  
9 appears at tab 17 of Exhibit P-126.

10 Is that correct?

11 MR. BURNS: Yes.

12 MR. GOVER: And on the next page,  
13 page 9, I note that you have written about "Crimes  
14 Against Humanity: International Protection and  
15 International Developments" in papers that were  
16 presented in the year 2000.

17 Is that correct, sir?

18 MR. BURNS: Yes.

19 MR. GOVER: You have also written  
20 a paper entitled "The United Nations Committee  
21 Against Torture and its Role in Refugee  
22 Protection". That was a paper presented to the  
23 International Association of Refugee Law Judges,  
24 which was reprinted in the Georgetown Immigration  
25 Law Journal.

1 Is that correct, sir?

2 MR. BURNS: Yes.

3 MR. GOVER: And that paper is  
4 reproduced at tab 16 of Exhibit P-126. Am I  
5 correct?

6 MR. BURNS: Yes.

7 MR. GOVER: Further, you wrote the  
8 paper which appears as the next entry with Sean  
9 McBurney, "Impunity and the United Nations  
10 Convention Against Torture: A Shadow Play Without  
11 an Ending?". That was a chapter in a book  
12 entitled "Torture as Tort".

13 Is that correct, sir?

14 MR. BURNS: That is correct.

15 MR. GOVER: That chapter appears  
16 at tab 14 of Exhibit P-126.

17 MR. BURNS: Yes.

18 MR. GOVER: And the next entry is  
19 "The Convention Against Torture and Diminishing  
20 Impunity". This was a paper that you presented at  
21 a conference entitled The Changing Face of  
22 International Criminal Law, and it appears at tab  
23 15.

24 Is that correct, sir?

25 MR. BURNS: Yes.

1 MR. GOVER: And at the bottom of  
2 the page, I note three further papers that you  
3 have written in relation to "The Convention  
4 Against Torture"; two in 2002 and one in 2003, the  
5 last of which was a lecture given to the Vancouver  
6 Institute at the University of British Columbia  
7 entitled "The Convention Against Torture: From  
8 Pinochet to a World Without Borders".

9 That lecture, or those notes,  
10 appear at tab 18 of Exhibit P-126.

11 Is that correct, sir?

12 MR. BURNS: That is correct.

13 MR. GOVER: Those are my  
14 questions, Mr. Commissioner, during the  
15 qualification stage. I don't know if my friends  
16 have any questions or submissions.

17 THE COMMISSIONER: Any questions  
18 or submissions from other parties?

19 MR. WALDMAN: Just that we  
20 absolutely support his qualifications as an  
21 expert.

22 THE COMMISSIONER: All right.

23 MR. FOTHERGILL: No questions.

24 Thank you.

25 THE COMMISSIONER: I am satisfied

1           that Professor Burns should be qualified as an  
2           expert to express opinions with respect to  
3           international criminal law, international human  
4           rights and prohibitions against torture.

5                           MR. GOVER: Thank you very much,  
6           Commissioner.

7                           Professor Burns, if you could turn  
8           now to tab 2 of Exhibit P-126, please, here we  
9           have the Convention Against Torture and other  
10          Cruel, Inhuman or Degrading Treatment or  
11          Punishment.

12                           What I would ask you to do at this  
13          point is to provide us with an overview of the  
14          history of the Convention Against Torture.

15                           MR. BURNS: Well, it depends on  
16          who you speak to as to your view of the history of  
17          the Convention.

18                           I place much of the impetus on the  
19          Swiss Committee Against Torture because of the  
20          eminence of a couple of very, very significant  
21          Swiss intellectuals who happened to also be rather  
22          well-to-do at the time and managed to carry this  
23          agenda, and also the activity occurring out of  
24          London by Amnesty International.

25                           This started occurring in the '60s



1 and picked up speed in the '70s, and ultimately  
2 there was a resolution before the General Assembly  
3 and that spun off into the Convention Against  
4 Torture.

5 The Convention came into existence  
6 in 1987 with the 27th ratification, and from that  
7 point to the present day where there are now 139  
8 ratifications, the Convention tended to be, until  
9 the most recent Convention on Migratory Workers,  
10 tended to be the least ratified of all the  
11 international human rights conventions.

12 One can understand that, because  
13 the obligations that the Convention imposes on  
14 States parties are very general, quite deep in  
15 terms of impact on the domestic legal system, the  
16 criminal justice system in particular, and in many  
17 instances imposed relatively onerous economic  
18 burdens, particularly on smaller countries and  
19 micro-States.

20 They had to change their  
21 legislation. They had to organize their police  
22 forces, reorganize their military in terms of the  
23 way in which military dealt with prisoners,  
24 et cetera. They then had to ensure there was  
25 somebody in the Department of Foreign Affairs who

1 had the capacity to pull all the information  
2 together that the Convention requires to be  
3 presented to the committee and then, actually  
4 having done all that, come to Geneva for at least  
5 five days, which for small countries is a major  
6 economic burden.

7 So 139 States doesn't sound that  
8 large at the moment, but I think in fact it is a  
9 sign of real progress.

10 The Convention itself is broken  
11 into four parts.

12 The first part of the  
13 Convention -- and it all relates to the  
14 jurisdiction of the committee.

15 The first part of the  
16 Convention -- and I am not talking at it in terms  
17 of Article 1 through 33.

18 The first part of the Convention  
19 deals with what the committee regards as its most  
20 significant function, and that is the reporting  
21 function of States and the committee's receipt of  
22 the State reports.

23 The theory is, as I understand it,  
24 that if States are under an obligation to report  
25 how they have actually observed the Conventional

1 obligations, and do so in public and are subjected  
2 not merely to the scrutiny of the committee but  
3 the committee's conclusions and recommendations --  
4 and these are all then presented to the General  
5 Assembly at the next meeting of a particular  
6 committee -- then the public outing of countries  
7 that aren't doing what they ought to do will have  
8 an impact domestically.

9           It will then be up to domestic  
10 NGOs and domestic bodies to put pressure on the  
11 government to modify its behaviour and ensure that  
12 it comports with the Convention. This sometimes  
13 works and sometimes doesn't work, but that is the  
14 theory that underlies the Article 19 reporting  
15 obligation. It certainly takes up the bulk of the  
16 time of the committee.

17           Then you have Article 20. Article  
18 20 gives the committee the authority to engage in  
19 an investigation where there is well-founded  
20 evidence of systematic torture, assuming one  
21 thing: that the State party has not, at the time  
22 of the ratification, excluded the committee's  
23 jurisdiction in that respect.

24           Many countries have excluded it;  
25 other countries have not, and to their surprise

1           they have found that they are subjected to  
2           investigations of this sort.

3                       I think today every country knows  
4           that unless it actually makes known its rejection,  
5           then the committee has jurisdiction.

6                       The committee regards this as a  
7           very extensive interference with domestic  
8           sovereignty, and it has not engaged in that many  
9           of these investigations. It has received  
10          information. It has acted on at least seven. It  
11          has rejected some, and I am sure it has received  
12          information since I was a member of the committee.  
13          So we will be looking at that.

14                      It is a very intrusive function of  
15          the committees and it is a very expensive function  
16          of the committees, so it is not undertaken  
17          lightly.

18                      The third jurisdiction is also a  
19          crucial one, and this is the individual  
20          communication jurisdiction.

21                      Where a country has opted into the  
22          individual communication system, the committee can  
23          receive complaints from individuals that the State  
24          party concerned is in breach of the Convention and  
25          has in some way affected the interests of the

1 individual. Now, that is becoming an increasing  
2 part of the committee's functions. As lawyers  
3 become aware of it, it tends to become, if you  
4 like, a final further review mechanism from those  
5 countries that allow such individual complaints to  
6 occur.

7 MR. GOVER: By way of example, I  
8 would take you to Exhibit P-120, which I believe  
9 is also before you, and to tab 21.

10 MR. BURNS: That is Sweden and  
11 Egypt, is it?

12 MR. GOVER: It is the Agiza and  
13 Sweden matter which is described as a decision,  
14 but Communication No. 233/2003.

15 MR. BURNS: Yes, that is an  
16 illustration of it.

17 MR. GOVER: So you have described  
18 the three purposes so far of the Committee Against  
19 Torture.

20 MR. BURNS: There was a fourth  
21 that I don't think we need to spend any time on,  
22 and that is that States, and virtually every  
23 State, can opt into a system whereby one State  
24 party can complain about another State party  
25 breaching the Convention and the committee can act

1 as an arbiter.

2 To my knowledge it has never  
3 happened. Every one of the human rights treaties  
4 has the same provision. To my knowledge it has  
5 never happened in any one of those, and one can  
6 understand why.

7 MR. GOVER: How is the agenda set  
8 for the country reports received by the committee?

9 MR. BURNS: It is set by the  
10 secretariat initially. The secretariat does it  
11 chronologically. As they are received, it then  
12 chronologically just becomes part of the stack of  
13 State reports to be dealt with in either the  
14 coming session or the session after that.

15 Then it goes before the committee.  
16 The committee looks at the chronological order,  
17 and it may make some adjustments. And the  
18 adjustments could be made on, from memory, one of  
19 two bases:

20 If a country has been a State  
21 party for many years but has not reported, but has  
22 finally produced a report -- and this tends to be  
23 indicative of some of the smaller countries that  
24 just didn't have the resources to pull the thing  
25 together and get it to the committee -- then the

1 committee is likely to take it out of order and  
2 deal with that.

3 If it is a country where there  
4 appears to be some sort of crisis, according to  
5 information the committee has before it, it may  
6 very well pull it out of the chronological order  
7 and deal with that at the next session.

8 Bear in mind that we are only  
9 talking about, historically, two sessions a year.  
10 I am not quite sure if there are not three  
11 sessions a year now. But historically it was two  
12 sessions a year.

13 MR. GOVER: How long are the  
14 sessions?

15 MR. BURNS: Two weeks and three  
16 weeks.

17 And you can only get through six  
18 in two weeks and nine or ten in three weeks. The  
19 only reason that the committee has not been  
20 swamped and unable to cope is the tardiness in the  
21 States in their reporting. If they actually  
22 reported according to the obligations contained in  
23 the Convention, the committee would be completely  
24 unable to deal with it.

25 MR. GOVER: How many times has

1 Canada reported to the committee?

2 MR. BURNS: Oh, at least three,  
3 maybe four. At least three occasions.

4 I think you have a copy of their  
5 last report here in the material.

6 MR. GOVER: Yes. Also in Exhibit  
7 P-120 we have the consideration of the --

8 MR. BURNS: It will tell you at  
9 the top.

10 MR. GOVER: -- fourth and fifth  
11 periodic reports of Canada.

12 MR. BURNS: Canada was late with  
13 the fourth, and it combined the fourth and fifth.

14 MR. GOVER: Now I would like to  
15 discuss the signatories of the Convention. You  
16 told us that it became effective upon the 27th  
17 State party signing.

18 MR. BURNS: Yes.

19 MR. GOVER: In particular, can you  
20 tell us when Canada signed the Convention? And I  
21 understand, sir --

22 MR. BURNS: From memory, I cannot.

23 MR. GOVER: I understand that was  
24 in August of 1985, and that Canada ratified in  
25 June 1987.



1 MR. BURNS: I am sure you are  
2 right. I just don't recall that.

3 MR. GOVER: The United States  
4 signed in April 1988 and ratified in October 1994.

5 Is that correct?

6 MR. BURNS: Yes, that is correct.  
7 That I remember.

8 MR. GOVER: Now, Syria, has it  
9 become bound by the Convention Against Torture?

10 MR. BURNS: Yes. Syria ratified  
11 it last year, and at the time of ratification it  
12 excluded the committee's Article 20 jurisdiction.

13 At the same time, it did not opt  
14 into the Article 22 jurisdiction. So it basically  
15 has the reporting jurisdiction applying to it.

16 MR. GOVER: Now, Egypt, has it  
17 become a party to the Convention?

18 MR. BURNS: It certainly has. It  
19 has been a party for a very long time, one of the  
20 earlier parties.

21 MR. GOVER: And Morocco?

22 MR. BURNS: Morocco has also, yes.

23 MR. GOVER: And finally, what can  
24 you tell us, if anything, about Jordan?

25 MR. BURNS: Virtually nothing. I

1 know nothing about Jordan. I do not recall. I am  
2 sure Jordan reported during the time that I was a  
3 member of the committee, but I don't recall the  
4 Jordanian report.

5 MR. GOVER: Now I would like to  
6 turn to the substantive provisions of the  
7 Convention, and in particular, if I could take you  
8 back to tab 2 of Exhibit P-126, which is the  
9 Convention itself and the definition of torture  
10 which appears in Article 1.

11 MR. BURNS: Yes.

12 MR. GOVER: Can you take us  
13 through, Professor Burns, the essential elements  
14 of that definition?

15 MR. BURNS: Okay. This definition  
16 has been criticized by commentators because it is  
17 a purposive definition.

18 One must remember that the  
19 Convention Against Torture was virtually the last  
20 of those Conventions that was hammered out and  
21 entered into by the world community before 1991,  
22 prior to the collapse of the old Soviet empire.  
23 So cooperation between the Eastern Bloc and the  
24 Western Bloc was not that high, and suspicions  
25 were the order of the day. As a consequence, many

1 of the concepts that were entered into these  
2 Conventions tended to be compromised concepts.

3 I think that is evident when you  
4 look at the definition of torture here because it  
5 is pretty limited.

6 "For the purposes of this  
7 Convention, the term  
8 'torture' means any act by  
9 which severe pain or  
10 suffering ..."

11 Not pain and suffering or  
12 suffering, but severe pain. And that created  
13 enormous difficulty for the committee in its  
14 dealings, particularly with the State of Israel,  
15 over a period of about 12 or 15 years. Israel  
16 used to interrogate terrorist suspects quite  
17 rigorously, and the methodologies were, although  
18 not admitted to by Israel, there was very strong  
19 independent evidence of what these methodologies  
20 were.

21 And the committee, as is the  
22 committee's wont, tended to approach things with a  
23 State party initially relatively softly and then,  
24 if it didn't get cooperation from the State party,  
25 increased both the contact and the tenor of the

1 so-called constructive dialogue.

2 And that is the way they talk  
3 about it in the United Nations; that the  
4 engagement with the committee and the State party  
5 is a constructive dialogue. It is not one of us  
6 holding a hammer to the other, and it is not  
7 supposed to be a discourteous or even the sort of  
8 discussion that you have when there is a lis. It  
9 is not a common law plaintiff-defendant  
10 relationship; it is a genuine dialogue.

11 Well, ultimately, we concluded  
12 that Israel was guilty of a breach of the Article  
13 1 definition of torture, and I am very pleased to  
14 say that the Supreme Court of Israel, quite  
15 independently of the committee, has prohibited  
16 Israel from engaging in virtually all the types of  
17 interrogation methods that the committee was  
18 concerned with.

19 But what Israel did was to hide  
20 behind the concept of "severe". Whenever you get  
21 an adverb or adjective like "severe" attached to a  
22 concept, then that gives the person who wants to  
23 the opportunity of saying, "Hey, it is open  
24 textured, and what I am doing doesn't fall within  
25 it." And that was Israel's position: what they

1           were doing was causing a little bit of pain and  
2           suffering, but not severe.

3                       MR. GOVER: Understood. Are there  
4           any other aspects of the definition of torture in  
5           Article 1 that cause you to say that this is the  
6           product of compromise?

7                       MR. BURNS: I think the purposive  
8           aspect of it is also a product of compromise. If  
9           you have a look at the European Convention on  
10          Human Rights there is no reference to purpose. I  
11          was quite surprised that when they had the  
12          opportunity of giving meaning to the definition,  
13          they adopted the same position as is contained in  
14          Article 1 of the U.N. convention, and they decided  
15          to import purposes into it.

16                      If you have a look at the  
17          definition of crime against humanity in the Rome  
18          Statute relating to the International Criminal  
19          Court, there is absolutely no reference to  
20          purpose, none whatsoever. There are some other  
21          requirements, but certainly purpose is not part of  
22          it.

23                      MR. GOVER: So here, for example,  
24          you are referring to the words:

25                               "... for such purposes as

1                   obtaining from him or a third  
2                   person information or a  
3                   confession, punishing him for  
4                   an act he or a third person  
5                   has committed or is suspected  
6                   of having committed, or  
7                   intimidating or coercing him  
8                   or a third person, or for any  
9                   reason based on  
10                  discrimination of any  
11                  kind..."

12                   MR. BURNS: That is right.

13                   MR. GOVER: Then it continues  
14                  about the capacity of the person who has  
15                  instigated, or inflicted, or consented to or  
16                  acquiesced in the infliction of the --

17                   MR. BURNS: Right. That of course  
18                  is open-textured too. To a common lawyer, it  
19                  immediately smacks of vicarious liability. But,  
20                  in fact, the committee has given it a very, very  
21                  broad interpretation. The interpretation was  
22                  designed to ensure that a State party did not hide  
23                  behind a very technical attribution of that  
24                  concept which would have led to a person being  
25                  refouled to a place which was a failed State where

1 the chances of him either being executed or  
2 tortured were, in the committee's eyes, very high  
3 indeed.

4 So this open texturedness of  
5 language can work in different directions.

6 We have never had a problem  
7 applying it, I might add. I mean, we criticize  
8 the purposive reference, but virtually every case  
9 that we have had in front of us fell within one of  
10 the purposes.

11 MR. GOVER: Right. And then, of  
12 course, the definition also refers to the role of  
13 a public official or other person acting in an  
14 official capacity in inflicting, instigating,  
15 consenting to or acquiescing in the treatment.

16 Is that right?

17 MR. BURNS: Yes. We take the view  
18 that that extends to such things as paramilitaries  
19 or any proxy for the government whatsoever. And  
20 in the case that I was referring to a moment ago,  
21 we extended it to a failed State where there is no  
22 government but where certain tribal groups were  
23 exercising quasi-governmental capacity within  
24 small geographic areas. So we extended it that  
25 far.

1                   MR. GOVER: So then am I correct  
2                   in summarizing -- and I am a little fearful in  
3                   doing this with a law professor. But am I correct  
4                   in summarizing the three elements as these:

5                                 (1) severe pain or suffering;

6                                 (2) that is inflicted for one of  
7                   the specific purposes outlined; and

8                                 (3) by or at the instigation,  
9                   et cetera, of some sort of State agency or proxy  
10                  for a State agency?

11                  MR. BURNS: Yes. The one other  
12                  thing that I don't think you want to waste time on  
13                  this is it doesn't include pain or suffering  
14                  arising only from inherent and incidental to  
15                  lawful sanctions. That is the conflict between  
16                  the western European and the United States' view  
17                  of capital punishment.

18                                 It is also a conflict that arose  
19                  when we met with Saudi Arabia, which applies  
20                  fundamental sharia law, and their argument was  
21                  that according to their domestic legal system,  
22                  sharia law, with its various forms of sanction,  
23                  applies because that is their domestic law and it  
24                  is excluded. All those sanctions are lawful  
25                  according to their domestic law.



1                   They reacted very strongly when I  
2                   asked them to consider the question that lawful  
3                   sanctions means lawful according to domestic and  
4                   international law, because many of the sanctions  
5                   probably fell outside those that were lawful at  
6                   international law. So we had a very long, loud,  
7                   constructive dialogue.

8                   MR. GOVER: Right. Now, earlier  
9                   this week we heard about differing practices of  
10                  various countries in ratifying treaties, and in  
11                  particular we heard about how the ratification  
12                  process in the United States involves obtaining  
13                  the advice and consent of the Senate. We have  
14                  heard some evidence as well about reservations and  
15                  understandings made by the Senate, or publicized  
16                  by the Senate, at the time of ratifying the  
17                  Convention Against Torture.

18                  You have the U.S. reservations,  
19                  declarations and understandings in relation to the  
20                  Convention Against Torture and Other Cruel,  
21                  Inhuman or Degrading Treatment or Punishment at  
22                  tab 4 of Exhibit P-126.

23                  MR. BURNS: Yes.

24                  MR. GOVER: In particular, can I  
25                  ask you to comment on the Senate's advice and

1 consent as it relates initially to Article 1, and  
2 then other aspects of the Convention.

3 First of all, do you think that  
4 the --

5 MR. BURNS: If you are asking me  
6 to comment on whether or not, in my view, the  
7 constitutional provisions in the United States are  
8 roughly similar to the Article 16 provisions -- is  
9 that what it is?

10 MR. GOVER: Well, to begin with,  
11 for example, at page 2 of 3, the United States  
12 sets out its understanding -- well, first of all,  
13 on page 1.

14 "... Article 1 is intended to  
15 apply only to acts directed  
16 against persons in the  
17 offender's custody or  
18 physical control."

19 And further above that, the United  
20 States sets out its understanding that:

21 "... in order to constitute  
22 torture, an act must be  
23 specifically intended to  
24 inflict severe physical or  
25 mental pain or suffering and

1                   that mental pain or suffering  
2                   refers to prolonged mental  
3                   harm caused by or resulting  
4                   from: (1) the intentional  
5                   infliction or threatened  
6                   infliction of severe physical  
7                   pain or suffering; (2) the  
8                   administration or  
9                   application, or threatened  
10                  administration or  
11                  application..."

12                   MR. BURNS: Okay.

13                   MR. GOVER: Can you comment on  
14                  that?

15                   MR. BURNS: Yes, I am willing to  
16                  comment on both those points.

17                   I will take the latter one first.

18                   The United States is bound by the  
19                  Vienna Convention on the interpretation of  
20                  treaties, as all States are that ratified it, and  
21                  it cannot interpret the treaty in a way which is  
22                  inconsistent with the terms or purpose of the  
23                  treaty.

24                   The notion of prolongation, as  
25                  distinct from transitory, which seems to flow out

1 of the U.S. understanding, is one that I find --  
2 and if I were sitting on the committee and looking  
3 at that that I would probably disagree with and  
4 require the United States to justify in terms of  
5 the purposes of the Convention.

6 In my view, torture can occur  
7 where the pain or suffering is transitory.

8 I would take the view, for  
9 example, that where electrodes are attached to  
10 genitalia and only one severe jolt is received,  
11 that that could, and in my view would, fall within  
12 the definition of torture within Article 1, even  
13 if you could introduce medical evidence that the  
14 pain was transitory and medical evidence that this  
15 individual did not suffer more than that and  
16 mentally was not shocked by it particularly.

17 I think, also, you have to take  
18 into account the circumstances in which the  
19 application of force or threatened force is  
20 occurring. If it is occurring in degrading  
21 circumstances, that seems to me to reinforce the  
22 view that what is happening is torture, even  
23 although it might be a single instance, even  
24 though the pain may not last very long. One shot  
25 is very often enough to get what you want from

1           someone that you are interrogating.  They don't  
2           want any more of it.

3                               So I have difficulty with their  
4           understanding.

5                               I have -- sorry, what was the  
6           first one again?

7                               MR. GOVER:  Well, I would like to  
8           take you back to this concept of vicarious  
9           liability that you mentioned earlier --

10                              MR. BURNS:  Oh, yes, yes.

11                              MR. GOVER:  At page 2, the United  
12           States set out its understanding that the term  
13           acquiescence required that:

14                              "... the public official,  
15                              prior to the activity  
16                              constituting torture, have  
17                              awareness of such activity  
18                              and thereafter breach his  
19                              legal responsibility to  
20                              intervene to prevent such  
21                              activity."

22                              MR. BURNS:  Right.  The reference  
23           you made in your original reading was with  
24           reference to "within their custody or physical  
25           control".

1 MR. GOVER: Right.

2 MR. BURNS: And I think that is  
3 just too narrow an interpretation and inconsistent  
4 with certainly the few instances that the  
5 committee has construed Article 1 as extending to.  
6 It is not difficult to at least conceive of a  
7 situation where, in a situation of international  
8 disorder, one State utilizes another State to act  
9 as proxy. It is not within their physical  
10 control, it is not within the territory, not under  
11 arrest, not under their custody, but the State is  
12 aware full well of what the circumstances of  
13 handing the person over to another State will be.

14 I have absolutely no doubt -- or I  
15 would suggest, with respect, that the committee  
16 would construe that as a requisite construction of  
17 that concept of acting in an official capacity in  
18 Article 1.

19 MR. GOVER: Right. And then as  
20 for this vicarious liability concept at the top of  
21 page 2, the term acquiescence is understood in a  
22 particular way.

23 What is your view in relation to  
24 the U.S. understanding in that respect?

25 MR. BURNS: The way it is

1           expressed is relatively narrow, and probably is  
2           narrower than the common law's domestic concept of  
3           constructive knowledge or wilful blindness. I  
4           doubt, with respect, that it is consistent with  
5           the purpose of the Convention: that the State,  
6           the public official or officials concerned must  
7           know of the specific circumstances.

8                         I suspect that the committee is  
9           likely to take the view it is sufficient if the  
10          public officials should have been aware -- it goes  
11          beyond just negligence -- but are aware of crucial  
12          facts that place them on notice but they choose  
13          not to take them into account or just ignore them,  
14          for whatever reason, which is effectively the way  
15          in which the same concept of wilful blindness has  
16          emerged in domestic criminal law in Canada, the  
17          U.K., Australia and New Zealand. I can't speak  
18          for the United States; I have never looked at it.

19                        So it is very narrow, and I  
20          suspect if it were applied literally the way in  
21          which it is referred to there, it may very well  
22          frustrate a rather important function of the  
23          Convention.

24                        MR. GOVER: If I could take you  
25          back to the Convention itself and Article 1, I

1 note that within Article 1, clause 2 provides  
2 that:

3 "This article is without  
4 prejudice to any  
5 international instrument or  
6 national legislation which  
7 does or may contain  
8 provisions of wider  
9 application."

10 MR. BURNS: Right.

11 MR. GOVER: Do you have any  
12 comment about that?

13 MR. BURNS: I knew you were going  
14 to ask that question, and I should have done a  
15 little work on it.

16 In fact, the European Convention  
17 doesn't have anything on that. As far as I am  
18 aware, it doesn't bear on it.

19 I should have looked at the  
20 Organization of American States Convention. But,  
21 no, I really can't comment. I am not aware of  
22 what the international instruments are that might  
23 be wider than the Convention Against Torture.

24 MR. GOVER: Fair enough. I would  
25 like to ask you now for some general comment in



1 relation to Article 2, please.

2 Article 2 provides in the first  
3 clause:

4 "Each State Party shall take  
5 effective legislative,  
6 administrative, judicial or  
7 other measures to prevent  
8 acts of torture in any  
9 territory under its  
10 jurisdiction."

11 MR. BURNS: Okay. That one is  
12 probably the first question that the committee  
13 asks of States, particularly when they are  
14 introducing their first report.

15 What the committee is looking for  
16 is initially a criminalization of the crime of  
17 torture, together with aiding, abetting,  
18 conspiring and being a party -- or being, after  
19 the fact, a party to the commission of torture.

20 What the committee is also looking  
21 for is a definition of torture domestically that  
22 is in terms identical to that contained in Article  
23 1.

24 Regrettably, very few countries  
25 have done that. Canada has done that. The U.K.

1 has now done it. France has now done it. A  
2 number of countries have -- Australia, New  
3 Zealand -- incorporated that definition.

4 And there are two reasons, I  
5 think, why it is important to have that definition  
6 incorporated.

7 The first is if you think about  
8 the way in which information is collected to be  
9 brought to the committee, it is initially  
10 collected by the foot soldiers, the police  
11 officers in the streets. They are the guys who  
12 write the reports. Those reports are then  
13 analyzed, then they are aggregated and they go up,  
14 and then ultimately the guys in justice pull this  
15 stuff together and try to fit it within whatever  
16 the international treaty is that they are having  
17 to deal with.

18 How on earth can you persuade a  
19 committee in Geneva about the rate of torture in a  
20 domestic situation if you don't have (a) a  
21 domestic crime of torture and (b) the same crime  
22 of torture that we are talking about in the  
23 Convention? How can you do it?

24 Well, all you can do is say we  
25 have murder, we have manslaughter, we have

1 assault, we have aggravated assault, and we have  
2 gone through this stuff and we have disaggregated  
3 the ones we think might be torture.

4 Well, that really is a very, very  
5 amorphous and unscientific way of trying to  
6 persuade anybody of anything.

7 However, I have to tell you that  
8 the vast bulk of the States have not incorporated  
9 a crime of torture domestically, taking the view  
10 that their manslaughter, murder and assault  
11 provisions are sufficient, and some of which have  
12 not adopted specifically the definition, such as  
13 the U.S.

14 The other reason is a very simple  
15 one, and that is we think it has precatory  
16 persuasive value if it is incorporated.

17 MR. GOVER: Just by overview, I  
18 understand as well that Article 2 expressly  
19 excludes the defence of superior orders.

20 MR. BURNS: Yes.

21 MR. GOVER: And expressly excludes  
22 the concept that exceptional circumstances, such  
23 as a state of war, or political instability, or  
24 other public emergency may be used as a  
25 justification for torture.

1 MR. BURNS: Right. It is not the  
2 only convention that does that. The International  
3 Covenant on Political and Legal Rights also has a  
4 very specific provision, and virtually every  
5 country has ratified that.

6 MR. GOVER: Let's turn then to  
7 Article 3, which is sometimes referred to as the  
8 nonrefoulement obligation.

9 MR. BURNS: Yes.

10 MR. GOVER: It provides in the  
11 first part:

12 "No State Party shall expel,  
13 return ('refouler') or  
14 extradite a person to another  
15 State where there are  
16 substantial grounds for  
17 believing that he would be in  
18 danger of being subjected to  
19 torture."

20 And in the second part:

21 "For the purpose of  
22 determining whether there are  
23 such grounds, the competent  
24 authorities shall take into  
25 account all relevant

1                   considerations including,  
2                   where applicable, the in the  
3                   State concerned of a  
4                   consistent pattern of gross,  
5                   flagrant or mass violations  
6                   of human rights."

7                   MR. BURNS: Yes.

8                   MR. GOVER: How has the committee  
9                   interpreted this obligation?

10                  MR. BURNS: The committee regards  
11                  this as an absolutely crucial part of the  
12                  Convention.

13                         The first point to make is the  
14                         committee has specifically, on every occasion it  
15                         has examined it, taken the position it is  
16                         non-derogatable. There can be no derogation. And  
17                         that may have some relevance to another question  
18                         you want to ask a little later.

19                         But so far as the international  
20                         obligations are concerned, the committee is clear:  
21                         no State can justify derogation of Article 3.

22                         MR. GOVER: If I can take you back  
23                         to tab 4, and that the is United States  
24                         reservations and understandings at the time of  
25                         ratifying the Convention, and especially to page 2

1 of 3, at the top of the page beside (2):

2 "That the United States  
3 understands the phrase,  
4 'where there are substantial  
5 grounds for believing that he  
6 may be in danger of being  
7 subjected to torture,' as  
8 used in Article 3 of the  
9 Convention, to mean 'if it is  
10 more likely than not that he  
11 would be tortured.'"

12 Do you have any comment in  
13 relation to that, Professor Burns?

14 MR. BURNS: Well, I think it is  
15 fairly obvious, in the light of the general  
16 comment of the committee, that the committee's  
17 view is that to require the civil standard of more  
18 probable than not in every case is not compliance  
19 with Article 3.

20 MR. GOVER: May I interrupt you  
21 just to point out that General Comment No. 01 of  
22 the committee appears at tab 5 of Exhibit P-126,  
23 and I believe you are referring to point 6 at page  
24 2.

25 MR. BURNS: Yes.

1 MR. GOVER: You have just  
2 testified that, in your view, the concept of  
3 meeting what we in Canada call the civil burden of  
4 proof as part of the standard which is contained  
5 in Article 3 of the Convention Against Torture is  
6 not consistent with the Convention itself in  
7 Article 3 or the purpose of it.

8 Is that right?

9 MR. BURNS: It is the purpose of  
10 it because the Convention doesn't say anything  
11 about it, and the committee has construed it, in  
12 terms of its purpose, to say this is what is  
13 expected of States parties.

14 Basically, the committee's view is  
15 that to always impose a probability of torture is  
16 in many instances too high. It would preclude --  
17 I should say it would preclude a State from  
18 feeling obliged not to send a person back to a  
19 particular country in circumstances where the  
20 committee feels the State should refrain.

21 If you look at it, as I did, very  
22 much in the same way as the House of Lords did in  
23 Baldman Stern when it was analysing the concept of  
24 risk and what sorts of risks require a reasonable  
25 person to respond and modify behaviour, in that

1 case Lord Reeves said a reasonable person is  
2 actuated by material, or subsequently it was  
3 called real risks in number two.

4 Material risks are those risks  
5 that would legitimately influence one's behaviour.

6 There are many circumstances  
7 involving the risk of torture where there is a  
8 risk that goes beyond mere theory and mere  
9 suspicion, but it may not, depending on what is  
10 ultimately decided, amount to a probability.

11 But given the nature of the risk,  
12 if you look at the history of the State concerned,  
13 the sort of interrogation methods that they adopt,  
14 the status of the individual -- it may be a person  
15 who belongs to a group that is particularly  
16 vulnerable in this country.

17 Kurds, for example, historically,  
18 have been very vulnerable in a number of  
19 countries, and the mere fact of being a Kurd puts  
20 you into a different risk category than being  
21 anybody else in those countries.

22 So taking these all into account,  
23 although we might if we were a legal tribunal  
24 sitting there looking objectively saying, "You  
25 know, you just haven't shown me it is more



1           probable than not," we have taken the view that  
2           given the purposes of the Convention, in those  
3           circumstances where there is a real or material  
4           risk, even though it may not be a probability, a  
5           State is under an obligation to exercise its  
6           choice in favour of the individual not running  
7           those risks.

8                           MR. GOVER: How do you factor into  
9           that analysis the pattern within the State -- and  
10          I am referring now to the second part of Article  
11          3 -- of a consistent pattern of gross, flagrant or  
12          mass violations of human rights?

13                          MR. BURNS: It is a really  
14          important factor and historically human rights  
15          bodies have regarded that as a crucial factor.  
16          But there have been a large number of cases that  
17          we have dealt with where there was a State where  
18          there were gross patterns of violations of human  
19          rights where the individual just didn't fit  
20          because of status into the category that was going  
21          to be exposed to it.

22                          For example -- again, I have to be  
23          careful here. In old Congo -- which is now broken  
24          up into different Congos. But I believe it was  
25          the old Republic of Congo. If you happened to be

1 a former military person who was being refouled,  
2 the evidence was clear: the moment you landed and  
3 you were in the hands of the people at the  
4 airport, you were pretty badly treated. They just  
5 had this practice of dealing with people who had  
6 displayed such disaffection to the State very  
7 rigorously.

8 But that didn't necessarily apply  
9 to other people who fell into different types of  
10 categories. We have in fact agreed that States  
11 can send others back where it was considered that  
12 the risk was very low, it was not a real risk,  
13 despite the fact that that was a country where you  
14 could argue that it fitted into the Article 3,  
15 paragraph 2, type of fact pattern.

16 MR. GOVER: Right. And could you  
17 take us through what the General Comment No. 01  
18 says then about standard of proof?

19 MR. BURNS: Okay. That is tab...?

20 MR. GOVER: That will be tab 5.

21 This is General Comment No. 01,  
22 dated November 21, 1997. This was at a time when  
23 you were on the committee.

24 Is that correct, Professor Burns?

25 MR. BURNS: Yes.

1 MR. GOVER: Were you chair of the  
2 committee then?

3 MR. BURNS: I am just trying to  
4 remember. What date was that?

5 MR. GOVER: November 21st, 1997.

6 MR. BURNS: 1997.

7 MR. GOVER: Actually, you became  
8 chair in 1998.

9 MR. BURNS: Yes. So I was not the  
10 chair.

11 MR. GOVER: Regardless of that,  
12 were you involved in the drafting of this?

13 MR. BURNS: Oh yes, yes. There  
14 were two of us that drafted this. The other  
15 member is now a judge of the Human Rights Court in  
16 Europe.

17 What we basically did was to set  
18 out what we understood the States were in need of,  
19 and that is direction concerning their obligations  
20 under Article 3. It became clear to us that they  
21 needed to know, because many States were viewing  
22 it differently and their practices were different.  
23 We basically formulated a set of practices which  
24 indicated that a State would be in breach of  
25 Article 3 if it returned a person to a State where

1           there is "a real or material risk of torture".

2                         We stated that the test does not  
3           have to go to the point of being highly probable,  
4           and that, in a sense, is a tip of the cap to the  
5           Americans. We didn't want to confront that  
6           directly at that point, as I recall, because I am  
7           not sure that everybody on the committee would  
8           have agreed or disagreed with it.

9                         But in any event, everybody agreed  
10          it doesn't go to the standard of high probability;  
11          it goes beyond mere theory or suspicion. And  
12          basically as long as there is a risk, in my view,  
13          that could be characterized as material risk, that  
14          would be sufficient for the State to be under an  
15          obligation not to return or extradite a person to  
16          that country of risk.

17                        MR. GOVER: Would the fact that a  
18          State has a notoriously poor record for violating  
19          human rights, would that in itself be sufficient  
20          to meet the standard?

21                        MR. BURNS: Well, as a lawyer, I  
22          have to say no, that is not in and of itself,  
23          because it has to be the individual that is at  
24          risk, which means you have to demonstrate this  
25          individual, in these circumstances, is at risk and

1           that the risk goes to a point where you feel you  
2           are under an obligation not to send back.

3                         You would take into account the  
4           conditions. You would take into account the known  
5           disposition of the State to people of the sort.  
6           You are under an obligation to do that. Those are  
7           the ordinary sorts of facts that you would take  
8           into account. But at the end of the day, as any  
9           adjudicator must, you have to ask yourself whether  
10          on the totality of the facts and these individual  
11          facts, including the record of this country, was  
12          this person at risk in the sense in which it is  
13          referred to in the general comment of being  
14          tortured?

15                        And if the answer is yes, in my  
16          view, you are under an obligation under the  
17          Convention not to return or extradite that person  
18          or deport that person.

19                        MR. GOVER: Can you comment on the  
20          role of diplomatic assurances, and in particular  
21          where there may be a risk which is beyond mere  
22          theory or suspicion, approximating even something  
23          that you don't have to meet here, the risk of  
24          highly probable, let's say? Does the mere fact of  
25          a diplomatic assurance then permit a State to

1 return someone to another country where there is a  
2 risk of torture?

3 MR. BURNS: Again, that would  
4 depend on the circumstances. You are dealing with  
5 the diplomatic world, and you are dealing with  
6 States that exercise their own internal  
7 jurisdiction, and jurisdiction with other States,  
8 on the basis of comity and reciprocity.

9 If a State gives an assurance and  
10 breaches the assurance, that is the end of it.  
11 That would be the end of it vis-à-vis the State  
12 that sent the person back but it would also be the  
13 end of it insofar as all future attempts at  
14 assurances from other States would be concerned.

15 And certainly the committee, I am  
16 sure, would take the view that to rely on the  
17 assurances of a State that had breached an  
18 undertaking would be really, really bad behaviour  
19 on the part of the State concerned.

20 It is most unusual for a State to  
21 breach a diplomatic assurance. But you do get  
22 States sometimes trying to weasel and sort of  
23 taking the position it wasn't a real diplomatic  
24 assurance, and it was really the State sending the  
25 person back that was looking for a ground to send

1           them back and they misinterpreted the range of the  
2           assurance, et cetera.

3                           MR. GOVER: Right. Moving on then  
4           to Article 10 of the Convention, taking us back to  
5           tab 2, I note that Article 10 creates an  
6           obligation on State parties to educate officials,  
7           including law enforcement officers, who may be  
8           involved in the treatment of individuals who are  
9           arrested, detained or imprisoned.

10                           Can you tell us what the  
11           committee's experience is in relation to this  
12           provision?

13                           MR. BURNS: I am not sure that  
14           this article is very satisfactorily applied in the  
15           dealings between States parties and the committee,  
16           because in virtually every case there will be a  
17           few paragraphs by the State party in their report  
18           saying that in the police colleges, in the  
19           military, educational programs, the personnel are  
20           advised they are not to torture people. It may  
21           well be that this is a one-day or half-a-day or  
22           two-hour portion of a 10-week or a 12-month  
23           program. It is not at all clear very often.

24                           But virtually every country claims  
25           it does train its personnel not to torture.

1                   Now, we know that some do, but  
2                   these are countries where torture is not endemic  
3                   anyway. Denmark has a big program for its police  
4                   officers and medical personnel, but torture is not  
5                   a problem in Denmark.

6                   It is a tricky one, once again,  
7                   because it involves resources. The committee  
8                   would like to see more schools and military  
9                   training establishments, police colleges that have  
10                  big blocks of training dedicated to this. But  
11                  this is only one small part of these people's  
12                  training generally.

13                  Every State says they do it. To  
14                  what extent one can take that with a grain of salt  
15                  or otherwise, is not entirely clear. Some  
16                  countries in fact do do it, and those countries  
17                  give us lots of paper on it.

18                  MR. GOVER: Right. We have  
19                  discussed rather extensively the definition of  
20                  torture in Article 1.

21                  Article 16 addresses cruel,  
22                  inhuman, or degrading treatment or punishment.

23                  MR. BURNS: Yes.

24                  MR. GOVER: Do you have any  
25                  comment regarding Article 16, and in particular I



1 note that we see the words again:

2 "... at the instigation of or  
3 with the consent or  
4 acquiescence of a public  
5 official or other person  
6 acting in an official  
7 capacity ..."

8 In relation to the infliction of  
9 cruel, inhuman or degrading treatment or  
10 punishment not amounting to torture.

11 Is that correct?

12 MR. BURNS: Yes, that is correct.

13 Article 16 does not receive, in my  
14 opinion, the focus it should receive in the State  
15 reports and by the committee as a consequence.  
16 The focus tends to be on torture, and one can  
17 understand that. But in reality, if you look at  
18 the whole range of what is happening in States,  
19 Article 16 probably is more problematic than  
20 Article 1.

21 But it is the Convention Against  
22 Torture, and that is how people focus.

23 I have no doubt we would interpret  
24 acquiescence of a public official in the same way  
25 they did in Article 1, give it a very broad

1 construction, and it would extend to circumstances  
2 where in a failed State you do have a group acting  
3 as though they were a government agency, or if you  
4 have a situation where some group is acting as  
5 proxy, even though they are not paramilitaries in  
6 the traditional sense. It would certainly extend  
7 to paramilitaries.

8 I have no doubt it would extend,  
9 for example, in the U.K. and in the United States  
10 to private incarceration modalities, using  
11 academic jargon, private prisons.

12 MR. GOVER: Is there a  
13 nonrefoulment obligation in relation to cruel,  
14 inhuman or degrading treatment?

15 MR. BURNS: No, there is not, not  
16 under this convention.

17 MR. GOVER: Is there elsewhere in  
18 international law?

19 MR. BURNS: I am not familiar with  
20 the conventional obligation, and I am not familiar  
21 with a customary international law obligation,  
22 although if I looked at that, it may very well be  
23 that there is one emerging in the light of  
24 developments over the last five or six years.

25 MR. GOVER: Also, in Exhibit

1 P-120, we have -- that is the thicker volume to  
2 which I referred you earlier --

3 THE COMMISSIONER: The Registrar  
4 will get it.

5 MR. GOVER: We have at tab 23 the  
6 "Conclusions and Recommendations of the Committee  
7 Against Torture" at the conclusion of the 34th  
8 session, and these conclusions and recommendations  
9 related to Canada. This was the subject of some  
10 comment by the witnesses yesterday.

11 Subjects of concern and  
12 recommendations are set out at pages 2 through 4  
13 of the conclusions and recommendations of the  
14 committee.

15 You have taken the time before  
16 testifying to review these, and in particular,  
17 before we get to that, can you tell me how the  
18 committee goes about formulating its conclusions  
19 and recommendations?

20 And you are smiling, I note,  
21 Professor Burns.

22 MR. BURNS: Well the first thing  
23 you must recognise is that the committee is not a  
24 court. The committee isn't even an administrative  
25 review body. The committee is a monitoring body.

1           So it does have rules of procedure, and it does  
2           observe the rules of procedure, but the members of  
3           the committee are not necessarily legally trained.

4                        I think there is at least one  
5           third at the moment who are not legally trained.

6                        And the way in which the  
7           committee -- and this is true of all committees,  
8           not just the committee against torture -- is that  
9           a couple of members of the committee take the lead  
10          role. They make sure that everything is read, all  
11          the arguments are teased out, and they are the  
12          ones who tend to draft the recommendations and  
13          conclusions and subjects of concern which are  
14          either adopted or not adopted by the bulk of  
15          committee.

16                       As well as that, in recent years,  
17          the non-governmental organizations have become  
18          rather more sophisticated and many of them have  
19          representation prior to the meetings and they meet  
20          with members of the committee and they press  
21          points of view upon the members of the committee.

22                       Now, these are usually the same  
23          points of view that are on paper that the  
24          committee has already received, but of course it  
25          has more of an impact if you are dealing with

1 people who claim to have firsthand knowledge.

2 Again, bear in mind that the  
3 committee is not like a court. It is not dealing  
4 with primary evidence. It is dealing with  
5 everything on the record, some of which may be  
6 true and much of it may be untrue. Even States  
7 parties may be gilding the lily when they are  
8 presenting this stuff to the committee.

9 So the committee has all this  
10 information, has met with people, has listened to  
11 the States party. The States party has had a lot  
12 of questions put to it. It goes away and comes  
13 back with the answers, and then the conclusions  
14 and recommendations and matters of concern are  
15 formulated. They are formulated in private and  
16 they are just laid on the States party when the  
17 conclusions have been reached, et cetera.

18 MR. GOVER: Right. And then these  
19 particular subjects of concern in relation to  
20 Canada at pages 2 and 3 --

21 MR. BURNS: Yes?

22 MR. GOVER: Referring to, for  
23 example, the Supreme Court of Canada's decision in  
24 Suresh v. Minister of Citizenship and Immigration;  
25 referring to the alleged roles of State party

1 authorities in the expulsion of Mr. Arar from the  
2 United States to Syria, where torture was  
3 reported; and then referring as well to the  
4 provisions in the Immigration and Refugee  
5 Protection Act 2002, among other subjects of  
6 concern.

7 Do you have anything to say about  
8 the subjects of concern that the Convention  
9 Against Torture has identified here?

10 MR. BURNS: (a), (b) and (c). I  
11 really don't have any comment on (b).

12 MR. GOVER: Which is the Arar case  
13 in our particular --

14 MR. BURNS: That is this case,  
15 yes. I believe that is what this Commission is  
16 designed for.

17 (c), again, I really haven't  
18 considered that very strongly.

19 (a) is one that gives me  
20 considerable concern.

21 MR. GOVER: That is in relation to  
22 the Suresh case.

23 MR. BURNS: Yes.

24 MR. GOVER: Why so?

25 MR. BURNS: Well, it appears on

1           one interpretation, although many people would say  
2           the only interpretation, of the Suresh case that  
3           there is still an avenue of opportunity for the  
4           State to, that is to say Canada, to refoule  
5           someone in circumstances where there is "a real  
6           risk of torture".

7                           My opinion is that Article 3 of  
8           the Convention precludes that. Canada has  
9           ratified the Convention, and that is a legal  
10          obligation imposed upon the Canadian government,  
11          and whatever the domestic law may be,  
12          internationally the Canadian government is in  
13          breach in those circumstances if it were to  
14          refoule someone.

15                          Personally, I cannot conceive of  
16          the Canadian government refouling anybody where  
17          there is a real risk of torture. I would be  
18          absolutely shocked and dismayed if that happened.

19                          I have lectured to immigration  
20          people. I have talked to the people in Foreign  
21          Affairs. They all understand, to my knowledge,  
22          the ones I have spoken to, the obligation under  
23          Article 3.

24                          MR. GOVER: By the way, I should  
25          have asked you: In consideration of country

1 reports, and in particular country reports from  
2 Canada, as a member of the committee from Canada,  
3 were you permitted to participate?

4 MR. BURNS: No, no. I recuse  
5 myself from anything having to do with Canada.

6 MR. GOVER: If I could take your  
7 attention now to the Recommendations, starting at  
8 page 3 and carrying over to page 4, the first  
9 recommendation relates to respecting the absolute  
10 nature of Article 3 -- that is the nonrefoulement  
11 obligation -- in all circumstances, and fully to  
12 incorporate the provision of Article 3 into the  
13 State party's domestic law.

14 Is that correct?

15 MR. BURNS: Yes.

16 MR. GOVER: Do you have any  
17 comments in relation to that recommendation made  
18 by the committee?

19 MR. BURNS: Well, I guess in the  
20 light of Suresh, it would be desirable that the  
21 government do something along those lines,  
22 although I would have thought that it is using a  
23 sledgehammer to crack a nut because in my opinion  
24 they are under that obligation anyway.

25 MR. GOVER: Right. The only other



1 two recommendations that I would like to take your  
2 attention to are, first, (d):

3 "(d) the State party should  
4 insist on unrestricted  
5 consular access to its  
6 nationals who are in  
7 detention abroad, with the  
8 facility for unmonitored  
9 meetings and, if required,  
10 appropriate medical  
11 expertise."

12 Do you have any comment in  
13 relation to that recommendation, Professor Burns?

14 MR. BURNS: No, that is standard.  
15 Most countries do in fact insist on unrestricted  
16 access to nationals who are in custody abroad.  
17 The big problem is 98 per cent of the time they  
18 don't know their nationals are in custody abroad,  
19 and in the bulk of those cases their nationals  
20 don't want Canada to know they are in custody.

21 MR. GOVER: Right. And then the  
22 subject of diplomatic assurances bears comment in  
23 the next recommendation which reads as follows:

24 "(c) given the absolute  
25 nature of the prohibition

1                   against refoulement contained  
2                   in article 3 of the  
3                   Convention, the State party  
4                   should provide the Committee  
5                   with details on how many  
6                   cases of extradition or  
7                   removal subject to the  
8                   receipt of 'diplomatic  
9                   assurances' or guarantees  
10                  have occurred since 11  
11                  September 2001, what the  
12                  State party's minimum  
13                  contents are for such  
14                  assurances or guarantees,  
15                  what measures or subsequent  
16                  monitoring it has undertaken  
17                  in such cases and the legal  
18                  enforceability of the  
19                  assurances or guarantees."

20                               Do you have any comment in  
21                  relation to that?

22                               MR. BURNS: This is almost a "have  
23                  you stop beating your sister" type of conclusion.

24                               Much of it I agree with. I think  
25                  a country like Canada ought to be able to, and

1           should be prepared to, reveal what its practices  
2           are relating to diplomatic assurances. To that  
3           extent it ought to be prepared to reveal which  
4           countries it has dealt with upon this basis, and  
5           also what follow-up it has initiated to see  
6           whether or not the assurances were met; and if the  
7           assurances weren't met, what sort of diplomatic  
8           protests occurred.

9                           That gets us back to the last  
10           question, and that is what sort of sanctions has  
11           Canada got? Canada has no sanctions except  
12           diplomatic protest. No country has, apart from  
13           protesting a breach if a breach occurs.

14                           Of course if it ever happened,  
15           Canada would never enter into an arrangement with  
16           that country again of that sort. I guess that is  
17           a form of sanction.

18                           No, I don't see anything wrong  
19           with requesting Canada to come up with that  
20           information. I am not sure that Canada may not  
21           try and hide behind questions of confidentiality,  
22           but I can't see why, quite frankly.

23                           MR. GOVER: Thank you, Professor  
24           Burns. Those are my questions.

25                           THE COMMISSIONER: How long are

1           you going to be, Mr. Waldman?

2                           MR. WALDMAN:    An hour.

3                           THE COMMISSIONER:  You will be  
4           that long?

5                           And how long would you expect to  
6           be, Mr. Fothergill?

7                           MR. FOTHERGILL:  Rather like  
8           yesterday, I would say, 15 minutes before I hear  
9           this estimate.

10                          That may lengthen depending on the  
11           questions that Mr. Waldman has.

12                          THE COMMISSIONER:  Why don't we  
13           take a ten-minute break?

14                          I will say this to you:  You can  
15           obviously take as long as you wish.  We have a  
16           full day and we have to finish with the three  
17           witnesses today, whatever time it is.

18                          The second comment is I do get it  
19           the first time when Mr. Gover leads.  So I urge  
20           you to go to areas that he hasn't covered.

21                          MR. WALDMAN:  I promise I won't  
22           repeat anything that is already covered.

23                          THE COMMISSIONER:  We will take a  
24           ten-minute break and then resume.

25                          THE REGISTRAR:  Please stand.

1 --- Upon recessing at 10:52 a.m. /

2 Suspension à 10 h 52

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

4 Reprise à 11 h 05

5 THE REGISTRAR: Please be seated.

6 Veuillez-vous asseoir.

7 THE COMMISSIONER: Mr. Waldman?

8 EXAMINATION

9 MR. WALDMAN: I would like to pick  
10 up just where we left off on the report with  
11 respect to Canada.

12 You say you would be shocked if --

13 MR. BURNS: Excuse me. What tab  
14 is that?

15 MR. WALDMAN: That is tab 23. The  
16 one you were looking at Of Exhibit P-120.

17 MR. BURNS: Thank you.

18 MR. WALDMAN: You told us you  
19 would be shocked if Canada ever attempted to  
20 deport someone to torture. I gather that means  
21 you are not aware that the Federal Court has  
22 already ruled, in the case called Sogi and other  
23 cases, that Suresh allows for deportation to  
24 torture?

25 MR. BURNS: I'm aware of Suresh

1 and that window of opportunity. Ultimately it is  
2 an executive decision.

3 I will be shocked if it  
4 actually happens.

5 MR. WALDMAN: I will leave it  
6 at that.

7 MR. BURNS: Your comment would be  
8 that I shock easily.

9 --- Laughter / Rires

10 MR. WALDMAN: No, my comment would  
11 be that Canada has already attempted to remove  
12 someone and it was only as a result of a stay that  
13 he was not removed. So that the executive  
14 decision to remove in Sogi back to torture has  
15 already been made.

16 How do you respond to that?

17 MR. BURNS: I'm shocked.

18 --- Laughter / Rires

19 MR. WALDMAN: Thank you.

20 More importantly, with respect to  
21 page 4, I wanted to tie this in to Article 14 of  
22 the Convention.

23 Page 1 of the recommendations  
24 is that Canada:

25 "...should review its

1 position under article 14 of  
2 the Convention to ensure the  
3 provision of compensation  
4 through its civil  
5 jurisdiction to all victims  
6 of torture;"

7 So perhaps we could go back and  
8 look at Article 14 in the Convention, because we  
9 didn't really cover this.

10 If I could ask you first about the  
11 obligation to ensure redress for compensation and  
12 why this recommendation might have been put in.

13 So perhaps you could tell us a bit  
14 about the obligation for redress?

15 MR. BURNS: The obligation is  
16 fairly clear. If an agency of the State has  
17 injured someone through torture, then the agency  
18 of the State is under a legal obligation, not only  
19 domestically but qua this Convention, to provide  
20 reasonable methods for redress, and redress  
21 includes compensation and rehabilitation. So we  
22 sort of start from that point.

23 That is relatively obvious, except  
24 in many countries there is no domestic law which  
25 imposes that obligation on States. That has

1           created all sorts of difficulty for victims who  
2           have to rely on international groups, charitable  
3           groups, to provide rehabilitation.

4                           Can I just take this up?  
5           Because I did take the trouble to read the report  
6           of the debate in the Committee Against Torture  
7           relating to this.

8                           MR. WALDMAN:   Okay.

9                           MR. BURNS:   To be quite frank with  
10          you, I was taken aback.  Because if I understand  
11          the way in which it arose as a question to the  
12          Canadian delegation, it was essentially:  Why do  
13          you, Canada, not provide a system of compensation  
14          made available to victims of torture who are  
15          tortured somewhere else?  That is, I understand,  
16          basically what the issue was.

17                           The person raising the question  
18          based it very largely on the literal language of  
19          the Convention.  This is the first time in all  
20          these years I have ever seen anybody raise this  
21          question.

22                           When you have a look at the  
23          travaux préparatoire you will see it was never  
24          considered in the travaux.  But the person raising  
25          the question drew an analogue with the U.S. Alien



1 Torts Claim Act.

2 The U.S. Alien Torts Claim Act  
3 is almost sui generis. You won't find anything  
4 in other countries that remotely resembles that.  
5 It was designed in the 18th Century. It was  
6 effectively, I think, the second piece of  
7 legislation that was enacted by the  
8 Continental Congress.

9 It was designed to deal with  
10 piracy. Pirates would attack vessels, seize their  
11 goods, and very often they would land on the  
12 Eastern Seaboard of the United States and make hay  
13 with all the stuff that they have stolen from  
14 people on the high seas.

15 What the Alien Torts Claim Act was  
16 then concerned to do was to give aliens, not  
17 Americans, an action in the United States against  
18 foreigners whose events occurred and caused damage  
19 to them outside the United States, namely the  
20 pirates in this case.

21 I'm delighted to let you know that  
22 it was used very successfully in the 20th Century  
23 to extend it to torture committed in Central  
24 America by one foreigner against another foreigner  
25 where they both ended up in the United States. So

1           it was extended to that.

2                           But, quite frankly, I don't think  
3           it is -- I don't think it is a legitimate  
4           interpretation of Article 14 if you are arguing  
5           that Canada is under an obligation to provide  
6           access to Canadian courts to provide a civil  
7           remedy for torture that has occurred outside  
8           Canada.  If that is the question?  I mean, I don't  
9           want to formulate your question, but I thought  
10          that is what you were driving at.

11                          MR. WALDMAN:  It was a little bit  
12          more sophisticated than that, it was to provide  
13          access to a civil remedy to people who have been  
14          tortured outside of Canada when they could not  
15          have access to -- if they are Canadian citizens,  
16          and if they could not get access to the remedy in  
17          the country where the torture occurred?

18                          MR. BURNS:  My response to that  
19          is twofold.

20                           One, I do not think that is a  
21          legitimate interpretation of the Article 14  
22          purposes.

23                           Second, I would be delighted if  
24          Canada was willing to introduce legislation of  
25          that sort.  How effective it would be, I suspect,

1 is another matter entirely.

2 But, again, the educative effect  
3 of that, and the moral effect of that, might be  
4 quite profound. But I don't believe it to be an  
5 obligation under Article 14.

6 MR. WALDMAN: Okay. If I could  
7 ask you to turn back to tab 4 of your book at 126?

8 I'm not going to repeat all the  
9 concerns that you expressed about the reservations  
10 of the Americans and your view that many of them  
11 are not in compliance with CAT.

12 Would it be fair to say that in  
13 light of all these reservations which, in your  
14 view, do not express U.S. compliance with CAT,  
15 that there are legitimate concerns about the  
16 extent to which the United States is complying  
17 with the Convention Against Torture, given these  
18 reservations that you have stated fall outside the  
19 interpretation of the committee?

20 MR. BURNS: If you want me to  
21 answer yes or no, I'm not sure I can.

22 I would say for the most part the  
23 United States is complying. Their reports  
24 indicate that for the most part they are  
25 complying, but there are some crucial classes of

1 case where there is a clear division of view  
2 between the CAT and the Convention and the United  
3 States and the Convention, and they are the ones  
4 you have just referred to.

5 MR. WALDMAN: The ones that I  
6 referred to?

7 MR. BURNS: Yes.

8 MR. WALDMAN: But those are pretty  
9 significant differences?

10 MR. BURNS: Very significant.

11 MR. WALDMAN: So in terms of  
12 non-return to torture, there is a very significant  
13 difference between your view and the American view  
14 on the threshold beyond which persons should not  
15 be sent back to torture?

16 MR. BURNS: Yes. The only  
17 qualification I would make is in the vast  
18 bulk of cases the real risk will also be a  
19 probability. It is those key cases where the real  
20 risk is less than a probability where that real  
21 distinction lies.

22 MR. WALDMAN: Right. In those key  
23 cases the Americans might be sending people back  
24 to torture because they are applying a higher  
25 threshold than the ones that you are --

1                   MR. BURNS:  If they are, it would  
2                   be my personal view that that is in contravention  
3                   of Article 1.

4                   MR. WALDMAN:  I won't take you to  
5                   the other examples that you gave us on that.

6                   I wanted to deal briefly with  
7                   the definition of torture, because my friend took  
8                   you to the mental -- o the physical aspects, but  
9                   he didn't ask you to deal with the mental aspect  
10                  of torture.

11                  MR. BURNS:  Yes.

12                  MR. WALDMAN:  Is it not correct  
13                  that torture can occur even if it is doesn't  
14                  involve physical abuse?

15                  MR. BURNS:  Yes.

16                  MR. WALDMAN:  In other words, in  
17                  Mr. Arar's case it is on the public record that he  
18                  said that during the first days of detention he  
19                  was beaten repeatedly with an electrical cord  
20                  during the course of interrogations that sometimes  
21                  lasted as long as 18 hours.

22                  In your view, would that  
23                  constitute torture?

24                  MR. BURNS:  If that was  
25                  established, in my view that would certainly

1 be torture.

2 MR. WALDMAN: Let's move on to  
3 other things that he alleged occurred to him.

4 He also alleged -- I mean he  
5 stated, we are asserting it as a fact, that during  
6 the period of time that he was detained he was  
7 detained incommunicado without access to anyone in  
8 a 3 by 6 by 9 cell that didn't have proper toilet  
9 facilities and that this caused him to become  
10 severely mentally disoriented. He was in darkness  
11 for most of the time, there was a grate that  
12 allowed rats and cats to urinate on him, and this  
13 created severe mental anguish for him.

14 Would that treatment in and of  
15 itself, in your view, constitute torture?

16 MR. BURNS: How long was he  
17 constrained?

18 MR. WALDMAN: Ten months?

19 MR. BURNS: Ten months. In  
20 this cell?

21 MR. WALDMAN: In this 3 by 6 by  
22 9 cell that was --

23 MR. BURNS: Incommunicado the  
24 whole time?

25 MR. WALDMAN: The only time he was

1 taken out was for interrogations and for nine  
2 consular visits that lasted a half an hour.

3 MR. BURNS: So no social  
4 interaction?

5 MR. WALDMAN: Absolutely no  
6 social --

7 MR. BURNS: Assuming that that  
8 was established, and assuming the medical evidence  
9 supported it, I would regard it to be torture,  
10 again subject to the purposive aspect of the  
11 definition.

12 MR. WALDMAN: Well, we know that  
13 he was held in detention for the purposes of  
14 interrogation by the Syrian Military Intelligence  
15 during that time as a result of him being deported  
16 by the United States to Syria. So would that not  
17 meet the purposive aspect?

18 MR. BURNS: Not simpliciter. It  
19 has to be for certain specific purposes. I'm sure  
20 you could fit it within any one of them.

21 MR. WALDMAN: Well, for the  
22 purpose of interrogating him to extract evidence  
23 about his alleged involvement in --

24 MR. BURNS: Confessions?

25 MR. WALDMAN: Confessions, yes.

1                   MR. BURNS: That certainly fits  
2                   within it.

3                   MR. WALDMAN: I wanted to ask you  
4                   about obligations of States who signed the  
5                   Convention to Prevent Torture. Is that something  
6                   that arises under international law from the  
7                   Convention Against Torture or any of the other  
8                   international conventions?

9                   Do States have an obligation to  
10                  take steps to prevent one of their citizens, or  
11                  any citizen, from being tortured, aside from the  
12                  non-refoulement issue

13                  MR. BURNS: Are you talking about  
14                  within their territory or a territory under their  
15                  control or through the agency of their people, or  
16                  do you mean does Canada have an obligation to stop  
17                  some people torturing some other people in the  
18                  polar regions of the south?

19                  MR. WALDMAN: Let's take a  
20                  specific example related to the facts of this  
21                  case: the consular officials in New York.

22                  If we assume a set of facts that  
23                  were that they were warned that there was a  
24                  serious risk that Mr. Arar might be sent to Syria,  
25                  that given the human rights record in Syria and



1 the reasons why he was being sent there, there was  
2 a risk that he might -- a serious risk that he  
3 might be tortured there.

4 If we make these two assumptions,  
5 would the Canadian consular officials and the  
6 Canadian government officials be under an  
7 obligation to attempt to prevent his deportation  
8 to Syria, to prevent the torture?

9 MR. BURNS: Under customary law,  
10 one of the functions of the consul is to represent  
11 the interests of the citizen abroad, and upon  
12 being notified that one of the citizens is being  
13 held in circumstances where there was a real risk  
14 of torture, I would take the view that it would be  
15 a real breach of the consular function not to at  
16 least make inquiries.

17 MR. WALDMAN: If they made  
18 inquiries and, based upon the information that was  
19 provided, -- if, for example, a consular official  
20 after they had been advised that there was a risk  
21 of deportation to Syria, spoke to a senior U.S.  
22 official and was told, "This is an extremely  
23 serious case. Your ambassador should take it up  
24 with the Department of Justice in Washington at  
25 the highest levels," would there be an obligation

1 to proceed further and take this up at the highest  
2 levels to prevent the deportation?

3 MR. BURNS: I am not sure whether  
4 public international law imposes that positive  
5 obligation, quite frankly, to go that far.

6 But where he would run a real risk  
7 I think is in domestic law. The government  
8 probably would find itself at the wrong end of a  
9 negligence suit under the ordinary rules of  
10 negligence if an official, having that knowledge,  
11 failed unreasonably of course, being under a civil  
12 law duty in Canada to take steps to protect and  
13 failed to do so.

14 That is where I would probably  
15 look rather than at customary international law,  
16 because the rules -- the Vienna Convention on  
17 consular rights, et cetera, is big on rights and  
18 low on duty, and what international practice is I  
19 have never examined very thoroughly on that  
20 particular point, but I suspect it is pretty light  
21 as well.

22 So I would say, according to the  
23 rule of reason, yes, he should certainly, given  
24 that information, investigate as part of the  
25 consular function; and a failure to do so may

1 render the government responsible in some way  
2 according to the domestic law of Canada, the law  
3 of torts -- may. I don't assert that as a  
4 positive.

5 MR. WALDMAN: I was intrigued  
6 about one of the possibilities that you mentioned,  
7 and I just wanted to raise it with you. There is  
8 this possibility of State-to-State complaints --

9 MR. BURNS: Yes.

10 MR. WALDMAN: -- under the  
11 Convention Against Torture?

12 MR. BURNS: Yes.

13 MR. WALDMAN: So let me ask you  
14 this: If the Canadian government has protested to  
15 the American government about Mr. Arar's  
16 torture -- deportation to Syria, would it be  
17 possible for the Canadian government to make a  
18 State-to-State complaint to the Committee Against  
19 Torture and ask the Committee Against Torture to  
20 investigate --

21 MR. BURNS: To adjudicate.

22 MR. WALDMAN: -- to adjudicate  
23 whether the U.S. violated the Convention?

24 MR. BURNS: This takes us over to  
25 Article 33 whereby a State, when it ratifies, has

1 to opt in to the State-to-State complaint  
2 mechanism.

3 MR. WALDMAN: I think you told us  
4 the Americans opted into that.

5 MR. BURNS: I don't believe I did.  
6 I mean, I would have to go and have a look at the  
7 Convention and the time they ratified the  
8 Convention.

9 Canada certainly has.

10 MR. WALDMAN: Assuming --

11 MR. BURNS: Assuming they both  
12 have, then yes, the short answer would be Canada  
13 could complain to the Committee Against Torture  
14 and the Committee Against Torture could then  
15 adjudicate the complaint, assuming the United  
16 States has also opted in.

17 MR. WALDMAN: So would it be fair  
18 to say that if Canada were concerned about the  
19 conduct of the U.S. officials in deporting  
20 Mr. Arar to Syria, one possible mechanism --  
21 because we know that, for example, the American  
22 authorities have not been willing to appear before  
23 this Commission. So assuming that the Americans  
24 ratified Article 33, would there not be another  
25 mechanism for Canada to force the Americans to

1 account for their deportation of Mr. Arar through  
2 the Convention --

3 MR. BURNS: That would be a  
4 mechanism. But as I indicated, that mechanism is  
5 in every treaty, every one of the international  
6 human rights treaties, the universal ones. Not  
7 one State has ever exercised it, and the reason is  
8 quite clear. Once one State does it, all bets are  
9 off. You know? They can't rely on comity. They  
10 can't rely on the good offices of each State. Now  
11 they have to cover their back against the other  
12 States party to the Convention.

13 MR. WALDMAN: Wouldn't you agree  
14 with me that if Canada were really concerned about  
15 what happened to Mr. Arar and the illegality of  
16 his deportation to Syria, that the Article 33  
17 complaint might be an appropriate way for them to  
18 get to the bottom --

19 MR. BURNS: It might.

20 MR. WALDMAN: Given the reluctance  
21 or the refusal of the Americans to come here?

22 MR. BURNS: It might. I have  
23 never seen a case of it so I don't know how it is  
24 going to work.

25 But I would have thought that the

1 more obvious one would be diplomatic notes to find  
2 out just what is going on.

3 MR. WALDMAN: I think diplomatic  
4 notes have already been sent and haven't helped.  
5 So if the diplomatic note route were unsuccessful,  
6 aside from the Article 33 route, is there any  
7 other route -- the International Court, can Canada  
8 do that as a mechanism for forcing the Americans  
9 to explain their actions in Mr. Arar's case?

10 MR. BURNS: I know of no other  
11 route.

12 MR. WALDMAN: There is no other  
13 route.

14 MR. BURNS: Not that I am aware  
15 of, except -- to require the Americans to justify  
16 sending him back to Syria? Is this the bottom  
17 line?

18 MR. WALDMAN: Or to provide  
19 information in some kind of public forum as to why  
20 they did it, what were the bases for it, and to  
21 justify it, yes.

22 MR. BURNS: No, I don't know of  
23 any alternative.

24 MR. WALDMAN: So the only way that  
25 we could force the Americans to show their hand

1 would be through this Article 33 complaint?

2 MR. BURNS: As far as I am aware,  
3 and then it would turn on just how the Committee  
4 Against Torture interpreted its adjudicative  
5 jurisdiction. You may not find it very  
6 satisfactory.

7 MR. WALDMAN: Thank you.

8 I would like to deal with an issue  
9 of information sharing. We know that Mr. Arar was  
10 brought to the attention of the American  
11 authorities as a result of information sharing  
12 that was part of a national security  
13 investigation. We know that other Canadians have  
14 made allegations that they were detained and  
15 tortured as a result of information sharing that  
16 was given by Canadians to regimes that do not  
17 respect human rights.

18 Given our international  
19 obligations under the Conventions Against Torture,  
20 and other conventions, do you have concerns about  
21 sharing of information with regimes that do not  
22 respect human rights when it results in Canadian  
23 citizens being tortured?

24 Is that in compliance with our  
25 international obligations?

1                   MR. BURNS: I am just trying to  
2 think -- I guess it is a reductio ad absurdum  
3 argument you are raising. If Canada shares  
4 information with the United States that leads to  
5 someone being sent to another country where there  
6 is a real risk of torture --

7                   MR. WALDMAN: Right.

8                   MR. BURNS: -- what mechanism is  
9 there internationally to prevent that from  
10 happening?

11                   Well, if the Canadian officials  
12 were wilfully blind, then you might be able to  
13 argue they are complicit. You could argue that  
14 they are complicit, if they know that this is what  
15 is going to happen.

16                   MR. WALDMAN: So this is an  
17 offence both under -- so that would be an offence  
18 under domestic --

19                   MR. BURNS: It would be a breach  
20 of CAT.

21                   MR. WALDMAN: A breach of CAT?

22                   MR. BURNS: Yes.

23                   MR. WALDMAN: It would also be --  
24 could it also be an offence under our domestic  
25 law?



1                   MR. BURNS:  Oh, I think it could.  
2                   It could be a crime under our domestic law.  We  
3                   have a crime of torture in this country, and we  
4                   have -- the common law has developed, you know,  
5                   the rules relating to aiding and abetting, and  
6                   conspiring, and also rules relating to  
7                   constructive knowledge and wilful blindness.  I  
8                   mean, this could all be realized.

9                   MR. WALDMAN:  So if we take the  
10                  examples of Canadian citizens who have alleged in  
11                  public statements that they were detained in Syria  
12                  and tortured as a result of information that was  
13                  provided by Canadian authorities, would that also  
14                  fall into the category of complicity in torture?

15                  MR. BURNS:  Well, it would depend.  
16                  The Canadian government could pass along perfectly  
17                  legitimate information to another State relating  
18                  to security, and the other State will then utilize  
19                  it in a particular way.

20                  If the Canadian government knew if  
21                  "X" then refoulement to a State that tortures,  
22                  then they would be in breach of the Convention.  
23                  Whether or not it would constitute something that  
24                  is suable civilly in Canada I think is a little  
25                  more oblique.

1                   MR. WALDMAN: What you have just  
2                   said to me then suggests that if an official  
3                   shares information and has a reasonable  
4                   expectation that the sharing of that information  
5                   might lead to a person being detained in regimes  
6                   where there are human rights violations, that that  
7                   would be an obligation both --

8                   MR. BURNS: I think that would  
9                   clearly be in breach of the CAT. You would be a  
10                  party to a breach of the CAT, even although you  
11                  are not the one that refouled them.

12                 MR. WALDMAN: The justification  
13                 that we have seen throughout the documentation is  
14                 that information-sharing is necessary to protect  
15                 our national security. Would that be a proper  
16                 justification --

17                 MR. BURNS: Article 2 of the CAT  
18                 says that necessity is not a defence, so it would  
19                 still be a breach of your international legal  
20                 obligation.

21                 How that would resound to the  
22                 advantage of the individual domestically is  
23                 another matter. I mean, what do you do with it?  
24                 Do you just have a breach of the international  
25                 obligation out there in the stratosphere? You, as

1 a lawyer, are looking for remedies.

2 MR. WALDMAN: Right now I am also  
3 concerned about this whole process of information  
4 sharing, and the extent to which it is being  
5 justified by the war on terrorism despite the fact  
6 that we see that there are serious consequences to  
7 Mr. Arar and other Canadian citizens about the  
8 torture. I am asking you on that particular  
9 level.

10 MR. BURNS: Okay.

11 MR. WALDMAN: If we establish that  
12 a person is arrested, detained and tortured as a  
13 result of the information sharing, that is a  
14 breach of CAT?

15 MR. BURNS: As long as the person  
16 rendering the information knew, or should have  
17 known, or was wilfully blind to the fact that it  
18 would be utilized for that purpose.

19 MR. WALDMAN: I would like to ask  
20 you about using the fruits of torture.

21 Generally speaking, is it  
22 acceptable for an official of any government --  
23 let's be more specific, the Canadian government,  
24 to receive statements that he knew or ought to  
25 have known were extracted under torture and used

1           them by sending them to police officials?

2                           MR. BURNS:  The Convention Against  
3 Torture does not prohibit that.  What it prohibits  
4 is the use of torture-obtained admissions in legal  
5 proceedings except against the torturer.

6                           MR. WALDMAN:  Does legal  
7 proceedings encompass national security  
8 investigations?

9                           MR. BURNS:  The CAT has always  
10 construed that to mean courtroom proceedings.

11                           MR. WALDMAN:  Only courtroom  
12 proceedings.

13                           MR. BURNS:  But to my knowledge,  
14 no one has raised the issue directly before with  
15 CAT.

16                           MR. WALDMAN:  So is it not fair to  
17 say that CAT could be -- one possible  
18 interpretation of that -- that is Article --

19                           MR. BURNS:  Article 14 or  
20 something -- no, Article 15.

21                           MR. WALDMAN:  Article 15.  Perhaps  
22 we could look at that for a second.

23                                   "Each State Party shall  
24 ensure that any statement  
25 made which is established to

1                   have been made as a result of  
2                   torture shall not be invoked  
3                   as evidence in any  
4                   proceeding..."

5                   So is it not fair to say that  
6                   that, at least on its wording, proceeding is broad  
7                   enough to cover not only legal proceedings but  
8                   other types of investigations?

9                   MR. BURNS: Pre-trial  
10                  investigation?

11                  MR. WALDMAN: Right.

12                  MR. BURNS: You could make that  
13                  argument. I am not sure I would buy into it. But  
14                  if it was a civilian system, then you might very  
15                  well do it because they have a sort of  
16                  quasi-legal-investigative proceeding before the  
17                  actual hearing in court.

18                  MR. WALDMAN: Are there any other  
19                  domestic or legal obligations that -- domestic or  
20                  international rules that would preclude officials  
21                  from receiving the fruits of torture that you are  
22                  aware of?

23                  MR. BURNS: There may have been  
24                  some ruling of the Human Rights Committee under  
25                  the international covenant, but I am not aware of

1           it, if there has been. I have never looked at  
2           that particular issue with respect to the European  
3           Convention or the Organization of American States,  
4           so I really can't answer that.

5                       MR. WALDMAN: So if the Canadian  
6           ambassador obtained the statements that Mr. Arar  
7           had made when he was subject to torture and  
8           brought them back to Canada and gave them to the  
9           RCMP and CSIS for their use in his investigation,  
10          that wouldn't be a violation of any international  
11          rule that you are aware of?

12                      MR. BURNS: Prima facie I would  
13          not regard that as a breach of Article 15, but I  
14          would want to listen to your arguments before I  
15          finally made my mind up on that.

16                      MR. CAVALLUZZO: Commissioner,  
17          just to correct the record, the evidence is not  
18          that the Canadian ambassador brought the statement  
19          back and shared it with CSIS and the RCMP. The  
20          evidence is that Mr. Pillarella brought the  
21          statement back and gave it to the other  
22          individuals at headquarters in DFAIT who shared  
23          the information. I just wanted to ensure that  
24          Mr. Pillarella...

25                      MR. WALDMAN: Okay.

1                   Perhaps I could take you to just  
2 one briefing note and ask you to comment on this.

3                   I am a bit lost. I don't know the  
4 number. It is one of the Wayne Easter books, book  
5 1 of Wayne Easter. My exhibit list doesn't go up  
6 to that and we didn't put the number down.

7                   It is Volume 1 of Wayne Easter.

8                   THE COMMISSIONER: It is a memory  
9 task.

10                  MR. FOTHERGILL: I believe it is  
11 P-117.

12                  MR. WALDMAN: Exhibit P-117,  
13 Volume 1, tab 49.

14                  THE COMMISSIONER: Forty-nine?

15                  MR. WALDMAN: Yes. I just want to  
16 illustrate to you how the information was used.

17                  Could you look to where it says  
18 "Current Status"?

19                  MR. BURNS: Yes.

20                  MR. WALDMAN: This is a briefing  
21 note that was sent by the Assistant Commissioner  
22 of the RCMP in charge of the Criminal Intelligence  
23 Directorate, Richard Proulx, on April 30th, 2003,  
24 to the Commissioner of the RCMP, and under  
25 "Current Status" it says -- and remember the

1 evidence before the Commission is that Mr. Arar  
2 was tortured and under torture he made statements  
3 to the Syrians.

4 It says:

5 "Arar remains in Syrian  
6 custody. He was interviewed  
7 by the Syrians and  
8 volunteered he had received  
9 training at the ... camp in  
10 Afghanistan."

11 Are those statements, as a  
12 distortion of what really happened in terms of the  
13 fact -- sort of negating and denying the torture,  
14 does that cause you any concern?

15 MR. FOTHERGILL: Mr. Commissioner,  
16 I really do need to intervene at this point.

17 First of all, I am not sure that  
18 we really do have direct evidence of the treatment  
19 Mr. Arar received. That is a matter that I think  
20 you are exploring through your appointment of the  
21 special fact-finder.

22 And quite apart from that, this is  
23 not a question that calls for this witness'  
24 expertise to answer. This is a rather thinly  
25 disguised form of argument where Mr. Waldman is



1           trying to recruit the witness to agree with him on  
2           what is really a question of logical  
3           interpretation of the facts rather than a question  
4           that calls for expertise in international law.

5                         THE COMMISSIONER:   Mr. Waldman,  
6           response?

7                         MR. WALDMAN:   Well, the first  
8           thing is I thought the evidence before the  
9           Commission is that Mr. Pardy had assumed that from  
10          the very beginning Mr. Arar was subject to torture  
11          during the periods of interrogation.  That is the  
12          basis of the facts, the assertion of fact I am  
13          making.

14                        Second of all, the question I am  
15          asking is whether this raises any -- this  
16          statement, because this is an example of how the  
17          confessions were used by the RCMP, and I want to  
18          know if this raises any concerns about violations  
19          of international law.

20                        THE COMMISSIONER:  I wouldn't  
21          object to the rule that out of order for you to  
22          ask the question on the assumption there was  
23          torture, because I think there is going to be  
24          evidence, and whether or not I eventually conclude  
25          there was --

1 MR. WALDMAN: Well, if we  
2 assume --

3 THE COMMISSIONER: Let me just  
4 finish the ruling.

5 Whether I conclude there was or  
6 not will be something at the end. But I wouldn't  
7 rule the question out of order on that basis.

8 On the other hand, I do think the  
9 question that you have asked this witness goes  
10 beyond the expertise that he -- with great respect  
11 to you, Professor Burns -- that he brings to  
12 assist this inquiry, and I think it is something  
13 that is well within my expertise to eventually  
14 rule on in my report.

15 MR. WALDMAN: Okay.

16 What would be your view, if we  
17 assume for a second that officials were aware that  
18 Mr. Arar had been tortured or had a reasonable  
19 belief that he was being tortured while he was  
20 being interrogated and instructions were sent to  
21 the ambassador to seek further information from  
22 the authorities who were subjecting Mr. Arar to  
23 torture, what would be your view of that conduct,  
24 if they were asking for the proceeds of the  
25 interrogations that might have been conducted

1 under torture?

2 THE COMMISSIONER: You are asking  
3 his opinion with respect to --

4 MR. WALDMAN: International law.

5 THE COMMISSIONER: International  
6 law or CAT?

7 MR. WALDMAN: Right.

8 MR. BURNS: I really don't have an  
9 opinion. It's just a personal view. I mean, I  
10 don't think it falls within CAT specifically, not  
11 the literal language of the Convention, if that is  
12 the question you are asking.

13 MR. WALDMAN: Would you not see it  
14 as aiding and abetting or encouraging torture to  
15 ask someone to get further information from  
16 someone who had been subjected to torture before?

17 MR. BURNS: It would depend on the  
18 circumstances. I mean, if they are doing it to  
19 find out the state of mind or how this person is  
20 being held or what his condition is, et cetera,  
21 et cetera, that is perfectly legitimate.

22 If they are doing -- and I think  
23 this might be what you are suggesting -- I mean, I  
24 don't know what the purpose of the government  
25 official was or is alleged to have been in

1           requesting the additional information.  If they  
2           know he is being tortured and they request  
3           information of the torturers, then it does seem to  
4           me that the official would be running into  
5           difficulty with the CAT.

6                         MR. WALDMAN:  Right.  So let's  
7           just be clear.  If the official requested from  
8           military intelligence, who are the people who are  
9           detaining and torturing Mr. Arar, further fruits  
10          of their interrogations, that would be problematic  
11          as far as CAT?

12                        MR. BURNS:  In my opinion, that  
13          would be problematic, because they would be  
14          presumably encouraging them to continue torturing  
15          to get the additional information.

16                        It would turn on the facts,  
17          though.  You would have to have really, really  
18          powerful facts in those cases.

19                        MR. WALDMAN:  We have -- well, we  
20          will let the Commissioner decide.

21                        MR. GOVER:  You are trying to  
22          shock me, aren't you?

23                        MR. WALDMAN:  I promised, sir,  
24          that I would shock you a few times and I think I'm  
25          trying to do that.

1                   I wanted to deal with one last  
2                   area, which is the question of assurances.

3                   You are going to have to forgive  
4                   me because I only have Suresh on my computer and  
5                   it was too long to print during the break, so I'm  
6                   going to have to read you one paragraph of Suresh.

7                   The issue of assurances arose in  
8                   Burns and Raffay in the context of the death  
9                   penalty and the Supreme Court of Canada ruled that  
10                  because there was -- I'm sure you are aware, that  
11                  because there was sufficient capacity to monitor  
12                  and there was diplomatic processes, that  
13                  assurances in the context of the death penalty  
14                  were sufficient. This also arose in the context  
15                  of Suresh.

16                  Do you recall Suresh?

17                  MR. BURNS: I know Suresh.

18                  MR. WALDMAN: Are you familiar  
19                  with what the Supreme Court of Canada said on  
20                  assurances?

21                  Should I read you the paragraph  
22                  just to remind you?

23                  MR. BURNS: Read it again, just so  
24                  that I -- Shock again.

25                  MR. WALDMAN:

1 "It might be useful to  
2 comment further on  
3 assurances. A distinction  
4 may be drawn between  
5 assurances given by a State  
6 that it will not apply the  
7 death penalty through a legal  
8 process and assurances by a  
9 State that it will not resort  
10 to torture, an illegal  
11 process. We would signal the  
12 difficulty in relying heavily  
13 on assurances by a State that  
14 it will refrain from torture  
15 in the future where it has  
16 engaged in illegal torture or  
17 allowed others to do so on  
18 its territory in the past.  
19 The difficulty becomes acute  
20 in cases where torture is  
21 inflicted not only with the  
22 collusion but through the  
23 impetus of the State in  
24 controlling the behaviour.  
25 Hence the need to distinguish

1                   between assurances regarding  
2                   the death penalty and  
3                   assurances regarding  
4                   torture." (As read)

5                   Do you agree with that statement?

6                   MR. BURNS: Sure, it is difficult.

7                   MR. WALDMAN: In the case of  
8                   Syria, you testified that Syria signed the CAT  
9                   last year. So when Mr. Arar was deported in 2002,  
10                  Syria had not signed the CAT.

11                  Would you be concerned about  
12                  receiving assurances from a State that had not yet  
13                  signed CAT with respect to not inflicting torture?

14                  MR. BURNS: Right. Actually Syria  
15                  acceded to the CAT which goes beyond signing.

16                  MR. WALDMAN: Okay, acceded. But  
17                  it was last year. When Mr. Arar was deported they  
18                  hadn't yet acceded.

19                  MR. BURNS: It would depend on the  
20                  State, quite frankly. There are some States that  
21                  haven't yet ratified or acceded -- and there are  
22                  reasons they haven't done it, legitimate reasons,  
23                  usually reasons of economic necessity -- and one  
24                  really would not be that concerned about  
25                  refoulement to those States.

1                   Then there are other States, and  
2                   those States are States that we make specific  
3                   reference to in many of our decisions, especially  
4                   Article 22 decisions, and it is always a negative  
5                   reference, where they haven't not only not  
6                   ratified or acceded to the CAT, they haven't  
7                   acceded to Article 22, which gives individuals the  
8                   power to go to the Committee Against Torture.

9                   So the short answer is, depending  
10                  on the State, yes.

11                  MR. WALDMAN: I'm not sure, are  
12                  you familiar with the specific human rights record  
13                  of Syria?

14                  MR. BURNS: Much of it, yes.

15                  MR. WALDMAN: Okay. Would you  
16                  feel comfortable, given your knowledge -- or would  
17                  you have felt comfortable in 2002 -- given your  
18                  knowledge of the serious human rights violations  
19                  that had were occurring in Syria and the fact that  
20                  Syria hadn't acceded to the CAT, and given what  
21                  the Supreme Court said in Suresh -- accepting  
22                  assurances from Syria in that context?

23                  MR. BURNS: If I am Foreign  
24                  Affairs I would have to qualify my answer, and I  
25                  qualify it now. I would look at the record of



1           assurances and whether they have been upheld by  
2           Syria. I mean, you have to look at past practice  
3           in order to gauge how they are likely to behave in  
4           the future.

5                            You would look at the human rights  
6           record, and you would look at what international  
7           instruments they had acceded to that would give  
8           protection to a person in these circumstances.

9                            If at the end of the day you had a  
10          bad human rights record, no accession to  
11          international instruments, and no record upon  
12          which you could base the assurance, then I would  
13          be very, very careful. I would regard that as a  
14          dubious one.

15                           MR. WALDMAN: Those are my  
16          questions. Thank you very much.

17                           THE COMMISSIONER: Thank you,  
18          Mr. Waldman.

19                           Mr. Fothergill?

20          EXAMINATION

21                           MR. FOTHERGILL: Professor Burns,  
22          by way of introduction, my name is Simon  
23          Fothergill and I am appearing for the Government  
24          of Canada.

25                           I'm wondering if I could enlist

1           your help in identifying some burdens of proof for  
2           us in the Convention Against Torture.

3                           MR. BURNS:  Yes.

4                           MR. FOTHERGILL:  If I could ask  
5           you first to address your mind to Article 1.

6                           The Convention is found at  
7           tab 2 of the materials that have been prepared for  
8           your testimony.

9                           In Article 1 we see there is a  
10          prohibition, not just on inflicting torture, but  
11          also on consenting or acquiescing to the  
12          infliction of torture.

13                          I'm wondering if you could help us  
14          in providing further clarity about what sort of  
15          standard is applied by the Committee Against  
16          Torture to the concepts of consent or  
17          acquiescence?

18                          MR. BURNS:  So far all we have  
19          said is that the burden of proof is on the person  
20          complaining.  We haven't really referred to the  
21          standard of proof that the person would have to  
22          meet with reference to that.

23                          My own view is that it would be  
24          the civil standard of proof.

25                          MR. FOTHERGILL:  So you would

1 equate it with something in the nature of the  
2 common law test of wilful blindness.

3 Is that correct?

4 MR. BURNS: Yes.

5 MR. FOTHERGILL: All right. As a  
6 practical matter, can you comment on the practice  
7 of States?

8 Do States generally adopt this  
9 common law test or is it a lesser or even a  
10 greater test?

11 MR. BURNS: I really am not in  
12 a position to answer that question. I just  
13 don't know.

14 This issue does not arise that  
15 often in front of the committee, so we have never  
16 really analyzed it in any great detail.

17 MR. FOTHERGILL: All right. If we  
18 turn then to Article 3, substantial grounds for  
19 believing that an individual would be in danger of  
20 being subjected to torture, you were already taken  
21 to the United States' understanding as distinct  
22 from a reservation of what that means, and that is  
23 the U.S.' standard of more likely than not. I  
24 think you agreed with Mr. Waldman's suggestion  
25 that that is, in the view of the Committee, a

1           serious difference of views, if I can put it that  
2           way, between the Committee and the United States  
3           of America.

4                           Is that true?

5                           MR. BURNS:  Yes, and I am pleased  
6           to hear you call it a difference of views because  
7           at this stage that is all it is.

8                           MR. FOTHERGILL:  All right.  Are  
9           you aware that at least in some cases Canada also  
10          applies the standard of more likely than not when  
11          determining whether somebody faces substantial  
12          risk of torture?

13                           MR. BURNS:  As a matter  
14          of practice?

15                           MR. FOTHERGILL:  Yes.

16                           MR. BURNS:  No.

17                           MR. FOTHERGILL:  We referred  
18          briefly yesterday, and we can do so again if  
19          necessary, to a recent decision of our Federal  
20          Court of Appeal in a case called Li that was  
21          issued in January.

22                           Are you familiar with that case?

23                           MR. BURNS:  I actually read an  
24          electronic version of it about two weeks ago.  
25          So I wouldn't say I'm familiar with it.  I know

1 of it.

2 MR. FOTHERGILL: You know of it.

3 MR. BURNS: Yes.

4 MR. FOTHERGILL: You said  
5 something quite interesting earlier, and I'm  
6 wondering if I'm interpreting it correctly.

7 Is the difference of views with  
8 the United States based upon the fact the United  
9 States has formally registered an understanding  
10 of how that provision operates in all cases as  
11 opposed to leaving open the possibility that a  
12 different standard might be applied in  
13 different cases?

14 MR. BURNS: If you are asking for  
15 a yes or no answer, I would probably say yes with  
16 qualifications.

17 MR. FOTHERGILL: All right.

18 MR. BURNS: I would put it  
19 slightly differently.

20 We take the view that there must  
21 be a real risk, which may be a probability but in  
22 certain circumstances may be less because of the  
23 circumstances.

24 MR. FOTHERGILL: Yes.

25 MR. BURNS: So we agree that

1 in, abstractly, 98 per cent of all cases the  
2 American probability test probably meets our  
3 threshold anyway, but it is the other little group  
4 of cases where they are still didactically  
5 applying that test where we would not, with  
6 respect, we would not, that the disagreement  
7 rests. A very small margin.

8 MR. FOTHERGILL: I was going to  
9 say, this is an articulation of the idea that a  
10 low risk of a very serious outcome --

11 MR. BURNS: Precisely.

12 MR. FOTHERGILL: -- perhaps can  
13 be comparable to a high risk of a less serious  
14 outcome and the two must be viewed --

15 MR. BURNS: Yes. Lord Reid  
16 exactly in Bolton and --

17 MR. FOTHERGILL: Yes. So you will  
18 agree with me, and I don't think we need to refer  
19 to it, that Canada is not being criticized for its  
20 application of the more likely than not test in  
21 certain cases?

22 MR. BURNS: That is probably an  
23 oversight.

24 --- Laughter / Rires

25 MR. FOTHERGILL: Very well. I

1 take your point.

2 --- Laughter / Rires

3 MR. FOTHERGILL: I was going to  
4 suggest that one possible explanation for that,  
5 however, is that Canada has not bound itself to  
6 always applying the standard, and it could be that  
7 in the cases where that standard has been applied  
8 it was, in fact, appropriate, given the risks  
9 involved?

10 MR. BURNS: I would not disagree  
11 with that. I just don't know.

12 MR. FOTHERGILL: But certainly  
13 the Committee would have had the opportunity to  
14 address it in its most recent report, had it  
15 wished to?

16 MR. BURNS: If the Committee had  
17 turned its mind to that question, and if the NGOs  
18 had specifically raised it. Because I'm not sure  
19 that the Canadian government did, did it?

20 MR. FOTHERGILL: I'm not in a  
21 position to advise, I'm sorry.

22 All right. Let's carry on.  
23 Another very short question I think. Article 10,  
24 the obligation of the State party to educate and  
25 inform its officials.

1 I take it Canada has never  
2 been criticized for any failing in respect to  
3 compliance with Article 10 to your knowledge?

4 MR. BURNS: Not that I am  
5 aware of.

6 MR. FOTHERGILL: The final area  
7 I want to discuss with you is one of the  
8 recommendations that was made in the recent  
9 Committee's report on Canada. This is the one  
10 about:

11 "A State Party should insist  
12 on unrestricted consular  
13 access to its nationals who  
14 are in detention abroad with  
15 a facility for unmonitored  
16 meetings and, if required,  
17 appropriate medical  
18 expertise."

19 First of all, can you give us any  
20 comment on the genesis of this recommendation or  
21 any sort of elaboration?

22 MR. BURNS: I suspect it was the  
23 Iraqis. I assumed when I read that somebody who  
24 was involved in Arar had drawn it to the attention  
25 of the Committee, and this is the result of that.



1 But I may be wrong. I have just never seen it  
2 before in any of the reports of the Committee.

3 MR. FOTHERGILL: Do you recognize  
4 that there may be some very real and practical  
5 limitations on the ability of a country such as  
6 Canada to insist on this kind of consular access?

7 MR. BURNS: Oh, yes, there are  
8 obvious limitations. One, you have got to be  
9 aware of it first.

10 As I say, in the sort of standard  
11 case where somebody is just picked up in a foreign  
12 country for selling drugs, Canada may never know  
13 about it, and the individual may not want Canada  
14 to know about it. So that is one.

15 The other one is, there is not a  
16 heck of a lot a consul can do. It is quite  
17 different if you are the consul in Liverpool and  
18 you are dealing with the British government in  
19 getting access, and you are the consul in a very  
20 small remote country which is not very sympathetic  
21 to western ideals and values and believes that  
22 this individual is a threat to it.

23 What can a consul do? A consul  
24 can demand access and very often get access. But  
25 access in private? I think that is a little

1           dubious in many cases. Getting access may take a  
2           long time because of the way in which the domestic  
3           agencies react to the request. There are all  
4           sorts of reasons why it is going to be very  
5           difficult.

6                           MR. FOTHERGILL: All right.  
7           Thank you. Those are my questions.

8                           THE COMMISSIONER: Re-examination,  
9           Mr. Gover?  
10          EXAMINATION

11                          MR. GOVER: Thank you,  
12          Commissioner.

13                          I have one question, which is a  
14          slight variation on a question that was asked by  
15          Mr. Waldman, and it is a hypothetical question  
16          that goes along these lines, Professor Burns.

17                          Would sharing information about a  
18          Canadian with a regime in which that Canadian was  
19          being detained and at risk of torture constitute a  
20          violation of the Convention Against Torture, in  
21          your opinion?

22                          MR. BURNS: Sharing information  
23          simpliciter may not, but sharing information with  
24          the knowledge that it would lead to torture I  
25          think in all probability would.

1 MR. GOVER: Thank you very much.

2 THE COMMISSIONER: Well, let me  
3 thank you, Professor Burns. That completes your  
4 evidence.

5 MR. BURNS: Thank you.

6 THE COMMISSIONER: I thought you  
7 demonstrated your expertise and I appreciate very  
8 much your sharing that with us.

9 MR. BURNS: And the limits of it.

10 --- Laughter / Rires

11 THE COMMISSIONER: The other  
12 observation, just before you leave, your teaching  
13 background was evident.

14 --- Laughter / Rires

15 This material was not only very  
16 informative, but was presented in a very  
17 interesting way and I appreciate it very much.

18 MR. BURNS: Thank you very much.

19 THE COMMISSIONER: You can  
20 step down and we will just figure out where we go  
21 from here.

22 Mr. Cavalluzzo, what is next?

23 MR. CAVALLUZZO: Commissioner, we  
24 have our next witness, Professor Ofshe, who can  
25 start right now if you want, or we can break a few

1 minutes.

2 THE COMMISSIONER: I'm content to  
3 start, unless there is any request for an  
4 adjournment or a recess.

5 MR. CAVALLUZZO: That's fine.  
6 Professor Ofshe.

7 --- Pause

8 MR. CAVALLUZZO: Can we commence?  
9 Is it all right? Fine.

10 Commissioner, our next witness  
11 is Professor Richard Ofshe and I would introduce  
12 you to him.

13 Professor, would you prefer to be  
14 sworn or affirmed?

15 MR. OFSHE: Affirmed.

16 THE COMMISSIONER: Could you stand  
17 then, please, Professor?

18 AFFIRMED: RICHARD J. OFSHE

19 THE COMMISSIONER: Your full name?

20 MR. BURNS: Richard Ofshe.

21 THE COMMISSIONER: Thank you.

22 MR. CAVALLUZZO: Mr. Commissioner,  
23 at the outset I would like to establish Professor  
24 Ofshe as an expert in interrogation methods with a  
25 special focus or interest in the theory and

1 classification of true and false confessions.

2 I would like to introduce as the  
3 next exhibit the reference materials, or Book of  
4 Documents which have been prepared for Professor  
5 Ofshe's evidence.

6 THE COMMISSIONER: Exhibit  
7 No. P-127.

8 EXHIBIT NO. P-127: Book of  
9 Documents entitled "Reference  
10 Materials Compiled in  
11 Relation to the evidence of  
12 Professor Richard J. Ofshe"

13 EXAMINATION

14 MR. CAVALLUZZO: Professor Ofshe,  
15 you are currently Professor Emeritus in the  
16 Department of Sociology at the University of  
17 California at Berkeley?

18 MR. OFSHE: Correct.

19 MR. CAVALLUZZO: In respect of  
20 your education, you received a Ph.D. in Sociology  
21 in 1968 at Stanford.

22 MR. OFSHE: Correct.

23 MR. CAVALLUZZO: And you have  
24 taught at Berkeley since 1967.

25 MR. OFSHE: That is also correct.

1 MR. CAVALLUZZO: That was a  
2 very interesting time to be at Berkeley. I wish I  
3 was there.

4 MR. OFSHE: The best of times.  
5 --- Laughter / Rires

6 MR. CAVALLUZZO: In any event you  
7 have taught consistently at Berkeley since 1967 in  
8 the Department of Sociology.

9 MR. OFSHE: That's right.

10 MR. CAVALLUZZO: During that  
11 period, in 1971 you were a Visiting Professor in  
12 the Department of Sociology at Stanford.

13 MR. OFSHE: Yes.

14 MR. CAVALLUZZO: Apart from your  
15 current teaching position, I understand that you  
16 are also a Fellow at the Center on Wrongful  
17 Convictions at Northwestern University School of  
18 Law in Chicago.

19 MR. OFSHE: Yes.

20 MR. CAVALLUZZO: In regard to a  
21 number of awards, you have, I guess, been the  
22 partial recipient of Pulitzer Prize for Public  
23 Service in 1979.

24 MR. OFSHE: The Prize is actually  
25 awarded to the Point Reyes Light newspaper. The

1 Gold Medal is the only one that goes to the  
2 institution. I did the work jointly with other  
3 people that won the Pulitzer Prize for the Point  
4 Reyes Light, a tiny newspaper in western West  
5 Marin County, California.

6 MR. CAVALLUZZO: The same  
7 newspaper was also awarded the California  
8 Newspaper Association Award in 1980.

9 Is that correct.

10 MR. OFSHE: That is correct.

11 MR. CAVALLUZZO: You were also the  
12 recipient of the Roy Dorcus Award for the Best  
13 Paper on Clinical Hypnosis of 1984.

14 MR. OFSHE: 1994.

15 MR. CAVALLUZZO: 1994, excuse me.  
16 You have a number of professional  
17 memberships, including the American Sociological  
18 Association, the American Psychological  
19 Association, and so on and so forth as is set out  
20 on page 2 of your CV.

21 MR. OFSHE: That is correct.

22 MR. CAVALLUZZO: Your professional  
23 activities are set out at page 2, at the bottom of  
24 page 2, and I need not refer to them other than  
25 having counsel read them.

1                   You are the consultant and have  
2                   been the consultant to a number of police and  
3                   prosecutorial agencies that are set out in page 3.

4                   Is that correct.

5                   MR. OFSHE: That is correct.

6                   MR. CAVALLUZZO: Indeed, I  
7                   understand from you this morning that you have  
8                   been an expert witness in judicial proceedings on  
9                   over 230 occasions.

10                  MR. OFSHE: That is correct.

11                  MR. CAVALLUZZO: In regard to your  
12                  publications, they are many and I will only refer  
13                  to a few of them. Perhaps if we can go to your  
14                  CV, starting at page 7, it would appear in about  
15                  1989 you published a paper entitled "Coerced  
16                  Confessions: The Logic of Seemingly Irrational  
17                  Action"?

18                  MR. OFSHE: Right. That is the  
19                  first in the series on interrogation.

20                  MR. CAVALLUZZO: That is what  
21                  I noted.

22                  In 1992 you wrote another  
23                  paper entitled "Coercive Persuasion and  
24                  Attitude Change."

25                  Is that correct.



1 MR. OFSHE: Yes.

2 MR. CAVALLUZZO: Then if we go to  
3 page 8 we see a series of published articles  
4 relating to the issue upon which you will be  
5 testifying today.

6 In 1995 you wrote an article  
7 entitled "I'm Guilty If You Say So"?

8 MR. OFSHE: Yes.

9 MR. CAVALLUZZO: In 1997 you  
10 co-author a paper with Richard Leo entitled "The  
11 Social Psychology of Police Interrogation: The  
12 Theory and Classification of True and False  
13 Confessions"?

14 MR. OFSHE: Correct.

15 MR. CAVALLUZZO: That can be  
16 found, Mr. Commissioner, behind tab 2 of the Book  
17 of Documents.

18 As well, in 1997 you coauthored  
19 another paper with Richard Leo entitled "The  
20 Decision to Confess Falsely: Rational Choice and  
21 Irrational Action".

22 Is that correct?

23 MR. OFSHE: Correct.

24 MR. CAVALLUZZO: That,  
25 Mr. Commissioner, can be found behind tab 3 of the

1 Book of Documents.

2 There are several other papers  
3 relating to coerced confession; for example, at  
4 page 10, if you go to four articles up, in 1988,  
5 "Coerced Confessions: Case Studies in The Tactics  
6 and Persuasion".

7 In 1988, the next paper, "Thought  
8 Reforming Interrogations in America".

9 On the next page as well -- your  
10 CV is filled with these kinds of articles and I  
11 would like to move on from your published articles  
12 to presentations that you have made at judicial  
13 conferences, starting at page 13 of your  
14 curriculum vitae.

15 It started back in 1994 and it  
16 would appear to have culminated in 2004 on a  
17 conference at the Annual General Meeting of the  
18 Ontario Court of Justice in this city, Ottawa.  
19 The title of your presentation was "Interrogation  
20 and Coerced and False Confession"?

21 MR. OFSHE: There is actually one  
22 more past that, a conference at Brooklyn Law  
23 School also in 2004.

24 MR. CAVALLUZZO: Okay. As well, I  
25 see that you are also involved in training of

1 attorneys and investigators, the very last page of  
2 your curriculum vitae, page 21. In 2004 you were  
3 involved in these kinds of trainings.

4 Is that correct.

5 MR. OFSHE: Correct.

6 MR. CAVALLUZZO: The final point,  
7 apart from the fact that you have made  
8 presentations to judicial conferences, have  
9 testified numerous times in court proceedings on  
10 this particular issue, I understand as well that  
11 your published works on police interrogation and  
12 production of true and false confessions have been  
13 cited quite often in judicial authorities, both  
14 Canadian and American.

15 Is that correct.

16 MR. OFSHE: They have certainly  
17 been cited. I don't know how often, but they have  
18 been cited.

19 MR. CAVALLUZZO: Mr. Commissioner,  
20 on that basis I would ask that Professor Ofshe be  
21 found to be an expert witness in the areas I have  
22 submitted.

23 THE COMMISSIONER: Ms Edwardh, any  
24 questions or submissions?

25 MS EDWARDH: No, other than to

1           acknowledge that the witness is well qualified to  
2           give opinion evidence in this area.

3                           THE COMMISSIONER: Mr. Fothergill?

4                           MR. FOTHERGILL: No questions,  
5           thank you.

6                           THE COMMISSIONER: Or submissions?

7                           MR. FOTHERGILL: No.

8                           THE COMMISSIONER: I am satisfied  
9           that the witness is well qualified to give expert  
10          evidence and express opinions in the areas  
11          indicated by Mr. Cavalluzzo.

12                           Please proceed.

13                           MR. CAVALLUZZO: Thank you, sir.

14                           Commissioner, really if I could  
15          summarize the areas in which Professor Ofshe will  
16          be testifying to: Initially we are going to  
17          discuss the general principles through which  
18          interrogation leads to confession, and while  
19          though torture fits into this analysis, it plays a  
20          unique role.

21                           Second, we are going to  
22          be reviewing Mr. Arar's account of his  
23          interrogation and discussing the principles,  
24          the general principles, with Professor Ofshe in  
25          respect of an application of those principles to

1 the process.

2 Then, finally, we will be  
3 discussing the conclusion that the type of  
4 interrogation program to which Mr. Arar was  
5 exposed is likely to drastically raise the rate at  
6 which false confessions are likely to be obtained  
7 from both actual terrorists and persons who are  
8 completely uninvolved in terrorism.

9 Just at the outset, Professor  
10 Ofshe, if we could just talk briefly about the  
11 tactics used during interrogation in respect of  
12 the three objectives that these tactics are  
13 intended to achieve.

14 MR. OFSHE: Interrogation is a  
15 process of influence. It can't be looked at  
16 simply as a laundry list of factors that are  
17 thrown into a pot and cooked into a stew. It is a  
18 process that is time-ordered. Certain things have  
19 to occur before other things are likely to happen  
20 and interrogation is built to influence a person  
21 to come to see the world in a certain way and then  
22 to make decisions based on their perception of the  
23 world as they find themselves in it. So it is an  
24 ongoing, moving-through-time process.

25 For convenience sake, I think it

1 is possible to talk about three factors that tend  
2 to occur during interrogation. One of them has to  
3 do with setting a stage, and then there are two  
4 factors that are dynamic that over the course of  
5 time change people's perceptions and impact their  
6 decision-making as their perceptions change.

7 These three factors I simply label  
8 as factors relating to a sense of powerlessness,  
9 factors relating to a sense of hopelessness, and  
10 factors intended to motivate a person to comply  
11 with what the interrogator wants.

12 It works best, or at least  
13 interrogation is built on the assumption that it  
14 works best, to first create a sense of  
15 powerlessness. That has to do generally, in a  
16 standard interrogation done by police agents, in  
17 certainly Western society, and I think the model  
18 applies to torture-driven interrogations as well.

19 After all, torture-driven  
20 interrogations are actually a step backward.  
21 Modern police interrogation derives from  
22 torture-driven interrogations. What we see  
23 historically is a process of repudiating  
24 various kinds of torture, minimizing the torture  
25 that appears in interrogation, and ultimately

1           shifting from torture as a legitimate or as an  
2           accepted motivator in interrogation to other  
3           motivators having essentially the same role that  
4           torture once played.

5                        So for me, looking at torture and  
6           interrogation is actually taking a step backward,  
7           looking at a less sophisticated rather than a more  
8           sophisticated system. I have certainly seen some  
9           examples of torture-driven interrogations in the  
10          United States in the recent past. So it is not  
11          entirely outside of my experience, but thankfully  
12          it is rare in my experience.

13                       The setting factors are those of  
14          where the interrogation takes place, the demeanour  
15          that the interrogator effects, the apparent  
16          certainty that the interrogator attempts to exude.  
17          All of this is designed to make the target of the  
18          interrogation feels as if he or she is utterly  
19          hopeless, that they have -- I'm sorry, utterly  
20          powerless, that they have no ability to control  
21          what is happening to them.

22                       Hence, in a modern interrogation  
23          the session tends to take place at a police  
24          station as opposed to someone's home. Obviously  
25          they will feel less comfortable and be made more

1           aware of the power of the State to interfere with  
2           their lives if they are taken into a secure area,  
3           a place where they have a sense that they have to  
4           be passed in and out at the pleasure of the  
5           interrogator, they are surrounded by agents of the  
6           State, and they are well aware of the fact that  
7           these agents of the State have the ability to  
8           interrupt the normal flow of their lives.

9                           The interrogator will always  
10           effect an attitude of absolute certainty in what  
11           he or she is saying. The interrogator will appear  
12           never to credit what the suspect says about an  
13           alibi, even if the interrogator has personal  
14           doubts about the information they are using and  
15           may suspect that the suspect is telling the truth  
16           when the suspect says, "I was with my girlfriend  
17           two Thursdays ago." The interrogator dares not  
18           reveal that because that will destroy the  
19           interrogator's sense -- or his appearance of being  
20           all-powerful and being all-knowing.

21                           These variables designed to  
22           create powerlessness merely set the stage for  
23           an interrogation. As we will see if we look at  
24           Mr. Arar's interrogation, the powerlessness  
25           factors are extraordinarily strong, far stronger



1           than one sees in a modern interrogation in a  
2           western society.

3                                 In that setting, the setting  
4           defined by where and how the interrogator acts,  
5           the first thing that needs to be accomplished is  
6           for the interrogator to convince the person who  
7           initially believes, "I will be able to survive,  
8           get through this situation in relatively good  
9           shape, or without any major damage, merely by  
10          denying what I'm accused to have done."

11                                The object is to change their  
12          perception of their situation from one in which  
13          they are all right and the future holds no great  
14          problem for them by simply saying that they did  
15          nothing wrong, to one in which they become  
16          convinced that their situation is utterly  
17          hopeless, that like it or not, innocent or not,  
18          confessing or not, their future is known.

19                                The interrogator will try to  
20          convince the person that, "I have so much evidence  
21          against you or my position is so strong that I  
22          don't need your confession in order to make my  
23          case. What it is that I want to accomplish, I  
24          have already accomplished. I'm talking to you for  
25          reasons that, all things considered, probably

1 benefit you more than they benefit me". In other  
2 words, to take a line from the Treasurer of the  
3 Sierra Madre, "I don't need your stinking  
4 confession. I have everything that I need,  
5 overwhelming evidence to link you to the crime."

6 The object is to take someone who  
7 feels confident, especially if they are innocent,  
8 that they did not commit the crime and make them  
9 realize it makes no difference what you think.  
10 Your situation is hopeless. When this session is  
11 over, you will move on to the next step of the  
12 process, whatever that is. In the ordinary police  
13 interrogation that would be arrest, indictment,  
14 prosecution, trial, conviction and punishment.  
15 All of these things are determined because I have  
16 so much evidence against you.

17 Again, comparing that to  
18 Mr. Arar's situation, one in which he certainly  
19 didn't know what the system held in store for him  
20 in the future and was certainly fearful of it, at  
21 some point he must have come to a feeling of  
22 extraordinary hopelessness, probably far more  
23 hopeless than an ordinary person accused of a  
24 crime in any western society that I have any  
25 experience with.

1                   MR. CAVALLUZZO: Just stopping you  
2                   there. In respect of the information that the  
3                   interrogator leads the target to believe he or she  
4                   has, are there any legal strictures as to whether  
5                   it must be credible information, reliable  
6                   information, truthful information, or are there no  
7                   limits at all.

8                   MR. OFSHE: It depends on what  
9                   country you are in. In England, for example, it  
10                  is prohibited for police to lie to suspects about  
11                  the strength of the evidence that they have. An  
12                  interrogation will be thrown out, or the result of  
13                  it will be thrown out, if police overstate the  
14                  strength of the evidence.

15                  In the U.S. it is completely the  
16                  opposite, and I gather in Canada it is also  
17                  permissible for police to overstate the evidence.  
18                  It is a difference in cultural attitude.

19                  I have no doubt that the freedom  
20                  to overstate evidence makes for a much more  
21                  powerful interrogation. I also don't believe that  
22                  merely that ability will necessarily produce false  
23                  confessions.

24                  It is a social judgment as to how  
25                  a society wants police to act that controls what

1 the society produces. Tactically, there is no  
2 question in my mind that overstating the evidence  
3 is a very powerful tactic and potentially a very  
4 dangerous tactic because the ability to overstate  
5 the evidence can lead to a sense of hopelessness  
6 in the mind of someone who knows they did not  
7 commit the crime. While that alone ought not to  
8 produce a false confession, it can open the door  
9 to a false confession if other things occur.

10 It varies from culture to culture,  
11 but it is very powerful. Certainly, if the person  
12 is convinced that the interrogating agent has  
13 enormous amounts of information, details about  
14 their lives for example, can almost substitute for  
15 specific information about their involvement in  
16 the crime, anything that contributes to creating  
17 the impression that the interrogator has vast  
18 amounts of information is going to empower the  
19 interrogator.

20 MR. CAVALLUZZO: Okay. Thank you.

21 In terms of the third principle or  
22 the third tactic, that of motivation, I wonder if  
23 you might expand on that, because you talk about  
24 different degrees of motivation which are crucial  
25 for interrogation methods.

1                   MR. OFSHE: Even if a person has  
2                   been convinced that the interrogator believes they  
3                   have overwhelming evidence linking them to the  
4                   crime, even if they come to the point where they  
5                   recognize that continued resistance is effectively  
6                   futile, they are never going to convince the  
7                   interrogator, who really stands for the State in  
8                   his role in relation to the suspect. It is the  
9                   accusing agent, the accusing authority is  
10                  immovable. That is not necessarily going to lead  
11                  someone to decide, "Well, gee, I should confess."  
12                  They still need to be motivated.

13                   In modern interrogations, there  
14                   are a series of motivators that can be introduced,  
15                   running from relatively low end, in terms of their  
16                   power, to extraordinarily high end, with torture  
17                   generally going beyond what one sees in most  
18                   interrogations in western society.

19                   Low-end motivators, as they  
20                   function in typical police interrogation, have to  
21                   do largely with if an interrogator has established  
22                   some rapport with the suspect, if the interrogator  
23                   has been successful in convincing the person that  
24                   they are caught, and if in fact they know that  
25                   they are caught, then appeals to play the game,

1 "do the right thing", "be a man, at least in my  
2 eyes", "do what someone who at least has the  
3 integrity to admit to having done something that  
4 you have been caught doing", "why continue to  
5 lie", "do something that presents yourself to me  
6 and to the rest of the world in a somewhat better  
7 light", can be a sufficient motivator to get  
8 someone who knows they have committed the crime to  
9 say "okay, you've got me", because they know that  
10 they are caught.

11 I have never seen an innocent  
12 person electing to give a false confession merely  
13 because the interrogator said "do the right  
14 thing". Usually the innocent person says, "I have  
15 been telling you the truth for the last five hours  
16 and you refuse to believe me."

17 They are at loggerheads over this  
18 issue of whether the person committed the crime or  
19 not.

20 The innocent person is not about  
21 to move off that. The person is not about to  
22 admit to something that they didn't do, or  
23 certainly, if we analogize this to Mr. Arar's  
24 situation, not about to admit that he is involved  
25 in international terrorism merely to please the

1 interrogator when he knows he wasn't.

2                   The mid-range interrogators, as  
3 they appear in most interrogations that I see,  
4 have to do with trying to get the person to begin  
5 to think about the future, think about what the  
6 criminal justice system holds for them, and to  
7 give them very subtle suggestions that, "In the  
8 future, given the future that is in store for you,  
9 you will fare better if you elect to confess now,  
10 if you elect to show remorse now."

11                   Statements which apparently have  
12 some history in Canadian law about "it would be  
13 better if" are suggestions that "it will be better  
14 for you if you confess", without linking up  
15 explicitly the consequence, without promising  
16 anything explicitly, but merely suggesting, and  
17 sometimes quite powerfully suggesting, that the  
18 system will treat you better if you confess.

19                   That is clearly an inducement  
20 beyond just "look better in my eyes".

21                   Beyond that, there is the  
22 introduction of obvious psychological coercion,  
23 and that is accomplished in one of two ways,  
24 typically: either through blatant linking up of a  
25 contingency between confession and a consequence

1 of minimal punishment or denial and a consequence  
2 of maximum punishment by simply asserting: This  
3 will follow if you do that, and something else  
4 will follow if you do something else. On the one  
5 hand, you could get the death penalty; on the  
6 other hand, I will talk to the judge, who is a  
7 friend of mine, or the prosecutor. I will some  
8 way intervene for you.

9 And that kind of explicit promise  
10 can get made.

11 But the idea that there will be a  
12 strong link between confession or denial and a  
13 subsequent result can be gotten across, can be  
14 successfully communicated, through suggestions.  
15 And there is research that demonstrates that this  
16 is the case.

17 And certainly in America these  
18 days police are trained to communicate threats of  
19 harm and offers of leniency through sub-blatant  
20 suggestions. I have seen that hundreds -- well,  
21 that is an exaggeration -- dozens and dozens and  
22 dozens, perhaps as many as a hundred times, in  
23 interrogations in the U.S. where a series of  
24 statements are made by the interrogator.

25 If one pulls those statements and



1 looks at them, it is very clear that a theme is  
2 being introduced and that theme is: contingent  
3 upon confession, "you will get lenient treatment";  
4 contingent upon continued denial, "you are likely  
5 to be charged with the worst version of the crime  
6 that is likely to have the much stronger  
7 punishment". In effect, the message is  
8 communicated quite well and is understood.

9 That puts the person in a position  
10 in which there is a benefit and a strong benefit,  
11 powerful benefit, for confessing, and a punishment  
12 for continuing to deny. That can produce a  
13 decision to give a false confession.

14 Someone who has been made to  
15 believe that their situation is hopeless, has  
16 accepted the idea that because they think the  
17 police would never lie to them all this evidence  
18 that the detective tells them is arrayed against  
19 him the detective genuinely believes exists --  
20 even though the person knows that it is in error,  
21 the detective believes it. The detective is a  
22 reasonably smart person with a lot of skills --  
23 with a lot of history and experience at the job.  
24 "The detective thinks I committed the crime. The  
25 detective tells me there is evidence that links me

1 to the crime. Other people will see it the same  
2 way," which is, of course, what the detective says  
3 about the prosecutor, the jury, the judge, and so  
4 on. "My fate is determined."

5 An innocent person feeling that,  
6 believing that, now given an option of confessing  
7 to the crime, especially if it is put out in a  
8 scenario form that transforms the severity of the  
9 crime from high to low, such as premeditated  
10 murder versus accidental killing versus  
11 self-defence, arrays a series of different crimes  
12 that carry different levels of punishment and the  
13 person is given the opportunity, very often in the  
14 form of some scenario for the crime articulated by  
15 the interrogator, that goes, "This looks like a  
16 premeditated murder, but what I think happened,"  
17 and then talks about how, "Harry was a bad guy.  
18 That is why you were carrying a gun. When you two  
19 met up, he became aggressive. He made a move like  
20 he was going for his gun, and then, in the best  
21 Texas style, you beat him to the draw, you shot  
22 him. It was just self-defence."

23 The interrogator signals he is  
24 willing to accept that. The person is now  
25 confronted with an opportunity to minimize their

1           loss.

2                           There are scenarios that police  
3           use for homicides, for sexual abuse crimes, that  
4           are tailored to get that message across.

5                           A desperate, confused, anxious,  
6           innocent person might at that moment elect to give  
7           a false confession, believing it is the only way  
8           to minimize their punishment, perhaps save their  
9           lives. That is typically where false confessions  
10          come about.

11                          For someone who knows they have  
12          committed the crime, when confronted with that  
13          sort of coercion, it looks like the best deal that  
14          they can ever get, and that can also lead to  
15          coerced but nevertheless reliable statements. But  
16          it will produce false confessions.

17                          And then we go beyond that to  
18          something that is rarely seen, and that is the  
19          introduction of torture.

20                          Torture, physical coercion of any  
21          sort, is simply a much more immediate and much  
22          more powerful motivator than suggesting things  
23          about what your punishment will be in the future  
24          or whether you will get to go home at the end of  
25          the day. Depending on the strength of the

1 torture, it as a motivator gets increasingly  
2 powerful.

3 I think everyone who either knows  
4 anything about the history of interrogation,  
5 studies it, thinks about it in terms of what you  
6 have to do to motivate someone to comply to  
7 anything, will clearly recognize that torture is  
8 an enormously powerful motivator, but it fits in  
9 the same system.

10 If the individual has already been  
11 convinced that the interrogator is immovable, then  
12 it makes no sense to resist the torture. The only  
13 thing in front of them is to minimize the amount  
14 of torture. That is the only choice they've got.  
15 And they can do that by complying. And the more  
16 severe the torture, the stronger the motivator to  
17 do that, to cut it off.

18 And if you can succeed in cutting  
19 it off by giving a false confession, that can  
20 start to look like a very attractive alternative,  
21 and perhaps you don't want to think about what is  
22 in store for you in the long run if you do that  
23 because you are concerned about minimizing the  
24 punishment at the moment.

25 So I think, as I see it, torture

1 is an extension of what we see going on in modern  
2 interrogation. It simplifies things. It can  
3 provide, depending on how strong the torture is,  
4 such a powerful motivator that primitive  
5 interrogation systems don't necessarily have to  
6 work very hard to convince someone that their  
7 situation is hopeless. It becomes immediately  
8 obvious that the situation is hopeless as the pain  
9 of the torture becomes excruciating, and the fact  
10 that the person anticipates that the torture will  
11 go on because they see no cavalry coming over the  
12 hill to rescue them. So therefore, they see  
13 nothing; a future filled with nothing but more of  
14 the same and perhaps worse torture.

15 Torture becomes just a very  
16 powerful motivator and is very likely to produce  
17 compliance, perhaps more likely to produce false  
18 confession than true confession, simply because if  
19 someone has something to genuinely confess,  
20 especially if we are thinking about ideologically  
21 or politically motivated individuals, they may be  
22 willing to hold out longer than someone who is in  
23 fact completely uninvolved, has nothing to protect  
24 in the sense of no commitment to the organization  
25 that they are accused of being a representative

1 of, and that person is freer to think about how to  
2 deal with their current situation. And the  
3 current situation has been designed to lead them  
4 to reach the decision to comply; hence, they want  
5 to confess, they want to confess falsely if that  
6 will end their torture. And there is nothing to  
7 restrain them other than perhaps the realization  
8 that in the long run it is not going to work.

9 Certainly anyone who operates a  
10 system that depends on this has got to be aware of  
11 its potential to produce either intentional  
12 deception on the part of people who have an  
13 involvement in an outlaw group that they are  
14 trying to protect or people who simply want to end  
15 the torture by telling them what they need to  
16 hear.

17 And so these systems would have to  
18 involve checks on the stories that are told to  
19 separate out the true from the false because they  
20 must be accustomed to getting false statements  
21 from people subject to this sort of torture.

22 MR. CAVALLUZZO: I wonder if we  
23 might turn then to some particulars of Mr. Arar's  
24 detention.

25 I wonder if the clerk might give

1           you Volume 8?

2                           Professor Ofshe, if you would  
3 refer to tab 693, and if you go to page 3 of 6, I  
4 just want to highlight certain facts before  
5 Mr. Arar arrives in Syria.

6                           If you go to the bottom of the  
7 page, you will see that on October the 8th  
8 Mr. Arar is still in New York City in the United  
9 States and -- about 15 lines up -- he is woken up  
10 by a guard. He is then chained and shackled and  
11 he is brought before a person, a director of the  
12 INS, and he is told a decision has been made and  
13 he is also told he will be deported to Syria.

14                          The facts are, prior to this time,  
15 he had been threatened with that deportation and  
16 said, "Don't send me to Syria. I will be  
17 tortured."

18                          In any event, it goes on. He was  
19 driven to an airport and you will see he was put  
20 in a plane. He was chained and shackled in the  
21 plane. He was along with others. They flew to  
22 Washington, D.C. and then eventually they ended up  
23 in Jordan, and he is with some four or five people  
24 in the airplane. He is taken to Jordan. He is  
25 met in Jordan by a number of people. Six or seven

1           Jordanian men were waiting for him. They  
2           blindfolded him, chained him, and put him in a  
3           van. They made him bend his head down in the back  
4           seat and then this man "started beating me. Every  
5           time I tried to talk, they beat me", et cetera.

6                           He is in Jordan for a particular  
7           period of time.

8                           If you go on to page 4 of 6, he  
9           continued to be blindfolded. They asked him  
10          certain routine questions. And then he is there  
11          for -- I am going to move on now.

12                          He is there for a period of time,  
13          of hours, and then finally, if you go eight lines  
14          down, it says:

15                                 "Over an hour later, we  
16                                 arrived at what I think was  
17                                 the border with Syria."

18                                 So he arrives in Syria finally.

19                                 He is put in another car, is  
20          driven for about three hours, taken into a  
21          building where there were guards who went through  
22          his bags and took some chocolates that he had  
23          bought in Zurich.

24                                 I assume that the taking of those  
25          chocolates is going to enhance his powerlessness,



1           presumably, in terms of the principles you are  
2           talking about.

3                           MR. OFSHE: In terms of the  
4           principles I am talking about, everything that you  
5           have read is so obviously going to impact someone,  
6           to give them a sense that they are utterly  
7           powerless, from being picked up at Kennedy  
8           Airport, which you did not read, but then held,  
9           transported from western society, obviously with  
10          great care and at great expense, to the Middle  
11          East, has got to be an experience that proves to  
12          you that you are utterly powerless to resist this  
13          fate.

14                           It is worse than my trying to  
15          change planes at O'Hare Airport yesterday.

16          --- Laughter / Rires

17                           MR. CAVALLUZZO: If we can move on  
18          from O'Hare.

19                           MR. OFSHE: Thankfully.

20                           MR. CAVALLUZZO: The good  
21          professor was delayed three hours last night at  
22          O'Hare airport for those who do not know.

23                           In any event, it goes on.

24                           Picking up three lines later.

25                           "Three men came and took me

1                   into a room. I was very,  
2                   very scared. I was crying  
3                   all of the time. They put me  
4                   on a chair and one of the men  
5                   started asking me questions.  
6                   I later learned this man was  
7                   a ... Colonel. He asked me  
8                   about my brothers and why we  
9                   had left Syria. I answered  
10                  all the questions. If I did  
11                  not answer quickly enough, he  
12                  would point to a metal chair  
13                  in the corner and ask, do you  
14                  want me to use this?"

15                         I guess another signal to the  
16                  target that your situation is hopeless.

17                         MR. OFSHE: Training of obedience  
18                  as well. Having read some of Mr. Arar's account  
19                  of his experience, I know that he did not know  
20                  what that chair was. But obviously the  
21                  interrogator is pointing out something to him  
22                  which he will eventually learn what its function  
23                  is.

24                         It is obviously pointed out to him  
25                  as a threat of what the future holds for you. All

1 of this is setting the target, Mr. Arar, up to  
2 recognize that he had better comply.

3 MR. CAVALLUZZO: Okay. Now, it  
4 goes on. Apart from these threats, he said,  
5 picking up:

6 "There was no violence. Only  
7 threats. At about 1:00 in  
8 the morning the guards came  
9 to take me from my cell  
10 downstairs. We went into the  
11 basement and they opened a  
12 door and I looked in. I just  
13 could not believe what I saw.  
14 I asked how long I would be  
15 kept in this place. He did  
16 not answer. But put me in  
17 and closed the door. It was  
18 like a grave, exactly like a  
19 grave. It had no light. It  
20 was three feet wide. It was  
21 six feet deep. It was seven  
22 feet high. It had a metal  
23 door with a small opening in  
24 the door which did not let in  
25 the light because there was a

1 piece of metal on the outside  
2 for sliding things into the  
3 cell. There was a small  
4 opening in the ceiling..."

5 We have heard earlier there were  
6 cats and rats that were urinating, and so on and  
7 so forth.

8 Just your comment in terms of that  
9 kind of detention condition in which Mr. Arar  
10 found himself from October to about late August of  
11 the next year.

12 MR. OFSHE: I suppose it would be  
13 reasonable to say that this is the equivalent in  
14 terms of the setting to what I have described as  
15 commonplace in interrogation in western society,  
16 done at the police station rather than at  
17 someone's home, in order to communicate a  
18 particular message.

19 Here the message is coming through  
20 loud and clear in everything and up to the  
21 abominable conditions under which he recognizes he  
22 is going to be kept, not knowing how long; all of  
23 it purposive, designed to communicate a certain  
24 message to him, and it is a message that I call  
25 powerlessness.

1 MR. CAVALLUZZO: Okay. Now, it  
2 picks up from there and you will see that physical  
3 beatings started that day. I am just picking up  
4 here, halfway down:

5 "The beatings started that  
6 day and was very intense for  
7 a week. And then less  
8 intense for another week.  
9 That second and the third  
10 days were the worst. I could  
11 hear other prisoners being  
12 tortured and screaming and  
13 screaming. Interrogations  
14 are carried out in different  
15 rooms. One tactic they use  
16 is to question prisoners for  
17 two hours and then put them  
18 in a waiting room so they can  
19 hear the others screaming and  
20 then bring them back to  
21 continue the interrogation."

22 And I guess that kind of periodic  
23 beatings, along with waiting time listening to  
24 others scream, must have some impact as well.

25 MR. OFSHE: He is learning that

1 his situation is not unique. The others are  
2 screaming. I don't know how intense his beating  
3 was at that point, whether he was screaming. But  
4 if he wasn't and others were, that must have  
5 gotten across to him the idea that it is possible  
6 that worse things can happen.

7 To assault someone for a period of  
8 time and let them sit while they hear the sounds  
9 of torture going on around them has got to  
10 communicate the message: this is just a temporary  
11 break. It is going to focus all of their  
12 attention on this experience, the fact that it  
13 appears to be the business of what goes on here,  
14 that it is continuous, and that how long it will  
15 go on and what breaks there will be are entirely  
16 up to those who control it, making him very aware  
17 of now his powerlessness and his hopelessness.

18 MR. CAVALLUZZO: Okay. The  
19 statement goes on to describe being beaten with a  
20 black electric cable, which is a shredded cable  
21 about 2 inches thick.

22 "They hit me with it  
23 everywhere over my body.  
24 They mostly aim for my palms  
25 but sometimes missed and hit

1                   my wrists."

2                   And then it goes on:

3                   "They also struck me on my  
4                   hips and my lower back.

5                   Interrogators constantly  
6                   threatened me with a metal  
7                   chair, tire, and electric  
8                   shocks."

9                   Part of the same pattern.

10                  And then it goes on:

11                  "Then on the third day, the  
12                  interrogation lasted about 18  
13                  hours. They beat me from  
14                  time to time and made me wait  
15                  in the waiting room for one  
16                  to two hours before resuming  
17                  the interrogation. While in  
18                  the waiting room, I heard a  
19                  lot of people screaming. I  
20                  remember that was one of the  
21                  worst parts of my  
22                  imprisonment, is just to hear  
23                  all those people screaming."

24                  And then it goes on.

25                  And then, finally, in regard to

1           any statements, if you pick it up about four lines  
2           down, it says:

3                                "I repeat, they had not asked  
4                                me about this in the United  
5                                States. They kept beating  
6                                me. So I confessed and told  
7                                them that I went to  
8                                Afghanistan. I was ready to  
9                                confess to anything if it  
10                              would stop the torture. They  
11                              wanted me to say I went to a  
12                              training camp. I was so  
13                              scared that day. I remember  
14                              I urinated on myself twice.  
15                              The beating was less severe  
16                              each of the following days.  
17                              At the end of each day, they  
18                              would always say 'tomorrow  
19                              will be harder for you' so  
20                              each night I could not  
21                              sleep."

22                              And then, finally, it goes on:

23                              "Around October 17th the  
24                              beatings subsided. Their  
25                              next tactic was to take me in



1 a room, blindfold will, and  
2 people would talk about me.  
3 I could hear them saying "he  
4 knows lots of people who are  
5 terrorists. We will get  
6 their numbers. He is a liar.  
7 He has been out of the  
8 country for long.' Then they  
9 would say let's be frank,  
10 let's be friends, tell us the  
11 truth and come around the  
12 desk and slap me on the face.  
13 They played lots of mind  
14 games. The interrogation and  
15 beating ended three days  
16 before I had my first  
17 consular visit which was on  
18 October 23rd."

19 It is obviously a rhetorical  
20 question as to whether, first of all, the  
21 conditions of detention as described by him, as  
22 well as the physical beatings, the threats, the  
23 screaming, and so on and so forth, whether these  
24 would be at the upper end of your model in terms  
25 of physical coercion inducing any kind of

1 confession.

2 MR. OFSHE: They are certainly  
3 worse than almost anything that I have seen in the  
4 U.S. On the other hand, there are examples of  
5 interrogations that have gone on in the U.S. in  
6 the recent past involving electrical currents  
7 passed through the genitals of prisoners in Cook  
8 County. There are perhaps as many as a hundred  
9 cases on appeal in the Illinois Appellate Court  
10 system over the issue of torture leading to  
11 confessions. I have seen other cases in which  
12 particular prisoners or suspects have been beaten.

13 This is clearly at least at that  
14 level, if not worse, partly because of the  
15 conditions of detention. But based on what  
16 Mr. Arar reports about what he learned later, when  
17 he was transferred to another prison, about the  
18 extent of torture that other people got, it is not  
19 as severe as it potentially might have been,  
20 apparently.

21 The chair, for example. They,  
22 while threatened him with it, he doesn't report  
23 that it was used on him, and he does report that  
24 other people told him that it was used on them.

25 Something is going on here that

1           may not be known to Mr. Arar. They are setting  
2           him up clearly, in my judgment, to focus on  
3           getting names of other people. Perhaps they  
4           actually believe at this point that he knows names  
5           of people involved in al-Qaeda, but they are  
6           certainly going through the motions of demanding  
7           names; and probably, had they pressed him on that,  
8           there is a good chance they would have gotten  
9           names. And if he is in no way involved in any  
10          terrorist organization, he probably would have  
11          given them the names of people that he knew who  
12          themselves were not involved.

13                         But if this process continued,  
14          they probably would have been able to squeeze  
15          everything that they wanted out of him, and it may  
16          all have been worthless.

17                         To me, it seems that is what they  
18          are setting him up for: letting him overhear "he  
19          is a liar", letting him overhear "he knows about  
20          other people". They are communicating to him what  
21          he has to do to control the level of torture. But  
22          it does not seem to continue.

23                         After he first breaks, he reports  
24          that the level of torture seemed to go down after  
25          that. That is teaching him: comply and the

1           torture will diminish.

2                           At the same time, according to his  
3           account, they are also communicating what they  
4           want to know next and allowing him to realize,  
5           perhaps, that he needs to give them that;  
6           otherwise, the torture will start going up.

7                           One of the things that I note in  
8           this that strikes me as intriguing or  
9           thought-provoking, he says his torture stopped  
10          three days before he had his first consular  
11          meeting. Probably the people who were torturing  
12          him knew at least three days in advance that he  
13          was going to be meeting with a consul. That may  
14          have been an inhibiting factor.

15                          His experience in this system may  
16          have been impacted by what the Canadian government  
17          was doing to try to protect him and may have in  
18          fact protected him from the kind of treatment that  
19          he learned other people got merely because of  
20          their presence.

21                          If I look at what he describes, I  
22          see the system as going in a particular direction,  
23          but then I see things not happening that appear to  
24          be destined to happen. Changes occurring on cue.  
25          When he complies, torture is reduced. But all of

1 a sudden torture stops, and three days later a  
2 Canadian consul shows up. Perhaps it is  
3 happenstance or perhaps there is some causal  
4 connection between them.

5 But the system that he is  
6 describing is somehow reacting to something  
7 external to it, it seems to me.

8 MR. CAVALLUZZO: Now, we have  
9 heard a great deal of evidence on that, and  
10 obviously at the end of the day the Commissioner  
11 will be making certain findings in respect of  
12 whether there is any causal connection.

13 But just a few final questions.

14 Obviously from what you have  
15 described in terms of your opinion, any product,  
16 any report, confession, statement that was the  
17 product of this process could be false, and the  
18 question that I have related to that is the  
19 reliability of that kind of statement.

20 In your experience, if we have a  
21 report or statement that is the product of  
22 torture, that we know is the product of torture,  
23 is it of any use to police or security  
24 intelligence agencies?

25 MR. OFSHE: As a general

1 principle, the purpose of an interrogation,  
2 whether lawfully conducted or driven by torture,  
3 is to obtain information about the matter that is  
4 at issue, whether it is the crime or the witness  
5 statement that the interrogator wants. It is not  
6 merely to get someone to say, "I did it"; it is to  
7 get a confession.

8                   And I would define confession as a  
9 detailed account of the persons involved in the  
10 crime step by step by step, or a detailed  
11 statement of what the person witnessed, if that is  
12 the target, if that is what the interrogator  
13 wants.

14                   Police are trained always to seek  
15 corroboration. Merely getting an "I did it" is  
16 not the name of the game. It is getting the  
17 person to volunteer information which can be  
18 objectively evaluated, which can be compared with  
19 the objectively knowable facts of the crime, or,  
20 if one is seeking intelligence, compare it with  
21 what is reliably known about the training camp in  
22 Afghanistan or the organization of an al-Qaeda  
23 cell or whatever it might be.

24                   So whether the person is  
25 confessing, first, to something that is within

1        their experience can be evaluated to screen out  
2        either false statements that are made by people  
3        who are ignorant of the matter at issue, or false  
4        statements made by people who are quite  
5        knowledgeable but are choosing to withhold that  
6        information. The only standard for doing that is  
7        getting details that can be evaluated, can be  
8        corroborated. That is true in confession of every  
9        sort. That is how one distinguishes between true  
10       and false confessions in modern societies that are  
11       not torture-driven; and certainly in  
12       torture-driven interrogation, the same principle  
13       would hold.

14                    So if torture increases the  
15       motivation to stop the process, it is going to  
16       increase the likelihood that someone would elect  
17       to falsely confess. And if one is dealing with a  
18       population, some of whom are perhaps innocent,  
19       others are ideologically committed, the factor of  
20       ideological commitment is also likely to produce  
21       some false confessions in order to (1) stop the  
22       torture, and (2) protect the group.

23                    So for a whole host of reasons I  
24       would think that interrogators or  
25       intelligence-gathering systems that depend on

1           torture have to be even more sensitive to the  
2           possibility of false confession and more aware of  
3           the need to get verifiable information than  
4           ordinary police agents, at least not terribly  
5           well-trained police agents.

6                        So I think there is a great danger  
7           for the system to produce an unreliable statement.

8                        MR. CAVALLUZZO: Just in closing,  
9           I guess there could be one exception to what you  
10          have just said, and that is we discussed earlier a  
11          statement that is really a political statement;  
12          and that is, you are not concerned about the  
13          information that you received, you just want a  
14          political statement for whatever the purpose is.

15                       MR. OFSHE: Sure. I don't think I  
16          mentioned that before, but certainly sometimes  
17          there are purely political purposes for getting  
18          someone to say "I did it", and that is all that  
19          the authority wants out of it. They simply want a  
20          confession.

21                       This was typical of foreign  
22          missionaries who were held in China after the  
23          revolution. They needed to be gotten to confess  
24          because of the political value, not for any  
25          intelligence that they were going to contribute.



1 I mean, I can't say what people believed about  
2 whether or not they really were spies, but it  
3 would be hard for me to imagine that they were  
4 actually thought to be spies. These were  
5 missionaries who happened to be in China, but they  
6 were made to confess.

7 A lot of the show trials in the  
8 Soviet Union after the revolution were about  
9 getting confessions, not about actually wrapping  
10 up spy rings. They had a political purpose.

11 I am sure that it certainly could  
12 come about that, under a particular set of  
13 circumstances, the goal might be or might become  
14 getting someone to make an admission that so  
15 damages their reputation that perhaps no one cares  
16 about what happened to them.

17 So it may have political purposes  
18 alone, especially, I would imagine, if it is  
19 recognized that a mistake has been made and that  
20 someone who never should have been taken against  
21 their will and subjected to this kind of torture  
22 was indeed taken and tortured; and as a political  
23 move, it is necessary to develop a cover story,  
24 and a confession would probably be helpful.

25 MR. CAVALLUZZO: Okay, Professor

1           Ofshe. That would complete your direct  
2           examination.

3                           Mr. Commissioner, it is one  
4           o'clock. I don't know. Maybe we should assess  
5           what the cross-examination --

6                           THE COMMISSIONER: Let's see what  
7           the likelihood of timing is.

8                           MS EDWARDH: I don't expect to be  
9           more than 15 to 20 minutes.

10                          THE COMMISSIONER: Okay.

11                          Mr. Fothergill?

12                          MR. FOTHERGILL: My estimate is  
13           roughly the same.

14                          THE COMMISSIONER: Would you say  
15           2:00 or 2:15?

16                          What is the last witness, the  
17           third witness, likely to be, Mr. Gover?

18                          MR. GOVER: I would estimate a  
19           similar length to Professor Ofshe. So I might  
20           suggest two o'clock?

21                          THE COMMISSIONER: All right.

22                          We will rise and resume at two  
23           o'clock.

24           --- Upon recessing at 12:57 p.m. /

25                          Suspension à 12 h 57

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

2 Reprise à 14 h 00

3 THE COMMISSIONER: Yes,  
4 Ms Edwardh.

5 EXAMINATION

6 MS EDWARDH: Good afternoon,  
7 Professor Ofshe. My name is Marlys Edwardh, and I  
8 represent Maher Arar.

9 MR. OFSHE: Good afternoon.

10 MS EDWARDH: I thank you for your  
11 evidence this morning because I will be very  
12 brief. I wanted to just canvass a couple of  
13 issues with you.

14 There is no doubt that there has  
15 been a significant moderation in interrogation  
16 tactics in ordinary domestic policing in both the  
17 United States and, I think probably I can say, in  
18 Canada as well since the 1930s.

19 MR. OFSHE: Without doubt.

20 MS EDWARDH: That did not,  
21 however, prevent interrogation practices that were  
22 designed to manipulate psychological variables to  
23 induce a confession.

24 MR. OFSHE: Correct.

25 MS EDWARDH: So that if one were

1 to look at interrogation teaching today in an  
2 ordinary policing environment, the process you  
3 have described is indeed one that is taught in  
4 order to produce a sense of those variables in  
5 order to obtain a confession.

6 MR. OFSHE: Let me clarify a  
7 little bit.

8 MS EDWARDH: Sure.

9 MR. OFSHE: My experience, and  
10 everything I have learned in studying  
11 interrogation, is such that except for an  
12 extraordinarily unusual set of circumstances, I  
13 would not anticipate that an otherwise legally  
14 acceptable interrogation would produce a false  
15 confession from someone who is not extraordinarily  
16 vulnerable; that is to say, intellectually  
17 impaired, a child, mentally ill. You know, those  
18 are special categories.

19 Deception, the pressure, the  
20 distress of being involved in any interrogation  
21 where you are being accused ought not to produce  
22 false confession.

23 What police are taught to do, that  
24 conforms to the law, I don't see as problematic.  
25 The problem is police are sometimes also taught

1           how to get around the law, by communicating  
2           threats and offers of leniency through suggestion,  
3           in order to deceive both the suspect and the  
4           courts as to what happened. It is possible to  
5           communicate the message. That is the dangerous  
6           point.

7                               Now, there are training  
8           organizations that deliberately train police to do  
9           that, tell them it is legal to do that, which is  
10          not, tell them that it won't produce false  
11          confessions, which it will, and that is because  
12          they are being misinformed as to what they are  
13          being taught. The problem there is that police  
14          are being misinformed as to what they are taught  
15          to do.

16                              That is assuming that the police  
17          want to conform to the law, which is not  
18          invariably true, but in the main I think it  
19          probably is.

20                              MS EDWARDH: I found it  
21          interesting if you actually go back to Mr. Arar's  
22          experience -- you have, I think, in front of you  
23          at Volume 8 and tab 693, his description of  
24          events. But it is noteworthy that when he was  
25          first arrested, and I believe that is around two

1 o'clock on September 26, 2002 -- you see that at  
2 page 2 of 6, halfway down that long paragraph:

3 "He is pulled aside and then  
4 there begins a process of  
5 interrogation by a number of  
6 officers ..."

7 According to this statement.

8 "...that lasts well until  
9 midnight."

10 Let me let you take a moment. It  
11 starts halfway down, the paragraph beginning with  
12 the words:

13 "My flight arrived in New  
14 York at 2 p.m."

15 I am not going to suggest very  
16 much, so I don't know if you have to read it in  
17 detail, Professor Ofshe, but it is obviously a  
18 serious interrogation and, without trying to pick  
19 it apart, is not conforming to proper police  
20 practices. Certainly techniques were used to  
21 convey certain impressions to Mr. Arar.

22 But in addition to this  
23 interrogation, which lasted quite a long time, he  
24 was again interrogated just before he was removed  
25 through a "hearing/interview process" for a number

1 of hours.

2 But it is interesting that despite  
3 what was done and despite being held in very harsh  
4 conditions at MDC in New York on the 9th floor for  
5 a period of days, if -- I will just note, if you  
6 turn to P-20, which is the decision of the INS  
7 when they remove Mr. Arar throughout whatever  
8 interrogation he went through -- if you could just  
9 provide that to the witness.

10 Are you getting the typed version  
11 or the --

12 Okay. I am, in this very bad  
13 copy, sir, on page 6 at the top right-hand corner,  
14 page 4 at the bottom.

15 It is interesting to observe that,  
16 despite the interrogation that he experienced in  
17 the United States, it notes:

18 "Mr. Arar denied having any  
19 affiliation or link to a  
20 terrorist organization."

21 So that really conforms to what  
22 you have just said. In a normal, healthy person  
23 with -- I don't want to call them appropriate, but  
24 at least standard police interrogation procedures,  
25 you would expect them to be able to take a

1 position and hold it and answer what they wanted  
2 to say without being overwhelmed by the  
3 circumstances.

4 MR. OFSHE: Of course.

5 MS EDWARDH: Now, I want to then  
6 go on to another area, if I could, and ask you to  
7 reflect on Mr. Arar's situation beyond that  
8 initial period that Mr. Cavalluzzo described to  
9 you.

10 We know that after two weeks or  
11 so, just before his first consular visit, the  
12 extremely aggressive interrogation coupled with  
13 physical brutality stopped, but he continues to  
14 reside, without having any knowledge of if or when  
15 he would be released, and continues on in the same  
16 prison conditions as he was in the first two  
17 weeks, and there are a couple of other incidents  
18 later on in his detention. And just before he  
19 leaves he is asked to sign a statement and he  
20 complies.

21 Now, I would just like to ask you  
22 whether or not the conditions of confinement that  
23 exist for a long period of time would continue to  
24 operate on him in such a way as to ensure  
25 compliance throughout his period of confinement?



1 MR. OFSHE: I would think so.  
2 There is no guarantee someone can -- you know, if  
3 they are in a period of relative stability, as  
4 long as they remain fearful that intense torture  
5 could return, that ought to generate compliance.

6 On the same count, if they are  
7 able to recover and regain some strength, their  
8 resistance might build up a little bit as well. I  
9 think either one is possible.

10 But certainly he is well aware of  
11 the dynamics of the system that he is in, and  
12 unless he wants to go through the process of being  
13 broken again, he would be wise to comply.

14 MS EDWARDH: And indeed that is  
15 one of the things that is taught throughout that  
16 whole process. He is trained to comply?

17 MR. OFSHE: Clearly, that starts  
18 from the very beginning.

19 MS EDWARDH: One of the things we  
20 have learned, Professor Ofshe, is that since 9/11  
21 there has been a merging of the world of  
22 intelligence-gathering with the world of criminal  
23 investigation and that the barriers have fallen  
24 between those two worlds, both -- I think we have  
25 heard it in Canada, and as well we understand it

1 is occurred in the United States.

2 I just want to ask you, sir, to  
3 reflect a little, if you would, on the difference  
4 between the two worlds, and I am going to suggest  
5 a couple of important differences.

6 If one is measuring the  
7 reliability of a statement given in interrogation  
8 in a criminal process where there has already been  
9 a crime, you would agree with me, sir, that one of  
10 the advantages of having a real crime scene is  
11 there is a basis to measure the narrative that you  
12 should get from a person to determine if it is  
13 consistent with the crime scene, and whether it is  
14 logically consistent in the entirety of the  
15 statement, et cetera.

16 You get a base measure of what the  
17 truth is.

18 MR. OFSHE: Well, you know what  
19 the crime facts are, and that becomes the basis  
20 for evaluating the fit of the confession to the  
21 crime facts, and then that becomes a basis for  
22 weighing how much significance to give to the  
23 person's statement, "I did it".

24 MS EDWARDH: And if the person can  
25 recount those facts without being told them, that

1 adds to the ability to give some sense of  
2 reliability to the person's utterances.

3 MR. OFSHE: Well, it doesn't add  
4 to it. It is the basis.

5 MS EDWARDH: Fair enough.

6 MR. OFSHE: If they are  
7 contaminated, it is worthless, whether  
8 contaminated through the press, contaminated  
9 through the interrogator. If someone says it  
10 first and all the person is doing is agreeing to  
11 it, they've just lost the value of that particular  
12 fact.

13 MS EDWARDH: Now, that is the way  
14 it is done when you are doing basic criminal law.  
15 I want to move into the kind of different world of  
16 intelligence-gathering and I want to talk about,  
17 for example, an interrogation that was premised on  
18 membership: "Are you a member of such an such an  
19 organization?" that doesn't really have a factual  
20 basis to make judgments about.

21 I mean, it is difficult, it is not  
22 like you have a crime scene.

23 I wonder if you can comment, sir,  
24 about whether or not the kind of information one  
25 gets, that you are a member, is more inherently

1 more unreliable because there is nothing to  
2 measure it against?

3 MR. OFSHE: I don't know that it  
4 is fair to say there is nothing to measure it  
5 against. What one would seek to measure it  
6 against is different than the already known or the  
7 crime facts that one could be led to. So often  
8 police don't know where the missing murder weapon  
9 is, and if the suspect can tell them where to find  
10 it, that is a biggie -- not because it is the  
11 murder weapon but because it is something the  
12 police didn't know.

13 If the person said "Go to this  
14 place and that is where you'll find it," the  
15 probability of guessing that is infinitely small,  
16 and bingo they come up with the right answer.

17 The evaluation problem is  
18 different. Let's say one is accused of being a  
19 member of a particular group. "Okay, I am a  
20 member of that group." "Tell me, now, where do  
21 they meet? Who are the other members? What's the  
22 secret handshake? What's the this? What's the  
23 that?" Gather that information.

24 Some of it, the intelligence  
25 agency may already have and they are discovering

1           that the person is telling them things that they  
2           have reason to believe are accurate; others, they  
3           might be information that they can act on and  
4           discover that it turns out to be reliable and  
5           therefore they can gain confidence in that way.

6                         There still has to be an  
7           evaluation. You are evaluating it in a different  
8           way, but it is still the same evaluation process.

9                         MS EDWARDH: So one evaluates it,  
10          though, by reference to factual matters that can  
11          be confirmed?

12                        MR. OFSHE: It has to be.

13                        MS EDWARDH: Now, I want to just  
14          talk about another aspect of the  
15          intelligence-gathering that we have at least  
16          adverted to.

17                        If in fact the confirmation comes  
18          from another interrogation by the same torturers,  
19          which is then confirmed --

20                        MR. OFSHE: Forgive me for  
21          laughing.

22                        MS EDWARDH: Well, I appreciate  
23          why you are laughing, because it is ludicrous to  
24          think that is confirmation.

25                        MR. OFSHE: It is called the

1 Central Park jogger case interrogations.

2 MS EDWARDH: Why don't you explain  
3 a little of that?

4 MR. OFSHE: Five teenage kids,  
5 grabbed by police the night that the Central Park  
6 jogger was raped back in 1989, I think it was.  
7 All of them interrogated, all of them gotten to  
8 give what we now know to be absolutely false  
9 confessions. And they simply impose the same  
10 story, insofar as they could -- and the stories  
11 turned out to be wildly different, because every  
12 time something that had not been determined by the  
13 police was asked about, the kids gave different  
14 answers, because they were just guessing and there  
15 was no reason to think that they would guess the  
16 same.

17 But that is an example of  
18 contamination; the contaminating of the suspect to  
19 get them to agree to the police version of the  
20 story. I have seen lots of examples of that.  
21 There is nothing unusual about it. Whether it is  
22 done to one person or two people to try to get  
23 similar stories, it is still a product of the  
24 technology of influence.

25 MS EDWARDH: And I suppose one can

1           only observe from your earlier remarks when the  
2           influence involves the use of torture, then the  
3           whole process, including the likelihood of a false  
4           confession, gets magnified many times.

5                       MR. OFSHE:  It is a much more  
6           powerful tool if I am correct that the likelihood  
7           of getting compliance goes up with the power of  
8           the motivator.  Then it follows that false  
9           confessions ought to be more of a problem when  
10          torture is used than when torture is not used.

11                      MS EDWARDH:  Thank you very much  
12          for joining us here, Professor Ofshe.  We wish you  
13          safe travels back to California.

14                      MR. OFSHE:  Thank you.

15                      THE COMMISSIONER:  Mr. Fothergill?

16          EXAMINATION

17                      MR. FOTHERGILL:  Professor Ofshe,  
18          my name is Simon Fothergill, and I am representing  
19          the Government of Canada in these proceedings.

20                      I think you told us that cases of  
21          torture are relatively rare in North America now.

22                      Is that right?

23                      MR. OFSHE:  As far as I know.

24                      MR. FOTHERGILL:  So to the extent  
25          you have the opportunity to analyze the phenomenon

1 of coerced confessions, the sample of torture  
2 cases is relatively small?

3 MR. OFSHE: Yes, that I am aware  
4 of.

5 MR. FOTHERGILL: Yes. I am only  
6 asking you to draw on your own experience.

7 Would you agree with me that, by  
8 its very nature, it is very difficult to study the  
9 effect of torture on people's tendency to give  
10 true or false confessions.

11 MR. OFSHE: It would be a very  
12 complicated problem. It would be much easier to  
13 study the dynamics, or the organization of a  
14 system of torture, than to evaluate the ground  
15 truth and any particular result of it.

16 MR. FOTHERGILL: And I take it as  
17 well as there being practical difficulties,  
18 presumably there are some ethical difficulties in  
19 terms of trying to ascertain the impact of torture  
20 on people's truthfulness.

21 MR. OFSHE: Well, I don't know if  
22 there are any ethical difficulties in asking  
23 people about their experience. It probably would  
24 be not a good thing to be present while it was  
25 going on. That might create an ethical problem.



1 But asking about it I think is fine.

2 MR. FOTHERGILL: After the fact.  
3 I take your point.

4 You have described torture as an  
5 extreme motivator.

6 MR. OFSHE: In the system I  
7 use, yes.

8 MR. FOTHERGILL: You have offered  
9 the view that it perhaps is more likely to elicit  
10 false confessions than true ones, but I take it  
11 that that is as far as you can go?

12 MR. OFSHE: That is why I went  
13 that far.

14 MR. FOTHERGILL: All right.

15 I take it that if we accept that  
16 it is conceivable, however unlikely, that people  
17 subjected to torture may nonetheless tell the  
18 truth, this underlines the importance of  
19 corroboration which you told us about?

20 MR. OFSHE: I guess I have a  
21 problem with the beginning of your question. I  
22 don't see necessarily why torture would only  
23 produce false confessions.

24 It starts with whether or not  
25 the person has something to confess. So not being

1           able to get blood from a stone, you are only going  
2           to get false confessions from people who are  
3           ignorant of the subject matter that you are  
4           interested in.

5                       Those who are knowledgeable of it  
6           may attempt to deceive you in the beginning, but  
7           you may eventually be able to get to a reliable  
8           statement from them if you are sophisticated in  
9           the way in which you manage the process.

10                      So I don't see that there is a --  
11           torture can produce compliance and can certainly,  
12           I think, produce reliable information as well.

13                      MR. FOTHERGILL:  It is the  
14           uncertainty that makes corroboration so important?

15                      MR. OFSHE:  Corroboration is  
16           important for any statement, whether volunteered,  
17           produced responsive to interrogation, or produced  
18           responsive to torture.

19                      MR. FOTHERGILL:  To the extent  
20           that you can corroborate information, even if it  
21           was given under duress, that would tend to make  
22           the information more reliable?

23                      MR. OFSHE:  Corroboration is  
24           the standard for evaluating the reliability of  
25           information.

1                   MR. FOTHERGILL: Now, I wonder  
2 if you could tell us whether it is possible to  
3 assess the reliability of a statement merely  
4 from its content?

5                   Let me make it clear what I  
6 mean by that. If you were given a summary of  
7 what somebody has said, but you are not privy to  
8 the manner in which it was obtained, is it  
9 possible to assess whether or not it was the  
10 product of coercion?

11                  MR. OFSHE: No. I wouldn't  
12 think so.

13                  MR. FOTHERGILL: So, for example,  
14 if you are given an account of somebody's  
15 so-called confession, does it make a difference  
16 whether the confession clearly incriminates the  
17 individual or leaves it somewhat unclear whether  
18 the individual is actually engaged in criminal  
19 behaviour or not?

20                  MR. OFSHE: I just don't think  
21 there is any way to get from the output statement  
22 back to the circumstances under which it was  
23 collected without independent information about  
24 the circumstances of the interrogation.

25                  Once the person has gotten to the

1 point of compliance, a different set of issues  
2 arise and I don't know that you can go backwards.

3 MR. FOTHERGILL: But I think you  
4 told us that typically if somebody is being  
5 coerced into confessing, the objective is to get a  
6 detailed account, a step-by-step account, that  
7 clearly implicates them in involvement in criminal  
8 behaviour.

9 MR. OFSHE: If someone can be  
10 gotten to the point where they are willing to say  
11 "I did it," I would refer to that as the point of  
12 admission, whether they indicate that they are  
13 giving up resisting, whether they use the words "I  
14 did it" or however they do it, that is the point  
15 at resistance stops.

16 Typically in interrogation, at  
17 that point the interrogator now seeks to get a  
18 confession. The confession by definition, at  
19 least my definition, is a detailed account of the  
20 person's involvement in the event, the crime,  
21 whatever it is. It is getting that detailed  
22 account that creates the possibility of using that  
23 information in order to corroborate.

24 If you don't have a detailed  
25 account, there is nothing to corroborate. You

1           can't independently corroborate the "I did it"  
2           statement, but what you can do is evaluate whether  
3           or not the person's account of what happened, or  
4           their statement about the mysterious group that  
5           you are trying to learn about, leads to  
6           information which is reliable, and that is how you  
7           evaluate the "I did it" statement, or the "I am a  
8           member" statement.

9                           MR. FOTHERGILL:  So following  
10           from Ms Edwardh's example, membership in the  
11           group, I think you indicated that for a statement  
12           to really be probative of anything you need a lot  
13           of detail:  Where the group meets, what the secret  
14           handshake is.

15                           MR. OFSHE:  Those would be  
16           examples of things that might be subject to  
17           evaluation, depending on what information the  
18           controlling organization had to start with, or  
19           what things they might learn in the future, or the  
20           leads they might get out of it that could then  
21           develop additional information.

22                           MR. FOTHERGILL:  To the extent  
23           that a statement is missing that kind of detail,  
24           does that tell you anything about whether or not  
25           it is likely the product of coercion?

1                   MR. OFSHE: Not the product of  
2 coercion. It tells me something about the skill  
3 of interrogators. It might suggest something  
4 about what the interrogators were trying to  
5 accomplish, but it wouldn't necessarily tell you  
6 anything about coercion itself.

7                   MR. FOTHERGILL: When you  
8 conducted your own analysis of Mr. Arar's  
9 statement and his experiences, how important was  
10 it to you to have the benefit of the statement  
11 that he gave on November 4th of 2003, that  
12 Mr. Cavalluzzo referred you to?

13                   MR. OFSHE: I didn't conduct  
14 very much of my own evaluation of Mr. Arar's  
15 account because I have never been able to meet  
16 with him. I took the information that was  
17 available that gave me some idea of the outline of  
18 what he experienced and, limited by that, it  
19 seemed nevertheless to fit into the analysis that  
20 I am accustomed to doing when it comes to  
21 evaluating interrogation. Certain things he said  
22 made sense to me. Had I been given the  
23 opportunity to interview Mr. Arar, I might have  
24 learned a great deal more.

25                   But my job, as I understood it,

1 was to come here and entertain or bore, or  
2 whatever it is, about the subject of  
3 interrogation, rather than try to help and develop  
4 the fullest account of the specifics of what  
5 Mr. Arar experienced.

6 MR. FOTHERGILL: So you found his  
7 statement useful but limited and it would have  
8 been preferable to speak with him?

9 MR. OFSHE: If I were to undertake  
10 the task of trying to develop the fullest  
11 understanding of his experience, then I would want  
12 as much information as I could get. The  
13 information that I got gave me some idea of what  
14 happened to him and the idea that I got from it  
15 was not terribly surprising to me.

16 MR. FOTHERGILL: If I can  
17 broaden the discussion just a little bit, when you  
18 are called upon to analyze whether or not a  
19 statement has been given under duress and may or  
20 may not be true, I take it that the best scenario  
21 is for you to have some sort of videotape or  
22 visual recording of the manner in which the  
23 interrogation was conducted.

24 Correct?

25 MR. OFSHE: Videotape recording

1 and transcript.

2 MR. FOTHERGILL: And transcript.  
3 Presumably if you can't have the video, a  
4 transcript would be your next choice?

5 MR. OFSHE: Correct.

6 MR. FOTHERGILL: Then after that  
7 it would be somebody's after-the-fact account of  
8 precisely what happened to them in as much detail  
9 as possible?

10 MR. OFSHE: Correct.

11 MR. FOTHERGILL: What if you have  
12 none of those things?

13 MR. OFSHE: Then I don't say  
14 anything.

15 MR. FOTHERGILL: Would you agree  
16 with me, then, that without having this kind of  
17 detailed information about the manner in which an  
18 interrogation was conducted, it is quite simply  
19 impossible to determine whether or not the  
20 resulting information is reliable or not?

21 MR. OFSHE: Whether it is  
22 reliable? I don't know any of the details that  
23 Mr. Arar gave. I don't know what details he was  
24 asked for. All I know is, he reports that he was  
25 tortured in this way and that way and exposed to



1           this horrendous set of circumstances, and he  
2           reports that he gave a false statement that he had  
3           been to an al-Qaeda training camp.

4                        I don't know what details he gave  
5           about that al-Qaeda training camp, if any. I  
6           don't know how thorough his interrogators were in  
7           trying to elicit information. All I know is what  
8           is contained in this report, and that is simply  
9           because it was available, and I asked for  
10          information about what happened to him.

11                      MR. FOTHERGILL: So if we  
12          return, then, to the issue that I think most  
13          concerns us in this inquiry, which is the conduct  
14          of Canadian officials. If you are a Canadian  
15          official trying to make sense of a statement that  
16          you have received from Syria through the auspices  
17          of the Department of Foreign Affairs, and Mr. Arar  
18          has not yet come home to Canada to give his  
19          account of what happened to him, how possible is  
20          it for that Canadian official to evaluate the  
21          statement and determine whether or not it is the  
22          product of coercion?

23                      MR. OFSHE: Does the Canadian  
24          official in your hypothetical know that Mr. Arar  
25          was grabbed by the FBI, was transported out of

1 the United States, was dumped into Syria, a place  
2 where he was fearful to go because he expected  
3 to be tortured, a place where there is a  
4 reputation for torturing people, someone who  
5 maintains that he has nothing to do with al-Qaeda,  
6 whose wife is maintaining that he had nothing to  
7 do with al-Qaeda, that he is maintaining he was  
8 tortured there?

9 MR. FOTHERGILL: I think the  
10 last one --

11 MR. OFSHE: Perhaps he wasn't.

12 MR. FOTHERGILL: I'm just saying,  
13 up until you said that I would have said yes, you  
14 can assume those.

15 MR. OFSHE: Right.

16 MR. FOTHERGILL: I think the  
17 evidence is that it would have been very difficult  
18 for Mr. Arar to communicate in the circumstances  
19 that he was held, whether he was being mistreated  
20 or not, but the rest of your assumptions I think  
21 are reasonable ones.

22 MR. OFSHE: Well, let me ask this:  
23 If that Canadian official that you have in your  
24 hypothetical had a child who was picked up by the  
25 FBI, transported to Syria, held in Syria for a

1 long period of time, without having access to  
2 the Canadian consulate for private meetings, do  
3 you think that Canadian official would be worried  
4 that perhaps his or her child was being mistreated  
5 in Syria?

6 MR. FOTHERGILL: Well, I think if  
7 perhaps you could try to answer my questions  
8 rather than vice versa.

9 MR. OFSHE: I would actually  
10 rather answer my questions.

11 --- Laughter / Rires

12 MR. FOTHERGILL: I may be able to  
13 sit down sooner, and you may be able to get back  
14 to California sooner.

15 I think you know where I'm heading  
16 with this line of questioning and I think that the  
17 qualifications that you want to place before you  
18 give your answer are perfectly reasonable ones.

19 Let me just cut straight to the  
20 point. I am suggesting to you that a Canadian  
21 official trying to make sense of the statement  
22 obtained from a country with admittedly a poor  
23 human rights record, where we cannot account for  
24 the conditions of incarceration, we may even have  
25 doubts about them, but I am suggesting to you that

1           it is a difficult process to properly evaluate the  
2           statement that is obtained from a foreign country  
3           without the benefit even of the account that you  
4           had, which you described as limited.

5                            Would you agree with me  
6           about that.

7                            MR. OFSHE: All I can agree with  
8           you is, if it was my government and there was not  
9           a great deal of concern I would be outraged. So I  
10          am not an expert on government practices and I  
11          don't represent myself to be.

12                           I assume that Canadian government  
13          officials are well-informed and are intelligent  
14          people, and if they don't use their information  
15          and their intelligence in a way to benefit  
16          Canadian citizens then I don't think they are  
17          doing their job. If it was an American government  
18          official and I were in that situation, I would be  
19          outraged at any failure to try to help me on the  
20          possibility that I might be having the worst  
21          experience of my life.

22                           Beyond that, I really can't  
23          say anything.

24                           MR. FOTHERGILL: Yet the one thing  
25          that you haven't addressed in your answer is the

1 question that I asked you, which is --

2 MR. OFSHE: I told you, I prefer  
3 my questions.

4 --- Laughter / Rires

5 MR. FOTHERGILL: But I'm asking  
6 you, sir, to give us an answer based on your  
7 expertise, which I believe is evaluation of  
8 confessions and whether they are reliable or not.

9 I am simply asking you to  
10 acknowledge that there are particular challenges  
11 faced by a Canadian official who receives  
12 information from a foreign country where we do  
13 not know the full circumstances under which it  
14 was obtained.

15 Will you agree with me that that  
16 poses real difficulty.

17 MR. OFSHE: It poses a problem  
18 that needs to be solved, and needs to be solved  
19 expeditiously, because some Canadian citizen may  
20 be being subjected to torture while the Canadian  
21 official is twiddling his thumbs.

22 MR. FOTHERGILL: I think that is  
23 probably about as clear an answer as I'm going to  
24 get. Thank you very much.

25 MR. OFSHE: Yes. You are welcome.

1 THE COMMISSIONER: Mr. Cavalluzzo,  
2 re-examination?

3 MR. CAVALLUZZO: I have no  
4 re-examination, Commissioner.

5 THE COMMISSIONER: Well, that  
6 completes your evidence, Professor. Let me just  
7 take a minute to thank you for your evidence. We  
8 appreciate somebody with your experience and  
9 stature coming to the Commission. It has been  
10 most informative. It has been very interesting.  
11 We all wish you a happier experience at O'Hare  
12 International.

13 MR. OFSHE: Thank you.

14 Your Honour, if you have a  
15 question I will actually answer it.

16 THE COMMISSIONER: I would be  
17 scared that you might ask me one. Just kidding.  
18 --- Laughter/ Rires

19 THE COMMISSIONER: Thank you  
20 very much.

21 Should we break, Mr. Gover, or  
22 just carry on?

23 MR. GOVER: I see Dr. Payne  
24 is in the room, however, I know that we need to  
25 set up.

1 THE COMMISSIONER: We will take  
2 10 minutes.

3 MR. GOVER: If we may. Thank you.

4 MS EDWARDH: Thank you very  
5 much, sir.

6 --- Upon recessing at 2:38 p.m. /

7 Suspension à 14 h 38

8 --- Upon resuming at 2:43 p.m. /

9 Reprise à 14 h 43

10 THE REGISTRAR: Please be seated.  
11 Veuillez vous asseoir.

12 THE COMMISSIONER: Good afternoon.

13 DR. PAYNE: Good afternoon.

14 MR. GOVER: Mr. Commissioner, our  
15 next witness is Dr. Donald Payne, and I will be  
16 asking you to qualify Dr. Payne as an expert in  
17 relation to the circumstances of torture, the  
18 physical and psychological effects of torture on  
19 its victims, and the reliability of information  
20 obtained under torture.

21 Broadly put, there will be six  
22 areas --

23 THE COMMISSIONER: I will just  
24 swear him first.

25 MR. GOVER: Yes. I was getting

1 ahead of myself.

2 --- Laughter / Rires

3 THE COMMISSIONER: Would you like  
4 to be sworn or affirmed?

5 DR. PAYNE: Affirmed.

6 AFFIRMED: DONALD ERNEST PAYNE

7 THE COMMISSIONER: And your full  
8 name?

9 DR. PAYNE: Donald Ernest Payne.

10 THE COMMISSIONER: Thank you,  
11 Doctor.

12 MR. GOVER: Broadly put,  
13 Mr. Commissioner, there will be six areas that  
14 Dr. Payne's evidence will address: first, the  
15 circumstances of torture; second, torture as  
16 described by Dr. Payne by over 1,450 torture  
17 claimants whom he has assessed; third, Dr. Payne's  
18 evidence in relation to the treatment and  
19 conditions of detention that Mr. Arar says he  
20 endured while in Syria; fourth, psychological  
21 symptoms experienced by torture victims and the  
22 psychiatric disorder of which they are  
23 characteristic; fifth, the course of treatment for  
24 torture victims; and finally, the reliability of  
25 information obtained under torture.



1                   Now Dr. Payne's reference  
2 materials are contained within a volume that is  
3 being distributed to counsel, and I would ask that  
4 the reference materials compiled in relation to  
5 the evidence of Dr. Donald Payne be marked as  
6 Exhibit P-128, please.

7                   THE COMMISSIONER: All right.

8                                 EXHIBIT NO. P-128: Book of  
9                                 Documents entitled "Reference  
10                                Materials Compiled in  
11                                Relation to the Evidence of  
12                                Dr. Donald Payne"

13                   EXAMINATION

14                                 MR. GOVER: Doctor to address the  
15 preliminary questions I have of you in relation to  
16 your qualifications, you received your Doctor of  
17 Medicine degree from the University of Toronto in  
18 May of 1963.

19                                 Is that correct?

20                                 DR. PAYNE: That is correct.

21                                 MR. GOVER: Subsequently, you were  
22 licensed to practise medicine in Newfoundland.

23                                 Is that right?

24                                 DR. PAYNE: That is correct.

25                                 MR. GOVER: And in 1967 you were

1 granted the licence to practise medicine in  
2 Ontario.

3 Is that right?

4 DR. PAYNE: That is correct.

5 MR. GOVER: Subsequently then,  
6 between 1967 and 1971, you undertook postgraduate  
7 training in psychiatry?

8 DR. PAYNE: That is correct.

9 MR. GOVER: Dr. Payne, I  
10 understand that you did that at the University of  
11 Toronto.

12 Is that correct?

13 DR. PAYNE: Correct.

14 MR. GOVER: You were, further, a  
15 resident in psychiatry at the Clarke Institute of  
16 Psychiatry, the Queen Street Mental Health Center,  
17 the Wellesley Hospital, St. Michael's Hospital and  
18 the C.M. Hincks Treatment Center.

19 Is that correct?

20 DR. PAYNE: That is correct.

21 MR. GOVER: You were certified as  
22 a specialist in psychiatry in 1971?

23 DR. PAYNE: That is correct.

24 MR. GOVER: Between 1971 and 1974  
25 you were a staff psychiatrist at the Queen Street

1 Mental Health Center?

2 DR. PAYNE: That is correct.

3 MR. CAVALLUZZO: Since 1972 you  
4 have been in the private practice of psychiatry in  
5 Toronto?

6 DR. PAYNE: That is correct.

7 MR. GOVER: Dr. Payne I understand  
8 an area of special interest to you has been the  
9 psychiatric assessment and treatment of  
10 individuals who have claimed to have been  
11 tortured.

12 Is that correct?

13 DR. PAYNE: That is correct.

14 MR. GOVER: And in particular I  
15 understand that you saw your first torture patient  
16 in 1979?

17 DR. PAYNE: That is correct.

18 MR. GOVER: And in fact, since  
19 1978 to the present day you have been a member of  
20 the Medical Network of Amnesty International?

21 DR. PAYNE: That is correct.

22 MR. GOVER: And you in fact have  
23 served as the National Coordinator of the Medical  
24 Network of Amnesty International Canadian Section,  
25 English-speaking, since 1982?

1 DR. PAYNE: That is correct.

2 MR. GOVER: Further, you have been  
3 a member of the Canadian Center for Victims of  
4 Torture since 1983?

5 DR. PAYNE: That is correct.

6 MR. GOVER: That membership  
7 continues to the present day?

8 DR. PAYNE: That is correct.

9 MR. GOVER: Since 2003 you have  
10 been one of two elected North American council  
11 members for the Council of the International  
12 Rehabilitation Council for Torture Victims, which  
13 is known as the IRCT.

14 Is that correct, sir?

15 DR. PAYNE: That is correct.

16 MR. GOVER: You have written about  
17 torture and about the psychiatric effects of  
18 torture over the past 21 years.

19 Is that correct?

20 DR. PAYNE: That is correct.

21 MR. GOVER: And if we look at page  
22 3 of your curriculum vitae, at tab 1 of Exhibit  
23 P-128, we see that you wrote to the editor of the  
24 Canadian Medical Association Journal in August  
25 1984 on the subject of "Torture and Human Rights

1 in Chile"?

2 DR. PAYNE: That is correct.

3 MR. GOVER: Further, about halfway  
4 down the page, you have written reports on Somali  
5 torture victims reported in the National Academy  
6 of Science's report "Scientists and Human Rights  
7 in Somalia", in 1988.

8 Is that correct, sir?

9 DR. PAYNE: That is correct.

10 MR. GOVER: You have written a  
11 paper, which appears at tab 3 of the reference  
12 materials in Exhibit P-128, "Psychological  
13 Problems of Refugee Claimants in Interviews and  
14 Hearings". You wrote that in 1989 and revised it  
15 in 1992?

16 DR. PAYNE: That is correct.

17 MR. GOVER: Further, on page 3,  
18 reference is made to your paper which was  
19 presented at the International Congress of Law and  
20 Mental Health in Toronto in June of 1990, "The  
21 Psychiatric Sequelae of Torture: Diagnosis and  
22 Treatment".

23 Is that correct, sir?

24 DR. PAYNE: That is correct.

25 MR. GOVER: Turning to page 4 of

1 your curriculum vitae, you have written the paper  
2 that appears at tab 2 of Exhibit P-128, "Refugees  
3 and the Experience of Violence: Coping with the  
4 Effects of War and Torture", presented at the  
5 Shared Citizenship Public Lecture Series at the  
6 University of Toronto in April 2004.

7 Is that correct, sir?

8 DR. PAYNE: That is correct.

9 MR. GOVER: And you have further  
10 made a presentation entitled, "Working with  
11 Refugees and Survivors of Torture and War:  
12 Experiences and Observations of the Canadian  
13 Centre for Victims of Torture". That is a paper  
14 that you co-authored and presented in October of  
15 last year.

16 Is that right, sir?

17 DR. PAYNE: That is correct.

18 MR. GOVER: Finally in respect of  
19 your publications, you have served since 1983 to  
20 the present day as editor of "Health Care and  
21 Human Rights", the Bulletin of Amnesty  
22 International's Medical Network in Canada.

23 Is that right, sir?

24 DR. PAYNE: That is correct.

25 MR. GOVER: You have, I

1 understand, performed psychiatric assessments of  
2 more than 1,450 victims of torture and other  
3 severe persecution.

4 Is that right, sir?

5 DR. PAYNE: That is correct.

6 MR. GOVER: And I understand that  
7 those individuals came to Canada from in excess of  
8 90 countries?

9 DR. PAYNE: That is correct.

10 MR. GOVER: Those countries  
11 include Afghanistan?

12 DR. PAYNE: Correct.

13 MR. GOVER: And I understand that  
14 you have assessed 31 individuals from Afghanistan?

15 DR. PAYNE: Yes.

16 MR. GOVER: Bangladesh?

17 DR. PAYNE: Yes.

18 MR. GOVER: And you have assessed  
19 32 individuals from there?

20 DR. PAYNE: Correct.

21 MR. GOVER: You have assessed 200  
22 from Bosnia?

23 DR. PAYNE: That is correct.

24 MR. GOVER: You have assessed 29  
25 from Bulgaria?

1 DR. PAYNE: That is correct.  
2 MR. GOVER: You have assessed 21  
3 from Chile?  
4 DR. PAYNE: That is correct.  
5 MR. GOVER: You have assessed 16  
6 from China?  
7 DR. PAYNE: That is correct.  
8 MR. GOVER: Seventeen from El  
9 Salvador?  
10 DR. PAYNE: That is correct.  
11 MR. GOVER: Forty-eight from  
12 Ethiopia?  
13 DR. PAYNE: That is correct.  
14 MR. GOVER: Sixty-one from Ghana?  
15 DR. PAYNE: That is correct.  
16 MR. GOVER: Forty-one from India?  
17 DR. PAYNE: That is correct.  
18 MR. GOVER: Three hundred from  
19 Iran?  
20 DR. PAYNE: That is correct.  
21 MR. GOVER: Eighteen from Iraq?  
22 DR. PAYNE: Correct.  
23 MR. GOVER: Fifteen from Kenya?  
24 DR. PAYNE: That is correct.  
25 MR. GOVER: Twenty-nine from



1 Nigeria?

2 DR. PAYNE: That is correct.

3 MR. GOVER: Twenty from Pakistan?

4 DR. PAYNE: That is correct.

5 MR. GOVER: One hundred and  
6 forty-six from Somalia?

7 DR. PAYNE: That is correct.

8 MR. GOVER: One hundred and  
9 twenty-seven from Sri Lanka?

10 DR. PAYNE: That is correct.

11 MR. GOVER: Twenty-three from  
12 Sudan?

13 DR. PAYNE: That is correct.

14 MR. GOVER: And 44 from Turkey?

15 DR. PAYNE: That is correct.

16 MR. GOVER: I understand that in  
17 addition to that list you have assessed torture  
18 claimants from Syria?

19 DR. PAYNE: That is correct. I  
20 have seen four from Syria.

21 MR. GOVER: When we speak of  
22 torture claimants who you have seen in the course  
23 of your work, can you tell me whether there was  
24 any sort of referral process by which torture  
25 claimants were screened in any way before you saw

1           them?

2                           DR. PAYNE: Usually refugee  
3 claimants would be seen by their lawyer and then  
4 sent to the Canadian Center for Victims of Torture  
5 and be assessed there, and then would be referred  
6 on to me or one of the other psychiatrists or  
7 physicians for examinations.

8                           Since there is a limited number of  
9 people doing this work, people have to be  
10 relatively disturbed before they got sent on.  
11 They weren't sent on for frivolous reasons.

12                           There were some occasions I would  
13 see people from the board, when they went for  
14 their refugee determination hearing and they were  
15 obviously very disturbed at the hearing. I got  
16 requests sent on from the board saying, "You  
17 should have a psychiatric assessment," before they  
18 returned for the continuation of their hearing.

19                           MR. GOVER: My final question in  
20 relation to your qualifications is this: I  
21 understand that on approximately 18 occasions you  
22 have been accepted as an expert witness  
23 previously.

24                           Is that right?

25                           DR. PAYNE: Yes, for refugee

1 determination hearings.

2 MR. GOVER: Those are my questions  
3 at this stage, Commissioner.

4 THE COMMISSIONER: Mr. Waldman,  
5 questions or submissions?

6 MR. WALDMAN: No questions. We  
7 are satisfied as to his qualifications.

8 THE COMMISSIONER: Mr. Fothergill?

9 MR. FOTHERGILL: I certainly have  
10 no quarrel with the witness' qualifications. He  
11 is obviously eminently well qualified.

12 One area of concern I do have  
13 relates to the purpose of the testimony. I will  
14 certainly concede that to the extent the witness  
15 is going to speak about the visible signs of  
16 torture, the sort of things that Canadian  
17 officials might have been able to observe when  
18 they visited Mr. Arar in captivity, that strikes  
19 me as useful to you in your evaluation of the  
20 conduct of Canadian officials.

21 If we are going to broaden that to  
22 examine the long-term effects of torture, then  
23 that strikes me as something which perhaps is more  
24 appropriate in the context of a civil damages  
25 claim rather than the mandate that has been given

1 to you.

2 THE COMMISSIONER: Mr. Gover, do  
3 you have anything to say with respect to that?

4 MR. GOVER: What I submit in  
5 relation to that is that, as with other evidence  
6 that you have heard in the course of this week,  
7 this is context evidence.

8 And in addition, I would submit  
9 that the evidence that you hear about the impacts  
10 of torture, the lasting effects, the course of  
11 treatment -- all of that may assist you in  
12 assessing what it is the fact-finder reports to  
13 you, which would be the basis for your findings  
14 regarding Mr. Arar's account of what happened to  
15 him.

16 So in that respect, I submit that  
17 it would be of assistance to you in assessing that  
18 evidence. As well, it would be of assistance to  
19 you overall in providing context.

20 THE COMMISSIONER: Do you wish to  
21 respond to that?

22 MR. FOTHERGILL: I might suggest  
23 that we proceed, and if I feel that there is some  
24 sort of unfairness being worked to people I  
25 represent, I will let you know.

1                   But with that explanation, I think  
2                   that does help me to understand the purpose of the  
3                   evidence.

4                   THE COMMISSIONER: Yes. I think  
5                   the comment could be made about, if I might just  
6                   observe, some of the other evidence we have heard  
7                   this week.

8                   I have found as background,  
9                   actually, a lot of it to be quite informative,  
10                  although some of it certainly wouldn't be directly  
11                  applicable to the facts. But I think some of it  
12                  clearly is and is very important.

13                  I think also with this witness'  
14                  evidence -- I don't know what it is going to be --  
15                  potentially it would be helpful in terms of the  
16                  symptoms, or how Mr. Arar presented, both during  
17                  his detention and on his return.

18                  I expect that there will be public  
19                  evidence, to some extent, with respect to that,  
20                  and I think it will provide certainly a background  
21                  and be helpful to me.

22                  So I am satisfied that Dr. Payne  
23                  is qualified to express opinions in the areas that  
24                  you have indicated, Mr. Gover, and I am also  
25                  satisfied that I should receive the evidence.

1 MR. GOVER: Thank you,  
2 Commissioner.

3 Dr. Payne, I ask you initially,  
4 with your background of performing assessments of  
5 individuals who have suffered torture and other  
6 severe persecution, can you provide us with some  
7 background or context for the circumstances of  
8 torture?

9 DR. PAYNE: I can respond  
10 historically in terms of how we became involved in  
11 Canada in seeing torture victims which occurred in  
12 the mid to late 1970s when torture victims from  
13 Chile started arriving in Canada and in Denmark.  
14 Torture victims from Chile and the military rule  
15 in Greece arrived and medical doctors then became  
16 involved in doing psychiatric assessments, medical  
17 assessments, to help support their claims for  
18 refugee status.

19 The literature of the first  
20 article was published in 1973 by Amnesty  
21 International, their medical group, calling  
22 attention to the problem, and especially calling  
23 attention to the participation of doctors in  
24 torture and with their concern about that.

25 In Canada, the first article was

1 published in 1979 by two doctors at St. Michael's  
2 Hospital in Toronto, Dr. Cathcart and Dr. Berger  
3 on 17 Chilean applicants that they had seen up  
4 until that point.

5 The article that is in your  
6 material from JAMA, the Journal of American  
7 Medical Association from 1988, an article that is  
8 an overview article of studies done in Canada,  
9 Denmark, and Holland on 319 reported survivors of  
10 torture that outlines the physical and  
11 psychological sequelae of that and how medical  
12 evidence could be used to back up or substantiate  
13 or correlate their stories of torture.

14 Following that, it has been  
15 accepted, yes, these are the psychological,  
16 physical sequelae. Many other people have written  
17 about their experiences, but in terms of advancing  
18 the field people are trying to go on to other  
19 areas now.

20 MR. GOVER: Doctor, if I could  
21 take you to tab 5 of Exhibit P-128, this is the  
22 article by Goldfeld et al, "The Physical and  
23 Psychological Sequelae of Torture".

24 Can you comment on the  
25 significance of this article in the psychiatric

1 assessment of torture victims?

2 DR. PAYNE: It outlines the  
3 psychological sequelae that have been observed in  
4 many different countries, and are the same in the  
5 three different countries, and established that  
6 these are real symptoms that occur and can be  
7 expected to occur as a result of torture.

8 MR. GOVER: Your paper, "Refugees  
9 and the Experience of Violence: Coping with the  
10 Effects of War and Torture" appears at tab 2 of  
11 the exhibit.

12 In this paper you trace, as you  
13 have mentioned a moment ago, the history of the  
14 assessment and treatment of torture claimants in  
15 Canada, and particularly the appearance in Canada  
16 of Chilean refugees following the September 1973  
17 overthrow of the Chilean government. You comment  
18 about halfway down the page:

19 "Although torture is often  
20 seen as the infliction of  
21 pain, the overall aim of  
22 torture is to dehumanize and  
23 degrade the victim."

24 You say:

25 "Individuals typically report



1                   that the physical effects of  
2                   their torture were very  
3                   intense at the moment of the  
4                   torture, but the  
5                   psychological aspects of  
6                   their torture were much more  
7                   difficult for them to deal  
8                   with overall."

9                   Can I ask you to elaborate on that  
10                  statement, please, Dr. Payne?

11                  DR. PAYNE: That is correct.  
12                  Again, torture has usually been, in the general  
13                  public's eye, viewed as pain and suffering that is  
14                  inflicted on somebody and people respond to reduce  
15                  the pain, whereas seeing many individuals you come  
16                  to recognize it is really destroying the will,  
17                  humanity, spirit of the individual so that they  
18                  lose control of themselves and are willing to give  
19                  up control of themselves to their torturers.

20                  It is done in the context where  
21                  the individual being tortured is dehumanized by  
22                  the process, regarded as a thing by the way they  
23                  are treated, the circumstances, the torture  
24                  itself, and once they are things, then the normal  
25                  restraints in dealing with other human beings are

1 released. They are seen like, you know, the  
2 enemy, the vermin that you can, you know, just get  
3 rid of and not have to treat them as human, with  
4 the respect as a human being.

5 MR. GOVER: Now, in the course of  
6 this treatment, and based on what those whom you  
7 have assessed have told you, have you been able to  
8 discern -- in addition through the literature by  
9 the way -- the purposes for infliction of pain?

10 DR. PAYNE: The purposes of the  
11 torture are generally three: One, to obtain  
12 information; second, as a punishment, either  
13 punishment of the individual directly or as a  
14 representative of the enemy, the opposition.  
15 Along with that is also their sort of the release  
16 of frustration of the torturers, where they can  
17 treat people badly as a way of getting out their  
18 frustration at the enemy; and, third, as a method  
19 of intimidating the population as a whole.

20 MR. GOVER: Are those three  
21 purposes mutually exclusive?

22 DR. PAYNE: The three tend to go  
23 together. Certainly torture for information  
24 usually involves a strong punitive element to it,  
25 the way people are beaten, abused verbally. As a

1           punishment and for information there is also an  
2           effect of intimidating the population as a whole  
3           so they know this is going to happen to them if  
4           they start rebelling.

5                       MR. GOVER: I would like to focus  
6           on the concept of use of torture as a means of  
7           extracting information.

8                       First of all, is that common  
9           or uncommon among torture claimants whom you  
10          have assessed?

11                      DR. PAYNE: It is fairly  
12          common, more so after coups, more so after  
13          uprisings or larger uprisings within the  
14          population it is there.

15                      One of the things that is done  
16          with people in general that are rounded up at  
17          demonstrations, they will be interrogated about:  
18          Who did you find out about it? If you are  
19          distributing pamphlets they will ask who did you  
20          get them from? Who has the printing press?

21                      There is always the problem of the  
22          authorities not knowing what information they do  
23          have and how much information they have. So  
24          opponents and suspected opponents tend to be  
25          grouped together as one group and treated the

1 same. It is almost that you are guilty until you  
2 can prove yourself innocent and there is no way of  
3 proving yourself innocent.

4 MR. GOVER: I would like to turn  
5 to the second area, which is the description of  
6 torture which has been given to you by the over  
7 1,450 claimants whom you have assessed.

8 Have the individuals whom you  
9 have assessed described the tortures that they  
10 have endured?

11 DR. PAYNE: Yes, they have.

12 MR. GOVER: Have those tortures  
13 had both physical and psychological dimensions?

14 DR. PAYNE: Yes, they have.

15 MR. GOVER: What have those  
16 individuals whom you have assessed told you about  
17 the physical tortures that they have endured?

18 DR. PAYNE: Regarding the physical  
19 tortures from the countries that I have seen, the  
20 torture is usually very harsh and brutal and  
21 doesn't require high technology at all.

22 Beatings are almost universal,  
23 either by one individual or, more often, by groups  
24 of individuals with fists or gun butts, batons,  
25 cables, being beaten on the soles of the feet,

1 being suspended upside down and being beaten while  
2 suspended, often being placed in painful  
3 positions, being given electrical shocks,  
4 especially to sensitive parts of their body, being  
5 burnt with cigarettes or hot pokers, being  
6 submerged in dirty water, being suffocated with a  
7 plastic bag over their head. Those are some.

8 MR. GOVER: Let me turn then  
9 to the psychological aspects of the tortures  
10 that those whom you have assessed have told you  
11 they have endured.

12 Can you tell us what they have  
13 described in that respect?

14 DR. PAYNE: Regarding  
15 psychological tortures, they talk again almost  
16 universally about being assaulted, verbally  
17 abused, both individually and for their ideas,  
18 being sexually abused or degraded, being  
19 threatened with worse torture or death, receiving  
20 threats against family members, having to hear or  
21 observe the torture of others. Many of those  
22 describe that as much worse than the torture of  
23 themselves because it reinforces their impotence.  
24 They are not able to do anything to come to the  
25 rescue of the person, especially women; and mock

1           executions, where someone is told they are going  
2           to be executed, they are prepared for it, told to  
3           write out their last words and are taken off to be  
4           often shot and gunshots will ring out and they are  
5           still alive. Sometimes other people who are taken  
6           out with them are dead, or they are told, "Okay,  
7           we have decided not to do it today. Come back  
8           tomorrow. We will do it tomorrow."

9                           MR. GOVER: Have the individuals  
10           whom you have assessed described torture with  
11           simultaneous physical and psychological aspects?

12                           DR. PAYNE: Usually both.  
13           Physical and psychological torture are done at the  
14           same time, or combined. People will be beaten,  
15           and while they are being beaten they are  
16           threatened that it is going to be worse if they  
17           don't provide information.

18                           Certainly the sexual abuse has  
19           both physical aspects of being abused and  
20           psychological aspects, especially in Muslim  
21           cultures where rape is considered equivalent to  
22           adultery, where it gives grounds for one's husband  
23           separating from one, or in strict Muslim sense it  
24           is even authority to be stoned to death.

25                           MR. GOVER: Have you seen evidence

1 of physical -- I know that you are there to  
2 perform a psychiatric assessment, but have you  
3 seen evidence of physical torture in those whom  
4 you have assessed?

5 DR. PAYNE: Yes. Usually when  
6 people come in for their physical assessment they  
7 will show me their physical scars as well even  
8 though I may not do a report on them. Usually  
9 they show scars from the cuts they received, scars  
10 from lashes, from burns, some evidence of broken  
11 bones. Some had blows to the head that resulted  
12 in hearing loss and neurological damage.

13 MR. GOVER: Have you observed any  
14 variation in the incidence of physical evidence of  
15 torture based on the place where those whom you  
16 have assessed came from?

17 DR. PAYNE: Very early in the work  
18 individuals from Chile and Somalia tended to show  
19 a lot of physical evidence of torture in terms of  
20 scars. Over the years there seems to be much less  
21 scarring shown, that countries tend to use methods  
22 of torture that leave less evidence of scars.  
23 They also tend to allow individuals to recuperate  
24 for some time after before they are released.  
25 That gives some time for healing to occur.

1 MR. GOVER: I understand, Doctor,  
2 that you have not assessed Mr. Arar.

3 DR. PAYNE: That is correct.

4 MR. GOVER: However, though,  
5 Dr. Payne, I would like to take you to Volume 8 of  
6 the Foreign Affairs Canada hearing documents,  
7 tab 693. I understand you have that before you.

8 DR. PAYNE: Yes.

9 MR. GOVER: At tab 693,  
10 page 3 of 6, this is toward the bottom of the  
11 page, approximately 10 lines from the bottom of  
12 the page -- let me give you the context.

13 Mr. Arar had earlier said that  
14 he had been asked to volunteer to go to Syria. He  
15 said no way. He had expressed fear of being  
16 deported to Syria because he felt he could be  
17 tortured there.

18 Just picking up his account, and  
19 then I will ask you for your opinion in relation  
20 to it, Mr. Arar says:

21 "We flew first to Washington.  
22 A new team of people got on  
23 the plane and the others  
24 left. I overheard them  
25 talking on the phone, saying



1           that Syria was refusing to  
2           take me directly. But Jordan  
3           would take me. Then we flew  
4           to Portland, to Rome, and  
5           then to Amman, Jordan. All  
6           the time I was on the plane,  
7           I was thinking how to avoid  
8           being tortured. I was very,  
9           very scared. That's all I  
10          thought about when I was on  
11          the plane, how can I avoid  
12          torture? We landed in Amman  
13          at 3:00 in the morning local  
14          time on October 9th. They  
15          took me out of a plane -- of  
16          the plane and there were six  
17          or seven Jordanian men  
18          waiting for us. They blind  
19          folded and chained me and put  
20          me in a van. They made me  
21          bend my head down in the back  
22          seat. Then this man started  
23          beating me. Every time I  
24          tried to talk, they beat me.  
25          Every time I tried to move, I

1           tried to talk, I tried to say  
2           anything, they just beat me  
3           very severely. And they did  
4           this for the first few  
5           minutes. It was very, very  
6           intense. About 30 minutes  
7           later, we arrived at a  
8           building where they took off  
9           my blindfold and asked me  
10          routine questions. Before  
11          taking me to a cell. It was  
12          around 4:30 in the morning on  
13          October 9th. Later that day,  
14          they took my fingerprints and  
15          blindfolded me..."

16                And so on.

17                The continues several lines down:

18                "Over an hour later, we  
19                arrived at what I think was  
20                the border with Syria. I was  
21                put in another car and we  
22                drove for another three  
23                hours. I was taken into a  
24                building where some guards  
25                went through my bags and took

1           some chocolates I bought in  
2           Zurich. I asked one of the  
3           people where I was, and he  
4           told me I was in the  
5           Palestine branch of the  
6           Syrian military intelligence.  
7           It was about 9:00 in the  
8           evening on October 9th. It  
9           was about 6:00 in the evening  
10          on October 9th. Three men  
11          came and took me into a room.  
12          I was very, very scared. I  
13          was crying all the time.  
14          They put me on a chair and  
15          one of the men started asking  
16          me questions. I later  
17          learned this man was a ...  
18          Colonel. He asked me about  
19          my brothers and why we had  
20          left Syria. I answered all  
21          the questions. If I did not  
22          answer quickly enough, he  
23          would point to a metal chair  
24          in the corner and ask, do you  
25          want me to use this? And he

1                   said it many times, do you  
2                   want me to use this? I did  
3                   not know then what that chair  
4                   was for. I learned later it  
5                   was used to torture people.  
6                   I asked him what he wanted to  
7                   hear. I was very terrified  
8                   and I did not want to be  
9                   tortured. I would say  
10                  anything to avoid torture.  
11                  This lasted for four hours.  
12                  There was no violence. Only  
13                  threats. At about 1:00 in  
14                  the morning, the guards came  
15                  to take me to my cell  
16                  downstairs. We went into the  
17                  basement and they opened a  
18                  door and I looked in. I just  
19                  could not believe what I saw.  
20                  I asked how long I would be  
21                  kept in this place. He did  
22                  not answer. But put me in  
23                  and closed the door. It was  
24                  like a grave, exactly like a  
25                  grave. It had no light. It

1 was three feet wide. It was  
2 six feet deep. It was seven  
3 feet high. It had a metal  
4 door with a small opening in  
5 the door which did not let in  
6 light because there was a  
7 piece of metal on the outside  
8 for sliding things into the  
9 cell. There was a small  
10 opening in the ceiling, about  
11 one foot by two feet, with  
12 iron bars. Over that was  
13 another ceiling so only a  
14 little light came through  
15 this. There were cats and  
16 rats up there, and from time  
17 to time, the cats peed  
18 through the opening into the  
19 cell. There were two  
20 blankets, two dishes, two  
21 bottles. One bottle was for  
22 water and the other one was  
23 used for urinating during the  
24 night. Nothing else. No  
25 light. I spent ten months

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1 and ten days inside that  
2 grave. Again, I repeat, I  
3 spent ten months and ten days  
4 in that -- inside that grave.  
5 The next day, I was taken  
6 upstairs again. The beatings  
7 started that day and was very  
8 intense for a week. And then  
9 less intense for another  
10 week. That second and third  
11 days were the worst. I could  
12 hear other prisoners being  
13 tortured and screaming and  
14 screaming. Interrogations  
15 are carried out in different  
16 rooms. One tactic they use  
17 is to question prisoners for  
18 two hours and then put them  
19 in a waiting room so they  
20 can't hear the others  
21 screaming, and then bring  
22 them back to continue the  
23 interrogation. The cable is  
24 a black electrical cable,  
25 it's a shredded cable, about

1 two inches thick. They hit  
2 me with it everywhere on my  
3 body. They mostly aim for my  
4 palms but sometimes missed  
5 and hit my wrists. They were  
6 sore and red for three weeks.  
7 They also struck me on my  
8 hips and lower back.  
9 Interrogators constantly  
10 threatened me with a metal  
11 chair, tire, and electric  
12 shocks. The tire is used to  
13 restrain prisoners while they  
14 torture them with beating on  
15 the sole of their feet. I  
16 guess I was lucky because  
17 they put me in the tire but  
18 only as a threat. I was not  
19 beaten while in the tire.  
20 They used the cable on the  
21 second and third day, and  
22 after that, mostly beat me  
23 with their hands, hitting me  
24 in the stomach and on the  
25 back of my neck and slapping

1 me on the face. Where they  
2 hit me with the cables, my  
3 skin turned blue for two or  
4 three weeks, but there was no  
5 bleeding. At the end of the  
6 day, they told me, tomorrow  
7 would be worse. So I could  
8 not sleep. Then on the third  
9 day, the interrogation lasted  
10 about 18 hours. They beat me  
11 from time to time and made me  
12 wait in the waiting room for  
13 one to two hours before  
14 resuming the interrogation.  
15 While in the waiting room, I  
16 heard a lot of people  
17 screaming. I remember that  
18 was one of the worst part of  
19 my imprisonment, is just to  
20 hear all those people  
21 screaming. I remember my  
22 heart on many times I heard  
23 this was just going to go out  
24 of my chest. they had not  
25 asked me about this in the



1 united states. I repeat,  
2 they had not asked me about  
3 this in the united states.  
4 They kept beating me. So I  
5 confessed and told them that  
6 I went to Afghanistan. I was  
7 ready to confess to anything  
8 if it would stop the torture.  
9 They wanted me to say I went  
10 to a training camp. I was so  
11 scared that day. I remember  
12 I urinated on myself twice.  
13 The beating was less severe  
14 each of the following days.  
15 At the end of each day, they  
16 would always say 'tomorrow  
17 will be harder for you' so  
18 each night I could not sleep.  
19 I did not sleep for the first  
20 four days. And I slept no  
21 more than two hours a day for  
22 about two months. Most of  
23 the time I was not taken back  
24 to my cell but put in a  
25 waiting room where I could

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1 hear all the prisoners being  
2 tortured and screaming. One  
3 time I heard them banging a  
4 man's head repeatedly on a  
5 desk really hard. Around  
6 October 17th the beatings  
7 subsided. Their next tactic  
8 was to take me in a room,  
9 blindfold will, and people  
10 would talk about me. I could  
11 hear them saying "he knows  
12 lots of people who are  
13 terrorists. We will get  
14 their numbers. He is a liar.  
15 He has been out of the  
16 country for long.' Then they  
17 would say let's be frank,  
18 let's be friends, tell us the  
19 truth and come around the  
20 desk and slap me on the face.  
21 They played lots of mind  
22 games. The interrogation and  
23 beating ended three days  
24 before I had my first  
25 consular visit which was on

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1                                   October 23rd. ""

2                                   Dr. Payne, I understand that you  
3                                   had previously read Mr. Arar's account of what  
4                                   transpired in Syria, including the excerpt that I  
5                                   have just read; is that correct, sir?

6                                   DR. PAYNE: That is correct.

7                                   MR. GOVER: With what Mr. Arar has  
8                                   said happened to him, can you comment on whether  
9                                   the treatment that he has described is consistent  
10                                  or otherwise with the torture described by those  
11                                  who you have assessed?

12                                  DR. PAYNE: I would say it is  
13                                  consistent with the torture of others I have  
14                                  assessed in general and consistent with the four  
15                                  individuals that I assessed from Syria.

16                                  It is certainly very common for  
17                                  people to be beaten severely at the time of their  
18                                  detention and while they are being taken to the  
19                                  police station or security space. It is very  
20                                  common for political prisoners to be held in very  
21                                  small, dark, underground cells with a metal door  
22                                  and just a little slot window up high above, the  
23                                  type of cell that Mr. Arar describes, with very  
24                                  limited hygiene facilities.

25                                  It is very common, again, to be

1       beaten, and usually more severely in the early  
2       stages of detention; very common to be threatened  
3       with worse torture. And especially the four  
4       individuals that I have seen from Syria, it was  
5       very common for them to be threatened with worse  
6       torture.

7                       The one man I saw who wasn't  
8       tortured very badly but was always threatened with  
9       being sent to the entertainment room, as he  
10      interpreted it to me, and he was hearing the  
11      screams and yells of other people being tortured  
12      at the time.

13                      I had one individual who was given  
14      electrical shocks to his abdomen and threatened  
15      with being given electrical shocks to his genitals  
16      if he didn't provide information, and he was taken  
17      out and shown a group of men who were very weak  
18      and sick and thin and pale, and was told that they  
19      had had electrical shocks to their genitals, and  
20      that he was going to end up like these men if he  
21      didn't provide information.

22                      MR. GOVER: Now, in addition, did  
23      any one of the four whom you assessed that came  
24      from Syria describe to you being held in a small,  
25      underground cell?

1 DR. PAYNE: Yes, three of them  
2 specifically reported being held in small  
3 underground cells. One cell was 1 metre by  
4 1 metre, even smaller than Mr. Arar's.

5 MR. GOVER: In addition, did  
6 any of the claimants from Syria describe to you  
7 hearing other people screaming in the course of  
8 their detention?

9 DR. PAYNE: Yes. They all heard  
10 other people screaming and had other similar  
11 threats used against them.

12 MR. GOVER: Can you comment on the  
13 conditions in which torture victims whom you have  
14 assessed were detained and the impact of the  
15 conditions of detention on the detainees?

16 DR. PAYNE: They were all held  
17 in rather sort of hopeless, demoralizing,  
18 depressing situation, in these small, dark cells  
19 without access to other people, in conditions  
20 where they had no control over their future at all  
21 of what was going to happen to them. Sort of a  
22 hopeless, helpless feeling that was most  
23 distressing, not knowing when they were going to  
24 be released, having no one they could appeal to  
25 for help or justice, and often being told that

1           they could be killed at any time and nobody would  
2           know the difference.

3                       MR. GOVER: In the course of  
4           referring to Volume 8 at tab 693 I also described  
5           to you the conditions of detention that Mr. Arar  
6           has described as the conditions that prevailed for  
7           10 months and 10 days of his detention in Syria.

8                       Given what Mr. Arar has said about  
9           the conditions of his confinement, can you comment  
10          on whether the conditions of his detention, as he  
11          has described them to you, are consistent or  
12          otherwise with the conditions that you have  
13          described as having been provided to you by way of  
14          description by those whom you have assessed?

15                      DR. PAYNE: Yes, they are  
16          consistent with the other individuals I have  
17          assessed, especially those from Syria. He was  
18          detained for quite a long time, more than most  
19          other people were detained, which was more in the  
20          range of several months.

21                      MR. GOVER: You described a moment  
22          ago the impact of conditions of detention on  
23          others who have claimed to have been tortured,  
24          specifically those whom you have assessed, these  
25          1,450 or more, including four from Syria.

1                   Can you comment on the  
2                   likely impact of those conditions of detention  
3                   on Mr. Arar in particular, if one accepts what is  
4                   reported here at tab 693 of Volume 8?

5                   DR. PAYNE: They are relatively  
6                   consistent with individuals that I have examined  
7                   in general who report that during the first few  
8                   weeks of the detention their torture is usually  
9                   worse, especially when they are held  
10                  incommunicado, without anybody knowing where they  
11                  are and the government officials denying that they  
12                  are even in detention.

13                  Often once their family knows  
14                  where they are and they are allowed access to  
15                  their family or lawyers, conditions improve  
16                  somewhat, and once they come to court and are  
17                  subject to the judicial system things usually  
18                  improve considerably. The torture can still go  
19                  on, but it is much, much less.

20                  MR. GOVER: So that I'm clear on  
21                  this, is it correct to say then that based on what  
22                  those whom you have assessed have told you, that  
23                  the severity of torture tended to vary depending  
24                  on the stage of detention?

25                  DR. PAYNE: It often did. As in

1 Mr. Arar's case, it would be most severe early on,  
2 and being still present but much less intense as  
3 time went on.

4 MR. GOVER: You have mentioned  
5 earlier that one of the purposes of the torture as  
6 reported to you by those who have endured it was  
7 extraction of information from them.

8 If you look at the three purposes  
9 that you described earlier as underlying torture,  
10 that is to obtain information as punishment of the  
11 person, either directly or as a proxy for the  
12 enemy, or as a method of intimidating a population  
13 as a whole, based on what they have told you once  
14 again, can you comment on the severity of torture  
15 and whether it is variable having regard to the  
16 apparent purpose?

17 DR. PAYNE: It is severe in terms  
18 of getting information, but that is also combined  
19 very much with punishment and getting out  
20 frustration of the guards as well.

21 In many cases it seems much more  
22 punitive than actually, you know, to get  
23 information, and in many cases it is known that  
24 the individuals have very little information to  
25 provide. But they are there, they are part of the



1           opposition, the enemy, so we have got them.  
2           Somebody has to be punished, so they get punished  
3           because they are there.

4                       MR. GOVER:  Earlier in your  
5           evidence and in your paper you described the  
6           objective of dehumanizing the victim of torture.

7                       How long does that dehumanization  
8           last and how long does the corresponding feeling  
9           of loss of control last?

10                      DR. PAYNE:  The psychological  
11           effects last for a long time.  Certainly during  
12           detention, certainly after they are released and  
13           they are still in the country, because there is  
14           always a fear of being detained again and having  
15           to face more torture that could happen at any  
16           time.  So it is not able to be relaxed, always  
17           being on the alert, you know, watching out for the  
18           authorities.

19                      Even after they come to Canada,  
20           the ones that do here, and out of their country,  
21           there is still an ongoing fear that persists in  
22           them, some because they may not pass their  
23           hearings and may get sent back on that tends to  
24           perpetuate it, but even after they have passed  
25           their hearings and are able to stay, it takes a

1 long time for this fear and sense of themselves to  
2 come back again. You know, to feel whole as a  
3 person takes a long time.

4 MR. GOVER: That really takes us  
5 to the fourth area that I would like to address  
6 with you, and that is the psychological symptoms  
7 experienced by torture victims and the psychiatric  
8 disorder of which they are characteristic.

9 Let me ask first, what are the  
10 psychological symptoms experienced by torture  
11 victims whom you have assessed?

12 DR. PAYNE: Psychological systems  
13 are related to, again, almost universal  
14 re-experiencing of their torture. That can occur  
15 through bad dreams at night, nightmares, intrusive  
16 memories of the torture repeatedly coming into the  
17 mind during the day. Sometimes they are able to  
18 distract themselves on to other things and  
19 sometimes they can't. And flashbacks, where they  
20 feel they are really back in the experience again,  
21 they are back in the country they came from and  
22 undergoing the torture rather than just  
23 remembering it.

24 MR. GOVER: So those are all  
25 manifestations of this symptom of persistently

1 re-experiencing the torture?

2 DR. PAYNE: Yes. More upset if  
3 they get any reminders, directly or indirectly,  
4 about the experiences they have been through,  
5 certainly such as seeing police in Canada, hearing  
6 sirens.

7 Very unfortunately, people have  
8 scars on their body from their torture. Every  
9 time they shave in the morning they see their scar  
10 and that reminds them, or scars on other parts of  
11 their body that are there, the permanent reminder  
12 of what they have gone through.

13 MR. GOVER: Other symptoms?

14 DR. PAYNE: Other symptoms. They  
15 usually avoid anything that will remind them of  
16 their torture. Many will stay away from people of  
17 their own country because that is a reminder.

18 They will stay away from  
19 television programs or movies associated with  
20 violence, because that again is a reminder of the  
21 violence that they went through.

22 They are much more revved up with  
23 anxiety, and many of them have a lot of  
24 psychosomatic physical symptoms of torture,  
25 headaches, muscle pains, stomach upset. They feel

1 depressed, in sort of that sort of hopeless type  
2 of depression rather than a loss-type of  
3 depression.

4                   They tend to be withdrawn and  
5 avoid other people. They tend to feel a sense of  
6 shame, especially those that have had sexual  
7 abuse. Women will tend to isolate themselves out  
8 of their sense of shame, and for men too because  
9 they no longer feel the strong person that they  
10 were before. There are even some men I have seen  
11 who have been coping relatively well and then  
12 their families arrive in Canada and they do much  
13 worse when their families are here, because they  
14 are no longer able to be the strong man in the  
15 family that they had been prior to their torture.  
16 They need their wife to look after them and to  
17 help them and that is a big disgrace to them.

18                   They often are more physically  
19 revved up in arousal, they just are agitated and  
20 can't calm down. They have an increased startle  
21 response. They hear a bang, they will jump very  
22 quickly and have difficulty tolerating noise.

23                   Their memory and concentration  
24 tend to be poor, which again makes it more  
25 difficult for them to learn English and learn

1 other things that they need in Canada.

2 They have a conditioned fear  
3 in Canada of situations from back in the country  
4 they came from. Especially seeing police, where  
5 they will regard the police here as sort of  
6 similar to the police back in the country they  
7 came from with the same danger. Even though  
8 logically they know it is not true, their  
9 emotional reaction is a fear reaction.

10 Especially for torture victims,  
11 they have difficulty trusting other people in  
12 general, especially government authorities they  
13 will have difficulty trusting. I have the  
14 advantage of being white skinned which makes it  
15 much easier for them to trust me. One of my  
16 colleagues who is a physician who has a beard and  
17 is a bit dark-skinned has great difficulty dealing  
18 with some individuals, especially from Iran, as he  
19 reminds them of people back in Iran.

20 MR. GOVER: Doctor, is there a  
21 psychiatric disorder that is consistent with the  
22 history and this grouping of symptoms?

23 DR. PAYNE: These symptoms  
24 fit under the diagnostic criteria of posttraumatic  
25 stress disorder in the American Psychiatric

1           Association's Diagnostic and Statistical Manual of  
2           Mental Disorders, which is now in its fourth  
3           edition.

4                       MR. GOVER: We haven't,  
5           Commissioner, reproduced the entire DSM-IV but we  
6           have an excerpt from it at tab 4 of Exhibit P-128.

7                       Perhaps I could draw your  
8           attention, Dr. Payne, to page 424, and  
9           specifically if you could summarize for us the  
10          diagnostic features for posttraumatic stress  
11          disorder, please?

12                      DR. PAYNE: The diagnostic  
13          features.

14                      First, one has to have the  
15          traumatic event which is outside the range of  
16          usual human experience. It is not something that  
17          is commonly experienced, and usually experienced  
18          in a helpless, hopeless situation.

19                      Then one has symptoms of  
20          re-experiencing of the traumatic events in various  
21          ways that I have mentioned, in dreams and  
22          intrusive memories. General avoidance, under (c)  
23          avoidance of stimuli in situations that remind the  
24          individual of these. They mention emotional  
25          numbing, but we don't see that much in torture

1 victims. They are more aroused up than being  
2 emotionally numbed.

3 Also things like difficulty  
4 concentrating, more irritability, getting upset  
5 easily. With a duration of 3 months -- acute they  
6 say is more than 3 months. Chronic, certainly the  
7 ones we get to see are all chronic, they have had  
8 symptoms lasting for many months, and in many  
9 cases years.

10 MR. GOVER: I note that the  
11 diagnostic features state that the person's  
12 response to the event must involve intense fear,  
13 helplessness, or horror.

14 DR. PAYNE: Yes. This is not  
15 just the ordinary upsets of life, it is something  
16 much more severe and intense than the ordinary  
17 upsets one might go through like divorce or minor  
18 accidents.

19 MR. GOVER: Now, can you  
20 provide us with a definition of the term  
21 "neurophysiology"?

22 DR. PAYNE: Neurophysiology is one  
23 of the areas of interest in posttraumatic stress  
24 disorder now. It relates to the neurological  
25 structures in the brain and the brain chemistry

1           that regulate our basic body functioning and  
2           underlie our conscious awareness of our feelings  
3           and our thinking.

4                       MR. GOVER: I understand that  
5           the neurophysiology of individuals with  
6           posttraumatic stress disorder has been studied and  
7           a report appears at tab 6 of Exhibit P-128.

8                       Is that correct.

9                       DR. PAYNE: That is correct.

10                      MR. GOVER: If you could put in a  
11           concise statement in layman's terms what it is  
12           this article says, I would be grateful.

13                      DR. PAYNE: This is one of several  
14           articles. Usually doing brain imaging techniques,  
15           MRI scans, PET scans of individuals that shows the  
16           areas of the brain that are being activated while  
17           people are talking about their torture  
18           experiences, and certainly it is shown that  
19           various brain structures are overly stimulated,  
20           hyperactive during this time.

21                      It gives an indication that  
22           posttraumatic stress disorder is not just  
23           something in the mind, in this mind-body  
24           dichotomy, but it something that affects the  
25           structure of and functioning of the brain itself.



1                   I guess in computer terms, it  
2                   is not just a software problem but it is a  
3                   hardware problem as well as software.

4                   It is likely these changes in  
5                   brain functioning result in disturbances in  
6                   processing information, especially memories, and  
7                   account for the long-lasting nature of many  
8                   psychological symptoms.

9                   Just to mention a few. There is  
10                  an area of the brain called the amygdala, which is  
11                  a sorting device for all information coming into  
12                  the brain and where it gets sent off in the brain  
13                  and, as well as that, it puts an emotional content  
14                  to it. People with posttraumatic stress disorder,  
15                  it gives a fear emotion put into many stimuli that  
16                  come in, so even before it hits the thinking part  
17                  of the brain it has this fear response that gets  
18                  activated.

19                  It is also shown that from people  
20                  that went through traumatic experiences some  
21                  developed posttraumatic stress disorder and some  
22                  didn't. For the ones who developed posttraumatic  
23                  stress disorder, they had more activation on the  
24                  right side of their brain, which is a pre-verbal  
25                  area of the brain, so that their thinking was --

1           their experience of their torture or other  
2           traumatic event, while they were talking about it  
3           it was very sort of raw emotion, whereas those who  
4           hadn't experienced posttraumatic stress disorder  
5           it was more on the left side of the brain was  
6           activated, which is more a logical, rational,  
7           where they can put their emotions into words.

8                            Again, it helps explain why people  
9           with posttraumatic stress disorder tend to have a  
10          lot of strong feeling associated with what is  
11          going on that is sort of non-verbalized yet. Once  
12          it gets verbalized, then you can manipulate it a  
13          lot more and deal with it in a rational fashion,  
14          but before it is verbalized it is more sort of raw  
15          emotion and comes out in a lot of visual images,  
16          in the re-experiencing and the flashbacks, rather  
17          than processed into verbal, intellectual terms  
18          that can then be manipulated later on.

19                          MR. GOVER: Can you give us a  
20          brief description of the course of the ongoing  
21          psychological symptoms you described earlier and  
22          the phases of treatment?

23                          DR. PAYNE: Yes. certainly a  
24          course for people varies considerably. It can  
25          relate to the length and severity of the torture,

1           certainly for torture victims' detention. There  
2           is a big difference between people who may be  
3           detained for a couple of hours or a couple of days  
4           and tortured and then they are released and get on  
5           with their lives. With individuals that are  
6           detained for months, certainly more than 6 to  
7           8 months, it has a much, much, much more severe  
8           long-term effect on people and they are more  
9           disturbed.

10                           It depends on how resilient people  
11           are. Some people are just naturally more  
12           resilient than others and will bounce back and  
13           have some inner resources to get themselves  
14           together pretty well, and some people don't have  
15           that. Some people have more supportive  
16           environment that are helpful to them and some  
17           people are left to flounder on their own and tend  
18           to do less well.

19                           Certainly individuals who are seen  
20           at the Canadian Centre For Victims of Torture that  
21           come to us, it is usually probably two to four  
22           years that people have contact with the Centre  
23           before they feel they can manage without it.

24                           With posttraumatic stress disorder  
25           the symptoms can carry on for many years or

1 decades. I have one man that I'm seeing now  
2 unrelated to this reasons who was in the Second  
3 World War as an underage soldier in Belgium, and  
4 every night, or almost every night, he is still  
5 back in the war, experiencing the war that he was  
6 in 55-60 years ago now.

7 Flashbacks can occur very often  
8 too. I have one person who I have seen previously  
9 who I encountered and told me she was studying for  
10 her Ph.D. exams and was giving a lecture and the  
11 projector wasn't focused quite right and she went  
12 to focus it and the light came in her eye and she  
13 immediately had a flashback to the torture she had  
14 had 15 years previously in one of the Latin  
15 American countries when a bright light was shone  
16 into her eyes while she was being interrogated.

17 People get on with their lives and  
18 cope, but things are still there and can be  
19 certainly reactivated.

20 In terms of general treatment,  
21 the first thing is just getting the person out of  
22 the situation. Like an allergic reaction, you  
23 want to get the person away from the thing that is  
24 stimulating the problem into a safe situation.

25 Then we want to deal with things

1 that are perpetuating their problems. Like  
2 difficulty sleeping can keep the person more  
3 aroused, they can't cope with things very well.  
4 Excessive anxiety. If you can, again, keep the  
5 cycle of tension going up, excessive depression,  
6 withdrawal, can again just deepen the depression.

7           If we deal with those immediate  
8 things that are just tending to keep the situation  
9 going and make it worse, then there is a real  
10 issue of integrating the person back into society  
11 again, and integrating his personal experience  
12 into his life experience.

13           I think part of this is getting  
14 it from this raw emotion in the right brain into  
15 this more logical, thought-out, able to be  
16 manipulated and dealt with and incorporated into  
17 one's life overall.

18           Certainly we can use a lot of  
19 things to help with that. Medication helps.  
20 Therapy, both individual and group therapy.  
21 Certainly in Toronto we found art therapy helps  
22 get people's non-verbal images out, and then  
23 talking about it and helping put it into sort of  
24 verbal things, then it can be dealt with much  
25 easier. A lot of just general support.

1                   One of the most important things  
2                   is developing a trusting relationship with people,  
3                   helping them develop trusting relationships with a  
4                   few people that hopefully then can expand as time  
5                   goes on and then they get better.

6                   MR. GOVER: Doctor, I would like  
7                   to return to one of the purposes of torture, as  
8                   you understand those purposes from what you have  
9                   been told by those whom you have assessed, and I  
10                  would like now to turn to the last area, and that  
11                  is the reliability of information obtained under  
12                  torture.

13                  Given your expertise, having  
14                  assessed over 1,450 patients who claim to have  
15                  been tortured, given your training, given your  
16                  familiarity with the literature, are you able to  
17                  comment on the reliability of information obtained  
18                  under torture?

19                  DR. PAYNE: I think reliability  
20                  is one of the difficult things to assess, because  
21                  people may say a lot of different things under  
22                  torture but again it is very difficult for the  
23                  person receiving the information to determine  
24                  whether it is reliable or not.

25                  In terms of the likelihood of

1 people providing information, useful information  
2 under torture, it tends to be associated with the  
3 personality of the individual and how important  
4 his or her attachment is to the organization or  
5 the individual that they are involved with.

6 Certainly there are people that  
7 are not very psychologically strong, have  
8 difficulty tolerating distress, are excessively  
9 narcissistic or self-centred, and they are ones  
10 that would likely quickly provide information  
11 under torture, under the threat of torture. They  
12 just don't want to tolerate stress at all.

13 These characteristics can be found  
14 in the population as a whole, probably in  
15 conscripted soldiers, but are probably not found  
16 in individuals who voluntarily strive for  
17 political change in difficult situations.

18 Individuals who are attracted to  
19 this political activity are usually  
20 psychologically strong, are aware of the risks  
21 that are involved in it, put their cause ahead of  
22 personal pleasure, and are able to tolerate  
23 distress for their cause.

24 An individual with a strong  
25 attachment to an identity with their cause, and

1 people associated with it, are much less likely to  
2 provide information than people who have very  
3 little attachment or less attachment to it.  
4 Someone who is very strongly committed to their  
5 political activity and the people associated with  
6 it are much less likely to give information.

7 I think we know probably from our  
8 own personal experience, if we were detained and  
9 tortured by somebody who wanted to know the  
10 location of our child or grandchild because they  
11 wanted to abuse them, how much torture would it  
12 take before we revealed that information? We  
13 could say, okay, yes, there are just some things I  
14 am not going to reveal because I could suffer as  
15 much as I want, but nothing is going to make me  
16 reveal things like that.

17 It shows that there is no direct  
18 correlation between the amount of torture given  
19 and people's ability or willingness to provide  
20 information. There are other psychological  
21 factors of importance of information, importance  
22 of a person and the cause that will limit  
23 information being given under any circumstances.

24 MR. GOVER: The answer to  
25 this should be self-apparent, but are you aware



1 of any medical studies on information obtained  
2 under torture?

3 DR. PAYNE: Again, I'm not aware  
4 of any medical studies. Again, these studies  
5 wouldn't and couldn't be produced. Couldn't  
6 because technically it is impossible to get into  
7 these situations, technically impossible to know  
8 who has information and who doesn't have  
9 information, and certainly it would be against  
10 medical ethics.

11 MR. GOVER: Have torture  
12 victims whom you have assessed told you about  
13 information that they have provided while being  
14 subjected to torture?

15 DR. PAYNE: They have talked to me  
16 about the way they dealt with the situation of  
17 dealing with it.

18 None of the individuals I have  
19 seen have admitted confessing, in the sense of  
20 spilling the beans, about what has happened to the  
21 people that have interrogated them.

22 They will speak much more about  
23 resisting that, speaking of the demoralizing and  
24 degrading effects of torture, and one way of  
25 maintaining their morale or their sense of

1 themselves was not giving information. If they  
2 could resist giving information, then they could  
3 feel they won, they succeeded over their captors,  
4 and there is a lot of positive self-esteem that  
5 went along with that, even though they are in this  
6 very degrading situation.

7 Many took pride in telling me,  
8 "Well, they didn't break me. I went through all  
9 of this, but they didn't break me."

10 MR. GOVER: Did torture victims  
11 whom you have assessed tell you about confessions  
12 in particular that they made under torture?

13 DR. PAYNE: In this context  
14 "confession" has to be used in quotation marks.

15 For many individuals who were  
16 tortured, if the torture carried on long enough  
17 they would do something to stop it when they  
18 couldn't tolerate it. Giving "confessions," again  
19 in quotation marks, would be one of the ways that  
20 they would stop the torture, at least temporarily.

21 Probably confessions in the  
22 sense that Mr. Arar has reported, where they have  
23 something written out that is produced before  
24 them and you sign it or you put your thumbprint on  
25 it, or for others you just sign a blank piece of

1 paper and they will fill it in and that is the  
2 confession, which again is not giving any  
3 information.

4 It seemed to me in many cases a  
5 face-saving way for the interrogators and  
6 torturers to deal with it. "If we don't get  
7 information from you, at least we have got you to  
8 sign something so we have got something, you know,  
9 to hold over you in the end, even though we don't  
10 get information and even though you are going to  
11 be released."

12 MR. GOVER: Do you have any other  
13 comments about information provided under torture  
14 and its reliability?

15 DR. PAYNE: Some people have told  
16 me they will consciously edit the information they  
17 provide. They will provide some information for  
18 somebody they may know of already in long-term  
19 detention, somebody who has left the country, the  
20 information they can provide that is not going to  
21 be helpful and it is not going to harm any of  
22 their colleagues or friends.

23 Some people would just, say,  
24 provide any information, usually unreliable, just  
25 to stop the torture for a short period of time,

1           until they get it checked out and they may come  
2           back and the torture will continue again, but it  
3           gives a little bit of a reprieve.

4                       MR. GOVER:  Finally, have torture  
5           victims whom you have assessed told you about  
6           undergoing torture after attempts to obtain  
7           information have ended or failed?

8                       DR. PAYNE:  Yes, but the torture  
9           carries on for almost everybody in detention for  
10          political reasons.  It is to start out being  
11          tortured.  It may become less intense but people  
12          seem to sort of get caught up in the system and  
13          once you are in the system you are in a system of  
14          torture and it continues, it continues on, often  
15          as a punitive thing to people keep in line, as a  
16          general deterrent from the population, that this  
17          will happen to you too if you start rebelling and  
18          speaking up.

19                      MR. GOVER:  Thank you, Doctor.  
20          Those are my questions.

21                      THE COMMISSIONER:  Thank you,  
22          Mr. Gover.

23          EXAMINATION

24                      MR. WALDMAN:  With respect  
25          to Mr. Arar's statements and confessions,

1 according to his statement he had nothing to do  
2 with anything, so he had nothing to hide or no  
3 one to protect.

4 Have you dealt with people in that  
5 kind of situation in your experience? Have you  
6 dealt with people who weren't involved and were  
7 just picked up and had nothing to hide?

8 DR. PAYNE: Oh, yes, I have dealt  
9 with many people who have been picked up, have  
10 nothing to hide. Because usually the suspicion  
11 that goes along with opposition groups is that  
12 somebody will be detained and then their brothers  
13 will be detained because they are part of the same  
14 family and under suspicion, or people will be at  
15 the house of somebody who gets arrested and then  
16 everybody in the house will be detained.

17 MR. WALDMAN: So in the context of  
18 those individuals who had no one to protect, how  
19 do they usually deal with the torture in terms of  
20 being asked to confess?

21 DR. PAYNE: They will usually  
22 maintain that they are not involved, they are not  
23 involved at all, but usually when the torture  
24 continues on for a long, long, long time, then  
25 they will eventually, as Mr. Arar says, be willing

1 to say anything, to sign anything just to stop it.  
2 They will confess, again usually in terms of  
3 signing something that has been prepared already  
4 for them.

5 MR. WALDMAN: Right. So in the  
6 context of someone like Mr. Arar, the normal  
7 course would be for the torturer to create the  
8 statement that the person would sign?

9 DR. PAYNE: Create, yes. In  
10 terms of Mr. Arar stating he had gone to  
11 Afghanistan, he knew this is what they wanted to  
12 hear, very clearly.

13 MR. WALDMAN: We won't take  
14 you through it, but the statement goes on for a  
15 while and a period of time goes by where he is in  
16 the very small cell in appalling conditions for a  
17 long time.

18 That, even though there is no  
19 physical torture, would being kept in the same  
20 place, in the very same difficult conditions,  
21 would that continue the traumatizing effect of the  
22 original torture?

23 DR. PAYNE: Yes, it very much  
24 continues the traumatizing effect of the original  
25 torture itself. There is no specific direct harm,

1 but the sensory isolation that goes along with  
2 being a prolonged time in a dark space where there  
3 is no outside stimulus, or very little outside  
4 stimulus coming in is an aspect of torture in  
5 itself. You have a lot of time to brood, to think  
6 about things, and usually it is the negative,  
7 depressing things.

8           There is always the sense of being  
9 on the outlook for something happening. Usually  
10 people held in these cells are very sensitive to  
11 noises, the sounds of individuals walking in the  
12 hallway, guards, or the door opening, any  
13 indication they might be, you know, taken out  
14 again. Because usually the only clue they have of  
15 what is happening in the world around them is  
16 people walking back and forth, the noises they  
17 make, what they are talking about, and they are  
18 always on the alert and revved up, hyped up, for  
19 these, rather than being able to relax.

20           MR. WALDMAN: Mr. Arar, according  
21 to his statement, was taken to another prison  
22 where he was put into slightly better conditions  
23 for a period of about 6 weeks. But then he was  
24 taken back to the same prison, to the same  
25 conditions.

1                   Being taken back to the first  
2           prison where he was tortured, would that have a  
3           retraumatizing effect on him?

4                   DR. PAYNE: That would make him  
5           feel more hopeless again. Certainly he was in  
6           better conditions in the other prison he was taken  
7           to, he was around other people and had  
8           socialization, people to talk to.

9                   When I read it, it said he was in  
10          a room 20 by 12 feet by 20 feet --

11                  MR. WALDMAN: Right, with --

12                  DR. PAYNE: -- with 50 people,  
13          which is less than 5 square feet per person. So  
14          it was an improvement, but if those figures are  
15          correct it was a pretty jam-packed area that he  
16          was in, rather than an area where he could relax.

17                  MR. WALDMAN: He said he was,  
18          according to his statement, only beaten on one  
19          occasion. But then at the end of September,  
20          according to his statement, he was taken back to  
21          the original place and it was during that period  
22          of time he was brought up and was asked to sign  
23          another confession.

24                  All the experiences that he  
25          experienced at the beginning when he was severely



1 treated, would they be present at the time he was  
2 asked to sign the second confession?

3 DR. PAYNE: Yes. I think it is  
4 always worse to go back again to a worse  
5 situation. It would bring back more the hopeless  
6 feeling, the expectation the torture was going to  
7 continue, that the situation had become worse and  
8 he was in a much more dangerous situation now.

9 MR. WALDMAN: You talked a bit  
10 about the retraumatization that occurs, and I  
11 would like to deal with that in respect of  
12 Mr. Arar, especially with respect to the event and  
13 conduct of Canadian officials after he came back  
14 to Canada and whether their conduct would have  
15 been likely to retraumatize.

16 When he came back to Canada, or  
17 since he has come back, the government has refused  
18 to acknowledge publicly that he was wronged.  
19 Would that have -- what is the -- oh.

20 Am I being corrected?

21 MR. FOTHERGILL: I don't know that  
22 that is entirely a correct statement. The  
23 government has conceded that he was a victim. The  
24 extent to which Canadian officials contributed or  
25 caused his misfortune is, of course, what we are

1 here investigating.

2 THE COMMISSIONER: I think that is  
3 a fair statement.

4 MR. WALDMAN: Okay. Well,  
5 they have conceded that he is a victim, but  
6 they haven't acknowledged their role in  
7 his mistreatment. Perhaps I will ask you a  
8 question.

9 One of the things that we have  
10 seen -- and I want you to advise if this is  
11 something that is common or present -- is it is  
12 quite clear from Mr. Arar's public statements that  
13 for him a sense of having justice and an  
14 acknowledgment that he was wronged is extremely  
15 important.

16 Is that something that you see in  
17 other torture victims?

18 DR. PAYNE: Yes, I think this is  
19 extremely important for torture victims, a sense  
20 of justice. I think that is part of the basis of  
21 the fight against impunity for individuals who  
22 have been torturers. Pinochet and other  
23 individuals who have been tortured, that there is  
24 a sense of injustice that they are allowed to go  
25 free and their own situation isn't recognized.

1                   MR. WALDMAN: So would it be  
2                   important in terms of Mr. Arar's long-term  
3                   recovery to have an acknowledgment as to the  
4                   extent and nature of involvement of the different  
5                   persons who were involved in his situation?

6                   DR. PAYNE: I think if he felt he  
7                   was getting justice. If this is one of the  
8                   methods of getting justice for himself I think it  
9                   would be a relief and would be helpful to put --  
10                  helping him to put some closure on this aspect of  
11                  his life and move on from it.

12                  MR. WALDMAN: After Mr. Arar has  
13                  returned there was, for example at the end of  
14                  October before he made a public statement, a very  
15                  public leak to CTV News which alleged that he had  
16                  provided information about other persons who were  
17                  detained in Canada under immigration security  
18                  certificates and other places, alleging that he  
19                  had fingered them as being members of al-Qaeda.

20                  He reacted very strongly publicly  
21                  to this, but my question is: How would that  
22                  affect him psychologically, an allegation that he  
23                  had fingered other people?

24                  DR. PAYNE: I think it would be  
25                  difficult for anyone to be pointed out as a

1           betrayer of people, to be falsely pointed out as a  
2           betrayer of people, especially people who they  
3           had, you know, strong, positive feelings for.

4                       MR. WALDMAN:   Subsequent to  
5           that, there was a major leak of his file,  
6           which was published in the Ottawa Citizen and  
7           other newspapers, suggesting that he had been  
8           to Afghanistan and was connected to a  
9           terrorist organization.

10                      Would that kind of public leak  
11           of information have had an effect of  
12           retraumatizing Mr. Arar?

13                      DR. PAYNE:   I would anticipate  
14           that it would have brought the whole situation up  
15           again and his sense of not being understood and  
16           not being given justice.

17                      MR. WALDMAN:   One of the  
18           other pieces of information that we have learned  
19           during the course of the hearing that affected  
20           Mr. Arar -- and I wanted to ask you if this is  
21           consistent with your understanding -- was when  
22           he learned that the information that he had  
23           provided during the consular visits to the  
24           consul who he had seen while he was being  
25           detained was subsequently passed on by officials

1 to the RCMP and CSIS and became part of his  
2 investigative file.

3 Would that have retraumatized him?

4 DR. PAYNE: I think he would have  
5 seen that as a big betrayal and that would have  
6 traumatized him and stirred up his ambivalence  
7 around Canadian officials, whether they are  
8 trustworthy or not, which I think would have  
9 reactivated his real frustration from his time in  
10 detention when he had the consular visits there,  
11 from which it is reported he seemed to really  
12 appreciate them for the contact with people but  
13 was very frustrated that they couldn't be helpful  
14 to him. They couldn't be helpful because he  
15 couldn't tell them what was happening to him and  
16 they didn't get it together in their heads to be  
17 able to understand what was going on.

18 I think that was a very  
19 distressing time for him and he tells in his  
20 report of how distressing that was, and screaming  
21 and banging his head against the wall with the  
22 tension and frustration that was there. I think  
23 that it would, again, sort of stir up this sort of  
24 tension/conflict within: How much can he trust?  
25 How much can they be helpful to him now? When

1 in some ways he knows they can, but then it is  
2 not happening and there are more problems. This  
3 would certainly create more of a dilemma in his  
4 head for himself.

5 MR. WALDMAN: What about the  
6 suggestion that he might still be under  
7 investigation? Would that be traumatic for him  
8 as well, to suggest that -- would that  
9 retraumatize him?

10 DR. PAYNE: I understand that he  
11 has a sense that his name is not cleared yet,  
12 whether it is with the authorities or with the  
13 community as a whole, and I think that has a  
14 negative psychological effect on him.

15 MR. WALDMAN: Thank you.

16 THE COMMISSIONER: Thank you,  
17 Mr. Waldman.

18 Mr. Fothergill?

19 MR. FOTHERGILL: I think I can be  
20 very brief.

21 EXAMINATION

22 MR. FOTHERGILL: Dr. Payne, my  
23 name is Simon Fothergill and I appear for the  
24 Government of Canada.

25 My questions really just arise

1 from the last exchange you had with Mr. Waldman.

2 I think you told us that you have  
3 never examined Maher Arar, is that right?

4 DR. PAYNE: No, I have never  
5 examined him.

6 MR. FOTHERGILL: Would you agree  
7 with me that there are some quite profound  
8 limitations to the extent to which you can comment  
9 on the impact of different events on his psyche  
10 without actually having examined him?

11 DR. PAYNE: Yes. I can only  
12 comment on what I would expect to happen in  
13 general in situations like his, yes.

14 MR. FOTHERGILL: So in respect to  
15 the answer that you just gave to Mr. Waldman, what  
16 you are telling us is that it is possible that  
17 Mr. Arar could have reacted in the way that  
18 Mr. Waldman suggested, but equally, without  
19 examining him, you cannot tell us for sure?

20 DR. PAYNE: It is probable, but I  
21 couldn't say for sure.

22 MR. FOTHERGILL: All right.  
23 Thank you.

24 DR. PAYNE: Probably more than  
25 50-50, but certainly I can't say for sure.

1 THE COMMISSIONER: Thank you.

2 Mr. Gover?

3 MR. GOVER: Mr. Commissioner, I  
4 have no re-examination of the witness.

5 Thank you, Dr. Payne.

6 THE COMMISSIONER: Let me express  
7 my thanks to you, Dr. Payne. I appreciate the  
8 time and effort you put in to preparing to give  
9 evidence and coming here today. It has been  
10 helpful and I am very appreciative of your help.

11 DR. PAYNE: Thank you very much.

12 THE COMMISSIONER: Thank you.

13 We are going to begin  
14 tomorrow at...?

15 MR. GOVER: At 9:30,  
16 Mr. Commissioner.

17 THE COMMISSIONER: 9:30 for  
18 everybody? Okay.

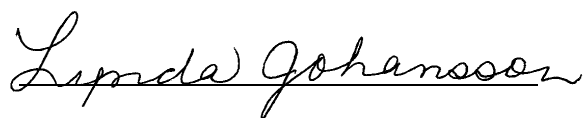
19 We will rise until then.

20 THE REGISTRAR: Please stand.

21 --- Whereupon the hearing adjourned at 4:09 p.m.,  
22 to resume on Thursday, June 9, 2005,  
23 at 9:30 a.m. / L'audience est ajournée à  
24 16 h 09, pour reprendre le jeudi 9 juin 2005  
25 à 9 h 30



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