

**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:

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Held at:

Algonquin Room
Old City Hall
111 Sussex Drive
Ottawa, Ontario

Tuesday, June 7, 2005

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Mr. Steven Shrybman	Canadian Labour Congress/Council of Canadians and the Polaris Institute
Mr. Emelio Binavince	Minority Advocacy and Rights Council
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APPEARANCES / COMPARUTIONS

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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Tuesday, June 7, 2005 at

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

4 7 juin 2005 à 9 h 33

5 THE REGISTRAR: Please be seated.

6 Veuillez vous asseoir.

7 THE COMMISSIONER: Good morning.

8 MR. CAVALLUZZO: Good morning,

9 Commissioner.

10 Today we are going to be dealing
11 with a number of issues, including extraordinary
12 rendition, certain aspects of the Convention
13 Against Torture, and I will be at the outset
14 indicating what issues we will be dealing with in
15 particular.

16 This morning we have Julia Hall
17 and Stephen Yale-Loehr, who will be testifying as
18 our expert witnesses this morning.

19 THE COMMISSIONER: Do you wish to
20 be sworn or affirmed? We have both choices here.
21 You can swear on the Bible or you can simply
22 affirm without using the Bible.

23 MS HALL: I am quite happy to be
24 sworn.

25 THE COMMISSIONER: Could you

1 please stand and take the Bible in your right
2 hand, and I will administer the oath.

3 SWORN: JULIA HALL

4 MR. YALE-LOEHR: I will be sworn.

5 SWORN: STEPHEN YALE-LOEHR

6 MR. CAVALLUZZO: Commissioner, at
7 the outset I would like to file two books of
8 documents.

9 The initial is the reference
10 material which we have compiled in relation to the
11 evidence of Ms Hall.

12 THE COMMISSIONER: That will be
13 120.

14 MR. CAVALLUZZO: That is P-120.

15 EXHIBIT NO. P-120: Book of
16 Documents entitled "Reference
17 Materials Compiled in
18 Relation to the Evidence of
19 Julia Hall and Stephen
20 Yale-Loehr"

21 MR. CAVALLUZZO: You should as
22 well have a smaller document book relating to
23 watchlists and so on.

24 THE COMMISSIONER: 121.

25 MR. CAVALLUZZO: Thank you.

1 EXHIBIT NO. P-121: Document
2 entitled "An Overview of U.S.
3 Immigration Watchlists and
4 Inspection Procedures,
5 Including U.S.-Canadian
6 Information Sharing",
7 authored by Stephen
8 Yale-Loehr and Matthew Vernon

9 MR. CAVALLUZZO: Now before
10 calling upon the witnesses initially to establish
11 their qualifications relating to the issues in
12 dispute, just let me state to you what issues we
13 will be dealing with.

14 We are going to be dealing with
15 ten issues today.

16 The first is we will be looking at
17 the definitions of extraordinary rendition,
18 rendition, and other ways that kind of transfer
19 has been described in the materials we have before
20 us.

21 Second, we will be looking at the
22 practice of rendition in the United States
23 pre-9/11.

24 Third, we will be looking at the
25 practice of rendition in the United States

1 post-9/11 and indicate how the implementation of
2 that practice has changed.

3 Fourth, we will be looking at the
4 obligations of the United States under
5 international law, particularly in respect of the
6 prohibition against torture.

7 Fifth, we will be looking at the
8 implementation of Article 3 of the Convention
9 Against Torture, into American law in general, and
10 into U.S. immigration law in particular.

11 Sixth, we will be spending some
12 time on diplomatic assurances, which are obviously
13 relevant in these proceedings.

14 Seventh, we will be having a
15 discussion on removal procedures under American
16 immigration law.

17 Eighth, we will be looking at a
18 legal analysis of Mr. Arar's removal from the
19 United States.

20 Ninth, we will be looking at the
21 importance of present American and Canadian
22 inquiries into issues relating to Mr. Arar's case.

23 The final issue we will be dealing
24 with today is the efficacy of what we have been
25 calling the Monterey Protocol, which of course is

1 the exchange of letters between the Minister of
2 Foreign Affairs and the Secretary of State in
3 January 2004.

4 So those will be the issues we
5 will be looking at.

6 Initially I would like to
7 establish the qualifications of both witnesses,
8 starting initially with Julia Hall.

9 Commissioner, I submit that
10 Ms Hall should be established as an expert in
11 international law relating to international
12 conventions, rules and principles, particularly in
13 regard to the prohibition against torture and
14 diplomatic assurances.

15 THE COMMISSIONER: All right.

16 MR. CAVALLUZZO: Second, we will
17 be seeking to establish her as an expert in the
18 U.S. implementation of these international laws,
19 rules and principles; then, finally, as an expert
20 in the policy and/or practice of rendition or
21 extraordinary rendition pre- and post-9/11.

22 As far as Stephen Yale-Loehr is
23 concerned, we would submit that he should be
24 established as an expert in U.S. immigration laws
25 and procedures, including U.S. immigration

1 watchlists and inspection procedures; second, in
2 international laws relating to the prohibition
3 against torture; and third, much of his time will
4 be spent on the implementation of Article 3 of the
5 Convention Against Torture into U.S. law, in
6 particular immigration laws and regulations.

7 Initially I would like to deal
8 with Ms Julia Hall.

9 EXAMINATION

10 MR. CAVALLUZZO: Ms Hall, you are
11 presently the legal counsel and senior researcher
12 in the Europe and Central Asia division at Human
13 Rights Watch?

14 MS HALL: I am.

15 MR. CAVALLUZZO: In respect of
16 that position, could you generally describe some
17 of your duties and responsibilities?

18 MS HALL: Current responsibilities
19 are almost exclusively relating to looking at
20 civil liberties and human rights concerns in the
21 context of the global war on terrorism. In
22 specific, I am the sole researcher at Human Rights
23 Watch who is looking at the phenomenon of global
24 renditions to risk of torture that are accompanied
25 by diplomatic assurances.

1 I am also looking at the treatment
2 of migrants and refugees in the use of immigration
3 and asylum laws in the context of the global war
4 on terrorism and looking at discriminatory
5 application of those laws when it comes to, in
6 specific, Muslim migrant communities, both in
7 North America and in Europe.

8 MR. CAVALLUZZO: And you are
9 admitted to the bar of New York?

10 MS HALL: I am.

11 MR. CAVALLUZZO: And at the
12 current time you are an adjunct Professor at the
13 State University of New York and Buffalo?

14 MS HALL: That is correct.

15 MR. CAVALLUZZO: In terms of your
16 education, you hold a Bachelor of Arts from
17 Fordham University in New York?

18 MS HALL: That is right.

19 MR. CAVALLUZZO: You have also
20 obtained a Master of Arts in sociology, magna cum
21 laude, from the State University of New York at
22 Buffalo?

23 MS HALL: Correct.

24 MR. CAVALLUZZO: You also
25 graduated from the University of Buffalo Law

1 School in 1996?

2 MS HALL: That is right.

3 MR. CAVALLUZZO: You received the
4 Max Koren Award for the highest academic
5 achievement?

6 MS HALL: That is right.

7 MR. CAVALLUZZO: You are a
8 Fulbright Scholar?

9 MS HALL: I am.

10 MR. CAVALLUZZO: Could you tell us
11 what you did in respect of that scholarship?

12 MS HALL: I, as an undergraduate,
13 studied Arabic language and Middle East studies,
14 politics and international relations specifically
15 with respect to the Middle East. I attended the
16 American University in Cairo, studying Arabic
17 language and culture and international relations
18 as a Fulbright Scholar.

19 MR. CAVALLUZZO: You are also a
20 Rotary International Scholar where you studied in
21 Australia?

22 MS HALL: That is correct.

23 MR. CAVALLUZZO: What did you
24 study at the National University in Australia?

25 MS HALL: International relations,

1 theory and practice.

2 MR. CAVALLUZZO: You hold a
3 Certificate in International Law from The Hague
4 Academy of International Law?

5 MS HALL: That is correct.

6 MR. CAVALLUZZO: And you have
7 interned with the United Nations Centre for Human
8 Rights in Geneva?

9 MS HALL: That is right.

10 MR. CAVALLUZZO: And for the
11 International Criminal Tribunal for the former
12 Yugoslavia at The Hague?

13 MS HALL: That is correct.

14 MR. CAVALLUZZO: Then in 1996 you
15 became a research fellow at Human Rights Watch?

16 MS HALL: That is correct.

17 MR. CAVALLUZZO: In terms of your
18 publications -- Mr. Commissioner, if you would
19 refer to tabs 9 and 10 of Exhibit P-120, you can
20 see that we have at tab 9 a human rights
21 publication called "Still at Risk: Diplomatic
22 Assurances No Safeguard Against Torture".

23 I understand, Ms Hall, that you
24 authored this particular study?

25 MS HALL: I did.

1 MR. CAVALLUZZO: And at tab 10,
2 Mr. Commissioner, is another human rights study
3 called "'Empty Promises:' Diplomatic Assurances No
4 Safeguard Against Torture".

5 And I understand, Ms Hall, that
6 you authored this study as well?

7 MS HALL: That is correct.

8 MR. CAVALLUZZO: In terms of your
9 practice as a lawyer, I understand that you were
10 the lead lawyer for Human Rights Watch's research
11 and advocacy work on the Agiza case. That is the
12 Sweden rendition case that we will be referring
13 to?

14 MS HALL: That is correct.

15 MR. CAVALLUZZO: And that decision
16 just came down in May of 2005?

17 MS HALL: That is right.

18 MR. CAVALLUZZO: Finally, you have
19 appeared as an expert on counter-terrorism and
20 migration issues at the United Nations, the
21 Council of Europe, and in numerous other
22 intergovernmental and academic fora.

23 Is that correct?

24 MS HALL: In my role as a lawyer
25 for Human Rights Watch, that is correct.

1 MR. CAVALLUZZO: Commissioner, I
2 submit that Ms Hall should be established as an
3 expert --

4 THE COMMISSIONER: Do any of the
5 other counsel wish to ask any questions with
6 respect to this issue of expertise or make any
7 submissions?

8 MR. EDWARDH: If I could,
9 Mr. Commissioner, I would just like to adopt the
10 position of Commission counsel. The witness is
11 obviously amply qualified to give expert opinion
12 evidence.

13 THE COMMISSIONER: Mr. Fothergill?

14 MR. FOTHERGILL: We agree.

15 THE COMMISSIONER: I do, too.

16 --- Laughter / Rires

17 THE COMMISSIONER: I will rule
18 that Ms Hall is qualified to express opinions in
19 the areas that you outlined, Mr. Cavalluzzo.

20 MR. CAVALLUZZO: Now, that doesn't
21 mean you can go home.

22 --- Laughter / Rires

23 THE COMMISSIONER: It is just the
24 start.

25 MR. CAVALLUZZO: Moving on to

1 Stephen Yale-Loehr, Mr. Yale-Loehr has authored as
2 well a number of publications. I am going to take
3 him through his education as well.

4 But at the outset -- and I should
5 have with Ms Hall -- pointed out that at tab 3, a
6 report was prepared for this Commission and
7 submitted by Wendy Patten, the U.S. Advocacy
8 Director, and Ms Hall will be certainly answering
9 many, many questions relating to the information
10 that can be found in tab 3.

11 As well, if you go to tab 4, we
12 have a paper which was submitted by Stephen
13 Yale-Loehr. It was submitted in May of 2005
14 dealing with the legality of Maher Arar's
15 treatment under U.S. immigration law. That was
16 authored by the witness and Jeffrey O'Neill as
17 well.

18 They authored P-121, which is the
19 second exhibit you have before you relating to
20 watch and lookout lists and so on.

21 I would like to ask some
22 questions, first of all relating to your
23 education.

24 You graduated from Cornell
25 University in Ithaca with a Bachelor of Arts in

1 1977. Is that correct?

2 MR. YALE-LOEHR: That is correct.

3 MR. CAVALLUZZO: You received a
4 J.D. degree cum laude with specialization in
5 International Legal Affairs in 1981 from Cornell
6 Law School?

7 MR. YALE-LOEHR: Correct.

8 MR. CAVALLUZZO: Amongst many
9 activities at Cornell during law school you were
10 the editor-in-chief of the Cornell International
11 Law Journal?

12 MR. YALE-LOEHR: Correct.

13 MR. CAVALLUZZO: In terms of your
14 professional experience, I would like to focus
15 initially on publications.

16 You are the co-author, with two
17 others, on a text called "Immigration Law and
18 Procedure", which I understand is the leading
19 immigration law treatise in the United States. It
20 is a 20-volume reference work?

21 MR. YALE-LOEHR: Correct.

22 MR. CAVALLUZZO: You are also
23 co-editor of a publication called "Interpreter
24 Releases". What is that?

25 MR. YALE-LOEHR: I was co-editor.

1 That was a weekly news publication put out in
2 Washington, D.C. by a company called Federal
3 Publications, and when I became co-author of this
4 treatise I relinquished my responsibilities as
5 co-editor of "Interpreter Releases".

6 MR. CAVALLUZZO: You are also the
7 executive editor of "Immigration Briefings"?

8 MR. YALE-LOEHR: I was.

9 MR. CAVALLUZZO: What is that?

10 MR. YALE-LOEHR: That is a monthly
11 monograph on individual topics in immigration law,
12 and I edited that until I took over the treatise
13 in 1994.

14 MR. CAVALLUZZO: Now, in terms of
15 teaching, you are an adjunct professor of
16 immigration and refugee law presently at Cornell
17 Law School?

18 MR. YALE-LOEHR: Yes, I teach an
19 immigration seminar in the fall, and I co-direct
20 an asylum and Convention Against Torture clinic in
21 the spring at Cornell Law School.

22 MR. CAVALLUZZO: Prior to that
23 time, you taught at Georgetown Law School?

24 MR. YALE-LOEHR: That is correct.

25 MR. CAVALLUZZO: As an adjunct

1 professor as a part time responsibility. You are
2 also of counsel to a law firm in Ithaca called
3 True, Walsh & Miller?

4 MR. YALE-LOEHR: Correct.

5 MR. CAVALLUZZO: In respect of
6 those responsibilities you focus on immigration
7 law and refugee law?

8 MR. YALE-LOEHR: Correct.

9 MR. CAVALLUZZO: Now, your
10 publications, apart from the ones that I have
11 mentioned, are many. If we go to page 2 of your
12 CV there is only one that I would focus on. As I
13 say, there are many.

14 You are co-author of a book called
15 "America's Challenge: Domestic Security, Civil
16 Liberties, and National Unity After September 11"?

17 MR. YALE-LOEHR: Correct.

18 MR. CAVALLUZZO: You have received
19 numerous awards, including the American
20 Immigration Lawyers Association's Elmer Fried
21 Award for excellence in teaching in 2001?

22 MR. YALE-LOEHR: Correct.

23 MR. CAVALLUZZO: You also received
24 an AILA, the Edith Lowenstein Award for excellence
25 in advancing the practice of immigration law, and

1 you received that award in 2004?

2 MR. YALE-LOEHR: Correct.

3 MR. CAVALLUZZO: In regard to your
4 role as a lawyer you are a member of the New York
5 and D.C. bars?

6 MR. YALE-LOEHR: Correct.

7 MR. CAVALLUZZO: You are a member
8 of the U.S. District Court for the Northern
9 District of New York?

10 MR. YALE-LOEHR: Correct.

11 MR. CAVALLUZZO: A member of the
12 bar for the U.S. Court of Appeals for the D.C.
13 Court, or Circuit, excuse me?

14 MR. YALE-LOEHR: Correct.

15 MR. CAVALLUZZO: And also of the
16 United States Supreme Court?

17 MR. YALE-LOEHR: Correct.

18 MR. CAVALLUZZO: You have
19 testified on numerous occasions before congress
20 and as an expert witness in both American and
21 Canadian courts?

22 MR. YALE-LOEHR: Correct.

23 MR. CAVALLUZZO: Commissioner, I
24 would also ask that Mr. Yale-Loehr be admitted as
25 an expert.

1 MR. EDWARDH: I certainly agree
2 with Commission counsel that the witness is amply
3 qualified to express an opinion.

4 MR. FOTHERGILL: Again, we agree.

5 THE COMMISSIONER: Thank you. I
6 am satisfied that Mr. Yale-Loehr as well is
7 qualified to express opinions in the areas
8 indicated by you, Mr. Cavalluzzo.

9 MR. CAVALLUZZO: Mr. Commissioner,
10 the procedure which we have adopted is initially
11 both witnesses will make a brief opening statement
12 which will be an overview of what their evidence
13 will be relating to these ten issues. At that
14 point in time I will ask questions calling upon
15 initially one witness and then the other to
16 comment on the particular issue we are discussing,
17 and then at the completion of that evidence,
18 Mr. Gover will be taking Mr. Yale-Loehr through
19 Exhibit P-121.

20 So initially we could start with
21 an opening statement.

22 THE COMMISSIONER: Please go
23 ahead.

24 MS HALL: On behalf of Human
25 Rights Watch, I would like to thank the Commission

1 for this opportunity to appear today and to share
2 some of the voluminous research and analysis that
3 we have done in the context of the global war on
4 terrorism, on renditions to risk of torture, and
5 the growing use of diplomatic assurances as an
6 alleged safeguard against torture.

7 Although the Commission's mandate
8 is to determine the role that Canadian actors
9 played in Maher Arar's apprehension, detention and
10 transfer to Syria, the nature of the information
11 Human Rights Watch has been asked to provide here
12 necessitates a detailed discussion of U.S. law,
13 policy and practice with respect to renditions and
14 the so-called linchpin of renditions policy; that
15 is, the use of diplomatic assurances.

16 I must say that we can only hope
17 that we will be asked to provide input into a
18 similar commission or judicial process in the
19 United States that will document in a full and
20 transparent manner the United States' own
21 responsibility for Mr. Arar's removal from the
22 U.S. and human rights violations he suffered in
23 the U.S., Jordan and Syria.

24 As you may know, Human Rights
25 Watch has raised Mr. Arar's case in a number of

1 fora, including at the United Nations and with the
2 United States government.

3 Our concerns go to the core of
4 this inquiry: that the United States government
5 transferred Mr. Arar to Syria despite the fact
6 that there was substantial evidence that he would
7 be in danger of being subjected to torture; that
8 diplomatic assurances that Mr. Arar would not be
9 tortured, allegedly secured by the United States
10 from Syrian authorities, were no more than cover
11 for the United States government in its subsequent
12 attempts to justify Mr. Arar's transfer on the
13 most dubious grounds, that is, that such empty
14 promises provide an effective safeguard against
15 torture; that as a result, the United States
16 government violated its obligations under the
17 Convention Against Torture.

18 And finally, but most crucially
19 for the purposes of this Commission of Inquiry, if
20 it can be determined that Canadian authorities and
21 officials knew or should have known through their
22 exchanges and interactions with U.S. authorities
23 at the time of Mr. Arar's apprehension and
24 detention that he was in danger of being
25 transferred to Syria and Canadian authorities,

1 through positive action or by failing to act,
2 facilitated or were complicit in Mr. Arar's
3 transfer, the Canadian government would also be in
4 violation of its obligations under both the
5 Convention Against Torture and its general legal
6 obligations to prevent and halt torture wherever
7 it may occur under any circumstances, including in
8 so-called national security cases.

9 The Commission will note that in
10 our written submission we attempt to clarify how
11 we at Human Rights Watch understand the terms
12 "rendition" and "extraordinary rendition". For
13 the purposes of my testimony today, I will
14 generally use the term "rendition" or "rendition
15 to risk of torture" to refer to any transfer of a
16 person to a country where he or she is at risk of
17 being tortured, whether the transfer is within or
18 outside a legal procedure.

19 This framing maintains a clear and
20 direct focus on the critical human rights issues
21 implicated by these practices, the absolute
22 prohibition on transferring people to a risk of
23 torture. Just as governments may not engage in
24 torture directly, they may not send or transfer
25 persons to other countries where they are at risk

1 of torture.

2 Thus, we have in fact labelled
3 Mr. Arar's case a rendition and place it squarely
4 within a set of global transfers post-September
5 11th with a common set of features.

6 First, the person subject to
7 transfer has been labelled a terrorist, associated
8 with terrorists or a threat to national security,
9 but does not have access to the evidence against
10 him, nor the ability to challenge it. The
11 countries to which such persons are subject to
12 transfer include states with well-documented
13 histories of torture abuses, in particular, of
14 persons in detention and subject to interrogation
15 for alleged terrorism or other security-related
16 activity. Such countries include Egypt and Syria.

17 The rendering or sending State
18 claims that it can justify such transfers on human
19 rights grounds by securing assurances of humane
20 treatment from the abusive receiving State. There
21 is no due process, or a seriously abridged process
22 that prohibits a person subject to such a transfer
23 from challenging it, including any assurances.

24 Finally, the transfers are
25 effected in a manner sorely lacking in

1 transparency, and attempts to secure information
2 about the process leading up to transfer and post
3 transfer are frustrated by claims of national
4 security confidentiality. Thus, there are serious
5 obstacles to holding any person or State
6 accountable for sending a person back to risk of
7 torture.

8 Again, given this set of common
9 features, the Arar case falls clearly into the
10 category of renditions to risk of torture that we
11 have been analyzing and researching for near on
12 three years.

13 A word about the so-called
14 linchpin in government's attempts to defend
15 renditions, and that is their reliance on
16 diplomatic assurances.

17 Human Rights Watch has grown
18 increasingly alarmed, as have other international
19 actors, by the use of diplomatic assurances by a
20 number of States, not just the United States, in
21 what we see as an end-run around their absolute
22 obligation not to return a person to a risk of
23 torture. Such assurances are enshrined in the
24 U.S. immigration regulations that allegedly
25 governed Maher Arar's removal from the United

1 States and transfer to Syria, but they are also a
2 matter of U.S. policy that governs a broad range
3 of transfers.

4 In February and March of this year
5 a series of U.S. officials, including Attorney
6 General Alberto Gonzalez, CIA director Porter
7 Goss, and President Bush himself, defended
8 renditions to countries where there is a risk of
9 torture by claiming that the U.S. government seeks
10 and secures assurances of humane treatment before
11 affecting the transfer. It is apparently the
12 policy of the U.S. to seek such assurances in
13 transferring enemy combatants, for example, from
14 Guantanamo Bay back to their homes or third
15 countries, and when taking custody of terrorism
16 suspects abroad and transferring them to third
17 countries.

18 In other words, reliance upon such
19 assurances from a range of abusive States where
20 people are clearly at risk of torture is pervasive
21 throughout the United States system.

22 Our research, however, is
23 unequivocal. Such assurances provide no effective
24 safeguard against torture. They are, in the main,
25 unreliable, unworkable and unenforceable.

1 In Mr. Arar's case, assurances
2 from Syria should have been dismissed out of hand
3 as inherently unreliable and lacking credibility.
4 Such a determination under U.S. law would have
5 precluded the United States from transferring
6 Mr. Arar to Syria.

7 However, as we stated in our most
8 recent report on renditions, in the absence of any
9 ability to lodge a challenge to diplomatic
10 assurances -- and I quote:

11 "The executive branch of the
12 United States government
13 essentially decides for
14 itself whether its transfer
15 of a person to the custody of
16 another government is legal."

17 In the May 2005 decision against
18 Sweden by the United Nations Committee Against
19 Torture, a case in which the United States
20 facilitated the rendition of two Egyptian
21 terrorism suspects from Sweden to Cairo where they
22 were subsequently tortured, the committee
23 reaffirmed that such renditions to risk of torture
24 violate international law and that diplomatic
25 assurances from Egypt did not suffice to protect

1 the two men against the manifest risk that awaited
2 them upon return.

3 Of particular note, and I would
4 think of particular interest to this Commission in
5 the Agiza case, is the fact that Swedish
6 authorities remained passive, or what one
7 government investigator termed remarkably
8 subordinate, as U.S. agents took control of the
9 situation and transferred the two men from
10 Stockholm to Cairo. The Swedish government
11 claimed that it did not realize what the U.S. had
12 planned and thus could not be held accountable,
13 and trusted Egypt's assurances and thus could not
14 be held accountable.

15 The committee, however, pointed to
16 several clues, so-called red flags, that should
17 have compelled the Swedes to halt the transfer:
18 Egypt's long history of practising torture; the
19 interest in the two men by the security services
20 of a number of governments; the involvement of the
21 United States in particular; and the men's
22 maltreatment in detention prior to their transfer.

23 I believe that there are some
24 strong parallels between the Swedish case and the
25 Arar case despite the fact that Mr. Arar was not

1 transferred from Canadian territory, and I look
2 forward to discussing these parallels in more
3 detail in my testimony.

4 Finally, I would like to conclude
5 by saying how crucially important this inquiry is.
6 I have been doing research on these issues for
7 three years. There are very few accountability
8 mechanisms for renditions. It is no great secret
9 that genuine accountability for serious human
10 rights violations in the course of the global war
11 on terrorism has been sorely lacking. But for any
12 accountability mechanism to be truly meaningful it
13 must be the result of a process that is fair and
14 transparent to the greatest possible extent.

15 Renditions themselves are always
16 negotiated in secret, with little or no
17 opportunity for the person subject to transfer to
18 effectively challenge the evidence against him.
19 It is our hope at Human Rights Watch this inquiry
20 will be conducted with the openness essentially
21 required to shed light on an illegal practice that
22 operates in the shadows and keeps both victims and
23 the public in the dark.

24 Thank you.

25 MR. YALE-LOEHR: Thank you.

1 My report summarizes U.S.
2 immigration law procedures as applied to Mr. Arar.

3 As background, it appears that
4 Mr. Arar was removed from the United States under
5 very unusual immigration procedures known as
6 expedited removal.

7 Normally when a person enters the
8 United States, they are inspected to make sure
9 that they are admissible to the United States.
10 The United States has many grounds of
11 inadmissibility, ranging from failure to have the
12 proper immigration paperwork to terrorism
13 concerns.

14 If an inspector at the border
15 thinks that a person is inadmissible, they are
16 usually referred to an immigration judge who hears
17 the evidence and decides whether the person can be
18 admitted to the United States or not. If the
19 person has a claim for relief, such as political
20 asylum or relief under the Convention Against
21 Torture, the immigration judge hears those claims
22 as well. Those are the normal removal procedures.

23 Instead of going through those
24 normal immigration procedures, however, some
25 people -- including Mr. Arar -- go through what

1 are known as expedited removal procedures.

2 Section 235 of the Immigration and
3 Nationality Act, what we call the INA, sets forth
4 the procedures by which we use expedited removal.
5 INA section 235(b) is used when a person lacks the
6 necessary immigration papers or has used fraud or
7 misrepresentation to try to enter the United
8 States. INA section 235(c) is for a variety of
9 security-related grounds.

10 Section 235 expedited removal
11 procedures are rare. In fact, Mr. Arar's case is
12 the first section 235(c) procedure and removal
13 order that I have seen.

14 These procedures are called
15 expedited removal for a reason. They bypass the
16 normal procedures of having a hearing before an
17 independent immigration judge to hear all the
18 evidence and to render a decision.

19 However, even the expedited
20 removal procedures acknowledge the United States'
21 obligations under Article 3 of the Convention
22 Against Torture not to deport someone to a country
23 where they may be tortured. The procedural
24 safeguards, however, are not clearly spelled out
25 in the U.S. immigration regulations. The

1 regulations simply state that the United States'
2 U.S. Immigration Agency will assess the
3 applicability of Article 3 through the removal
4 process to ensure that a removal order does not
5 violate Article 3.

6 An immigration judge does not make
7 that assessment, however. The same immigration
8 agency that is trying to get the non-citizen
9 removed from the United States makes that torture
10 assessment. Thus, the agency that is the
11 prosecutor, the judge and the jury in an expedited
12 removal case also decides whether it is safe to
13 send a person to a country where they may be
14 tortured.

15 Now, how does all of this apply to
16 Mr. Arar?

17 Well, we know that U.S.
18 immigration authorities put Mr. Arar through
19 expedited removal procedures under INA section
20 235(c). The removal order claims that removing
21 Mr. Arar to Syria would not violate Article 3 of
22 the Convention Against Torture. But that
23 statement on the removal order flies in the face
24 of Syria's well-known record of torture. The U.S.
25 State Department's annual human rights report

1 consistently notes Syria's use of torture.
2 Moreover, Mr. Arar has said that he has told U.S.
3 authorities that he feared being tortured if he
4 was sent back to Syria.

5 Given these facts, U.S.
6 immigration authorities arguably violated Article
7 3 of the Convention Against Torture by removing
8 Mr. Arar to Syria.

9 How do we prevent another
10 Arar-type situation from occurring again?

11 As has already been stated, in
12 January of 2004, U.S. Secretary of State Colin
13 Powell and then Canadian Minister of Foreign
14 Affairs William Graham signed a Memorandum of
15 Understanding, or an MOU. The MOU requires
16 notification and consultation between the two
17 countries before a citizen of the other country
18 can be removed to a third country.

19 In my view, that MOU does not go
20 far enough. Even under the MOU, another Mr. Arar
21 could be sent to a country where they might be
22 tortured. For example, Mr. Arar was granted
23 access to a Canadian consular official while he
24 was being detained in the United States. The
25 record also indicates that U.S. and Canadian

1 officials consulted about Mr. Arar. Thus, the two
2 requirements of the MOU, access and consultation,
3 were already met in Mr. Arar's case. Yet despite
4 such notification and consultation, Mr. Arar was
5 involuntary removed to Syria.

6 The MOU does not necessarily
7 prevent a similar situation from happening again.

8 In my view, the United States and
9 Canada should negotiate a stronger Memorandum of
10 Understanding. I wish that the U.S. would agree
11 not to remove a Canadian citizen to a third
12 country unless Canada explicitly agrees in advance
13 and in writing.

14 Alternatively, at the very least
15 the United States should agree if a Canadian
16 expresses a fear of torture or persecution, an
17 independent immigration judge should hear that
18 claim.

19 I believe that those changes are
20 necessary because, as Mr. Arar's case shows, the
21 current procedures concerning removal of people
22 from the United States based on security concerns
23 under INA section 235(c) are too vague to
24 guarantee compliance under Article 3 under the
25 Convention Against Torture.

1 Mr. Arar's case also shows the
2 inadequacy of diplomatic assurances. Diplomatic
3 assurances are not effective, both legally and as
4 a practical matter. I would recommend that both
5 Canada and the United States should abolish
6 diplomatic assurances in Convention Against
7 Torture cases.

8 I hope that the Commission will
9 include such recommendation in its final report.

10 Thank you.

11 MR. CAVALLUZZO: Thank you.

12 Now I would like to move on to our
13 first issue, which is that of definitions. I
14 would like to call upon Ms Hall.

15 You told us in your opening
16 statement that, in respect of your paper, that you
17 will be using the term "rendition to risk of
18 torture", and we understand that.

19 However, before moving on, I
20 wonder if you might be of assistance in terms of
21 the expressions or terms "rendition" and
22 "extraordinary rendition" as they were used in or
23 about 2002, 2003 and so on, starting with
24 "rendition".

25 What was the common sense meaning

1 of "rendition" at that point in time?

2 MS HALL: The word "rendition" has
3 no legal meaning. It is a generic term. All it
4 means is the surrender or handing over of one
5 person from one country to another country. And
6 that definition, that general non-legal
7 definition, there is no human rights dimension.

8 What began happening with a series
9 of articles in the Washington Post by Peter Finn,
10 I believe, about December 2001, was a term came
11 into more the popular discourse, this term
12 "extraordinary rendition", which somehow had two
13 dimensions.

14 One was that the handing over of
15 the person would happen outside of legal channels;
16 in other words, this notion that someone would be
17 snatched off the street, for example, by the
18 security services and transferred without any
19 process, no access to an attorney, et cetera, to a
20 third country.

21 And the second mention of the
22 notion of extraordinary, as in this popular
23 discourse, was that person would also be at risk
24 of torture.

25 But this terminology is very, very

1 imprecise, and it really doesn't help us
2 understand what the crucial components are of this
3 practice.

4 The crucial components of this
5 practice, rendition to risk of torture, I laid out
6 somewhat in my opening statement. The key issue
7 is: In effecting these transfers, are people's
8 human rights implicated?

9 And in fact that is the case in
10 the full range of renditions that we have studied
11 over the last three years.

12 So the idea is that a rendition,
13 either inside or outside of a legal process, where
14 a person would be sent back to a place where they
15 are at risk of torture, are the key features that
16 we look for when we talk about renditions. And we
17 have decided just to augment that word to
18 renditions to risk of torture so that every time
19 we are talking about it now we can slightly alter
20 the discourse so that people clearly understand
21 that there is a serious human rights violation
22 implicated in the transfer.

23 MR. CAVALLUZZO: So that
24 importantly the fact that the State may have
25 pursued a legal process in effecting the rendition

1 is really irrelevant to the ultimate question as
2 to whether the international law, in particular
3 the Convention Against Torture, has been violated?

4 MS HALL: That is correct.

5 MR. CAVALLUZZO: Okay. Now, you
6 have mentioned the word "snatches", and of course
7 Richard Clark in his book refers to rendition as
8 "snatches". I guess at one point in time the
9 expression was a situation where a person may be
10 snatched, if we can use that expression, from one
11 country and may be brought back to the United
12 States for prosecution.

13 Is that correct?

14 MS HALL: Well, this is -- if you
15 want me to begin talking necessarily about the
16 evolution of the practice?

17 MR. CAVALLUZZO: Yes, and let us
18 move into the second issue, which is the pre-9/11.

19 MS HALL: First, in the interests
20 of full disclosure, there is very little actual
21 public information about the practice prior to
22 9/11. But from what we know, there are a series
23 of Presidential directives, beginning in the early
24 1990s in the first Bush administration -- actually
25 it was the late '80s in the first Bush

1 administration -- that actually provided for a
2 process whereby U.S. officials from various
3 agencies would consult about apprehending
4 terrorist and drug suspects, in particular,
5 outside of the United States, specifically with
6 the idea of bringing them back to the United
7 States for prosecution.

8 The earliest directive on this
9 from George Herbert Walker Bush in the first Bush
10 administration remains classified, so this is
11 information we have upon information and belief,
12 essentially.

13 In the 1990s, President Clinton
14 then issued a Presidential directive -- and again
15 I would refer you to the paper that we submitted
16 to the Commission for exact dates -- whereby he
17 essentially confirmed that terrorist suspects and
18 others wanted for prosecution in the United States
19 could be apprehended outside of the borders of the
20 United States by U.S. operatives without the
21 consent or cooperation of the country in which the
22 person was found.

23 So that was a dimension that --
24 pieces of that directive are in the public domain
25 and are quoted in our report.

1 MR. CAVALLUZZO: That directive,
2 by the way, Commissioner, can be found at page 3
3 of the paper of Human Rights Watch and was enacted
4 in June 1995 by President Clinton. It is (PDD) 39
5 and it is set out at that portion of the paper.

6 MS HALL: That is correct.

7 MR. CAVALLUZZO: Okay. Ms Hall, go
8 on.

9 MS HALL: That Presidential
10 directive was again, in (PDD) 62, was reaffirmed
11 that it was United States policy vis-à-vis the
12 directive that people could be apprehended,
13 extradited and rendered for prosecution.

14 Prior to September 11th, 2001,
15 what is of particular interest is that renditions
16 were occurring for this express purpose of
17 prosecution. They were either being brought back
18 to the United States for prosecution or, in some
19 cases -- for example, the returnees from Albania
20 case -- they were being sent to other countries
21 for the express purpose of a prosecution.

22 In September of 2001, the World
23 Trade Centers were attacked. Shortly thereafter
24 the second Bush administration issued a similar
25 directive, and our understanding of that

1 directive -- again upon information and belief
2 since it remains classified -- is that there was a
3 slight rule change. Whereas prior to September
4 2001 there would be inter-agency consultation
5 about rendition and legality of renditions --

6 MR. CAVALLUZZO: And this would be
7 coordinated from the White House, the National
8 Security Council in the White House?

9 MS HALL: That is our assumption.

10 MR. CAVALLUZZO: The assumption is
11 their inter-agency meetings would be with perhaps
12 the CIA, the FBI and any other agency involved?

13 MS HALL: It would involve any
14 actor who was directly participating or advising
15 on the rendition.

16 After September 2001, with the new
17 directive, which I reiterate remains classified,
18 our understanding -- and it is mainly from press
19 reports, in particular by Dana Priest in the
20 Washington Post -- is that the requirement for
21 consultation, broad consultation amongst the
22 agencies involved was no longer operating; that
23 there was now a broad discretion on the part of
24 the CIA in particular to effect renditions, to
25 determine what countries people would be sent to,

1 et cetera.

2 At that time, in the course of
3 understanding this PDD, we had no notion about
4 diplomatic assurances. All we understood was now
5 that there was broad discretion on the part of the
6 CIA to effect the transfers. That is one issue.

7 The second issue is post-September
8 11th, the fundamental nature, the purpose of the
9 transfers, appears to have changed. Although
10 there are a few post September 11th renditions
11 where people were returned for prosecutions -- and
12 I would point you in specific to the Ahmed Agiza
13 case where he was taken from Stockholm back to
14 Cairo and was subsequently prosecuted -- in the
15 main the examples, the cases of rendition that we
16 have covered, were not expressly for prosecution.

17 It appeared they were for one of
18 two reasons:

19 One would be for the express
20 purpose of interrogation, simply of interrogation,
21 either at the behest of the United States or not.
22 In certain cases we know that was the case; in
23 other cases we suspect it. But it wasn't for
24 prosecution. It was simply for interrogation to
25 gather intelligence information related apparently

1 to the global war on terrorism.

2 The other purpose is for what we
3 have referred to very generally as warehousing.
4 States do maintain their sovereignty to determine
5 who enters their borders and who doesn't, and who
6 is expelled given certain conditions like the
7 torture convention, which we will get to. And the
8 idea being that if a person has been labelled a
9 threat to your national security but your security
10 services do not have enough information to
11 prosecute that person, the intention of the
12 rendition then is to simply get them off your
13 territory and have another government take
14 responsibility for them and warehouse them so that
15 they no longer present the imminent threat that
16 governments would say they present by being on
17 their territory.

18 MR. CAVALLUZZO: So that it could
19 serve either purpose or both purposes; in other
20 words, to collect information through
21 interrogation and to warehouse the person, that
22 is, get the person away from the United States,
23 which has rendered the individual.

24 Now, in terms of numbers, I know
25 this, as you have stated, is not really a

1 transparent process, and I am wondering if you
2 could share with us any information you have as
3 to, for example, the number of renditions prior to
4 9/11.

5 MS HALL: The only way that we
6 would be able to access that information, accurate
7 information, would be if the United States
8 government were willing to release it, which
9 heretofore it has not been.

10 We have had statements by
11 government officials in congressional hearings,
12 et cetera, that puts the number at somewhere
13 around 70 to 80 in the decade prior to 2001,
14 September 2001.

15 Since September 2001, the
16 estimates have risen to anywhere from 100 to 150.
17 Again, those numbers are -- we are not able to
18 independently corroborate those numbers.

19 MR. CAVALLUZZO: And just finally
20 in respect of the practice after 9/11, are there
21 specific countries to which the United States will
22 render individuals pursuant to this classified
23 directive?

24 MS HALL: Our research indicates
25 that the primary country of destination has been

1 Egypt. We have done quite a bit of research on
2 Egypt. Renditions have occurred to Syria. We
3 know that they have occurred to Jordan. There is
4 information in the public domain, allegations by
5 British officials in particular, that people have
6 been rendered with U.S. facilitation to
7 Uzbekistan.

8 Important to note in this context
9 in terms of countries, many of you may have heard
10 of the so-called torture planes that have been
11 travelling the globe, landing at various airports.
12 In fact, we and other organisations have access to
13 flight logs and what we do see is a regular
14 pattern of landing in Egypt, in Syria, in Jordan,
15 in Uzbekistan and stops in various European
16 capitals.

17 So I would say that certain Middle
18 Eastern countries with well-known records of
19 torture, in particular, and some Central Asian
20 republics as well.

21 MR. CAVALLUZZO: In the case of
22 Mr. Arar, it would seem that certainly Syria was
23 chosen as the country to which he was rendered,
24 which would be consistent, I guess, with what you
25 are saying. And I guess it is difficult for you

1 to assess what particular purpose he was sent
2 there for, whether it be to collect information
3 through interrogation or in effect to warehouse
4 him, as you have put it. And we will come back to
5 that.

6 But a couple of final questions
7 relating to this, and at the end of these
8 questions, I will call upon you, Mr. Yale-Loehr,
9 to share with us any views you have on that.

10 The first question would be? Why
11 doesn't the United States get the information
12 themselves? Why do they have to render somebody
13 to another country, to send them there for the
14 purposes of interrogation? Why doesn't the U.S.
15 do itself?

16 MS HALL: The strong suspicion is
17 that because there are both domestic and
18 international legal obligations that impinge on
19 the United States' ability to interrogate in ways
20 that might elicit certain forms of information
21 that they send people to places where the
22 interrogation methods are much more severe, and
23 therefore there is an expectation by sending
24 people to places like Syria and Egypt where we
25 know people are tortured under interrogation that

1 there will be a better opportunity to gain
2 intelligence.

3 MR. CAVALLUZZO: And is it fair to
4 say that a person might be rendered by the United
5 States to one of these countries because there is
6 insufficient evidence to charge the person
7 criminally, or can you analyze that? Or is that a
8 fair question?

9 MS HALL: We have seen this in our
10 research all over the globe, not just with respect
11 to the United States. But the question is: If
12 someone is within your territory and you have
13 sufficient evidence, why don't you prosecute?

14 The reality is that governments
15 will say one of several things:

16 One is that they will, in some
17 cases, openly admit that they don't have
18 sufficient evidence. They have strong suspicions,
19 but that doesn't amount to reasonable cause in
20 terms of arresting and prosecuting.

21 Another reason is that the United
22 States and other governments will say: "We do
23 have a lot of evidence, but we are not willing to
24 release it in any type of forum where it could
25 potentially be leaked because it could have

1 profound national security implications for us."

2 MR. CAVALLUZZO: Right.

3 MS HALL: So there are several
4 reasons why they wouldn't want to prosecute -- or
5 let me rephrase. These are the reasons that
6 governments give us as to why they will not
7 prosecute.

8 MR. CAVALLUZZO: The other
9 question I would have related to that: In the
10 circumstances of Mr. Arar, can you help us in
11 terms of why would they render him to Syria, for
12 example, rather than to Guantanamo? Do you have
13 any idea as to why?

14 MS HALL: First of all, not
15 wanting to delve too much into the facts of this
16 particular case, all of the persons who are
17 interned at Guantanamo Bay have been labelled
18 enemy combatants.

19 MR. CAVALLUZZO: I see. All
20 right.

21 MS HALL: And it is a very
22 specific label that was attached to them in the
23 context of their participating, or their alleged
24 participation, on the battlefield in the context
25 of the global war on terrorism.

1 Mr. Arar's case can be
2 distinguished from that. He is a Canadian
3 citizen. He was not apprehended by U.S. forces in
4 the field and transferred back. His case does not
5 have humanitarian law implications, which is a
6 separate body of law from human rights law. That
7 is the law that obtains at Guantanamo in addition
8 to human rights law. Mr. Arar's case is squarely
9 within the confines of international human rights
10 treaty and customary law.

11 MR. CAVALLUZZO: One final thing
12 and we will move on because you may be able to
13 help us regarding specific information you have
14 relating to something we have been calling the
15 Metropolitan Detention Centre in Brooklyn. The
16 adjudicative facts are that Mr. Arar was held at
17 the Metropolitan Detention Center.

18 I am wondering if in the course of
19 your duties and responsibilities at Human Rights
20 Watch whether you have done any studies, analysis
21 of conditions in the Metropolitan Detention Center
22 in Brooklyn?

23 MS HALL: In fact, in August of
24 2002, Human Rights Watch issued a report entitled
25 "Presumption of Guilt" and in that report

1 documents the treatment of detainees post-9/11.
2 Hundreds and hundreds of Muslim men in particular,
3 of varying statuses, were detained post-9/11, were
4 interrogated. Many of them were found in
5 violation of visa and other immigration
6 requirements. Some of them were deported; some of
7 them were kept in detention for extended periods
8 of time. Many of them were not granted access to
9 consular visits. Many of them were not even
10 notified that they have the right, should they so
11 desire, to have communication with consular
12 officials from their countries of origin.

13 The conditions of detention were
14 characterized in the main by procedural
15 violations, lack of access to counsel, lack of
16 access to independent arbiter to determine various
17 aspects of the case, and the conditions of
18 detention themselves were -- our research was
19 unequivocal. In many cases people were physically
20 and verbally abused. They were subject to various
21 forms of humiliation, based on their race, their
22 ethnicity or their religion. They were subject to
23 conditions of detention that amounted to
24 overcrowding, lack of access to adequate medical
25 care, et cetera.

1 So the treatment of people in the
2 Metropolitan Detention Facility was a source of
3 particular concern because of procedural deficits,
4 the secrecy surrounding the proceedings, the lack
5 of access to consular visits and the conditions of
6 detention.

7 MR. CAVALLUZZO: Mr. Yale-Loehr, I
8 wonder if you have any comments in relation to
9 definitions and --

10 MR. YALE-LOEHR: Just two short
11 comments, first on why the United States may not
12 have wanted to bring charges.

13 You have to realize that under the
14 U.S. legal system, at least until September of
15 2001, there was also a barrier between
16 intelligence information and information that
17 could be used in Federal Court. And while
18 intelligence agencies may have had suspicions
19 about a particular individual, depending on how
20 that information was gathered, it may not have
21 been able to be used in a court proceeding.

22 Those barriers have been broken
23 down to a large extent under the U.S.A. Patriot
24 Act that was enacted by Congress in 2002, but at
25 the time that Mr. Arar was detained those barriers

1 were still high. So that could be an additional
2 reason why he was not charged with anything in the
3 United States.

4 Second, as to the conditions of
5 detention at the Metropolitan Detention Center,
6 one of the reports that I co-authored, the
7 "America's Challenge Report", went through press
8 reports and went through interviews with lawyers
9 who represented these individuals, and we
10 catalogued some of the same things that Human
11 Rights Watch did about the conditions of detention
12 there.

13 That particular detention facility
14 and one in Passaic County, New Jersey, were
15 particularly notorious for their inability to be
16 able to provide good conditions for all detainees.

17 MR. CAVALLUZZO: Thank you.

18 A couple of final questions in
19 terms of rendition, extraordinary rendition.

20 In September of 2002, was this
21 practice or policy well-known in the United States
22 or was it for the most part known only to the
23 government and a few others beyond the government?

24 MS HALL: I seek clarification of
25 the question.

1 MR. CAVALLUZZO: Well, the
2 question would be: If I was an official operating
3 in the area of consular access for Canada, would
4 it be reasonable for me to be aware of the
5 practice of rendition as you described it in
6 September of 2002, or was there such a lack of
7 transparency that it would not be reasonable for
8 me to know about this policy or practice?

9 MS HALL: Well, certainly in the
10 press there was -- there were two stories in the
11 Washington Post that garnered a great deal of
12 attention, the Peter Finn stories about renditions
13 that featured, for example, the December 18th,
14 2001, transfers of the two Egyptian men, Ahmed
15 Agiza and Muhammad El-Zari back to Cairo.

16 In addition to that there were
17 other sources of information. I have a press list
18 of maybe ten some odd articles. So in the press
19 this was beginning to be an issue that the press
20 was paying attention to.

21 Amnesty International had issued
22 urgent actions, for example, on behalf of more
23 than one person who was subject to a rendition at
24 that time, the Agiza case being only one of them.

25 Our own reporting on this, again,

1 is inextricably linked to the treatment of
2 post-9/11 detainees that I just discussed.

3 And in addition to that, the
4 notion -- one of the key, key red flags, I guess,
5 in terms of the whole phenomenon of renditions to
6 risk of torture was precisely this issue of
7 consular knowledge, and the idea that
8 post-September 11th the rules had changed. And it
9 is the rare consular official who you meet now who
10 doesn't acknowledge that in the media aftermath of
11 September 2001, the consular relations, the
12 ability to gain access to information, all the
13 rules that applied on September 10th didn't seem
14 to apply any more.

15 We have had numerous statements
16 from consular officials saying things like, you
17 know, "We had trouble getting access before
18 September 2001, but then when our people were
19 being detained, for example, after September 11th,
20 2001, it was so immensely difficult for us to
21 determine what was going on, under what
22 conditions, what information they had, what they
23 potentially were going to do with people."

24 So I think that we try to say that
25 September 11th, it wasn't the end of the world,

1 but there clearly was a line in the sand in terms
2 of how people were being treated and what antennae
3 people should have had up for how the rules had
4 changed.

5 MR. CAVALLUZZO: Now, you have
6 mentioned the Agiza case on a couple of occasions.
7 Why don't we refer to the Agiza case right now,
8 which can be found at tab 21 of your book.

9 This is a recent decision of the
10 committee under the Convention Against Torture,
11 and it deals with Mr. Agiza, who was one of the
12 Egyptian gentlemen that was picked up in
13 Stockholm. This is the case in which you acted as
14 lead counsel for Human Rights Watch.

15 Is that correct?

16 MS HALL: That is correct.

17 MR. CAVALLUZZO: I wonder if you
18 might give us, first of all, a brief factual
19 summary of what happened to Mr. Agiza in Sweden.

20 MS HALL: Mr. Agiza lived for a
21 number of years in Sweden with his family, his
22 wife and children. He had applied for asylum in
23 Sweden, and on his asylum application had stated
24 that in fact he was of special interest to the
25 Egyptian authorities on terrorism-related charges.

1 He had been tried in absentia in 1999 by a
2 military tribunal in Egypt, found guilty of
3 terrorism-related activity, and sentenced to 25
4 years at hard labour. Again, that conviction was
5 in absentia. He disclosed that he was of interest
6 again to the Swedish authorities.

7 The Swedish Migration Board
8 determined that Mr. Agiza did in fact have a
9 well-founded fear of persecution which would
10 qualify him for protection under the 1951 Refugee
11 Convention, to which Sweden is a signatory.

12 In the interim -- and the lines
13 here are not quite so clear; information is still
14 coming out. After the Migration Board made the
15 determination that Mr. Agiza had a well-founded
16 fear of persecution, they sought advice from the
17 government specifically because there seemed to be
18 a terrorism-related issue. The government
19 determined that Mr. Agiza would not be eligible
20 for refugee status; that he would be excluded from
21 refugee status based upon a specific set of
22 clauses within the convention and that he would be
23 deported.

24 Subsequently, on December 18th, he
25 was apprehended. On the very same day, a few

1 hours later, he was taken to Bromma Airport, which
2 is a small airport in Stockholm. He was at that
3 point handed over to U.S. operatives who, through
4 a series of negotiations with the Swedish
5 government -- and again, not all the information
6 has been made clear -- the United States
7 government agreed to facilitate the transfer by
8 providing an airplane to the Swedish government,
9 and the Swedish government agreed to that
10 arrangement.

11 When he got to the airport, he was
12 handed over to the sole custody, however, of U.S.
13 operatives, hooded operatives, a group of men, the
14 numbers shift anywhere between six and eight,
15 accompanied by two American officials. They were
16 hooded. The men were hooded and disguised.
17 Mr. Agiza's clothes were cut off of him. He was
18 thoroughly searched. He was shackled, hand and
19 foot, and he was beaten at that point and put
20 aboard an airplane.

21 Now, the conditions on the
22 airplane again remain somewhat unclear. It is
23 clear to us at this point that there were U.S. and
24 Egyptian officials on the plane and press reports
25 of late have indicated that Swedish officials were

1 also on the plane.

2 He was transported back to Cairo.
3 He was handed over to the sole custody of the
4 Egyptians. He was kept in incommunicado detention
5 for the first five weeks before the Swedish
6 authorities made their first visit to him. The
7 reason the Swedish authorities were visiting him
8 was because they effected the transfer based on
9 diplomatic assurances from the Egyptians that they
10 would not torture or inhumanely treat Mr. Agiza.

11 At the first visit, Mr. Agiza told
12 the Swedish authorities he had in fact been beaten
13 and ill-treated whilst in detention. The Swedish
14 authorities redacted this information from that
15 first monitoring report. In other words, that
16 information was never made public. It was also
17 not made known to the Committee against Torture.

18 Therefore, his allegations of
19 torture in those first five weeks were never
20 really made known until 2004, at which point a
21 Swedish television program made them known.

22 In the meantime, Mr. Agiza's
23 Swedish lawyers lodged with the U.N. Committee
24 Against Torture an individual application for them
25 to determine whether or not Sweden was in

1 violation of its Article 3 obligations under the
2 Convention Against Torture by sending him back
3 when he was at risk.

4 MR. CAVALLUZZO: And the holding,
5 Mr. Commissioner, the essence of the holding,
6 really the important part is in page 34.
7 Paragraph 13.2 really sets out the substantive
8 issue under Article 3 of the Convention Against
9 Torture.

10 And paragraph 13.4 is really the
11 essence of the holding.

12 I note that in that paragraph they
13 dismiss the argument that Sweden had received
14 diplomatic assurances from Egypt that Mr. Agiza
15 would not be tortured.

16 MS HALL: That is correct.

17 MR. CAVALLUZZO: Could you just
18 share with us the rationale of that holding, as to
19 why they found that the diplomatic assurance in
20 that case was ineffective or invalid?

21 MS HALL: They pointed to several
22 factors. One is Egypt's long and well-documented
23 history of employing torture as a matter of state
24 policy.

25 The other is that the Egyptian

1 authorities would often specifically target people
2 who had been labelled as Islamic militants,
3 terrorism suspects, et cetera. So there was a
4 direct relation between how Mr. Agiza had been
5 tagged and who the Egyptian government had
6 targeted.

7 As well, when Mr. Agiza was
8 retried in April of 2004, Human Rights Watch was
9 granted permission to have a trial monitor at his
10 trial. The Swedish diplomats were denied access
11 for the first two of those four hearings, although
12 we were in attendance for all four of them.

13 During that hearing, it became
14 manifestly clear to our trial monitor that the
15 assurance on fair trial issues was breached at
16 every turn. I mean, we basically documented a
17 catalogue of fair trial violations, despite the
18 fact that the Egyptian authorities had promised
19 the Swedes that Mr. Agiza would have a fair trial.

20 This weighed very heavily, it
21 would seem -- or let me rephrase, was a
22 significant factor in the CAT decision. It gave
23 weight to the idea that the Egyptians could not be
24 trusted to honour their assurances.

25 So I think there was a

1 constellation of facts that led the CAT to arrive
2 at the decision that the assurances did not, in
3 fact, mitigate what was a manifest risk.

4 MR. CAVALLUZZO: Okay.

5 I would like to move on to the
6 fourth issue, which is obligations of the United
7 States under international law in respect of the
8 prohibition against torture.

9 I note at page 10, Ms Hall, of
10 your paper, you begin your analysis of the
11 different aspects of international law which are
12 relevant to the particular prohibition, and I
13 wonder if you might perhaps briefly take us
14 through that, starting with the Convention Against
15 Torture.

16 MS HALL: Right. Well, it is no
17 secret that the United States has not ratified a
18 great number of international treaties,
19 multilateral human rights treaties. The two that
20 are of significance for us here today would be the
21 United States Convention Against Torture, which
22 the United States ratified in 1994 and
23 incorporated into law in 1998 via the FARRA, which
24 is the Foreign Affairs Reform and Restructuring
25 Act.

1 When the United States ratified
2 the CAT, they did lodge a series of reservations,
3 understandings and declarations. As you all know,
4 the prohibition against torture, including the
5 nonrefoulement obligation are absolute, and they
6 permit of no exceptions.

7 MR. CAVALLUZZO: Why don't we look
8 at Article 3 of the Convention, which can be found
9 at Tab 5. What you are referring to now in terms
10 of absolute terms is Article 3 which can be found
11 at the second page.

12 Is that correct?

13 MS HALL: Exactly. And Article 3
14 enshrines the nonrefoulement obligation; that is,
15 the absolute obligation that States cannot
16 transfer a person to any country where there is
17 substantial evidence that he or she would be in
18 danger of being subjected to torture.

19 And in making and evaluating
20 whether or not there was a risk of torture, sub 2
21 under Article 3 requires that a country take into
22 account all relevant information, including the
23 existence in the State of return of a consistent
24 pattern of gross, flagrant or mass violations of
25 human rights.

1 MR. CAVALLUZZO: As to the
2 absolute nature of that obligation, if we refer to
3 Article 2 we can see that even exceptional
4 circumstances will not give rise to any
5 justification for torture.

6 MS HALL: There are no exceptions
7 permitted.

8 MR. CAVALLUZZO: But there is in
9 Canada, I understand.

10 MS HALL: One of the great ironies
11 of the Maher Arar case is the fact that while the
12 United States government has no exception to the
13 absolute ban on torture, Supreme Court
14 jurisprudence in Canada does in fact permit in
15 extraordinary circumstance, or exceptional
16 circumstance, excuse me, that the government would
17 be able to transfer a person to risk of torture
18 upon balancing national security considerations
19 against the risk of torture.

20 To our knowledge, it is the only
21 western democratic government that contains such
22 an exception. When Canada reported before the
23 Committee Against Torture in May 2005, the
24 committee was somewhat dismayed that the Canadian
25 government would have such an exception in its

1 jurisprudence and in fact have invoked it in two
2 of the security certificate cases that are
3 currently pending in Canadian courts right now.

4 MR. CAVALLUZZO: Right. Now,
5 coming back to the United States, you talked about
6 an understanding in respect of the interpretation
7 of the CAT, if you could share that with us.

8 MS HALL: I will focus my comments
9 mainly on Article 3.

10 MR. CAVALLUZZO: Okay.

11 MS HALL: The United States did
12 issue an understanding, lodge what is called an
13 understanding, in relation to Article 3, and the
14 understanding was to the effect that in
15 determining whether there was substantial evidence
16 that a person would be subjected to torture in the
17 country of return, the United States understood
18 that to mean that the person would have to prove
19 that it would be more likely than not that they
20 would be tortured in a country of return.

21 After the United States issued
22 that understanding, several other governments
23 objected to that understanding because it raises
24 the bar in terms of the standard of proof.

25 You will note in Article 3 that

1 the drafters of Article 3 left somewhat of a wide
2 breadth. The way that they interpret Article 3,
3 it means that you can't just have a theory or a
4 suspicion that you might be at risk of torture;
5 you have to have something more than that,
6 something that is personal to you. But it doesn't
7 have to be of a high probability that you will be
8 tortured.

9 So what the United States did in
10 its understanding was effectively invoked a
11 balance of probabilities standard of proof, which
12 quantifies in some respect a standard that the CAT
13 drafters clearly did not want quantified. You see
14 in the U.S.'s implementation of this under the
15 law, if you look at the jurisprudence, for
16 example, the immigration jurisprudence in the
17 United States, this has played out to mean 50 per
18 cent plus; it is a quantification. Can you prove
19 by anything over 50 per cent that you would be
20 tortured?

21 And this standard is very, very
22 difficult to understand how you go about an
23 evaluation that arrives at 51, to be frank.

24 So several other countries
25 objected to this United States understanding.

1 They objected with the intent to say that the
2 United States was somehow undermining the object
3 and purpose of the convention by lodging the
4 understanding.

5 But because it is an understanding
6 and not a reservation, we do not see the United
7 States as derogating from Article 3. We do take
8 issue with the standard of proof required in
9 immigration proceedings and CAT proceedings and
10 hope that the United Nations Committee Against
11 Torture will interrogate the United States about
12 this when they come up.

13 MR. CAVALLUZZO: In your paper you
14 also talk about the International Convention on
15 Civil and Political Rights which also is relevant
16 to the prohibition against torture. I wonder if
17 you might share that with us in terms of --

18 MS HALL: The United States --
19 this is one of the other few international
20 treaties that the United States has ratified.

21 Article 7 under the ICCPR
22 prohibits torture. It does not have an express
23 nonrefoulement provision. But the human rights
24 committee that supervises implementation of the
25 convention by States parties has authoritatively

1 ruled that the prohibition against torture
2 includes the prohibition against sending a person
3 back to risk of torture.

4 What is interesting about the way
5 the human rights committee has interpreted Article
6 7 under the ICCPR is that it also includes cruel,
7 inhumane and degrading treatment. So expressly
8 under the U.S.'s obligations under the ICCPR there
9 is a nonrefoulement obligation, and it includes
10 what we refer to as CID, cruel, inhumane and
11 degrading treatment.

12 MR. CAVALLUZZO: Now, the
13 International Convention on Civil and Political
14 Rights, Mr. Commissioner, can be found behind tab
15 6 of the Book of Documents, and once again the
16 section that we are talking about is Article 7,
17 which can be found in the body of the document at
18 page 4.

19 MS HALL: I would like to bring
20 the discussion around to something that is, I
21 think, really relevant for all three governments
22 involved in the Arar case, vis-à-vis the law, and
23 that is the fact that the treaties are not the
24 only kind of regime that governs the prohibition
25 against torture.

1 The prohibition against torture
2 has risen to the level of jus cogens in
3 international law. It is in the hierarchy of
4 prohibitions somewhere near the top. It is
5 recognized as we call compelling law. All
6 governments under all circumstances, whether they
7 have ratified the CAT or not, are bound by jus
8 cogens, and the prohibition against torture is in
9 that group of jus cogens norms, which means it
10 gives rise to something called obligatio erga
11 omnes, with all due respect.

12 It means that obligations to halt
13 and prevent torture flow to all people as a matter
14 of their responsibility to the international
15 community as a whole.

16 So in every instance where there
17 is the possibility that a State can halt or
18 prevent a direct act of torture, facilitation,
19 complicity, aiding or abetting in an act of
20 torture, it is incumbent upon them to do so given
21 the jus cogens nature of the norm.

22 I think that it is very, very
23 important to point out the customary law, nature,
24 of this prohibition, because there are certain
25 governments that, for example, haven't ratified

1 the CAT. Syria only ratified the CAT in 2004 and
2 wasn't subject to its provisions during the time
3 that Mr. Arar was in the country.

4 However, it was bound by the
5 customary international legal norm against
6 torture.

7 MR. CAVALLUZZO: And that
8 customary law, Mr. Commissioner and counsel, can
9 be found at pages 16 and 17 of the paper prepared
10 by Human Rights Watch.

11 Just on that aspect where you said
12 that Syria didn't ratify the Convention Against
13 Torture until 2004, I believe you said?

14 MS HALL: That is my
15 understanding.

16 MR. CAVALLUZZO: Okay. Just a
17 question related to that, and that is: Then
18 presumably if the United States got diplomatic
19 assurances from Syria in 2002 that Mr. Arar
20 wouldn't be tortured, at that point in time they
21 were not signatories to the Convention Against
22 Torture themselves.

23 Is that correct?

24 MS HALL: Actually, just for the
25 purposes of clarification, it wouldn't necessarily

1 matter. What would have mattered in that case was
2 whether the United States was a signatory and
3 whether the assurances secured by the U.S.
4 provided an effective safeguard against torture,
5 and we would reject that out of hand as
6 categorically untrue that they are an effective
7 safeguard.

8 MR. CAVALLUZZO: Wouldn't you
9 agree with me that if a State is a signatory to
10 the Convention Against Torture and it gives a
11 diplomatic assurance that it will not torture
12 somebody, presumably that would carry more weight
13 on that particular State being a party to the
14 convention?

15 MS HALL: To be honest with you,
16 Egypt is a signatory, and was at the time that
17 they were issuing diplomatic assurances. We do
18 not believe at Human Rights Watch that because you
19 have signed the CAT, or ratified the CAT, that
20 your assurances have more weight. What is
21 important is your practices on the ground.

22 Egypt was a signatory at the time
23 that torture was systematic in the country. In
24 other words, it flouted its international legal
25 obligations. Why then would we believe they would

1 honour a promise, an unenforceable promise, a
2 non-legally binding promise, in an isolated case?

3 So there isn't necessarily a
4 direct link between the legitimacy or credibility
5 of assurances simply because you ratified the
6 convention. It really goes to practice on the
7 ground.

8 MR. CAVALLUZZO: I would like to
9 move on to the fifth issue. Mr. Yale-Loehr, you
10 have been sitting there listening for a long time,
11 so why don't we --

12 MR. YALE-LOEHR: Give Ms Hall a
13 break.

14 MR. CAVALLUZZO: We are going to
15 deal with the important issue of the
16 implementation of Article 3 into U.S. law
17 generally and in particular into immigration law.

18 You, as well, have produced a
19 paper for us, and I am wondering if you might take
20 us through that issue, particularly starting with
21 the implementation of the convention itself.

22 MR. YALE-LOEHR: This is set forth
23 on page 3 of my report at tab 4.

24 Basically, as Ms Hall pointed out,
25 the United States became a party to the Convention

1 Against Torture in November of 1994. We have
2 already discussed the fact that at the time the
3 U.S. Senate added this understanding about
4 substantial grounds. But the mere fact we
5 ratified the convention didn't mean we had to
6 apply it automatically and immediately in U.S.
7 law. We had to enact implementing legislation by
8 the U.S. Congress before it became a part of U.S.
9 domestic law. That was done in 1998, as Ms Hall
10 pointed out, in the Foreign Affairs Reform and
11 Restructuring Act, and basically then codified the
12 International Convention Against Torture into U.S.
13 domestic law. We basically tracked Article 3 in
14 our domestic law.

15 We also said that agencies need to
16 publish regulations to implement how we are going
17 to actually enforce the Convention Against
18 Torture.

19 And, third, they said that we will
20 consider national security issues, but we need to
21 make sure that when we consider those, we honour
22 our obligations under Article 3 of the Convention
23 Against Torture.

24 MR. CAVALLUZZO: Okay. Now,
25 obviously regulations are important for two

1 reasons: one, it gives indication to the claimant
2 that there are particular rules or processes that
3 they are entitled to seek the protection of; and
4 second, presumably it gives some indication or
5 guideline to the government or State actor as to
6 how they should be acting.

7 In terms of this direction to
8 agencies to pass regulations so as to effect
9 policy and the law, what kind of experience do we
10 have with that? How many agencies in fact enacted
11 such regulations?

12 MR. YALE-LOEHR: Well,
13 unfortunately, only two U.S. agencies have
14 actually adopted regulations implementing the
15 Convention Against Torture. The Immigration and
16 Naturalization Service, which was a part of the
17 Department of Justice at the time, passed interim
18 regulations in 1999, and then slightly revised
19 them in 2000. The State Department also passed
20 its own regulations to implement Article 3 in
21 extradition context.

22 Other regulations, such as the
23 Defense Department or the Central Intelligence
24 Agency, as far as I know, have not adopted formal
25 regulations about Article 3.

1 MR. CAVALLUZZO: Mr. Commissioner,
2 we are going to be moving on to a very broad area
3 of diplomatic assurances.

4 At this point in time, it is about
5 five minutes to eleven, I don't know if you want
6 to start or will we have the morning break at this
7 point?

8 THE COMMISSIONER: We will take
9 the morning break. We will rise for 15 minutes.

10 THE REGISTRAR: Please stand.

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

12 Suspension à 10 h 52

13 --- Upon resuming at 11:12 a.m. /

14 Reprise à 11 h 012

15 THE REGISTRAR: Please be seated.
16 Veuillez vous asseoir.

17 MR. CAVALLUZZO: Commissioner, I
18 was about to move on to diplomatic assurances.

19 However, prior to doing that, I
20 would just like a comment from Ms Hall concerning
21 the implementation of Article 3 of the CAT into
22 American law, in particular Foreign Affairs Reform
23 and Restructuring Act, and particularly the
24 wording that can be found at page 18 of your
25 paper, the human rights paper.

1 MS HALL: I thought it would be of
2 interest to understand how the law that actually
3 implements the CAT in the United States
4 articulates the prohibition, and it is very, very
5 instructive, I think, for the purposes of the
6 Commission, and I will read it to you.

7 It is:

8 "... the policy of the United
9 States not to expel,
10 extradite, or otherwise
11 effect the involuntary return
12 of any person to a country in
13 which there are substantial
14 grounds for believing the
15 person would be in danger of
16 being subjected to torture
17 regardless of whether the
18 person is physically present
19 in the United States."

20 What is so interesting about this
21 policy articulation is, first, it does not state
22 the more likely than not standard. It fairly
23 closely articulates the CAT standard of
24 substantial evidence. Secondly, it has an
25 extra-territorial dimension.

1 So you see in this policy the idea
2 that any rendition, whether it is within the
3 territory of the United States, such as Mr. Arar,
4 or these reports that we have had of abductions or
5 apprehensions overseas, they all clearly have to
6 be consistent with U.S. policy as articulated
7 textually in the FARRA.

8 MR. CAVALLUZZO: Thank you.

9 I would like to turn to diplomatic
10 assurances and pick up at your paper, Ms Hall, at
11 page 19 and following. Initially you talk about
12 the origins of assurances. Why don't you maybe
13 discuss with us briefly what the origins are
14 relating to death penalty cases and so on, and
15 then we will get into whether those situations are
16 analogous or not.

17 MS HALL: Right. The genesis of
18 diplomatic assurances, for most of you who have
19 heard of them before, are in relation to the death
20 penalty, and the most obvious cases you will
21 recall of late will be, for example, criminal
22 suspects being held in Europe and sent back to the
23 United States. The Europeans will request
24 diplomatic assurances that a person not be subject
25 to the death penalty. If the death penalty is

1 requested and is laid, it shall not be executed.

2 Several people, even in the human
3 rights field, have said, "So what's the
4 difference, really, between diplomatic assurances
5 for the death penalty and diplomatic assurances
6 for torture?"

7 There are some obvious -- and I
8 will be very brief -- differences.

9 One, the death penalty is a legal
10 outcome. Human Rights Watch is an abolitionist
11 organization. We believe in the abolition of the
12 death penalty, but the fact is that under
13 international law the death penalty is not per se
14 outlawed. Therefore, if you are returning a
15 person to a jurisdiction where the death penalty
16 obtains, the assurances are basically an
17 accommodation, taking into consideration the
18 concerns of governments that are abolitionists
19 vis-à-vis the United States where the death
20 penalty is a legal outcome.

21 As a legal outcome, there are
22 procedures that govern the application of the
23 death penalty. There is a procedure in law and
24 the outcome is something that is quite easy to
25 monitor.

1 For example, if you are convicted
2 and the death penalty is given to you, you know,
3 the sending State can say, "Wait a minute. We
4 agreed that this wouldn't happen." It is quite
5 easy to monitor the process leading up to
6 something that could potentially be a breach.
7 Whereas with diplomatic assurances for torture,
8 torture is unlawful activity, it is criminal, it
9 is always practised in secret. There are very few
10 ways to detect the more sophisticated forms of
11 torture, et cetera.

12 Just simply, the difference
13 between a lawful activity and an unlawful activity
14 and detecting a breach are quite profound in terms
15 of distinguishing diplomatic assurances in the
16 death penalty context versus as a safeguard
17 against torture.

18 Then that leads us into what we
19 believe to be a relatively novel practice, and
20 that is seeking them as an alleged effective
21 safeguard against torture.

22 What is so interesting and what
23 the Commissioner for Human Rights and the Council
24 of Europe has noted in his report is that
25 governments only seek diplomatic assurances

1 because they recognize, acknowledge and admit that
2 there is a serious risk of torture, else why would
3 they need to be assured otherwise?

4 The obligation, once you recognize
5 that there is a risk of torture, is not to return,
6 not to transfer. That is how it is articulated
7 under international law.

8 There is no provision for
9 diplomatic assurances in the Convention Against
10 Torture in the ICCPR, or in any other
11 international legally binding instrument. This is
12 a tool that was created specifically, we believe,
13 to circumvent the nonrefoulement obligation.

14 So just on principle we see this
15 as a serious danger to the prohibition against
16 torture because assurances in and of themselves
17 are man-made to some extent and circumvent the
18 nonrefoulement obligation.

19 That is on the principle level.
20 In terms of practicalities, if you like -- shall I
21 move on to practicalities?

22 MR. CAVALLUZZO: I think you
23 should.

24 MS HALL: In my opening statement
25 I mentioned that we believe them to be unreliable,

1 unworkable and unenforceable, and there are
2 various reasons for that.

3 First of all, as in the case of
4 Mr. Arar, diplomatic assurances against torture
5 are always navigated, negotiated and brokered at a
6 diplomatic level. And for those of you who have
7 read histories of diplomacy, we all know that
8 diplomats take several State interests into
9 account in their work and very rarely are human
10 rights concerns at the top, or privileged.

11 So what we see is that there is a
12 real limit to using diplomacy to try to protect
13 people's human rights, and I will give you a very
14 obvious example.

15 When Ahmed Agiza was sent back to
16 Egypt, the Swedish ambassador to Cairo did not
17 visit him for the first five weeks that he was in
18 detention. When we queried him about this, he
19 said, "How would that look to the Egyptians? They
20 would have thought that we didn't trust them if we
21 would have run in there and tried to see what the
22 condition of these men were."

23 So clearly it was the bilateral
24 governmental relationship privilege whether or not
25 these men were being tortured. So human rights

1 will always be subordinate, or at least in our
2 estimation will mostly be subordinate to other
3 diplomatic concerns.

4 A second thing is, just to look at
5 the nature of what we are really doing here when
6 we look for assurances. We are asking a
7 government that we know to be an abuser of human
8 rights, that we know to employ torture. Despite
9 their international obligations, legal
10 obligations, under the CAT or customary law, we
11 are asking that abusive State to make a promise in
12 the case of one particular individual.

13 Why should we trust that abusive
14 State to honour those obligations? Diplomatic
15 assurances are not legally enforceable. They have
16 absolutely no legal character.

17 In Mr. Arar's case, we don't even
18 know what form they took. Whether they were
19 written, whether they were verbal, et cetera. We
20 have collected them over the last three years. I
21 have some examples that are pages and pages long,
22 but from governments that simply cannot be trusted
23 to abide by them.

24 The other reason that they are not
25 an effective safeguard against torture is because

1 there is no incentive on the part of either the
2 sending government or the receiving government to
3 ever find a breach. If the sending government
4 finds a breach, they make an admission that they
5 violated the nonrefoulement obligation, a
6 preemptory norm of international law. If the
7 receiving government admits that they have
8 breached the assurances and actually physically or
9 psychologically tortured someone, they do the same
10 thing. Inherent in the assurances is disincentive
11 to find a breach, and this is where the
12 enforceability issue is so crucially important.

13 There is just no reason why anyone
14 would want to find a breach and, in fact with the
15 Swedish government we found that they worked very
16 hard to cover up breaches of the assurances for
17 that very reason.

18 With respect to the United States
19 and the way the United States uses assurances, we
20 don't know, again, what form they take, whether
21 they are oral or written. What we do know is that
22 the United States government has worked very hard
23 to keep those negotiations out of the public eye.

24 In a variety of court proceedings,
25 both for returnees from Guantanamo Bay and in

1 extradition cases, the United States has submitted
2 affidavits requesting the court not to permit any
3 evidence relating to the assurances: not the level
4 at which they were brokered, not their content,
5 not whether there is post-return monitoring
6 mechanisms in place. They have said that this
7 would irreparably damage their foreign relations
8 with other governments. So there is a profound
9 lack of transparency.

10 And, finally, I have to say one
11 word about post-return monitoring, the notion that
12 you could actually send your diplomats to a
13 country to detect signs of torture.

14 The forms of torture that
15 governments that have been using for a long time
16 employ are quite sophisticated. They include
17 various forms of sexual violence that are not
18 easily detectable, electricity, electric shock,
19 that is not very easily detectable, psychological
20 forms of torture that are very difficult to
21 understand and to diagnose.

22 So the idea that you would send
23 your ambassador in to meet with a guy and he would
24 be able to tell whether a person had been
25 tortured, it really defies credibility. Not to

1 mention the fact that once a person has been
2 tortured, they quite clearly understand the threat
3 that they face every time they come into contact
4 with prison staff or detention staff. The
5 reluctance on the part of torture victims to talk
6 about their experiences is really a profound
7 obstacle, while they are still in detention, to
8 actually getting information about their treatment
9 and a potential breach of the assurances.

10 So in a variety of ways we see
11 that the assurance regime vis-à-vis torture simply
12 cannot, either by its inherent nature as a
13 non-legal unenforceable agreement, or
14 operationally on the ground vis-à-vis post-return
15 monitoring, they really just simply cannot work
16 and as such cannot provide an effective safeguard
17 against torture.

18 MR. CAVALLUZZO: One question
19 related to that. You have talked about the two
20 parties to the assurance, the seeking party and
21 the party giving the assurance.

22 I would like to ask you about
23 third parties. In the Agiza case, we did seem to
24 have third party countries. In the case of
25 Mr. Arar we have a Canadian citizen who had been

1 sent to Syria on the basis of apparently, not
2 transparent but apparently, diplomatic assurances
3 given by the Syrians to the Americans.

4 In that situation, would there be
5 an obligation on Canada, in international law,
6 particularly under the Convention Against Torture,
7 to try and do anything to alleviate the situation
8 of Mr. Arar if it believed he was being tortured?

9 MS HALL: Not trying to draw from
10 the facts of this case, let me just say that what
11 the Commission -- what would behoove the
12 Commission, let me say it this way, is to look for
13 red flags along the way, that the Canadian
14 government knew or should have known that certain
15 things were happening at certain times.

16 For example, I will name a couple
17 of them, if that is okay.

18 First of all, had there been
19 problems with other cases where the Canadian
20 government was not able to get adequate
21 cooperation of the U.S. officials?

22 Second, were statements made to
23 actors in the Canadian government that should have
24 raised a red flag? Were there any indications
25 that this case was different, it was special, it

1 was of some kind of extraordinary nature that
2 would give rise to an understanding that the
3 ordinary rules don't apply?

4 Did Mr. Arar himself make
5 statements to Canadian government officials
6 indicating that he had a fear that he would be
7 sent back to a place where he would be at risk of
8 torture?

9 All of this constellation of
10 questions, and the answers to those questions,
11 would indicate to the Commission whether or not
12 the Canadian government knew or should have known.
13 If that can be determined, then clearly Canada's
14 obligations, both under the CAT and under
15 customary international law, would be implicated.

16 It is absolutely incumbent upon
17 every State party to the CAT and every government
18 globally not to facilitate in any way, aid, abet,
19 or be complicit in, either by a positive act or by
20 an act or by its inaction, in helping to assist an
21 act of torture.

22 That would be the frame for
23 thinking about whether or not Canada would be
24 liable as well.

25 MR. CAVALLUZZO: Right. You have

1 dealt with a situation in the United States prior
2 to his rendering to Syria.

3 What I would like to ask about now
4 is when he is in Syria, he is in detention in
5 Syria, and whether there would be an obligation on
6 Canada, since he is also a citizen of Canada, to
7 effect his release if Canada believed that he was
8 subject to torture while he is in Syria.

9 And I understand you said some of
10 the diplomatic considerations might be that Canada
11 might be concerned about offending Syria; for
12 example, if it said, "You are torturing a Canadian
13 citizen, therefore send him back".

14 The concern I have, is when he is
15 in Syria are there any obligations on Canada,
16 under the Convention or whether it be customary
17 international law, if Canada reasonably suspects
18 that Mr. Arar is being tortured while he is in
19 Syria and we are getting consular access to him?

20 MS HALL: Absolutely. There would
21 be no question that Canada's obligations under the
22 Convention and customary law would be triggered if
23 they had reason to suspect that he was being
24 tortured or -- and I think it is quite important
25 to say -- they should have known that under the

1 conditions of detention, and given his special
2 interest as a person who had been labelled an
3 al-Qaeda suspect, that the "should have known" is
4 equally as important as whether or not they knew.

5 MR. CAVALLUZZO: Okay.

6 Mr. Yale-Loehr, now, we are moving
7 on to the seventh issue, and this is obviously
8 very relevant for Mr. Arar's situation, and that
9 is the removal procedures under American
10 international law.

11 You start discussing that issue at
12 page 5 of your paper, and I wonder if you might
13 take us through the inspection procedures as well
14 as the removal procedures, and then we will focus
15 on expedited removal procedures under section
16 235(c).

17 MR. YALE-LOEHR: Well, as
18 background, anyone who comes into the United
19 States who is not a citizen of the United States
20 needs to be inspected by an immigration inspector
21 at the port of entry. Normally they go through
22 what's known as primary inspection first, which
23 means everyone gets off the plane, they show up,
24 the immigration inspector looks at their passport,
25 they look on the computer screen to see if there

1 is anything about this individual they need to do.
2 They find out the reason they are coming into the
3 United States, how long they plan to be in the
4 United States. If everything is fine, they pass
5 through primary inspection. They get a stamp
6 saying they have been admitted in a particular
7 category, as a tourist, or a student, or a
8 temporary worker, and then they are on their way
9 into the United States.

10 If there are some questions about
11 the individual, maybe he doesn't have the proper
12 immigration paperwork, maybe he says he is coming
13 to be a tourist but the immigration inspector has
14 reason to believe that he really plans to work in
15 the United States, or marry a U.S. citizen and
16 reside permanently rather than temporarily. Maybe
17 he has some information he has received that
18 indicates maybe a security concern.

19 Then that individual goes to what
20 is known as secondary inspection, which then gives
21 the immigration authorities more time to probe
22 what is really going on here. They can look at
23 the individual's baggage, they can ask questions,
24 they can look at his paperwork. They can hold him
25 while they make inquiries of other government

1 officials as to what is really going on here.
2 They have access to computer screens that talk
3 about various watchlists, and we will get into
4 that later.

5 And then the individual may be
6 released from secondary inspection and be admitted
7 to the United States, if all the questions are
8 finally properly answered. Or, in the normal
9 course of things, if they look like they are not
10 admissible to the United States under one of our
11 many grounds of inadmissibility, they will be
12 held, or possibly released on bail, to go before
13 an immigration judge.

14 An immigration judge will then
15 make a determination, as a legal matter, whether
16 the person is admissible to the United States or
17 not.

18 It is not a criminal proceeding,
19 so they don't have a right to counsel, but they do
20 have the right, normally, if they can afford an
21 attorney, to hire an attorney at their own expense
22 and have an attorney represent them before that
23 immigration judge. The government has immigration
24 trial attorneys who represent the government.
25 Both sides make their case to the immigration

1 judge, and the immigration judge then makes a
2 ruling. That is the normal procedure.

3 MR. CAVALLUZZO: Right.

4 MR. YALE-LOEHR: And if the
5 individual is in the United States and does
6 something illegal, the same kind of procedure.
7 They go to an immigration judge and that is called
8 a removal proceeding.

9 What Mr. Arar went through was a
10 variation on the normal procedure called expedited
11 removal, and this begins on page 6 of my report.

12 MR. CAVALLUZZO: Right.

13 MR. YALE-LOEHR: This was enacted
14 by Congress in 1996, saying we don't like this
15 delay where people can basically be in the United
16 States for a long time. We want to be able to
17 kick people out of the United States more quickly.

18 And so they set forth certain
19 criteria that says if you do X or Y, we will be
20 able to kick you out more quickly, known as
21 expedited removal. These are codified in section
22 235 of the Immigration and Nationality Act of the
23 United States, which we call the INA.

24 Section 235(b) is what I call
25 normal expedited removal. It is rare, but still

1 it is not that rare. And these are where people
2 have come into the United States either with a
3 lack of immigration documentation or they have
4 committed some kind of fraud or misrepresentation.

5 In that regard then, normally the
6 immigration inspector at the front line will make
7 the determination saying, "I think you have done
8 something wrong, and I am entitled to kick you out
9 of the country."

10 And normally that order by the
11 immigration inspector is all there is. You would
12 not go to an immigration judge and have a separate
13 hearing.

14 There is an exception, under
15 235(b), that says if the individual in expedited
16 removal expresses a credible fear of persecution,
17 then in that case the immigration inspector is
18 supposed to back off and say, "Okay, because of
19 this credible fear, we need to resolve this. We
20 need to have you go before an immigration judge."
21 Then the immigration judge can decide whether
22 there is a fear of persecution or a torture claim,
23 et cetera.

24 Those are the normal procedures
25 under 235(b), expedited removal.

1 Mr. Arar went through expedited
2 removal under section 235(c), which is very
3 rare -- in fact, it is the first case that I have
4 actually been testifying about this.

5 This is where someone is deemed to
6 be inadmissible on a security-related ground, and
7 there, again, you don't have a hearing before an
8 immigration judge. The immigration inspector is
9 supposed to make the initial decision as to
10 whether 235(c) applies.

11 Because these are national
12 security issues, the Attorney General has to
13 review that order. It cannot be done by a
14 low-level person right at JFK, or some other
15 airport or land port of entry. The Attorney
16 General is supposed to review that.

17 The regulations are quite vague in
18 terms of how you make sure that these procedures
19 do not violate the Convention Against Torture.
20 The regulations simply say that they need to make
21 sure that the removal order will not violate
22 Article 3 of the Convention Against Torture, but
23 they don't say how you go about that. They don't
24 say explicitly you have to get a diplomatic
25 assurance. They don't say if you do get a

1 diplomatic assurance how you weigh that against
2 other considerations such as known human rights
3 abuses in that country, whatever. But presumably,
4 this is what is supposed to happen.

5 MR. CAVALLUZZO: In terms of
6 diplomatic assurances in the United States -- and
7 I want to come back to Mr. Arar's situation in
8 particular.

9 But before doing that, in terms of
10 diplomatic assurances in the United States, in
11 this kind of expedited removal under 235(c), who
12 gets it? Is it the Attorney General, the
13 Secretary of State? Who gets the diplomatic
14 assurance?

15 MR. YALE-LOEHR: The regulations
16 say that the Secretary of State is supposed to
17 receive a diplomatic assurance and then consult
18 with the Attorney General of the United States,
19 and the Attorney General then is supposed to make
20 the final determination of weighing the diplomatic
21 assurance against other factors as to whether it
22 is safe to remove that individual consistent with
23 our obligations under Article 3 of the Convention
24 Against Torture.

25 MR. CAVALLUZZO: So the ultimate

1 decision according to the regulations would be
2 made by the Attorney General?

3 MR. YALE-LOEHR: Correct.

4 MR. CAVALLUZZO: And the relevant
5 considerations that would be taken into account by
6 the Attorney General, obviously the advice of the
7 Secretary of State, but presumably the human
8 rights record of the country --

9 MR. YALE-LOEHR: The regulations
10 don't specify what all the factors are. There is
11 not a hearing per se where the Attorney General
12 becomes a judge and gathers all the information,
13 so we don't know, and the regulations do not say,
14 you have to consider factors X, Y, and Z.

15 Under the normal course of events
16 you would believe, and would hope, that the
17 Attorney General would take in certain key facts
18 such as the human rights record of that particular
19 country, credible threats or fears expressed by
20 the individual as to why he would be concerned
21 about being tortured going back to a particular
22 country, even if there weren't general facts about
23 human rights abuses in that country.

24 MR. CAVALLUZZO: Let's get very
25 concrete now. I would like to review with you the

1 order which removed Mr. Arar.

2 Mr. Commissioner, this would be
3 Exhibit P-20.

4 Do you have that in front of you,
5 Commissioner?

6 THE COMMISSIONER: Yes, I do.

7 MR. CAVALLUZZO: And you have that
8 in front of you?

9 MR. YALE-LOEHR: Yes, I do.

10 MR. CAVALLUZZO: If we go about
11 halfway in, we see a legible typewritten copy of
12 the removal order, which is dated October 7 of
13 2002, and I want to ask you several questions
14 about the order, if you can be of assistance to
15 us.

16 First of all, it would appear at
17 the bottom of the page that this particular order
18 was served through a certificate of service, was
19 served upon, presumably, Mr. Arar, at four o'clock
20 in the morning on October 8th, which would be a
21 Tuesday in that week.

22 MR. YALE-LOEHR: Correct.

23 MR. CAVALLUZZO: And the first
24 question would be that the order seems to be, at
25 the front page, from something called the Regional

1 Director.

2 Who is the Regional Director in
3 the INS process?

4 MR. YALE-LOEHR: In the hierarchy
5 of immigration officers within the United States,
6 we have normal officials, who are your inspectors
7 at the line. We have supervisory officials. Then
8 we have 33 District Offices of the Immigration and
9 Naturalization Service around the country.

10 They each have a District
11 Director. It is sort of the head person in charge
12 of that, what I call local office.

13 Then those 33 offices are divided
14 into three regions of the United States, and the
15 Regional Director would be the person in charge of
16 that third of the United States.

17 So this order was signed by the
18 Regional Director of, I assume, the Eastern Region
19 of the Immigration and Naturalization Service
20 which was a part of the Department of Justice at
21 the time.

22 MR. CAVALLUZZO: If we look in,
23 first of all, the second recital or order, it
24 says:

25 "It is ordered that you be

1 removed without further
2 inquiry before an immigration
3 judge in accordance with
4 section 235(c)..."

5 Of the Act and Regulations, and so
6 on.

7 So clearly this is a 235(c)
8 removal and on top of it, it looks like it is a
9 removal without any kind of hearing.

10 Is that correct?

11 MR. YALE-LOEHR: That is correct.
12 That is because, under section 235(c) of the
13 Immigration and Nationality Act, they are
14 authorized to make this kind of determination
15 without having to go before an immigration judge.

16 MR. CAVALLUZZO: And if we go on
17 to the last paragraph of the order on the front
18 page, it states:

19 "The Commissioner of the
20 Immigration and
21 Naturalization Service..."

22 Now, who is the Commissioner of
23 the INS?

24 MR. YALE-LOEHR: The Commissioner
25 of the Immigration and Naturalization Service is

1 basically the chief officer of the immigration
2 agency. So this Commissioner would be in charge
3 of the Regional Director. The commissioner is
4 based in Washington, D.C.

5 MR. CAVALLUZZO: It goes on to
6 say:

7 "The Commissioner of the INS
8 has determined that your
9 removal to Syria would be
10 consistent with Article 3 of
11 the Convention Against
12 Torture and other cruel,
13 inhumane or degrading
14 treatment or punishment."

15 And then it is signed by the
16 Regional Director.

17 So that it would appear that, at
18 least so far as the removal to Syria is concerned
19 and whether that allegedly is consistent with
20 international law, that decision was made by the
21 Commissioner?

22 MR. YALE-LOEHR: Correct.

23 MR. CAVALLUZZO: Is that unusual,
24 or is this whole case unusual?

25 MR. YALE-LOEHR: The whole case is

1 very unusual. Normally, as I mentioned before, if
2 someone has a fear of persecution, or a fear of
3 torture, you go before an immigration judge. The
4 immigration judge, in an open hearing, will hear
5 all of the evidence from both sides and make a
6 determination as to whether someone qualifies for
7 relief under the Convention Against Torture.

8 As I mentioned, these expedited
9 removal procedures in general, and the 235(c)
10 expedited removal procedure in particular, try to
11 get around the normal procedures because they were
12 deemed to be slow and cumbersome and oblivate any
13 immigration judge proceeding.

14 So I think that when the
15 immigration agency enacted its regulations it knew
16 it had to do something to comply with Article 3,
17 and so it decided if the Commissioner, this
18 high-level official, makes this determination,
19 presumably it would be done in a way that takes
20 into account our obligations under Article 3 of
21 the Convention Against Torture.

22 MR. CAVALLUZZO: As to whether
23 Mr. Arar made a claim under the Convention Against
24 Torture, Mr. Commissioner, I am referring to
25 something in the United States District Court for

1 the Eastern District of New York in the litigation
2 between Maher Arar and John Ashcroft. This is a
3 memorandum in support of the defendant John
4 Ashcroft's partial motion to dismiss claims
5 encompassed by the claims of State secrets
6 privilege, and in the body of that memorandum on
7 page 6, it states, and this is Mr. Ashcroft
8 talking through counsel:

9 "Arar subsequently was
10 notified that defendant
11 Blackburn..."

12 And that is the INS Regional
13 Director.

14 "... had decided to remove
15 him to Syria. Because
16 plaintiff requested
17 protection under the
18 Convention Against Torture,
19 the Convention Against
20 Torture determination was
21 referred to the
22 Commissioner."

23 So it would appear that Mr. Arar
24 made a claim under the Convention Against Torture,
25 and as a result of that this determination was

1 referred to the Commissioner.

2 And then it goes on:

3 "Arar alleges that the order
4 to remove him to Syria was
5 signed on October 8, 2002, by
6 Deputy Attorney General
7 Thompson as the acting
8 Attorney General. Arar
9 alleges he was taken to New
10 Jersey and flown to
11 Washington, D.C."

12 And so on and so forth.

13 So it would appear that, because
14 of Mr. Arar's claim under the Convention Against
15 Torture, the matter was referred for determination
16 by the Commissioner of the INS, but there doesn't
17 seem to be any suggestion here that the Attorney
18 General turned his mind to whether he could be
19 removed, whether there was a diplomatic assurance.

20 It doesn't say anything about
21 assurances here, and I just wanted to know if you
22 could help us in that regard.

23 MR. YALE-LOEHR: Unfortunately I
24 can't, because the regulations don't specify the
25 procedure by which, or the mechanism by which the

1 Attorney General or anyone else is supposed to
2 consider these various factors. So we don't know.

3 For example, the regulations don't
4 require diplomatic assurances in this particular
5 case. They don't require anything. They simply
6 say take Article 3 into consideration in your
7 final decision.

8 I think that is a real failing of
9 the regulations, and if this were in the United
10 States, one of my basic recommendations are,
11 number one, besides the fact that diplomatic
12 assurances should be abolished generally; number
13 two, if they are not going to do that, at the very
14 least procedurally we need to have more
15 transparency to know what is being taken into
16 account and how to weigh the various factors.

17 Unfortunately, both under the
18 regulations and under this order, we have no idea
19 of how much regard they took into account about
20 his torture claim, whether they received
21 diplomatic assurances as of October 7 when they
22 signed this order or anything else.

23 MR. CAVALLUZZO: We have this
24 decision being made by the Regional Director.
25 Could Mr. Arar have appealed that decision of the

1 Regional Director to an immigration judge?

2 MR. YALE-LOEHR: No. Here the
3 regulations specifically say -- and I will give
4 you a quotation. This is Title 8 of the Code of
5 Federal Regulations of the United States
6 Immigration Agency, and this is section 235.8(c).

7 I will read it. It says:

8 "The Regional Director's
9 decision under this
10 section..."

11 Meaning section 235(c).

12 "... is final when it is
13 served upon the alien. There
14 is no administrative appeal
15 from the Regional Director's
16 decision."

17 MR. CAVALLUZZO: Now, it would
18 appear that in the body of the decision itself, on
19 page 3 that I am looking at, that Mr. Arar was
20 served with a notice in effect charging him with
21 being inadmissible to the United States, and they
22 specifically set out a number of allegations,
23 including that he is an alien who is a member of a
24 foreign terrorist organization.

25 And then it goes on to recite the

1 unclassified information or facts.

2 What I would like to ask you about
3 is the ultimate conclusion, which can be found if
4 we go to page 6 of -- if you can call it a
5 decision -- and it states in the last paragraph
6 that:

7 "Specifically al-Qaeda has
8 been found responsible for
9 multiple terrorist attacks
10 upon the United States and
11 is..."

12 I guess that should be:

13 "... considered a clear and
14 imminent threat to the United
15 States."

16 And then it goes on at the next
17 page, and it says:

18 "As discussed above and more
19 fully in the classified
20 addendum, Arar's membership
21 in this organization bars him
22 from admission to the United
23 States because he is presumed
24 to share the goals and
25 support methods of an

1 organization which he freely
2 joined and which he continues
3 to meaningfully associate.
4 This organization has been
5 deemed to be responsible for
6 terrorist activity and
7 represents a clear and
8 imminent threat to the United
9 States."

10 And then it goes on in conclusion
11 to find that:

12 "There are reasonable grounds
13 to believe that Arar is a
14 danger to the security of the
15 United States."

16 And that ground itself, that
17 Mr. Arar is a danger, or reasonable grounds to
18 believe that he is a danger to the security of the
19 United States, I assume is a legitimate ground to
20 rely upon by the Regional Director for removal
21 proceedings through this expedited process?

22 MR. YALE-LOEHR: Yes, it is. It
23 is one of the grounds of inadmissibility under the
24 Immigration and Nationality Act. A person could
25 question whether indeed this opinion is reasonably

1 reached. But as a legal matter, if you reach that
2 legal decision and say that there are reasonable
3 grounds to believe that he is a danger to
4 security, then you can remove him from the United
5 States.

6 But you can only do so as long as
7 you comply with Article 3 of the Convention
8 Against Torture, and that is the key linchpin
9 here.

10 Knowing what we know now, the fact
11 that he was at substantial risk of being tortured
12 in Syria, yes, he could be removed, but not to
13 Syria because of the fear of torture there.

14 MR. CAVALLUZZO: Before we move on
15 actually to that legal analysis, in terms of the
16 legal hierarchy at that point in time, the INS was
17 part of the Attorney General's Department?

18 MR. YALE-LOEHR: That is correct,
19 the Department of Justice.

20 MR. CAVALLUZZO: The Department of
21 Justice, the Attorney General is obviously the
22 executive head and ultimately responsible for this
23 decision?

24 MR. YALE-LOEHR: Correct.

25 MR. CAVALLUZZO: Okay. I would

1 like to move on now to that statement that you
2 made, that although it may have been a legal
3 process removal, the fact is that there are
4 international law obligations respecting that
5 removal, and indeed, starting at page 10 of your
6 paper, you share with us your legal analysis.

7 Why don't you pick it up from
8 there in terms of Article 3 and its application in
9 Mr. Arar's case?

10 MR. YALE-LOEHR: Well, as Ms Hall
11 has already pointed out, there are no exceptions
12 to the nonrefoulement provision of Article 3 of
13 the Convention Against Torture. It is absolute.
14 You cannot send someone back to a country where
15 there are substantial grounds to believe that they
16 are at risk of torture.

17 Therefore, regardless of the
18 procedures involved, if that is what happens, we
19 violated Article 3.

20 I say in my legal analysis,
21 beginning on page 10, that Syria's record of
22 torture is well-known. It was well-known to the
23 U.S. government before, during and after 2002.
24 The State Department's Annual Human Rights Report
25 on Syria clearly documented several instances of

1 torture. President Bush has recently referred to
2 the fact that torture happens and occurs regularly
3 in Syria. So this is something that was
4 well-known within the U.S. government at the time.

5 Apart from those general
6 background information about torture, Mr. Arar
7 himself says that he told U.S. immigration
8 authorities that he feared being tortured if he
9 were sent back to Syria. So the individual
10 immigration officials, even if they never picked
11 up a State Department report or read a newspaper,
12 heard from Mr. Arar himself that he feared being
13 tortured if he was sent back to Syria.

14 MR. CAVALLUZZO: Which has been
15 confirmed by the Attorney General in that
16 memorandum?

17 MR. YALE-LOEHR: That is right.

18 So regardless of diplomatic
19 assurances, it seems clear to me that the United
20 States seems to have violated Article 3 by sending
21 Mr. Arar to Syria.

22 MR. CAVALLUZZO: Okay. You go on
23 now at page 11 to discuss Mr. Arar's procedural
24 rights, his administrative law rights, in respect
25 of the removal proceedings, and I wonder if you

1 might give us that analysis.

2 MR. YALE-LOEHR: Okay. As I
3 mentioned, under section 235(c) these expedited
4 removal proceedings are very different from the
5 normal immigration proceedings. He didn't have a
6 right to go before an immigration judge and, as
7 the order itself points out, the Attorney General
8 only needed a reasonable ground to believe that he
9 is likely to engage in, or actually has engaged
10 in, terrorist activity to find him inadmissible.

11 Under U.S. Supreme Court law, the
12 highest law of the land, there is great deference
13 given to determinations made by the immigration
14 agency, and as long as they say they have a
15 reasonable ground to believe immigration
16 authorities and reviewing courts are supposed to
17 abide by and accept those determinations.

18 So from a procedural perspective,
19 yes, the immigration authorities could have found
20 him inadmissible to the United States. But again,
21 that doesn't allow us -- "us" meaning the United
22 States -- to violate its obligations under Article
23 3 of the Convention Against Torture.

24 MR. CAVALLUZZO: Okay. Now, I
25 would like to move on to the next point in your

1 legal analysis, and that is Mr. Arar's right to be
2 deported to Canada and not Syria.

3 Of course, as you know, Mr. Arar
4 was a Canadian citizen, had been in Canada since
5 1987. His family is all here, and so on and so
6 forth, which the Americans were quite aware of.

7 I wonder if you might share with
8 us this point in your analysis.

9 MR. YALE-LOEHR: Well, again, in a
10 normal removal proceeding you normally are
11 removed, if you are not admissible to the United
12 States, to the country of where you are a citizen.
13 In this case Mr. Arar was a citizen of two
14 countries. Even in an expedited removal, the
15 individual still can make a request as to where he
16 or she can be removed to.

17 There are four exceptions where we
18 can override that request, so to speak.

19 MR. CAVALLUZZO: This is set out
20 at page 12, Mr. Commissioner, in the first
21 paragraph. Why don't you take us through that --

22 MR. YALE-LOEHR: Those four
23 exceptions are, number one, if the non-citizen
24 fails to designate a country to which he wants to
25 go to. That does not apply here.

1 Number 2, if the foreign country
2 does not tell the United States within 30 days if
3 it will take the individual. I don't know the
4 facts here, but let's assume Canada talked about
5 this with the United States.

6 Number 3, the foreign country is
7 not willing to accept the non-citizen.

8 Or number 4, the immigration
9 agency decides that removing the non-citizen to
10 that country would prejudice the United States.

11 As far as I know, none of those
12 four exceptions applied in this particular
13 instance.

14 MR. CAVALLUZZO: What about number
15 4 where it says the immigration agency decides
16 that removing the non-citizen to Canada would
17 prejudice the United States?

18 Is it possible that somebody, in
19 making that decision, thought that by sending
20 Mr. Arar to Canada that he would be a threat to
21 the United States because he could come back down
22 to the United States once he was returned to
23 Canada?

24 Is that a possibility?

25 MR. YALE-LOEHR: It is a

1 possibility, but then the alternative would kick
2 in, of sending him to Syria. And again, our
3 Article 3 obligation is absolute. We cannot send
4 a person to a country where they are at risk of
5 torture.

6 So in that case we don't have the
7 alternative of being able to send him to Syria.

8 MR. CAVALLUZZO: Right. Now, in
9 terms of the third exception, and that is the
10 foreign country is not willing to accept the
11 citizen, we do have evidence where there was a
12 communication between American officials and
13 Canadian officials on October the 5th, whereby
14 Canadian officials were asked at least two things:
15 One is, if we send him to Canada, must you admit
16 his entry into Canada? And the answer was yes.
17 And the second question was: Well, if you do
18 admit him into Canada, can you charge him
19 criminally? And the answer was no, which may be
20 related to these four exceptions that you are
21 referring to.

22 MR. YALE-LOEHR: Well, in my view,
23 it would mean that -- the answer to the first
24 question was that Canada would have to admit him
25 because he is a citizen of Canada. That means

1 that they are willing to accept him. And
2 therefore, in my view, as a legal analysis,
3 exception number 3 could not apply here.

4 MR. CAVALLUZZO: Okay. And
5 indeed, what you are saying, finally, is even if
6 one of the exceptions applied, Article 3 of the
7 Convention Against Torture would kick in?

8 MR. YALE-LOEHR: It trumps
9 everything else because of the absolute nature.

10 MR. CAVALLUZZO: Finally, you talk
11 about the possible remedies for Mr. Arar, and the
12 three aspects are due process, the Torture Victim
13 Protection Act and the Alien Tort Claims Act.

14 Could you briefly take us through
15 that?

16 MR. YALE-LOEHR: The U.S.
17 constitution says, first of all, that no person
18 can be deprived of life, liberty, or property
19 without due process of law. So this is a claim
20 that he could make in the United States. He could
21 also allege that U.S. immigration officials who
22 carried out his deportation violated his right to
23 procedural due process by recklessly subjecting
24 him to torture at the hands of a foreign
25 government where they had reason to believe that

1 he would be tortured there. So that is one claim
2 that he could make in the United States.

3 Second, he could claim that he has
4 a claim under the Torture Victims Protection Act
5 based on the fact that he could allege that U.S.
6 officials were complicit in bringing about the
7 torture that he suffered in Syria.

8 Third, he could also raise an
9 argument under the Alien Tort Claims Act, which is
10 a 1789 law that allows non-citizens to sue in U.S.
11 Court for a tort committed in violation of the Law
12 of Nations.

13 These are allegations. It is
14 unclear as to whether he would succeed with these
15 allegations in U.S. court, but at least it would
16 provide arguable basis for him to win relief in
17 U.S. courts.

18 MR. CAVALLUZZO: Don't worry about
19 the 1789 law. We are already dealing with a 1689
20 law in terms of what kind of evidence could be
21 heard at this Commission. So that is another
22 story.

23 --- Laughter / Rires

24 MR. CAVALLUZZO: The second-last
25 issue I would like to deal with is the efficacy of

1 present inquiries which are taking place in
2 respect of Mr. Arar's situation.

3 I would call upon you again, Ms
4 Hall, to share with us your views.

5 I understand that there is an
6 American inquiry that is going on right now by the
7 Inspector-General of what is called now the
8 Department of Homeland Security, and they are
9 looking into the situation of Mr. Arar.

10 However, I believe there are a
11 number of limitations to the scope of that
12 inquiry, and I wonder if you would like to share
13 that with us?

14 MS HALL: That is correct. The
15 federal agencies in the United States, a variety
16 of them, have something called the inspector
17 general. They are established under something
18 called the Inspector General Act. The inspector
19 general's mission is to ensure that taxpayer
20 dollars essentially are not being wasted, that the
21 organization is running efficiently, that there is
22 no abuse, there is no fraud, et cetera.

23 It was Representative John
24 Conyers -- in response to a letter from
25 Representative John Conyers, that the then IG in

1 the Department of Homeland Security Clark Kent
2 Irvin agreed to undertake not an investigation.
3 The language of the letter is that they will
4 review the circumstances surrounding Mr. Arar's
5 removal from the United States and also evaluate
6 the regulations governing that to determine
7 whether or not they themselves could directly lead
8 to a human rights abuse.

9 I add that because at some point
10 in the United States there was some concern that
11 the IG for DHS was responding to pressure from
12 human rights groups, but in fact he was responding
13 to a request specifically from Representative
14 Conyers.

15 This review is limited in a number
16 of ways. First of all, an IG can only take into
17 consideration -- he can only compel evidence, and
18 compel people to give him evidence, from within
19 his own organization. So there is no ability for
20 the inspector general, for example, to seek
21 information by subpoena, for example, or compel
22 information from other federal agencies.

23 In Mr. Arar's case, it remains
24 unclear what other federal agencies were
25 implicated.

1 For example, on May 30th, I
2 believe, or a late May article in the New York
3 Times revealed information that several agencies
4 were in discussion prior to Mr. Arar's removal,
5 including DOJ, FBI, CIA, all independent separate
6 agencies in the constellation of federal agencies
7 in the United States.

8 The IG can only really seek
9 information from within his own organization, and
10 this will present, we believe, potential problems
11 in arriving at the full story of what happened
12 with respect to Mr. Arar.

13 To our knowledge, that
14 investigation -- that review, excuse me, is
15 ongoing. Normally our experience is that IG
16 reports come out within a year to 18 months, so a
17 rough estimate is that something will come out by
18 the end of 2005.

19 The IG, under normal
20 circumstances, is completely independent. In this
21 case, in the context of the Department of Homeland
22 Security, the Secretary of Homeland Security has
23 significant influence on the IG and on the
24 parameters of any review that he or she
25 undertakes. So we remain unclear about how much

1 information will actually come out.

2 What I would finally say is that
3 it also remains unclear whether this report will
4 be a public report. It could be that a brief
5 summary, similar to some of the in-camera evidence
6 summaries that you have issued through this
7 Commission, will come out. It is unclear whether
8 there will ever be a public report.

9 MR. CAVALLUZZO: Just so I am
10 clear, can the Inspector General review the
11 conduct of the CIA and the FBI if they were
12 involved in Mr. Arar's situation?

13 MS HALL: If they were willing to
14 cooperate. It is at their discretion to
15 cooperate. It is at his discretion to seek their
16 cooperation; he cannot compel it.

17 So it really depends on what kind
18 of cooperation he might get from other federal
19 agencies.

20 MR. CAVALLUZZO: You also have
21 some views about the importance of our inquiry,
22 and I just leave that for counsel to read.

23 The final issue relates to the
24 Monterey Protocol, and I guess I would call upon
25 you, Mr. Yale-Loehr, because you mentioned that in

1 your opening comments.

2 Just let me tell you that we did
3 have the Minister of Foreign Affairs, who was
4 party to the MOU, as you have referred to it, and
5 he basically stated in his evidence that that is
6 the best we could do; the Americans would not give
7 us a veto. He felt that the duty to notify and
8 consult was better than what we had before.

9 I am wondering if you could share
10 with us your views as to the efficacy of the
11 Monterey Protocol.

12 MR. YALE-LOEHR: To be blunt, I
13 don't think it does a damn thing. As I mentioned
14 in my opening statement, basically all it requires
15 is notification and consultation, and that is what
16 happened in Mr. Arar's case.

17 The consular officials of Canada
18 were notified. They did visit him while he was
19 being detained in the United States. There did
20 seem to be consultation between Canadian and U.S.
21 authorities and yet, despite that, he was removed
22 involuntary to Syria where he was tortured.

23 So even under the Monterey
24 Protocol, the same thing could happen to another
25 person.

1 That is why I make my
2 recommendation in my report, in my opening
3 statement, that I think that needs to be
4 strengthened. I think there should be a veto
5 power by Canada over the United States.

6 As a political matter, it may not
7 happen. But I think Canada should try and strive
8 to get that into its bilateral relationship with
9 the United States.

10 Absent that, I think that at the
11 very least there should be pressure by Canada on
12 the United States to enforce and enhance the
13 procedures in the United States for expedited
14 removal so that if someone does raise a credible
15 fear of persecution, it has to go before an
16 immigration judge and have that determination made
17 by an independent person rather than by the very
18 agency that is trying to remove him.

19 And I wish you luck in doing that.

20 --- Laughter / Rires

21 MS HALL: May I just add one small
22 thing?

23 MR. CAVALLUZZO: Yes, please do.

24 MS HALL: And I think this really
25 goes to the global phenomenon of rendition as

1 well, and we saw it in the Agiza decision. This
2 is the notion of deference to the United States
3 and how that really plays out on the ground.

4 The Monterey Protocol, in our mind
5 as well, just repeats that very dynamic of
6 deference to the United States in all matters
7 related to security and national security issues.

8 I think that, you know, from our
9 point of view, for the Canadian government to say,
10 "Well, we just simply couldn't do any better" is
11 really significant, a profound statement about
12 whether it is a level playing field right now,
13 whether the Canadian government can negotiate with
14 the United States as an equal partner or whether
15 the United States will always have the upper hand.

16 We have seen this repeatedly in
17 the course of the renditions that we have studied,
18 that in fact the United States seems to always
19 have the upper hand.

20 So if this Commission in some way
21 can alter that dynamic to level the playing field,
22 it could really have global implications that we
23 would see as quite beneficial.

24 MR. CAVALLUZZO: In your paper,
25 Ms Hall, you make a number of recommendations

1 relating to the Government of Canada, to the
2 Government of the United States and to all
3 governments.

4 In closing, I don't know if you
5 want to share with us and summarize your
6 recommendations to the Government of Canada, which
7 obviously is relevant to us, in respect of the
8 kinds of recommendations you are making dealing
9 with the prohibitions on transfers to risk of
10 torture.

11 MS HALL: Well, the first
12 recommendation that we would make to the
13 Government of Canada is, as we say to all
14 governments when it comes to the prohibition
15 against torture, is to get your own house in
16 order.

17 There is an exception in your
18 jurisprudence that permits returns to risk of
19 torture. That is patently unacceptable under your
20 international obligations under the CAT. There
21 are cases currently pending in your courts where
22 people are at risk of the very same treatment that
23 Mr. Arar suffered at the hands of the United
24 States. So I would offer that as the first
25 recommendation.

1 The second one is that Canada also
2 employs diplomatic assurances. So we have
3 speculated, as I have stated before, that maybe to
4 Canadian authorities this all didn't look that
5 unusual because some of the same legal principles
6 or excuses and justifications that occurred on the
7 U.S. end also occur domestically here in Canada.

8 MR. CAVALLUZZO: And in terms of
9 the diplomatic assurances you are saying that
10 Canadians rely upon, you are talking about
11 security certificate cases, those kind --

12 MS HALL: Security certificate
13 cases, including the Suresh case, but there were
14 cases that were documented in our first report
15 from April 2004, the Pacificador case, included
16 cases that did not necessarily have a national
17 security profile.

18 So it is increasingly common,
19 unfortunately, in Canada.

20 In terms of the notion of what the
21 Canadian government can do in the future, we
22 recommend that the Canadian government take all
23 diplomatic and legal means to halt transfers like
24 this in the future, and that means -- obviously
25 the deficits in communication that have been used

1 to explain why actors at the political level in
2 Canada didn't know Mr. Arar was going to be --
3 didn't understand what was happening, et cetera,
4 frankly, that is not an excuse under the
5 convention.

6 You can't excuse yourself by
7 saying that somehow your process broke down. Your
8 process needs to be up and running so that those
9 modes of communication give you the information
10 required to take action. It is incumbent upon the
11 government to take action in issues related to
12 torture.

13 We agree with Professor Yale-Loehr
14 in terms of putting pressure on the United States
15 government in terms of its own processes, and that
16 pressure would come from the Canadian government.
17 It wouldn't just be vis-à-vis Canadian citizens.
18 It could, again, have a beneficial impact for
19 other people in those circumstances.

20 And finally the notion of what
21 constitutes a high-level government review, we
22 state that if any person, a Canadian citizen,
23 raises any concern of torture, ill-treatment if
24 transferred to another country or if the U.S. is
25 seeking assurances, et cetera, then Canadians

1 officials must seek high-level review of the case
2 through a carefully delineated procedure.

3 One of the interesting things
4 about the Monterey Protocol is it really doesn't
5 lay out who calls whom, what the substance of the
6 negotiations are, at what level the discussion
7 takes place. So we would want to see something
8 much more detailed to ensure that something like
9 what happened to Mr. Arar would not happen again.

10 MR. CAVALLUZZO: And in terms of
11 that obligation on the State to ensure that their
12 officials are quite aware of the obligations under
13 the Convention Against Torture, Mr. Commissioner,
14 I would refer to Article 10 of the Convention
15 Against Torture, which provides that:

16 "Each State Party shall
17 ensure that education and
18 information regarding the
19 prohibition against torture
20 are fully included in the
21 training of law enforcement
22 personnel, civil or military,
23 medical personnel, public
24 officials and other persons
25 who may be involved in the

1 custody, interrogation or
2 treatment of any individual
3 subjected to any form of
4 arrest, detention or
5 imprisonment."

6 Finally, Commissioner, behind tab
7 23 we have the consideration by the Committee
8 Against Torture in respect of Canada. This is a
9 very recent report, just coming out this month,
10 and you will see in paragraph 4 the concerns
11 expressed by the Committee Against Torture in
12 respect of the situation in Canada in which we
13 find ourselves today.

14 I would like to call upon
15 Mr. Gover, who will deal with the last aspect of
16 the direct examination dealing with watchlists.

17 THE COMMISSIONER: That is Exhibit
18 P-121?

19 MR. GOVER: Yes, that is correct,
20 Mr. Commissioner.

21 EXAMINATION

22 MR. GOVER: Mr. Yale-Loehr,
23 Exhibit P-121 is a document that you and Matthew
24 Vernon have authored entitled "An Overview of U.S.
25 Immigration Watchlists and Inspection Procedures,

1 Including U.S.-Canadian Information Sharing".

2 Is that correct, sir?

3 MR. YALE-LOEHR: Correct.

4 MR. GOVER: In your paper you have
5 outlined the key databases that are employed by
6 U.S. officials, including what was then known as
7 Immigration and Naturalization Services in 2002,
8 to screen incoming travellers.

9 Is that correct?

10 MR. YALE-LOEHR: Correct.

11 MR. GOVER: Key among those, you
12 have identified something referred to as the
13 "Treasury Enforcement Communication System" or
14 "TECS".

15 Is that correct, sir?

16 MR. YALE-LOEHR: Correct.

17 MR. GOVER: Can you tell us what
18 information is available through the TECS
19 database, if I can call it that?

20 MR. YALE-LOEHR: Again, TECS is
21 sort of like the mother of all databases.
22 Specific underlying databases feed into TECS, and
23 so there are over 35 computer systems that have
24 various kinds of information about non-citizens in
25 the United States.

1 Some are very simple; it just has
2 the name of the individual or whether they were in
3 the United States before. Others go to criminal
4 records. We have the FBI database, as to whether
5 somebody has committed a crime or not. We also
6 have terrorist watchlists. All of these
7 individual lists feed into TECS, and so TECS is
8 sort of the acronym of what the inspector sees on
9 the computer screen when an individual approaches
10 them trying to be admitted to the United States.

11 MR. GOVER: You note in your
12 report that TECS is not entirely a law enforcement
13 database.

14 MR. YALE-LOEHR: That is correct.
15 In addition to criminal information, it has other
16 information, such as immigration information, such
17 as information about alleged terrorist suspects or
18 other informants. So it has any kind of
19 information that is deemed to be relevant for
20 immigration purposes, which is not only law
21 enforcement.

22 MR. GOVER: At pages 1 through 3
23 of your report, you identify approximately 19
24 databases that feed into TECS.

25 Is that correct, sir?

1 MR. YALE-LOEHR: Correct.

2 MR. GOVER: I would like to deal
3 with 11 of them.

4 First you mention something called
5 TIPOFF.

6 Is that right?

7 MR. YALE-LOEHR: That is correct.

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

10 MR. YALE-LOEHR: TIPOFF is a
11 watchlist that was really started by the State
12 Department, is still managed by the State
13 Department, and that is information both from
14 classified and from open sources as to whether
15 someone is suspected to be a terrorist or a
16 supporter of terrorism.

17 And from public information that
18 we have been able to gather, it appears that about
19 120,000 records are in TIPOFF. This has been
20 substantially enhanced since September 11 of 2001.
21 It was much smaller before then.

22 MR. GOVER: Next you refer to a
23 subset of TIPOFF called Visas Viper.

24 Is that correct?

25 MR. YALE-LOEHR: Correct.

1 MR. GOVER: Can you tell us about
2 that, please?

3 MR. YALE-LOEHR: Visas Viper is a
4 subset of TIPOFF in the sense that these are
5 people who appear to be terrorist suspects, even
6 if they have not applied for a visa. The consular
7 officers of the United States Department of State
8 around the world are gathering information, and
9 when they think that someone could be a terrorist,
10 or may possibly be a terrorist, or has links to
11 terrorism, they can input that information into
12 Visas Viper, which then feeds into TIPOFF so that
13 if the individual applies for a visa at another
14 consular post in another country or manages to
15 come to a border of the United States, we will
16 then supposedly know that, oh we ought to think
17 about this person because there may be some
18 terrorism connection here that we need to
19 investigate.

20 MR. GOVER: Next you refer to the
21 Advance Passenger Information System. Can you
22 tell us about that, please?

23 MR. YALE-LOEHR: The APIS is
24 really just sort of the travel manifest issued by
25 air carriers saying these are the individuals who

1 are on this plane, or on this boat, who are coming
2 to the United States. That information is shipped
3 to the immigration inspectors ahead of time while
4 the airplane is in flight, or while the boat is
5 coming to the United States, so that immigration
6 inspectors can review that information and say,
7 "Oh, here's someone," by looking at various
8 databases and watchlists, "that we ought to pay
9 particular attention to when they actually show up
10 at the immigration booth."

11 MR. GOVER: You have already
12 discussed to some extent the concept of primary
13 and secondary inspections. Can you tell us how
14 those concepts or practices can interact with
15 information from the Advance Passenger Information
16 System?

17 MR. YALE-LOEHR: If things are
18 working as they are supposed to, the APIS, the
19 Advance Passenger Information System, should be
20 sent to the immigration inspector ahead of time so
21 that they can sort of review it before the
22 individual actually shows up at the immigration
23 booth. That is sort of then a red flag to ask
24 that individual questions at primary inspection to
25 see whether it is false information or whether

1 there is reason to have them go to secondary
2 inspection where they can be questioned in more
3 depth.

4 MR. GOVER: Before I leave Advance
5 Passenger Information System, I note that at page
6 7 you refer to a similar system that has been
7 implemented in Canada, something referred to as
8 PAXIS, P-A-X-I-S.

9 Is that correct?

10 MR. YALE-LOEHR: Correct.

11 MR. GOVER: You indicate at page 7
12 of the report that Canada implemented an advance
13 passenger information system or PAXIS at Canadian
14 airports on October 8, 2002?

15 MR. YALE-LOEHR: Correct.

16 MR. GOVER: You then refer to a
17 Department of Homeland Security report, indicating
18 that the joint U.S.-Canada program was to be
19 implemented in the spring of 2003?

20 MR. YALE-LOEHR: Correct.

21 MR. GOVER: And further, that only
22 23 Canadian airports were PAXIS-compliant by
23 December 2002.

24 Is that correct?

25 MR. YALE-LOEHR: Correct. This

1 was part of the Smart Action Border Plan that was
2 implemented between the United States and Canada
3 after September 11th.

4 MR. GOVER: Returning to our list
5 at page 2, you refer as well to Crossing History.
6 Can you tell us about crossing history?

7 MR. YALE-LOEHR: I don't know very
8 much about this particular database, but I do know
9 that when someone enters the United States they
10 get what's known as an I-94 card, which is sort of
11 like a 3-by-5 piece of paper that is stamped when
12 they enter the United States, how long they are
13 able to be in the United States, and in what
14 category of our immigration laws they are allowed
15 to be in the United States: a student, or a
16 tourist, or a worker or whatever.

17 When they leave the United States,
18 they are supposed to turn in that I-94 card so
19 that then we know they actually left, and on which
20 day they left.

21 I suspect that that information
22 then goes into this Crossing History so that six
23 months later, if the individual comes back to the
24 United States, we can look up his prior crossing
25 history and say, "Oh, you know what? Last time

1 you overstayed by a couple of days. I don't
2 really think you are a real tourist. I am not
3 going to let you in this time because you violated
4 our immigration laws last time."

5 It is very similar to the NIIS
6 system, N-I-I-S, which is at the bottom of page 2
7 of my report.

8 MR. GOVER: Right. Now, you refer
9 as well to something that is probably
10 self-explanatory, the Biographic Watchlist?

11 MR. YALE-LOEHR: Again, I don't
12 know a lot about this. A lot of this comes from
13 DHS reports that simply put together the fact that
14 there are a lot of watchlists without a lot of
15 detail. Obviously the U.S. government is not keen
16 to share a lot of information about these
17 watchlists, so they mention that there was one.

18 But all I know about it is what I
19 wrote here, that it includes biographic
20 information on individuals of interest.

21 MR. GOVER: I understand. You
22 then note that results of secondary inspections
23 constitute another database feeding into TECS.

24 Is that right?

25 MR. YALE-LOEHR: That is correct.

1 MR. GOVER: Next you refer to
2 Arrival Departure Information System, a database
3 that stores traveller arrival and departure data
4 and provides query and reporting functions.

5 Is that right?

6 MR. YALE-LOEHR: That is correct.

7 MR. GOVER: And this I take it
8 operates in tandem with APIS?

9 MR. YALE-LOEHR: As far as I know.
10 I think it is a little broader in that APIS may
11 only be air and sea carriers, and the ADIS can
12 also possibly include car travel between the
13 countries.

14 MR. GOVER: Right. And the sole
15 remaining point on this page that I will refer you
16 to is the next point, Automated Biometric
17 Identification System known as IDENT.

18 Could you tell us about that
19 please?

20 MR. YALE-LOEHR: This is the
21 Immigration and Naturalization Service's own
22 database in which they collect information about
23 visitors. So, for example, if someone came in the
24 country and they wanted to put a note in their
25 computer database about the individual, or make

1 sure that the person really does leave by a
2 certain time, or is only authorized to visit
3 Disneyworld and not go somewhere else to visit
4 Aunt Helen, that is the kind of information that
5 could be put in there.

6 That could then be shared with
7 other agencies or fed into the TECS superstructure
8 so that other agencies would know about it.

9 MR. GOVER: If I could ask you to
10 turn to page 3, please, I note that the third-last
11 bullet point there is reference to the National
12 Crime Information Centre, NCIC, which is a Federal
13 Bureau of Investigation database containing
14 comprehensive information on 41 million criminals
15 and 2.5 million suspected or known terrorists.

16 Is that right?

17 MR. YALE-LOEHR: Correct.

18 MR. GOVER: What else can you tell
19 us about the NCIC database?

20 MR. YALE-LOEHR: I can tell you
21 that before September 11th, 2001, immigration
22 officials did not have automatic and easy access
23 to the NCIC, and certainly State Department
24 officials overseas did not have access, easy
25 access, to the NCIC. One of the things that the

1 United States did after the September 11 terrorist
2 attacks was try to make these various information
3 databases easier to access between different
4 agencies.

5 If a local cop stops someone for a
6 traffic ticket or a local cop arrests someone for
7 shoplifting, that information can go into NCIC.
8 And now, because of the interoperability with
9 immigration, that means if that person applies for
10 a visa in London or Pakistan or whatever, suddenly
11 it pops up on their computer screen that the
12 person was convicted for shoplifting, and it means
13 the individual then has to prove what was really
14 going on there, make sure that they are not
15 inadmissible because of past crimes, et cetera.

16 So it allows immigration officials
17 to supposedly get more information about people
18 than they had before September 11.

19 MR. GOVER: The next bullet point
20 refers to Interagency Border Inspection System, or
21 IBIS, which is apparently in itself a compilation
22 of about 23 agency databases.

23 Is that correct?

24 MR. YALE-LOEHR: Correct.

25 MR. GOVER: I understand that

1 contained within IBIS are also records relating to
2 known and suspected terrorists.

3 Is that right?

4 MR. YALE-LOEHR: That is correct.

5 So, for example, the very next thing, the
6 NAILS II, which is an immigration-specific
7 database, feeds into IBIS.

8 So if you look at these various
9 numbers, you see there are 80,000 suspected
10 terrorists in IBIS, there are 58,000 in NAILS, you
11 know, there are supposedly 2.5 million terrorists
12 in NCIC, it is not like, you know, you should add
13 them all up and suddenly we have 5 million
14 terrorists in the United States, or alleged. A
15 lot of these are just duplicates of each other.

16 MR. GOVER: I understand.

17 Finally, then, in this list is
18 NAILS, which I take it is an acronym for the
19 National Automated Immigration Lookout System?

20 MR. YALE-LOEHR: Correct.

21 MR. GOVER: Can you tell us about
22 NAILS, please.

23 MR. YALE-LOEHR: That was sort of
24 the prime immigration agency lookout system when
25 they were operating by themselves before September

1 11, and basically any immigration officer could
2 put information into NAILS saying why a particular
3 individual is inadmissible, either on criminal
4 grounds, suspected terrorism grounds, et cetera.

5 Or if they had been found
6 inadmissible or deportable before, that
7 information would be put into NAILS.

8 So it is sort of the key
9 immigration database that the immigration agency
10 used when they didn't have access to these other
11 databases.

12 MR. GOVER: In relation to NAILS,
13 you note at page 3 of the report:

14 "Since the INS's merger..."

15 That is the Immigration and
16 Naturalization Services' merger.

17 "... into the DHS..."

18 Department of Homeland Security.

19 "... in 2000, NAILS II has
20 been merged into TECS.

21 MR. YALE-LOEHR: Correct.

22 MR. GOVER: You say that:

23 "NAILS II had about 3.8

24 million files. Of these,

25 about 58,000 files concerned

1 suspected or known terrorists
2 and their supporters."

3 MR. YALE-LOEHR: Correct.

4 MR. GOVER: And if you have a copy
5 of Exhibit P-20 in front of you still -- this was
6 the order that Mr. Cavalluzzo took you through.

7 MR. YALE-LOEHR: Correct.

8 MR. GOVER: I would direct your
9 attention to page 3 of the retyped and therefore
10 legible version.

11 MR. YALE-LOEHR: Correct.

12 MR. GOVER: And especially to the
13 concluding sentence of the first paragraph under
14 the word "Background" as a heading.

15 Do you see the words here:

16 "Upon secondary inspection,
17 it was determined that Arar
18 was the subject of a
19 TECS/NAILS outlook as being a
20 member of a known terrorist
21 organization."

22 MR. YALE-LOEHR: Correct.

23 MR. GOVER: And this then appears
24 to be a basis for the order that Mr. Cavalluzzo
25 has taken you through, which we have as Exhibit

1 P-20.

2 MR. YALE-LOEHR: Yes. This would
3 be, again -- to reiterate what I said before, this
4 would be the starting point. If someone is in the
5 lookout system for any reason -- because they have
6 overstayed their visa before, they don't have
7 proper paperwork, because they are an alleged
8 terrorist -- then you start removal procedures
9 against them.

10 So you say, "I allege that you are
11 inadmissible to the United States based on these
12 grounds. In this particular ground, it looks like
13 you are a member of a foreign terrorist
14 organization."

15 They issue a form, the form I-147
16 in this particular case, saying these are the
17 charges against you, somewhat like a criminal
18 proceeding but it is a civil proceeding instead.

19 In Mr. Arar's case, he had five
20 days to respond, saying, "Oh, I am not a member"
21 or "I am admissible to the United States."

22 So that would have been the
23 starting point as to why they could allege that he
24 should not be admitted to the United States.

25 And this order we have in front of

1 us, issued on October 7, was the culmination of
2 that process, saying, "Based on all the
3 information, both classified and unclassified, I
4 make a final determination that you are not
5 admissible to the United States."

6 MR. GOVER: Then if you turn to
7 page 4 of your report, you shift your focus toward
8 the agencies that provide information used in
9 TECS.

10 Is that right?

11 MR. YALE-LOEHR: Correct.

12 MR. GOVER: You say that:

13 "A number of state, federal,
14 and international agencies
15 provide information used in
16 TECS..."

17 MR. YALE-LOEHR: Correct.

18 MR. GOVER: I note that, again, it
19 is approximately 19 federal agencies are listed
20 there. They include the Department of Homeland
21 Security's Customs and Border Protection Agency?

22 MR. YALE-LOEHR: Mm-hmm.

23 MR. GOVER: The Immigration and
24 Customs Enforcement Agency?

25 MR. YALE-LOEHR: Correct.

1 MR. GOVER: The FBI?

2 MR. YALE-LOEHR: Mm-hmm.

3 MR. GOVER: The U.S. Secret
4 Service, the U.S. Coast Guard, the Internal
5 Revenue Service, the Drug Enforcement Agency, the
6 Bureau of Alcohol, Tobacco and Firearms, the U.S.
7 Marshals Service, the U.S. Office of Foreign Asset
8 Control, the National Guard, the Treasury
9 Inspector-General, the U.S. Department of
10 Agriculture, the Department of Defense
11 Inspector-General, the U.S. State Department, the
12 Food and Drug Administration, the Financial Crimes
13 Enforcement Network, the Bureau of Engraving and
14 Printing, and the Department of Justice Office of
15 Special Investigations.

16 Is that correct?

17 MR. YALE-LOEHR: Hey, everybody
18 wants a piece of this action.

19 MR. GOVER: And you also list two
20 international agencies.

21 MR. YALE-LOEHR: Correct.

22 MR. GOVER: What are they?

23 MR. YALE-LOEHR: The two
24 international agencies on this list are the Royal
25 Canadian Mounted Police and Interpol.

1 MR. GOVER: Apart from Interpol
2 and the Royal Canadian Mounted Police, are you
3 aware of any other international agencies that
4 provide information used in TECS?

5 MR. YALE-LOEHR: I am not aware of
6 any. There could be some that are classified.

7 MR. GOVER: Are you aware of any
8 reliability assessment process applicable to
9 information that is sought to be added to the TECS
10 database?

11 MR. YALE-LOEHR: Yes. I mean, it
12 is sort of garbage-in/garbage-out. Anyone can add
13 information into any of these watchlists, and the
14 reliability of that information that goes into the
15 system is not verified. It is not checked before
16 it is actually put into the system.

17 So a number of reports have been
18 done by U.S. government agencies, including the
19 U.S. Government Accountability Office, indicating
20 that in some cases information is not reliable.

21 MR. GOVER: You, in fact, in your
22 report detail some of those disparate practices
23 surrounding information which is added to the TECS
24 database.

25 Is that correct?

1 MR. YALE-LOEHR: Correct. For
2 example, at the bottom of page 5, the U.S.
3 Department of Justice Office of Inspector General
4 did an audit of pre-flight immigration inspections
5 at three of Canada's airports. This is just one
6 small segment of information that can flow into
7 the number of immigration watchlists which then
8 feed into TECS.

9 In that particular report, the OIG
10 found that there was information that was not
11 recorded very accurately, particularly at Toronto.
12 So I urge all of you who want to get into the
13 United States to go out of Toronto, I guess.

14 But, you know, that shows where
15 information did not go into immigration
16 information. In other cases, too much information
17 or inaccurate information flows into our
18 immigration watchlists.

19 MR. GOVER: So that we are clear
20 about this, and we are sensitive about this type
21 of thing, that was the responsibility at those
22 three airports, up until 2002 or 2003, of
23 Immigration and Naturalization Service employees,
24 and after that Department of Homeland Security
25 employees.

1 MR. YALE-LOEHR: Yes. These are
2 U.S. people who are stationed in Canada to do this
3 kind of inspection before they actually arrive in
4 the United States.

5 MR. GOVER: In your report at page
6 6, in fact, you refer to a more comprehensive
7 audit conducted by the Office of the Inspector
8 General of the Department of Justice.

9 Is that right?

10 MR. YALE-LOEHR: Correct. There
11 they discovered even more widespread deficiencies
12 in the secondary inspection process and said that
13 every airport audited had deficiencies compared to
14 a previous audit. So they had a previous audit in
15 2001. They told the agency, "You ought to clean
16 up your act." But when they went back in 2003,
17 they found that things had only gotten worse, not
18 better.

19 MR. GOVER: You have commented on
20 the reliability issue and I would like to deal now
21 with timing.

22 Are you aware of the length of
23 time it takes for information to be added to the
24 TECS database?

25 MR. YALE-LOEHR: It really depends

1 on the kind of information that is being added and
2 who is adding it. For example, if I were an
3 immigration inspector at a port of entry and I
4 make a determination that someone is not
5 admissible, I can put that right into TECS. Over
6 30,000 people in the U.S. Immigration Agency have
7 authority to add information into the database.

8 By contrast, if I am a consular
9 officer over in Pakistan or Egypt and I have
10 information that leads me to believe that a
11 particular individual is a terrorist or a
12 supporter of terrorism, I would put that into the
13 Visas Viper database. I don't know how long it
14 takes for Visas Vipers to go to the main database
15 in State Department as of 2002, the time period
16 that we are talking about, or how long it would
17 take for them to go from the State Department to
18 be shared with other agencies of the United States
19 government.

20 MR. GOVER: What if you are an FBI
21 agent?

22 MR. YALE-LOEHR: If you are an FBI
23 agent, you can certainly put information into the
24 NCIC, the National Crime Information Centre
25 database, and I don't know how long it took for

1 NCIC information to be shared with immigration
2 databases as of September 2002. Now I know they
3 have emerged since then.

4 MR. GOVER: The other issue
5 concerning timing is: How long does information
6 remain on TECS? Is there any sort of culling
7 process?

8 MR. YALE-LOEHR: There is no
9 automatic culling process. Any individual who has
10 access to TECS can say, "I only want this
11 information in for one day, one week, one year, or
12 permanently."

13 For example, if the individual is
14 being admitted for just two weeks, you can put an
15 information note in TECS saying, "Look if this
16 person shows up again in three weeks, that is too
17 soon. You should not let them back in."

18 So that kind of information can be
19 sort of automatically purged after three weeks
20 because of the time-sensitive nature.

21 If an individual makes a general
22 statement saying "this person is an alleged
23 terrorist" or "this person is inadmissible because
24 in the past they worked without authorization in
25 the United States", those kinds just stay in the

1 system until someone makes a positive
2 determination to go in and take them out for
3 whatever reason.

4 MR. GOVER: Now I would like to
5 address the more general issue of Canada-United
6 States information-sharing which you address at
7 page 6 of your report.

8 You make the statement there, and
9 I quote:

10 "The period between September
11 11, 2001 and September 2002
12 (the month Maher Arar was
13 detained by U.S. Immigration
14 officials) was marked by
15 rapid changes in the way
16 intelligence was shared
17 between the United States and
18 Canada."

19 MR. YALE-LOEHR: Correct.

20 MR. GOVER: Could I ask you to
21 explain that statement, please?

22 MR. YALE-LOEHR: Well, obviously
23 after the terrorist attacks of September 11,
24 everyone had a wake-up call that we need to do
25 more to make sure that people have access to

1 information so that future terrorists cannot come
2 into the United States as easily as they did
3 before September 11.

4 The U.S. government did many
5 things, obviously, within its own agencies to
6 share information. They also started to contact
7 Canada, because of our long land border with
8 Canada, to make sure that the information-sharing
9 was increased and enhanced between Canada and the
10 United States.

11 As I point out in my report, in
12 December of 2001 the United States and Canada
13 signed the Smart Border Declaration and Action
14 Plan to tighten border security between the two
15 countries, and that was sort of the recognition on
16 a formal level that we need to do more to share
17 information about biometrics, about alleged terror
18 suspects and otherwise.

19 But even beforehand, informally
20 there was more information-sharing going back and
21 forth before Canadian and U.S. immigration
22 officials.

23 MR. GOVER: For example, you refer
24 to the Integrated Border Enforcement Teams.

25 MR. YALE-LOEHR: Those even

1 existed before September 11. As I note in my
2 report, those actually were started in 1996.

3 There has long been a recognition
4 that if we work together with Canada, you can be
5 more effective than if each country only works on
6 their own to try to stop smuggling across the
7 border or unauthorized trafficking of people
8 across the border.

9 So even as early as 1996, we set
10 up these special multi-agency task forces to try
11 to deal with issues between the United States and
12 Canada borders, whether it is regarding organized
13 control, tobacco, alcohol, or individuals crossing
14 the border.

15 After September 11, 2001, that
16 concept, which was already in place, was greatly
17 expanded.

18 MR. GOVER: And it was expanded in
19 a real way in that you also refer to personnel
20 being included in the form of a number of FBI
21 agents who were posted to Canada.

22 MR. YALE-LOEHR: Correct. We
23 don't know the numbers, but we know that it was
24 unprecedented at the time for that number of FBI
25 agents to be posted to Canada.

1 As you know better than I do,
2 after September of 2001, the RCMP also greatly
3 enhanced the number of its officials dedicated to
4 counter-terrorism activities.

5 MR. GOVER: We have already
6 referred to the PAXIS system. You also at page 7
7 refer to a pilot program for passenger assessment
8 units, which was apparently commenced on September
9 30th, 2002.

10 Is that right?

11 MR. YALE-LOEHR: Correct.

12 MR. GOVER: You indicate that that
13 was a pilot project which focused on identifying
14 high-risk passengers using advance passenger
15 information.

16 MR. YALE-LOEHR: Correct.

17 MR. GOVER: And you comment
18 further that these units would use the information
19 to immediately direct disembarking passengers to
20 secondary inspection.

21 MR. YALE-LOEHR: Correct.

22 MR. GOVER: You comment further,
23 and I would like you to explain this statement:

24 "As far as we can determine,
25 the United States and Canada

1 did not have regular or
2 formal information exchange
3 through electronic databases
4 for visa offices during the
5 relevant period."

6 MR. YALE-LOEHR: We simply don't
7 know. I can't prove it one way or the other, so I
8 wanted to be cautious in my report.

9 They well could have been doing
10 that, but certainly it has not been disclosed on
11 the public record.

12 MR. GOVER: Finally, to take you
13 to your conclusion, you say this:

14 "After the terrorist attacks
15 of September 11, 2001, the
16 United States and Canada
17 began to explore ways to more
18 efficiently share
19 intelligence about high-risk
20 travellers. These efforts
21 seemed to still be in their
22 infancy by May 2002.
23 However, the RCMP is
24 certainly now in closer and
25 more frequent contact with

1 U.S. law enforcement
2 officials. At some point in
3 2002 the RCMP began or
4 increased sharing information
5 it had about suspected
6 terrorists with the FBI. We
7 have not been able to
8 determine the details of this
9 information sharing."

10 MR. YALE-LOEHR: Correct.

11 MR. GOVER: Do you wish to
12 elaborate at all on that statement you make in
13 your conclusion?

14 MR. YALE-LOEHR: Again, obviously,
15 the Canadian and U.S. authorities are not wanting
16 to divulge the details of their information
17 sharing for national security reasons and other
18 reasons. So this is as much as we have been able
19 to glean from the various data points, newspaper
20 articles and reports by the various government
21 officials, as to what they are willing to share.

22 So this is as much as we have been
23 able to determine, but we simply don't have enough
24 details to be able to know exactly how much
25 contact and information sharing was going on at

1 the relevant point in time that Mr. Arar was
2 detained in the United States.

3 MR. GOVER: Thank you,
4 Mr. Yale-Loehr.

5 Those are my questions.

6 THE COMMISSIONER: It is
7 twenty-five to one. How long are you going to be,
8 Ms Edwardh. Do you know?

9 MR. EDWARDH: I think,
10 Mr. Commissioner, about 45 minutes.

11 THE COMMISSIONER: Okay. Does
12 anybody else before the Government have any
13 questions? No.

14 How long do you think you will be,
15 Mr. Fothergill?

16 MR. FOTHERGILL: Perhaps half an
17 hour or so.

18 THE COMMISSIONER: Would you
19 rather start now or after lunch?

20 MR. EDWARDH: I think I would
21 rather start after lunch.

22 THE COMMISSIONER: Okay. Why
23 don't we break until two o'clock, and we can deal
24 with those cross-examinations then.

25 We will rise until two o'clock.

1 THE REGISTRAR: Please stand.

2 --- Upon recessing at 12:38 p.m. /

3 Suspension à 12 h 38

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

5 Reprise à 14 h 00

6 THE REGISTRAR: Please be seated.

7 Veuillez-vous asseoir.

8 THE COMMISSIONER: Good afternoon.

9 Ms Edwardh?

10 MR. EDWARDH: There is a technical
11 glitch here, Mr. Commissioner.

12 THE COMMISSIONER: All right.

13 EXAMINATION

14 MR. EDWARDH: I would like to
15 direct my question to both members of the panel
16 and invite them, if they wish, to defer to one
17 another.

18 I would like, first of all, to
19 turn, if I could, to the Convention Against
20 Torture and the definition that might reasonably
21 be used to describe what torture is, and I would
22 like also to read to them a statement and have
23 them to comment, Mr. Commissioner.

24 The statement in question is in
25 Volume 8.

1 MS HALL: Ms Edwardh, would you
2 mind bringing the microphone closer to your mouth?
3 It is somewhat difficult for us to hear you up
4 here.

5 MR. EDWARDH: I'm not allowed to
6 touch it, having been thoroughly chastised before.
7 --- Laughter / Rires

8 If you don't hear anything,
9 please, don't hesitate to...

10 Could the panel be given Volume 8
11 of the DFAIT materials. In particular, I would
12 like to turn to tab 693, and invite you, if I
13 could, to turn into that tab a number of pages,
14 because what you will see attached to the first
15 page is a description of Mr. Arar's first
16 statement when he went public describing his
17 experiences.

18 Over to page 4 of 6, in
19 describing arriving in Syria he makes the
20 following statement:

21 "I was put in another car and
22 we 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

StenoTran

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 I
6 went to Afghanistan. I was
7 ready to confess to anything
8 if it would stop the torture.
9 they wants 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

StenoTran

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."

8 I will just stop there. That is
9 the public statement of Mr. Arar upon his return
10 to this jurisdiction.

11 Given the definitions of
12 torture under CAT, I would like you just to
13 comment, assuming those facts were found to be
14 true, would that fall within the definition of
15 "torture" in CAT?

16 Either of you please comment.

17 MS HALL: I'm happy to start.

18 It is important to understand that
19 there are two ways that people can be tortured,
20 both physically and mentally. The elements of
21 this description, taken at face value and the
22 types of abuse that are described herein, clearly
23 fall within the ambit of Article 1 of the
24 Convention Against Torture.

25 That is all I have to say.

1 MR. EDWARDH: That sounds
2 unequivocal.

3 You, sir?

4 MR. YALE-LOEHR: I can answer this
5 both as a lawyer and a human being.

6 As a lawyer, I am not as familiar
7 with the international definition of "torture",
8 but I am very familiar with the U.S. regulations
9 implementing the Convention Against Torture.

10 I have pulled them up here and the
11 Code of Federal Regulations, Section 208.18
12 indicate both physical and mental threats.

13 Even the things such as hearing
14 other people being tortured can be considered
15 torture for purposes of the U.S. definition of the
16 Convention Against Torture, let alone the physical
17 actual beatings that Mr. Arar received.

18 So to me this is a clear-cut case
19 as a lawyer, and obviously as a human being I
20 think this is clearly torture.

21 MR. EDWARDH: Let me just ask one
22 other question.

23 Mr. Arar has been very clear that
24 but for a few episodes thereafter, mostly it was
25 the conditions of prolonged confinement as

1 described, in the darkness, in a cell of that
2 size, after the first couple weeks in Syria. If
3 one were to be detained in those conditions,
4 without access to the outside world -- lawyers or
5 family, an occasional consular visit -- in those
6 circumstances, would that itself, in your opinion,
7 fall below the standard set in CAT?

8 MS HALL: There are international
9 monitoring mechanisms at both the U.N. level and
10 European level that look at specifically
11 conditions of detention for violations of the ban
12 on torture. So, for example, the European
13 Committee on the Prevention of Torture, the
14 Special Rapporteur on Torture at the U.N. level
15 will often look at conditions to see whether they
16 amount to Article 1 violations. It is clear that
17 substandard conditions of detention can rise to
18 the level of torture, cruel, inhuman or degrading
19 treatment.

20 The reality is that in most cases
21 substandard detention conditions have been
22 classified as cruel, inhuman and degrading.
23 However, in these circumstances, given the
24 notorious reputation of the Palestine Branch, for
25 example a parallel would be Mazra'at Tora prison

1 in Egypt, these are places where the detention
2 conditions have been determined to be so
3 substandard, so rejecting of human dignity, so
4 below international standards which are laid out
5 in several international documents, that it is
6 quite possible that they rise to the level of a
7 torture violation, vis-à-vis Article 1.

8 MR. EDWARDH: All on their own?

9 MS HALL: All on their own.

10 MR. EDWARDH: I suppose it would
11 be particularly pertinent that those conditions of
12 confinement followed a period of torture in the
13 same institution?

14 MR. YALE-LOEHR: Yes.

15 MS HALL: They also constitute a
16 form of mental torture. I mean, in terms of the
17 psychological effect that the standards have, you
18 can draw a link, and I believe in this case an
19 inextricable link, between mental or psychological
20 torture and the profoundly substandard detention
21 conditions.

22 MR. EDWARDH: Thank you. I want
23 to turn then to another topic and it is the topic
24 of assurances.

25 I'm just a little confused, so I

1 would like your view, if I could, about their
2 character as diplomatic. In other words, I
3 interpret that to mean nation to nation. It is
4 not good enough, I take it, to have one police
5 officer or one intelligence officer promise
6 another intelligence officer?

7 MS HALL: To phrase it a different
8 way, the way that we find them operating at
9 international level right now, and what the
10 special rapporteur on torture has said, is that
11 the person who speaks for the government giving
12 the assurances has to have a degree of authority
13 such that he or she can actually supervise the
14 conditions once the person returns.

15 So it would be correct to say, I
16 believe, that a police officer to police officer
17 exchange vis-à-vis assurances would not meet that
18 requirement, because they would not be in the
19 capacity to ensure that the assurances were
20 actually observed.

21 MR. EDWARDH: Would you not expect
22 then for the assurance -- and I will come to one
23 I'm more familiar with -- but the assurance would
24 go, then, from those that had authority to ensure
25 the quality of treatment through to the Foreign

1 Ministry of the nation who was to speak and then
2 to the country, whether through the embassy or
3 not, but then to the country who had sought the
4 assurance?

5 In other words, if I were wanting
6 to look at and evaluate whether Syria had
7 committed itself to ensuring fair treatment, I
8 would assume that I would be looking at two
9 things: Has the Syrian Foreign Ministry told -- I
10 will take Canada for an example -- told Canada
11 that it can provide those assurances, and that it
12 does so by reference to assurances given by the
13 appropriate authority in Syria. Isn't that the
14 way they ought to speak?

15 MS HALL: It is very difficult to
16 say about the way they ought to speak because they
17 come in so many variations in the course of our
18 research. So how they ought to operate, you have
19 to understand that from Human Rights Watch's
20 perspective we have not made a prescription for
21 how they ought to operate because we believe them
22 to be inherently unreliable. So I cannot make
23 that prescription.

24 MS EDWARDH: Fair enough.

25 MR. YALE-LOEHR: I can say that in

1 a U.S. perspective the regulations say that it is
2 the Secretary of State who is to make that
3 determination of assurances and then pass that on
4 to the Attorney General of the United States. So
5 it is at the highest level as codified in the U.S.
6 immigration regulations.

7 MR. EDWARDH: So it goes, then,
8 from the foreign nation to the Secretary of State,
9 who is really like our Minister of Foreign
10 Affairs, and then passed on to the person who
11 wants to act on them?

12 MR. YALE-LOEHR: Again, this is
13 the way it is written in the regulations. Whether
14 it actually operates that way on a day-to-day
15 basis, I don't know.

16 MR. EDWARDH: You made an
17 interesting comment that assurances are not
18 usually public, but certainly in a case that I was
19 involved in, if I can just be personal for a
20 moment, in a decision called Regina v. Burns and
21 Raffay, we got, from the Canadian government,
22 assurances from the D.A. in Seattle, Washington,
23 that he would not seek nor would the death penalty
24 be applied. Those assurances went to the
25 Secretary of State, went to the Department of

1 Foreign Affairs, went to the Department of
2 Justice, and were provided to counsel.

3 That was my understanding of the
4 usual course such assurances would go, but that is
5 a death penalty case.

6 MS HALL: Death penalty, the
7 genesis of the use of assurances in the death
8 penalty is profoundly different from what we see
9 in terms of using them as a so-called effective
10 safeguard against torture.

11 I would caution not to use that
12 experience as some kind of a parallel for what is
13 operating in this case or any of the other cases
14 where we see --

15 MR. EDWARDH: I hear you. But the
16 reason I'm asking is I would like to take you to a
17 document you will find in Volume 4 of the DFAIT
18 materials.

19 If you could please provide that
20 to the panel? Tab 392.

21 This is a document that summarizes
22 a meeting held in April of 2003 with the Deputy
23 Foreign Minister of Syria and a number of Canadian
24 Members of Parliament and others.

25 There are two bits of it I want to

1 take you to. If you turn over the page, at
2 paragraph 5 the Deputy Foreign Minister made the
3 following comment:

4 "Turning to the Arar case,
5 the Deputy Foreign Minister
6 explained that the US
7 decision to deport Arar to
8 Syria via Jordan had taken
9 his government had I
10 surprise. The Syrians had
11 not asked for Arar and had
12 expected him to be deported
13 to Canada."

14 Let me stop there and ask you to
15 go to one other document.

16 If I could ask that the panel be
17 given Exhibit P-99.

18 We are going to come to this
19 document in two contexts, but let me just say that
20 between those remarks of the Syrian Foreign
21 Minister -- I'm not going to take you to the
22 newspaper articles, but we have seen both the
23 Syrian Ambassador in Canada and the Syrian
24 Ambassador in the U.S. make similar remarks, that
25 it was a surprise to them that Mr. Arar arrived on

1 their doorstep.

2 Certainly, given his position,
3 would you agree that the logical inference is:
4 Had there been assurances, he would have known?

5 MS HALL: Yes. The logical
6 inference would be that, especially under the
7 immigration regulations. It is the Secretary of
8 State who seeks and secures the assurances, the
9 implication being that he or his deputy would
10 seek them from a person similarly situated
11 within Syria.

12 The fact that the similarly
13 situated person appears to be saying that the
14 whole affair was a surprise, when in fact
15 assurances had to be sought, secured and deemed
16 credible prior to removal from the United States
17 under these regulations, if they are a factor,
18 really contradicts -- the chronology is somewhat
19 upset by those statements.

20 MR. EDWARDH: If one were to
21 conclude that there was evidence that those
22 statements were factually correct, then they raise
23 the very serious issue that Mr. Arar's removal
24 from the United States to Jordan and then Syria
25 were without any assurances at all?

1 MS HALL: That's correct. It's
2 also something that both Professor Yale-Loehr and
3 I were concerned about when we looked at the
4 deportation order itself, a concern about why, if
5 assurances had been secured at that point, the
6 regulations where those assurances -- that provide
7 for those assurances were not referenced in the
8 order, and why there was no mention of them as the
9 justification for finding that the order comported
10 with Article 3 under U.S. law. So we ourselves
11 have noticed that there seems to be a real issue
12 of concern as to when the actual assurances were
13 negotiated.

14 MR. EDWARDH: If at all.

15 There certainly is also no recital
16 in the body of the order which says: Having
17 received assurances, then we are satisfied there
18 is no violation of the Convention Against Torture?

19 MR. YALE-LOEHR: That's correct.

20 MR. EDWARDH: You made a number of
21 references in your discussions -- I'm not sure
22 that both of you didn't so again it is a question
23 to both of you.

24 I'm interested in pursuing this
25 issue of an index of suspicion and when one ought

1 to be alive to the concerns that someone may be
2 being rendered, in the sense of rendered at risk
3 to torture as you have used it.

4 Also what I understood you to say,
5 and I just want to clarify this, I gather it is
6 your view that should a person know or ought to
7 know that this is happening, that they are
8 duty-bound to take all steps, a nation is
9 duty-bound to take all steps to try to reverse the
10 process?

11 MS HALL: If the rendition is to
12 a country where the person would be at risk of
13 torture.

14 MR. EDWARDH: That's all I'm
15 talking about. We are talking about rendition to
16 a risk of torture.

17 We will come back to what
18 those steps might be, but I want to see whether,
19 if I itemize a number of facts, you will comment
20 upon what the level or index of suspicion ought to
21 have been.

22 First of all, we know that Syria's
23 human rights record is well-publicized and indeed
24 we, in Canada, are very familiar with the country
25 reports published by the Secretary of State, or

1 the State Department, and we can all agree that
2 the issues of detention and interrogation and
3 torture within military intelligence have been of
4 concern for a number of years.

5 Is that fair?

6 MR. YALE-LOEHR: Correct.

7 MR. EDWARDH: Number two fact: In
8 August of 2002, some weeks before Mr. Arar was
9 arrested, a Canadian was given consular access in
10 Egypt after he had left Syria -- we will leave out
11 how he got there -- but he had been detained in
12 Syria, and he had been detained by the military
13 intelligence, and he was going public to consular
14 affairs, at least at that time, that he had been
15 the victim of torture?

16 MR. YALE-LOEHR: In Syria?

17 MR. EDWARDH: In Syria. So
18 this is August of 2002. This is the same
19 department that is charged with working and
20 protecting Mr. Arar.

21 Then we know that in the last week
22 of September Mr. Arar was arrested and detained
23 and held for three or four days without access to
24 anyone -- lawyer, family, consular official -- and
25 that he was interrogated during that period and

1 then placed on the 9th floor of the MDC. You can
2 assume that our consular initials in New York knew
3 about the 9th floor of the MDC because they had
4 been assisting other persons there but had had
5 considerable difficulty in getting access to those
6 persons.

7 My next fact is, when Mr. Arar
8 came to the attention of Canadian consular
9 officials, they initially got the big run-around.
10 If I could invite you -- Mr. Registrar, could you
11 provide our panel with Volume 1 of the DFAIT
12 materials? Tab 11.

13 What this document is, just for
14 your information, when consular staff are working
15 on a consular case, they can enter into a
16 real-time system their observations and
17 conclusions and the steps they have taken once a
18 consular case is opened. The person who is the
19 author of this note is someone who was working on
20 the Arar case, and she notes as follows on the 1st
21 of October:

22 "Contacted MDC Records
23 Division, who refused to
24 provide us with information
25 regarding the charges under

1 which subject..."

2 That is Mr. Arar.

3 "...is being held. We were

4 told that we would have to

5 make our request by fax.

6 This is highly unusual as we

7 are normally able to obtain

8 the charges. Was referred to

9 the Executive Assistant of

10 the Warden (Miss Ward) at our

11 request, who again said that

12 a faxed request would be

13 necessary, and that they were

14 leaving for the day,

15 therefore we would not

16 receive any information

17 today."

18 Next paragraph:

19 "Also contacted the

20 Deportation INS section in

21 New Jersey. Spoke to Officer

22 ... who advised us that they

23 had no INS deportation file

24 on subject, and suggested

25 that it was unlikely that

1 subject was a deportation
2 case, as MDC does not hold
3 deportation cases."

4 Now, I see that at least one brow
5 was furrowed.

6 What do you say to the remark
7 that, "MDC did not hold deportation cases", in the
8 sense that those cases may involve allegations of
9 connections to either terrorism or involve
10 security issues of interest to the United States?

11 Do you have any knowledge, either
12 of you?

13 MR. YALE-LOEHR: I don't have any
14 direct knowledge of this timeframe. This is
15 October of 2002.

16 Certainly right after
17 September 11, 2001 over 1,200 people were detained
18 by immigration authorities and many of them were
19 sent to MDC, and also to Passaic County in New
20 Jersey. Many of them were being held for
21 deportation cases. So this is what I find a
22 little odd.

23 Although by this point in time
24 of October 1, 2002, it is possible the procedures
25 changed and there were no longer many people

1 going to MDC who were of immigration interest, I
2 don't know.

3 MR. EDWARDH: We have the
4 Inspector General's report that actually is the
5 year following this, so the Commissioner will
6 be able...

7 But certainly your experience off
8 the top is that that statement would not be
9 accurate?

10 MR. YALE-LOEHR: Correct.

11 MR. EDWARDH: All right. Now,
12 then the paragraph goes on:

13 "He referred us back to
14 MDC...

15 Also contacted INS Public
16 Affairs Office (as we did
17 yesterday, to no avail...)
18 and was again told that
19 no-one was there to discuss
20 the case. Lisiane asked to
21 speak to the superior, and we
22 then spoke with Officer..."

23 It is a man who I understand is
24 one of the senior inspectors in the area. So they
25 speak with him.

1 "As Officer was not aware of
2 case, he undertook to contact
3 the JFK airport and obtain
4 information - and call us
5 back in the next 15 minutes.
6 Officer ... called us back as
7 promised and informally
8 advised us that this case was
9 of the seriousness that
10 should be taken to the
11 highest level, i.e. he
12 suggested our Ambassador in
13 Washington should contact the
14 Dept. of Justice."

15 I noted in your earlier comments
16 there was reference to had there been the
17 suggestion that this was an unusual case, as a
18 flag, a red flag that should increase the index of
19 suspicion.

20 Would you recall this statement as
21 being such an indication of the extraordinary
22 nature of the case?

23 MS HALL: I would, in fact, think
24 that if information was passed to Canadian
25 consular officials that talked about the

1 seriousness should be taken to the highest levels,
2 that that would be a red flag, a significant red
3 flag. If we are talking about a constellation of
4 issues, I have written down six now, I would think
5 that that in and of itself would have been enough
6 to trigger a deep suspicion that this case would
7 not follow the normal procedures and the normal
8 rules would not apply.

9 MR. EDWARDH: All right. I just
10 want to go on and then I will have you comment on
11 the totality of circumstances, both of you.

12 Around this same time the consular
13 officials receive a telephone call. If you go
14 back to tab 10, it is actually the same date, and
15 obviously Mr. Arar had been given access to a
16 telephone and spoke with his brother. The
17 consular official who speaks to the brother -- I'm
18 sorry, mother. There is another chain there. But
19 the brother calls the consular official.

20 "Brother called this morning
21 in a state of panic. He said
22 that subject was able to call
23 him this morning from MDC and
24 informed him that he would be
25 deported back to Syria where

1 he was born. Both, subject
2 and brother are extremely
3 afraid that he would be
4 deported to Syria and not to
5 Canada."

6 Then, finally, the consular
7 officials get access to Mr. Arar and they meet
8 with him at MDC on October 3rd.

9 If I could invite you to turn to
10 tab 31?

11 Again you will have a record of
12 the person who visited Mr. Arar at the MDC. There
13 are a number of these documents associated with
14 this same visit, but for our purposes it is tab 31
15 that is relevant.

16 First of all you will see that the
17 consular official has made a very clear note of
18 the factual allegations of inadmissibility.

19 Do you see that?

20 MR. YALE-LOEHR: Mm-hmm.

21 MR. EDWARDH: Including the
22 allegation that Mr. Arar is a member of a
23 terrorist organization, to wit, al-Qaeda.

24 Then down in the second-last or
25 penultimate paragraph on the page, in describing

1 what Mr. Arar had said:

2 "At one point, two
3 immigration officers spoke to
4 him and told him that they
5 were going to send him to
6 Syria. He said that he asked
7 why, since he has not been to
8 Syria for years and all his
9 family is in Canada.

10 They put him back in the
11 cell..."

12 We are into September 2002 and I
13 have itemized a number of issues that are in your
14 face clear from reading these documents. You have
15 talked about some of the publicly available
16 information.

17 I would like to ask you both
18 to comment upon whether the index of suspicion
19 of Canadian consular officials should have been
20 such that they would have taken
21 extraordinary steps, beyond the usual, because of
22 a concern that something very unusual was going to
23 happen to Mr. Arar?

24 MS HALL: As I stated before, the
25 standard for assessing this is whether or not

1 Canadian consular officials, or officials in
2 general, knew or should have known. So it is not
3 just whether they suspected that something was
4 going to happen, it is whether, based on a fact
5 pattern, a red flag after a red flag after a red
6 flag after a red flag, whether they should have
7 been able to tell.

8 Based on that standard, taken as a
9 whole, this is a very compelling set of red flags,
10 especially in the context of post-September 11th.

11 I think for our purposes that is
12 as far as I can go, but I would say, as I said,
13 six, now seven, different red flags in a row
14 meeting the knew or should-have-known standard,
15 seems to me to be a very compelling set of
16 evidence.

17 MR. EDWARDH: Can you agree with
18 me they certainly ought to have known that they
19 were dealing with an extraordinary case?

20 MS HALL: That I believe to
21 be true, given the fact pattern that you just
22 laid out.

23 MR. YALE-LOEHR: Absolutely.

24 MR. EDWARDH: They certainly ought
25 to have known that someone somewhere was looking

1 at Syria as a possible destination?

2 MS HALL: Yes. Moreover, the
3 fact that Mr. Arar held dual citizenship I would
4 add to your --

5 MS EDWARDH: Of course.

6 MS HALL: I would simply add that
7 as another very serious red flag, especially if
8 this Commission is to find out that in practice
9 there is no real commitment to dominant
10 nationality and to consular -- into an affirmative
11 commitment to consular assistance for that
12 dominant nationality. In this case, it would have
13 been Canadian. So I would simply add that to
14 this list.

15 MR. EDWARDH: Certainly what it
16 does, it raises the possibility, even if Canada is
17 committed to providing consular services on
18 principles of dominant nationality, it raises a
19 real concern that the U.S. may exercise a right of
20 deportation to a nation where Mr. Arar faces a
21 risk of torture?

22 MR. YALE-LOEHR: Correct.

23 MR. EDWARDH: Now I want to
24 deal with the detection of torture. I think we
25 all are perhaps naive when we assume that the

1 results of torture are going to be clear and
2 visible and stamped on the foreheads of anyone who
3 has gone through it.

4 A remark or two was made about the
5 difficulty of detection and I would like you both,
6 if you could, to comment on it, and also the kind
7 of incorrectness in the assumption that this is
8 easily and readily identified.

9 MS HALL: Maybe a way to segue
10 into this question is to refer you to an article
11 that we reference in our "Still at Risk" report
12 about the influence and the participation of
13 medical doctors in torture in detention
14 facilities. The specific reason that they are
15 there is (a) to make sure that a detainee remains
16 alive; but (b), as well, to ensure that obvious or
17 more overt signs of torture are not visible. I
18 would argue that this is one of the ways that
19 torture has become much more sophisticated in this
20 day and age.

21 I assume the next part that we
22 should address is the idea of what forms of
23 torture would not be easy to detect.

24 MR. EDWARDH: Exactly.

25 MS HALL: Certainly psychological

1 torture, being able to look at a person and
2 understand whether they are experiencing trauma
3 that is of a psychological or a mental nature,
4 especially given the fact that in those
5 circumstances where a person remains in detention,
6 they would be fearful of speaking about what is
7 happening in terms of mental and psychological
8 processes.

9 So I would highlight in fact
10 mental and psychological torture being the most
11 difficult to detect.

12 Second, we have documented forms
13 of torture dealing with electricity, which is
14 likewise very difficult to detect. There are
15 bombs that can be put on the parts of the body
16 where electric shock is applied, and electric
17 shock leaves no serious overt marks, plus it is
18 often applied to parts of the body that are
19 particularly sensitive, nipples, genitalia, parts
20 of the body that most people would not -- trained
21 torture -- you know, persons trained to detect
22 torture, doctors and others -- if you are not
23 trained you wouldn't even think to ask a person to
24 pull down their pants and show you their genitalia
25 to see whether -- an assurance that you were being

1 treated humanely was being complied with.

2 MR. EDWARDH: Let me just stop you
3 there, because in order to ask someone, "Please
4 pull down your pants," or have a discussion of
5 that kind, you are certainly going to have to have
6 some confidentiality attached to your
7 communication with the detainee?

8 MS HALL: That's correct.

9 The case that is the best example
10 of post-return monitoring to date -- and we
11 believe that to be true globally -- it is the
12 30 visits that the Swedish diplomats made to
13 Mr. Agiza and Mr. El-Zari, the two men who were
14 rendered from Stockholm to Cairo, on only one of
15 those occasions -- on none of those occasions,
16 correction, were they alone with the men. None of
17 those visits took place in confidentiality. As a
18 matter of fact, the vast majority of those visits
19 took place in the prison warden's office in
20 accompaniment of upwards of 10 prison guards, some
21 of whom directly supervised the day-to-day
22 movements of the detainees within the facility.

23 So confidentiality, independent
24 medical and forensic gathering of evidence,
25 et cetera, has not been a feature of the

1 post-return monitoring mechanisms that we have
2 researched.

3 MR. EDWARDH: So in the case you
4 were just referring to, I take it in those
5 30 visits, although the Swedish Ambassador, and
6 any other consular persons who were there, were
7 looking for signs, because that is what they were
8 monitoring, they didn't see any?

9 MS HALL: They state in all of
10 their monitoring reports that there are no obvious
11 signs of torture or other ill-treatment.

12 MR. EDWARDH: Now, I want just to
13 give you one fact -- you may be aware of it, but I
14 think it is not much in dispute anymore -- that
15 certainly once Mr. Arar left the United States he
16 was removed, first to Jordan and then quickly left
17 Jordan and was placed into the hands of the
18 Syrians, and was held incognito for a period of
19 approximately 10 days. It wasn't until the 21st
20 of October when the Syrians finally acknowledged
21 that they indeed had Mr. Arar in their custody.

22 I just want to ask you, given your
23 experience with torture and regimes of torture,
24 can you comment on whether a period of incognito
25 detention at the beginning of someone's

1 incarceration is a common facet of a regime that
2 tortures and also the period of time when torture
3 is most likely to take place?

4 MR. YALE-LOEHR: That is a fairly
5 easy question to answer. I also happen to work
6 for Amnesty International and am in charge and
7 Chairman of the Refugee Steering Committee of
8 Amnesty International. Amnesty International has
9 said repeatedly that the most likely time that a
10 person is going to be tortured is in the first
11 week or so of detention.

12 MR. EDWARDH: So it certainly then
13 would come as no surprise to you that Mr. Arar
14 describes an experience with Syrian Military
15 Intelligence that involves torture in really the
16 first two weeks of his confinement, physical
17 torture?

18 MR. YALE-LOEHR: Correct.

19 MR. EDWARDH: I want your
20 assistance, both of you if I could, to comment on
21 a couple of reports.

22 When Mr. Arar was finally seen by
23 consular staff in Syria -- if I could just invite
24 you, I'm sorry, it is Volume 2, tab 130 -- he was
25 seen in circumstances where -- I can just give you

1 a little background. I don't think there is any
2 dispute. He certainly was not seen in the cell
3 area. So the consular officials had no direct
4 visual observation of the place of his
5 confinement. And he certainly was never alone
6 with the consular officials, but was closely
7 supervised by his handlers. You get a real sense
8 of that when he surfaces finally at tab 130.

9 But I want you to comment, if I
10 could, on two things: What do you read into the
11 report by what is being described, given your
12 knowledge?

13 But also, what should a consular
14 official be doing? Assuming they have any hope of
15 identifying a problem, what are the domains they
16 should be looking at?

17 So that is the second part of
18 the coin.

19 But let's take a look at
20 Mr. Martel, who was in charge of consular matters
21 in Damascus. We will have to start at the second
22 paragraph, we are not allowed to see the first:

23 "Arrived on site at
24 1000 hours and was greeted by
25 an officer who declined to

1 give his identity. Meeting
2 with Syrian officials was
3 cordial and took place in one
4 of their offices. Importance
5 that Canadian authorities
6 attach to this high profile
7 consular case was emphasized
8 and Martel indicated that it
9 was in the best interest of
10 both countries to work
11 together. Officials took
12 minutes during this entire
13 initial period."

14 Now we move on to Mr. Arar's
15 arrival.

16 "Arar was brought to the
17 office at 10:30 and meeting
18 with Martel lasted
19 approximately one-half hour.
20 It was not possible to see
21 where exactly Arar was being
22 detained."

23 Now, let me just ask you some
24 observations.

25 Do you attach any significance

1 to the fact they couldn't see where he was
2 detained?

3 MS HALL: Obviously.

4 MR. EDWARDH: I don't mean the
5 question to sound --

6 MS HALL: I don't mean to sound
7 that way either, but I mean this is -- inherent in
8 these deficits of post-return monitoring
9 mechanisms that there was obviously a concerted
10 effort to keep them away from a cell. If you take
11 it at face value again as described by Mr. Arar,
12 would not have met anybody's definition of
13 sufficient standards for detention conditions.

14 MR. EDWARDH: All right. Let's
15 keep going.

16 "After shaking hands, Arar
17 was shown a seat at a
18 distance."

19 Do you attach any significance
20 to that?

21 MR. YALE-LOEHR: Sure. Again,
22 if you are trying to avoid detection of torture
23 the farther away you can put the individual the
24 harder it is for a consular officer or someone
25 else to determine how that person has actually

1 been treated.

2 MR. EDWARDH: Then:

3 "Questioning started along
4 the lines of your
5 instructions but it was
6 obvious subj was not free to
7 answer all of the questions."

8 Do you see that?

9 Would that be of great concern if
10 you saw that report?

11 MS HALL: Yes.

12 MR. YALE-LOEHR: Yes.

13 MR. EDWARDH: It is clear that the
14 person who has been brought up cannot be free to
15 discuss anything about his conditions of
16 confinement or his treatment, is it not?

17 MS HALL: Well, the obvious
18 implication being that if the subject reveals
19 those conditions that he would be subject then to
20 retribution for having revealed them. It is a
21 cyclical process.

22 MR. EDWARDH: Right.

23 "Conversation took place in
24 English and was translated
25 into Arabic immediately.

1 Notes were taken at all times
2 by Syrians."

3 Does that not just reinforce the
4 notion that anything said that was out of line
5 could be subject to retribution?

6 MR. YALE-LOEHR: Yes.

7 MS HALL: Yes.

8 MR. EDWARDH: Then, paragraph 4:
9 "Subj appeared to be healthy
10 but this is difficult to
11 assess. He looked resigned
12 and submissive."

13 Would you expect, indeed,
14 someone who had been subject to torture and abuse
15 to look resigned and submissive in the face of
16 his handlers?

17 MS HALL: When Ahmed Agiza was
18 asked this question he replied that it was so
19 useless, that it was impossible for him to give
20 the information because he probably would have
21 been tortured even more severely, that his
22 disposition was resigned and submissive because he
23 felt he had no other option.

24 MR. EDWARDH: Then the
25 observation:

1 "Numerous eye signals seemed
2 to indicate he was not free
3 to speak out. At least this
4 is the impression we had."

5 There is an attempt by the
6 consular officer to sort out how long he had been
7 in Jordan. If you go down to paragraph 5, the
8 last four lines:

9 "When prompted further for
10 answers, the Syrians told him
11 in Arabic he was not to
12 answer those questions. He
13 said he only stayed in Jordan
14 for a couple of hours before
15 being taken to the Syrian
16 border. He would therefore
17 have been detained in Syria
18 for the past two weeks,
19 contrary to what we had been
20 led to believe."

21 That is the incognito part of it.

22 Then there is a lovely
23 observation, it looks redacted but we have it,
24 paragraph 7:

25 "When asked if he wished the

1 Embassy to provide him with
2 anything he might need he
3 answered that his needs were
4 all taken care of by his
5 Syrian hosts."

6 We now know the blackened portion
7 reads:

8 "This answer was dictated to
9 him. He also repeated in
10 English after his hosts,
11 speaking Arabic, prompted him
12 to do so: 'I am Syrian and I
13 obey the law of Syria. I am
14 proud of my country of origin
15 and I am also proud of
16 Canada, my country of
17 adoption. I have been
18 respected by my Syrian
19 brothers and I am happy to
20 have come back to Syria. The
21 authorities have not
22 exercised any pressure on me.
23 You can see I feel well.
24 Anything I ask for I
25 receive.'"

1 MS HALL: It is difficult to think
2 that this is anything but absurd. It is difficult
3 to come to any other conclusion but for that this
4 consular visit was seriously compromised by the
5 conditions under which the Canadian authorities
6 agreed to meet Mr. Arar.

7 MR. EDWARDH: Indeed, I don't want
8 to suggest to you that when this was sent back to
9 the person in charge of consular affairs he did
10 anything other than think that this description of
11 being glad to be back in Syria was ludicrous, and
12 indeed that the working assumption he developed
13 was that Mr. Arar was being tortured. I don't
14 want to suggest that --

15 But the question really becomes:
16 It does seem to me that if you wanted to convey
17 real information, you would want another set of
18 factors described. When you say Mr. Arar seems
19 well but it is hard to assess, you would want to
20 say: What kind of clothing is he wearing? Is his
21 body, in fact, fully covered?

22 I mean, there are a whole series
23 of domains that if you were training consular
24 officers it seems to me you would direct them to
25 make observations and report on.

1 Am I correct about that?

2 MS HALL: Well, at a higher level
3 you would assume that these visits would be very
4 carefully negotiated in advance to ensure the
5 basic safeguards related to confidentiality and
6 complete confidentiality would be secured prior to
7 the visit. So there is a prior step.

8 Visits such as these have
9 virtually no meaning in terms of what consular
10 visits are supposed to achieve, what their purpose
11 is, which is to gain information so that the
12 country which the person is seeking protection
13 from can then provide it based on that
14 information. None of this information appears to
15 be very useful in that respect. So that is the
16 first thing.

17 Your question, I'm sorry, I have
18 forgotten it now.

19 MR. EDWARDH: I found your answer
20 so interesting --

21 --- Laughter / Rires

22 I wouldn't surprise you if I
23 told you that at no time was Mr. Arar ever
24 permitted to have access to consular services in a
25 confidential fashion. It was always supervised in

1 this kind of setting.

2 I take it that would mean that
3 none of the consular visits met the objectives
4 because they were not confidential.

5 MS HALL: Precisely.

6 MR. EDWARDH: Precisely. Now I
7 can't remember my question.

8 MS HALL: Training. I think you
9 asked something about training.

10 MR. EDWARDH: About training, yes.
11 I'm interested.

12 MS HALL: The reality of providing
13 training so that consular officials can do their
14 job would require the preconditions that I just
15 stated. So to say that you could be in this
16 situation, with all of this constellation of
17 obstacles to getting information but you could
18 still train your consular staff to get at
19 information, I think is very naive.

20 MR. EDWARDH: Yes. I mean, the
21 difficulty for Canadian authorities, though, I
22 don't suppose that if they said, "Gee whiz, we
23 would really like to have a private chat," they
24 would have ever gotten it? There is nothing to
25 suggest that Syrian Military Intelligence would

1 have said, "I will just leave you for half an hour
2 and we will be back."

3 MS HALL: I would ask if there is
4 anything in the record to indicate whether the
5 Canadians ever asked for such a thing?

6 MR. EDWARDH: A very good
7 question. Perhaps my friend can assist me, but I
8 am going to suggest that certainly there is no
9 correspondence, nor any statement on this record,
10 that the Canadian consular officials sought and
11 were denied confidential access. I take it from
12 your perspective they ought to have, of course?

13 MS HALL: I would assume that
14 that would be a first -- a necessary precondition
15 for the visits.

16 MR. EDWARDH: My friend may have
17 a correction.

18 MR. CAVALLUZZO: Just to provide a
19 little bit of context to this, the information we
20 have is that Canadian officials found this
21 consular access that they were getting in respect
22 of Mr. Arar quite surprising in the sense that
23 they had experiences with two other Canadians who
24 had been held in Syria prior to this time, during
25 which they had absolutely no consular access. So

1 they were somewhat gratified to see that they were
2 getting consular access with Mr. Arar, which was
3 very much unlike their past experience in Syria.

4 MR. EDWARDH: I don't want to have
5 a dialogue with Mr. Cavalluzzo, but despite the
6 fact this may have been unique, so was perhaps the
7 manner of Mr. Arar's arrival in Syria unique, and
8 certainly one of few Canadians that has arrived
9 that way.

10 But it is to be noted there is
11 nothing in this record that would show any demand
12 for confidential access on a consular basis,
13 merely that they were very enthusiastic that they
14 got any at all.

15 I take it from your perspective it
16 ought to have been a matter that was at least
17 demanded and then refused, if necessary?

18 MS HALL: Yes.

19 MR. EDWARDH: I want to go to
20 perhaps the most troubling part of our record, for
21 me anyway, which is the role the Canadian
22 Ambassador played in our case.

23 We have been told that the
24 Canadian Ambassador wears many hats. You have
25 referred to that in your discussion. He

1 represents the Government of Canada and therefore
2 represents the many interests of the Government of
3 Canada when he is in Damascus and Syria.

4 We have also been told that from
5 the perspective of consular affairs, which is
6 reposed in the Department of Foreign Affairs, that
7 getting Mr. Arar home was a principal objective.
8 It was at the heart of the delivery of consular
9 services to him.

10 So with that in mind I want to ask
11 you the following question: Before Mr. Martel
12 goes and visits Mr. Arar, he, his Ambassador,
13 Mr. Pillarella, meets with the head of Syrian
14 Military Intelligence. You will find a briefing
15 from that meeting at tab 123. I'm sorry, that is
16 Volume 1.

17 Because all this takes place --
18 MR. YALE-LOEHR: What tab is this
19 again, please?

20 MR. EDWARDH: I'm sorry, it is
21 tab 123.

22 All of this takes place, this
23 meeting and the weeks thereafter, when the first
24 consular visit has occurred, and we know there is
25 a general understanding in the department that

1 there is a working hypothesis that Mr. Arar has
2 been tortured -- is being tortured, whatever.

3 So at tab 123 you have a
4 description of this meeting, and the gentleman in
5 question is the highest ranking person in military
6 intelligence in Syria. We know his name but we
7 are not repeating it a lot.

8 In any event, he meets with the
9 Canadian Ambassador and makes a few observations
10 that are of interest.

11 He says, contrary to what Mr. Arar
12 says very soon after, in paragraph 2:

13 "...that Arar appeared at the
14 Jordan/Syrian border
15 yesterday without warning..."

16 This is the 21st.

17 Do you see that?

18 MS HALL: Mm-hmm?

19 MR. YALE-LOEHR: Mm-hmm.

20 MR. EDWARDH: We now know that to
21 not be true.

22 In addition, the Ambassador
23 is told -- despite the remarkably short period of
24 time that Mr. Arar is there, the Ambassador is
25 told:

1 "According to ... Arar has
2 apparently already admitted
3 that he has connections with
4 terrorist organizations..."

5 So he been there less than
6 24 hours and it is alluded -- described there.

7 Then, at the end of this meeting,
8 before the very first consular visit, the
9 Ambassador says, in the last line of this report:

10 "Finally ... has promised..."

11 That is the General.

12 "Finally [the General] has
13 promised to pass on to me any
14 information they may gather
15 on Arar's implication in
16 terrorist activities."

17 So having obtained that promise on
18 October 22nd -- I will just track this for you --
19 a few weeks later, if you go to Volume 2, the
20 ambassador personally receives the products of the
21 interrogation.

22 This is Volume 2, tabs 164 and
23 165.

24 This is a document where the
25 ambassador is reporting back to Ottawa, to a

1 variety of persons, all of whom have those various
2 acronyms, and you see the paragraph number 3:

3 "When I asked ... whether I
4 could get a resume of
5 information obtained so far
6 from Arar that I could take
7 to Canada with me, he agreed
8 to do so. He promised I
9 would receive it before my
10 departure, unfortunately only
11 in Arabic."

12 This of course is November 3.

13 Then if you turn over to tab 165,
14 there is a record in the Canadian files:

15 "On November 3, 2002, the
16 Canadian Ambassador to Syria
17 received a document (written
18 in Arabic) from ... The
19 Ambassador brought the
20 document to Canada personally
21 and gave it to ISI..."

22 Which is the intelligence group in
23 the Department of Foreign Affairs.

24 "... on November 6. ISI sent
25 it to CSIS ..."

1 They are like the CIA.
2 "... for translation. The
3 document, an undated
4 three-paragraph bout de
5 papier, was translated on
6 November 7. The document
7 alleges that Arar spent time
8 in Afghanistan in Mujaheddin
9 camps and that he knew ...
10 The document was sent to CSIS
11 for translation by ... The
12 translated document was
13 returned to ISI and the
14 information shared with ...
15 the RCMP and CSIS."

16 I suppose I need two other facts.
17 Shortly after November the 3rd and after the 7th,
18 unbeknownst to those persons in consular affairs,
19 the Canadian Security Intelligence Service
20 travelled to Damascus, met with military
21 intelligence counterparts, and we know somehow
22 left an impression that Canada did not want
23 Mr. Arar back, an impression that lasted for at
24 least six months.

25 And the last fact I would like to

1 put to you is that just before Mr. Arar was
2 finally released, as had happened two or three
3 times earlier, more information was sought from
4 military intelligence and indeed the very man who
5 accompanied Mr. Arar home in an airplane carried
6 the brief.

7 I am going to ask this question:
8 It seems to me that, at its mildest, the
9 ambassador was sending a mixed message. "Please,
10 we want him home," but meanwhile, "Give us the
11 intelligence you gather."

12 Do you agree with that?

13 MR. YALE-LOEHR: Yes, absolutely.

14 MR. EDWARDH: Is there any other
15 interpretation you would give to that?

16 MR. YALE-LOEHR: No.

17 MR. EDWARDH: And you?

18 MS HALL: No.

19 MR. EDWARDH: And if in fact there
20 were -- I am going to take it one step further:
21 that the seeking of information and wanting the
22 products of the interrogation is in fact using the
23 Syrian Military Intelligence to do the work when
24 you can't do it yourself. There is no other way
25 around that. And if they know that there is

1 torture involved, they are no better than farming
2 out torture themselves.

3 I would like your comments on
4 that.

5 MS HALL: If Canadian officials
6 had any suspicions that Mr. Arar was being
7 tortured, any suspicions at all, it was incumbent
8 upon them to do everything they could to do one
9 thing: halt the torture, period, including asking
10 for a halt to the interrogations. Not necessarily
11 standing by while interrogations continued and
12 then reaping the benefits of that information, or
13 getting access to that information.

14 It strikes me as very serious,
15 very, very serious, based on how you have
16 presented these facts to us. And of course we
17 don't have access to --

18 MR. EDWARDH: You have to rely on
19 my presentation.

20 MS HALL: I have to rely on what
21 you are saying.

22 But the report where you
23 categorically state that there was a suspicion on
24 the part of Canadian officials that he might be
25 subject to torture or other ill-treatment, that

1 should have triggered a halt to interrogations or
2 a sole effort on the part of Canadian authorities
3 to stop them; not to liaise with security
4 officials, and in a manner that looked quite
5 collaborative for the interrogations not only to
6 continue but then for the Canadian government to
7 have access to that information.

8 MR. EDWARDH: Would you agree that
9 such conduct, assuming it took place, in fact
10 encourages the interrogation and detention of
11 Mr. Arar?

12 MS HALL: Such conduct, if it
13 occurs, would violate Canada's obligations under
14 the Convention Against Torture to halt and prevent
15 torture wherever there is a suspicion that it may
16 be occurring.

17 MR. EDWARDH: Would you go this
18 far: that in fact to ask for, on a repeated
19 basis, the products of the investigation, in fact
20 you encourage that investigation and therefore if
21 torture is part of it, you encourage the torture?

22 MS HALL: At the very least you
23 would not be discouraging it.

24 MR. EDWARDH: Those of us who
25 believe that.

1 I have one other question I would
2 just like to cover with you, and there may be an
3 objection because I am wearing two hats now
4 instead of just one.

5 On the public record, as in the
6 newspapers and public discussions that have gone
7 on around these issues involving Syria and
8 Mr. Arar and others, we have on the public record
9 information that at least two other Muslim men,
10 also of Canadian citizenship, one before Mr. Arar
11 and one after Mr. Arar, travelled to Syria, were
12 arrested in Syria, were detained by the Palestine
13 military branch of Syrian Military Intelligence,
14 and alleged they were interrogated with
15 information that could have come from -- that
16 probably only could have come from a Canadian
17 investigation.

18 Would that cause you concern and,
19 if so, what concern?

20 MS HALL: The obvious concern on
21 that straight fact pattern that there was
22 intelligence sharing between the intelligence
23 services of the Canadian government and the Syrian
24 government that led to an interrogation which
25 resulted in -- where information was extracted by

1 torture.

2 MR. EDWARDH: And then raises the
3 issue of whether there is a planned practice of
4 that kind?

5 MS HALL: It raises the issue of
6 whether the Canadian government is somehow
7 complicit, and I speak to you as a legal expert.

8 MR. EDWARDH: Of course.

9 MS HALL: Given Canada's
10 obligations under the CAT, the legal analysis goes
11 something like you share information that leads to
12 an interrogation, where information is extracted
13 by torture.

14 That's a direct violation
15 vis-à-vis complicity in an act of torture.

16 MR. EDWARDH: I think you have
17 answered the question. I don't have to take it
18 any further.

19 Do you have any comment?

20 MR. YALE-LOEHR: No, I don't.

21 MR. EDWARDH: Those are my
22 questions. Thank you very much Mr. Commissioner.

23 THE COMMISSIONER: Mr. Fothergill?

24 MR. FOTHERGILL: Commissioner,
25 partly as a result of Ms Edwardh's questioning, I

1 think I will be a little longer than previously
2 estimated. I am happy to begin now.

3 THE COMMISSIONER: How long do you
4 think you will be? I don't want to rush you.

5 MR. FOTHERGILL: It is always
6 difficult to estimate these things. I think I
7 will be at least an hour. I think we will still
8 finish comfortably today.

9 THE COMMISSIONER: Why don't we
10 start for a few moments now.

11 MR. FOTHERGILL: I will just take
12 a minute to set up, if that's all right.

13 THE COMMISSIONER: All right.

14 --- Pause

15 EXAMINATION

16 MR. FOTHERGILL: Just by way of
17 introduction, my name is Simon Fothergill, and I
18 represent the Government of Canada in these
19 proceedings.

20 My first questions will relate to
21 Exhibit P-121. This is Professor Yale-Loehr's
22 piece on Immigration Watchlists and Inspection
23 Procedures and the like. So I expect that my
24 questions in the first instance will be directed
25 primarily to you, sir, but obviously if Ms Hall

1 would like to add anything, I would welcome her
2 comments as well.

3 There is also a document I would
4 like to refer to in relation to my first question.
5 That's the removal order, what we understand to be
6 the removal order, which is Exhibit P-20.

7 I wonder if the Registrar could
8 provide that to you?

9 Do you have that in front of you?

10 MR. YALE-LOEHR: Yes, I do.

11 MR. FOTHERGILL: You were referred
12 earlier to page 3 of the typed transcription, and
13 that is the background description that includes
14 in the first paragraph, final line, the words:

15 "Upon secondary inspection it
16 was determined that Arar was
17 the subject of a TECS/NAILS
18 lookout as being a known
19 member of a terrorist
20 organization."

21 MR. YALE-LOEHR: Correct.

22 MR. FOTHERGILL: My first question
23 arising from that is: Based on what you know of
24 how these watchlists and the like operate, can we
25 infer anything from the fact that the TECS/NAILS

1 lookout was identified only after Mr. Arar had
2 already been referred to secondary inspection?

3 MR. YALE-LOEHR: No, I can't tell
4 that from this record, whether it was perhaps on
5 the initial screen that caught their attention at
6 primary inspection, or whether it was only
7 determined at secondary inspection. So I don't
8 know the answer to that question.

9 Am I answering your question?

10 MR. FOTHERGILL: Possibly. I am
11 not sure. Let me probe a little bit more.

12 As I read this, it would seem to
13 suggest that whatever caused him to be referred to
14 secondary inspection, it was not the existence of
15 a TECS or NAILS lookout; it must have been
16 something else. And it was only once he had
17 already been referred to secondary inspection that
18 the fact that he was the subject of a TECS/NAILS
19 lookout was identified.

20 MR. YALE-LOEHR: It is possible,
21 and that could be a logical inference. I just
22 can't tell from the exact nature of this language
23 as being drafted that it was only upon secondary
24 inspection. It may be that they had some
25 suspicion on primary inspection, but that the

1 final determination was made in secondary
2 inspection.

3 MR. FOTHERGILL: I think your
4 report tells us that TECS is, as you described it,
5 the mother of all databases, and one of the things
6 that it includes is the National Crime Information
7 Centre.

8 I am now at page 3 of your report,
9 the NCIC?

10 MR. YALE-LOEHR: Correct.

11 MR. FOTHERGILL: Which you
12 describe as:

13 "...a Federal Bureau of
14 Investigation (FBI) database
15 that contains comprehensive
16 information on 41 million
17 criminals and 2.5 million
18 suspected or known
19 terrorists."

20 MR. YALE-LOEHR: Correct.

21 MR. FOTHERGILL: If I could ask
22 you to turn to the Exhibit before P-20, that's
23 P-19 -- it is in the same book.

24 This, Professor, is the report of
25 an internal investigation that was done by the

1 RCMP into Mr. Arar's circumstances, and I would
2 like you to refer to page 67 of that report, which
3 lists a number of conclusions.

4 MR. YALE-LOEHR: Okay.

5 MR. FOTHERGILL: Can I ask you,
6 please, to refer to paragraph 5, that part of it
7 which we can read.

8 MR. YALE-LOEHR: Mm-hmm.

9 MR. FOTHERGILL: The legible text
10 reads:

11 "Additionally, there is
12 sufficient other
13 documentation about the
14 actions of both ..."

15 And the two entities that are
16 blacked out.

17 "... to conclude that Maher
18 Arar was, at the very least,
19 a person of interest to U.S.
20 authorities and they were
21 conducting their own
22 investigation with respect to
23 him."

24 MR. YALE-LOEHR: Mm-hmm.

25 MR. FOTHERGILL: Would you agree

1 with me it is reasonable then to infer that if in
2 fact Mr. Arar was of interest to United States law
3 enforcement authorities, that information could
4 appear in TECS independent of anything the
5 Canadian officials did?

6 MR. YALE-LOEHR: It could. We
7 don't know from this statement whether the fact
8 that he was a person of interest was based on
9 information that was originally put into TECS or
10 some other thing by U.S. authorities, or whether
11 it was perhaps put in initially by the RCMP,
12 passed on to TECS, and that made him of interest
13 to U.S. authorities.

14 So I can't tell from this sentence
15 what the initial motivation was or information
16 that caused U.S. authorities to be interested in
17 Mr. Arar.

18 MR. FOTHERGILL: All right. So
19 you can't tell us whether it is the result of the
20 actions of Canadian officials that Mr. Arar's name
21 showed up in TECS or the actions of U.S.
22 officials, or even a combination of the two;
23 correct?

24 MR. YALE-LOEHR: I cannot tell
25 from this sentence.

1 MR. FOTHERGILL: All right. TECS,
2 I understand, can be read by some 30,000 front
3 line immigration inspectors.

4 Is that correct?

5 MR. YALE-LOEHR: Correct.

6 MR. FOTHERGILL: Would I be right,
7 then, in thinking that the information one finds
8 in TECS is of a very rudimentary and non-sensitive
9 nature?

10 MR. YALE-LOEHR: I don't know the
11 answer to that question since I have not been an
12 immigration inspector myself.

13 I think that the information on
14 the screen that the primary inspector sees could
15 say something like suspected terrorist. If your
16 question is how much detail does the primary
17 screen go into, I suspect that because of screen
18 size limitations they can't go into detail as to
19 the source of that information or what their
20 details is. That would be primarily a reason why
21 then a person would be sent to secondary
22 inspections because the immigration authorities
23 are trying to get through the mass of people who
24 do qualify for entry, and those for which they
25 have more questioning are sent to secondary

1 inspection.

2 MR. FOTHERGILL: You did
3 anticipate my next question, and I appreciate your
4 explaining that you have never actually see a TECS
5 screen when a check is run.

6 I was wondering if you could help
7 us at all in telling us what a front line
8 immigration inspector could reasonably learn from
9 a TECS match. So you think it might identify the
10 nature of the investigative interest, for example,
11 or can you tell us?

12 MR. YALE-LOEHR: I am only
13 speculating here. I would suspect that -- it
14 could be one of two things.

15 It could be code, such that it is
16 tied to the Immigration and Nationality Act, such
17 as inadmissible under INA section 212(a)(3). To
18 us who know the Immigration and Nationality Act,
19 that's an immediate reference to someone who is a
20 terror suspect.

21 It could be a narrative such as:
22 "This person is a suspected terrorist; send him to
23 secondary inspection."

24 MR. FOTHERGILL: But you wouldn't
25 expect to see a detailed narrative with classified

1 or sensitive information in the TECS screen?

2 MR. YALE-LOEHR: Not on the first
3 screen, the one that the primary inspectors see.

4 MR. FOTHERGILL: My next set of
5 questions I think will probably be directed to
6 Ms Hall in the main, but again, Professor
7 Yale-Loehr, if you wish to comment, please feel
8 free.

9 And it relates to the issue of
10 rendition and extraordinary rendition and
11 generally what was known in the public domain
12 about this phenomenon, both before and after
13 September 11th, 2001.

14 If I understood your evidence
15 correctly, rendition is addressed in some form in
16 a Presidential directive that was issued under the
17 first Bush administration in 1988; correct?

18 MS HALL: That's correct.

19 MR. FOTHERGILL: But we don't know
20 precisely what it provides because it remains
21 classified to this day?

22 MS HALL: That's correct.

23 MR. FOTHERGILL: Would you agree
24 with me that one example of a practical
25 application of the policy around that time would

1 be the Noriega case, where Mr. Noriega was
2 abducted in South America and then brought back to
3 the United States to face trial?

4 MS HALL: It is possible that that
5 case falls within the ambit of that directive.

6 MR. FOTHERGILL: And that is, I
7 suggest to you, probably one of the better-known
8 cases that we have of what we might call
9 extraordinary rendition, rendition without the
10 benefit of legal process?

11 MS HALL: I am not qualified to
12 comment on the Noriega case, I am afraid. I would
13 not be able to say whether that was what
14 contemplated by the PDD issued at that time, or
15 whether in fact it did clearly fall within the
16 ambit of the directive. I am sorry.

17 MR. FOTHERGILL: But would you
18 agree with me that in terms of the popular
19 imagination, if I can put it that way, the Noriega
20 case often comes to mind when people speak in
21 terms of extraordinary rendition?

22 MS HALL: I cannot answer the
23 question.

24 MR. FOTHERGILL: No? All right.
25 The next directive we have is from

1 the Clinton era, which is not classified, and I
2 think you explained that the emphasis there was on
3 apprehending people and facilitating their return
4 to the United States to be prosecuted in the
5 United States.

6 Is that correct?

7 MS HALL: That is correct.

8 MR. FOTHERGILL: Perhaps you won't
9 be able to help us with this, but I gather there
10 was an individual named Alvarez who was a Mexican
11 national?

12 MS HALL: That's correct.

13 MR. FOTHERGILL: Do you feel
14 comfortable talking about that, and whether that
15 would be an example of extraordinary rendition?

16 MS HALL: I am familiar with the
17 Alvarez-Machain case. I am not an expert on the
18 case. You can ask your question and I will do my
19 best.

20 MR. FOTHERGILL: It is really the
21 same question. Would you agree with me that that
22 is probably one of the better known examples of
23 extraordinary rendition from that era? I gather
24 it took place in the late 1990s?

25 MS HALL: Being more familiar with

1 that case, I would say that yes.

2 MR. FOTHERGILL: And again, that
3 is a case where someone is apprehended outside the
4 United States and brought back to the United
5 States to face trial in that country?

6 MS HALL: That's correct.

7 MR. FOTHERGILL: We then come to
8 the post-September 11th 2001 era, where there is
9 another directive but again it is classified.

10 Is that right?

11 MS HALL: That's correct.

12 MR. FOTHERGILL: And I think the
13 next thing you have referred to was articles that
14 began appearing in the press that suggested that
15 perhaps the U.S. clandestine rendition program was
16 starting to expand or change.

17 Is that right?

18 MS HALL: I believe I referred to
19 the Peter Finn articles in the Washington Post.

20 MR. FOTHERGILL: Through the
21 wonder of modern technology in the lunch break I
22 tried to find that article, and I have to say I
23 was unsuccessful.

24 One thing I might ask, perhaps
25 through you, sir, is if we could perhaps be

1 provided with the December 2001 article from Peter
2 Finn.

3 What I do have is a March 11th
4 article that appeared in the Washington Post where
5 Peter Finn is one of two authors.

6 MS HALL: Yes. I apologize. I
7 referred to the fact that they reference the
8 December 2001 renditions of the Egyptians from
9 Stockholm to Cairo.

10 MR. FOTHERGILL: I understand.

11 MS HALL: The dates of the
12 articles -- and that occurred in December 2001. I
13 may have misspoken.

14 The article dates are 11 March
15 2002 and 29 January 2002.

16 MR. FOTHERGILL: In that case,
17 sir, if you permit me -- and I know my friends
18 have not had notice of this. But as I said, we
19 tried to find the article in the lunch break. I
20 do have copies.

21 THE COMMISSIONER: Sure, go ahead.

22 MR. FOTHERGILL: If we could
23 distribute it, it might be useful for us to
24 discuss it.

25 THE COMMISSIONER: By all means.

1 That will be 122.

2 EXHIBIT NO. P-122: Newspaper
3 article dated March 11, 2002,
4 by Peter Finn

5 MR. FOTHERGILL: I wonder,
6 Ms Hall, if you could take a moment to glance
7 through the text there and tell us if this appears
8 to be the article you were referring to?

9 MS HALL: Which of the two
10 articles by Peter Finn?

11 MR. FOTHERGILL: I must confess I
12 thought I distributed only one.

13 MS HALL: I have two in front of
14 me, so I apologize. Which date are you referring
15 to?

16 MR. FOTHERGILL: This is dated
17 March 11th, 2002.

18 MS HALL: Okay.

19 MR. FOTHERGILL: The passage I
20 would particularly like to refer to is on page 3
21 of this Internet copy.

22 Ms Hall, is the article familiar
23 to you?

24 MS HALL: I haven't read it in a
25 bit, but I am happy to have you --

1 MR. FOTHERGILL: Perhaps I can
2 refer you to a paragraph and then you can tell us
3 if this is what you had in mind.

4 MS HALL: Certainly.

5 MR. FOTHERGILL: Page 3 of the
6 article, the first full paragraph reads as
7 follows:

8 "U.S. involvement in seizing
9 terrorism suspects in third
10 countries and shipping them
11 with few or no legal
12 proceedings to the United
13 States or other countries,
14 known as rendition, is not
15 new. In recent U.S. agents
16 working with Egyptian
17 intelligence and local
18 authorities in Africa,
19 Central Asia and the Balkans
20 have sent dozens of suspected
21 Islamic Extremists to Cairo
22 or taken them to the United
23 States, according to U.S.
24 officials, Egyptian lawyers
25 and human rights groups.

1 U.S. authorities are urging
2 Pakistan to take the same
3 step with the chief suspect
4 in the kidnapping and killing
5 of Wall Street Journal
6 reporter Daniel Pearl."

7 The point that I would make,
8 reading this article, is that even on this account
9 of the state of rendition, or extraordinary
10 rendition, in the months following September 11th,
11 2001, what has been described is that the U.S. is
12 involved in seizing terrorism suspects in third
13 countries and then shipping them either back to
14 the United States, which is the version that we
15 discussed earlier, or possibly to other countries,
16 again outside the United States.

17 But what this article doesn't
18 describe is any instance where somebody is
19 apprehended in the United States and then removed
20 from the United States to a third country where
21 arguably more robust interrogation practices can
22 be used.

23 MS HALL: That's correct.

24 MR. FOTHERGILL: And in fact am I
25 right in understanding that Mr. Arar's case is the

1 only case we know of to this day where somebody
2 was apprehended in the United States and then sent
3 to a country with a contentious human rights
4 record for further questioning?

5 MS HALL: I believe what Professor
6 Yale-Loehr said was it is the only 235(c)
7 expedited removal proceedings based on national
8 security guards.

9 MR. FOTHERGILL: Yes. I recall
10 him saying that but I am actually broadening the
11 question. Are there cases that you are aware
12 of -- and maybe we should break this down
13 chronologically.

14 Before the case of Mr. Arar, are
15 you aware of any case where an individual is
16 apprehended within the United States and moved to
17 a third country such as the Middle East for
18 further questioning?

19 MS HALL: I am not, for the
20 express -- just to clarify -- for the express
21 purpose of interrogation overseas.

22 MR. FOTHERGILL: Exactly. I am
23 situating this in what you described to us as what
24 is generally understood as either rendition or
25 extraordinary rendition or indeed deportation to

1 face torture.

2 MS HALL: Right.

3 MR. FOTHERGILL: I am looking for
4 another example somehow comparable to Mr. Arar
5 before Mr. Arar's case, and I take it you are
6 telling us that you can't think of one?

7 MS HALL: I do not personally know
8 of one.

9 MR. FOTHERGILL: And Professor
10 Yale-Loehr?

11 MR. YALE-LOEHR: No. But you are
12 never going to find another case with the exact
13 same facts. I think Ms Hall's testimony was
14 clear: that the practice of rendition was
15 relatively well-known, and I think that that fact
16 is more important than whether the precise facts
17 of Mr. Arar had ever arisen before.

18 MR. FOTHERGILL: Well, I think I
19 have to politely disagree with you about that. It
20 is one thing to say the practice of rendition is
21 well-known, but I would suggest it is another
22 thing to suggest that something like what happened
23 to Mr. Arar was reasonably foreseeable given that
24 he was detained in the United States and moved to
25 another country for further interrogation.

1 I am suggesting that there was no
2 precedent for that.

3 MR. YALE-LOEHR: There was no
4 factual precedent for that, you are correct, as
5 far as I know.

6 But I guess I am not a big fan of
7 the United States to think that because the United
8 States had done that in third countries, that they
9 for some reason would not do it merely because
10 someone happened to be on U.S. soil and they
11 wanted to render them.

12 MS HALL: I would refer you again
13 to my opening statement where I list a set of
14 common features that cross all of the renditions
15 cases that we have researched, and where we place
16 Mr. Arar's case squarely within that group of
17 cases.

18 The common features are things
19 like being labelled a terrorist, being sent back
20 to a country where torture abuses are routinely
21 employed, not having access to adequate process to
22 challenge the transfer, being sent back and
23 subsequently -- excuse me -- based on diplomatic
24 assurances, et cetera.

25 If you look at the common features

1 that I lay out in my opening statement and apply
2 them in this context, then Mr. Arar's case, it
3 would seem to me, would definitely be foreseeable.
4 The only difference that you are pointing out to
5 us is the fact that Mr. Arar was on U.S.
6 territory.

7 But it is very important for you
8 to note and for all of us to note that Mr. Arar
9 was not admitted to U.S. territory. Therefore, he
10 was not technically within the jurisdiction of the
11 United States at the time that he was rendered.
12 He was ruled inadmissible.

13 So in some ways that places him
14 much more closely to the group of renditions that
15 you are talking about than you seemed to be
16 indicating at the beginning of your question.

17 MR. FOTHERGILL: When did Human
18 Rights Watch first identify this phenomenon as a
19 subject of concern that perhaps should attract
20 greater scrutiny?

21 MS HALL: Amnesty International,
22 if I remember correctly, issued an urgent action
23 on behalf of Ahmed Agiza and Muhammad El-Zari
24 sometime late in 2001, and that was the first time
25 that it came to our attention.

1 MR. FOTHERGILL: At Human Rights
2 Watch?

3 MS HALL: No. Amnesty
4 International, with whom we work very, very
5 closely, issued the urgent action on behalf of
6 these two men and that was the first time that it
7 came to our attention.

8 We began working on those cases in
9 2002, began to actively monitor the progress of
10 what was happening in those cases and had our
11 first meeting with Swedish officials in 2003.

12 MR. FOTHERGILL: When was it that
13 Human Rights Watch published anything that would
14 be of wide circulation cautioning the
15 international community about these possible
16 practices on the part of the United States?

17 MS HALL: I would need to go back
18 to documents within our U.S. file because we
19 clearly referenced renditions in some of our
20 earliest counterterrorism work. And I apologize,
21 I don't have an exact date for you right now.

22 The first reports that we began to
23 put out on this practice, or press releases that
24 we began to put out on this practice, began in
25 2003, exactly at the time that Mr. Arar was being

1 released from custody.

2 MR. FOTHERGILL: Yes.

3 MS HALL: That would be the first
4 time that we put anything out specifically on his
5 case. However, we referred to the phenomenon of
6 renditions and transfers to risk of torture in
7 prior documents.

8 And I apologize that I don't have
9 the U.S. file with me to give you dates. I can
10 submit that information to the Commission after
11 the testimony.

12 MR. FOTHERGILL: Really the point
13 that I am asking you to agree with, and I detect
14 some reluctance, but that the kind of thing that
15 happened to Mr. Arar was not a widespread
16 phenomenon before it happened to Mr. Arar.

17 MS HALL: Actually our suspicion
18 is that it was a widespread phenomenon at that
19 time. Whether or not certain actors, say the
20 public, had access to that information, is the
21 question I believe that you are asking me.

22 MR. FOTHERGILL: That is correct,
23 yes.

24 MS HALL: I believe that if groups
25 like Amnesty International and journalists like

1 Peter Finn and others had access to information
2 about this practice, that had the set of common
3 features which I laid out in my opening statement,
4 and it was on Human Rights Watch's screen, it
5 strikes me as odd that it would not be on the
6 official screens of governments all around the
7 world.

8 MR. FOTHERGILL: Despite the fact
9 that what Peter Finn identifies is this rendition
10 from one third country to another as opposed to a
11 removal from the United States, a deportation to
12 torture.

13 MS HALL: On the specific issue of
14 removal proceeding in the U.S. courts, that is
15 correct.

16 MR. FOTHERGILL: Ms Edwardh took
17 you through some features of Mr. Arar's detention
18 in New York that, in her view, raised the index of
19 suspicion, was the term she used. I think you
20 used the term "red flags".

21 I would like to perhaps relate to
22 you some of the things that might fall on the
23 other side of the ledger, that might have caused
24 Canadian consular officials to think that this
25 probably would unfold in the normal way, and when

1 I say "the normal way", I mean with the result
2 that Mr. Arar would ultimately be deported to
3 Canada.

4 He was -- I think our evidence is
5 clear -- reported missing by his family, first of
6 all, on September 29th and the U.S. acknowledged
7 his detention by October 1st. So the United
8 States was prepared to acknowledge that indeed
9 they did have Mr. Arar in detention.

10 Next, a consular visit was
11 arranged on October 3rd. So there was no denial
12 of consular access. We can certainly argue about
13 whether it was as timely as one would like, but
14 the United States was quite prepared to grant
15 Canada consular assistance to this individual.

16 Next, he was able to retain
17 counsel, or certainly to take steps to retain
18 counsel. I understand there is a dispute on the
19 part of counsel whether she was ultimately
20 formally retained or not, but he was able to take
21 steps to retain counsel. That was not denied to
22 him.

23 Funds could be provided to him to
24 help him address certain personal needs while he
25 was in detention.

1 You have heard about the 9th floor
2 of the MDC and two other cases that Canadian
3 consular officials had experience with, both of
4 whom ended up being removed to Canada after
5 several months.

6 So the understanding on the part
7 of consular officials was that MDC was not
8 generally used for deportation cases but more for
9 security cases where detention would be pending
10 FBI investigation, and at least, in the case of
11 the two dual nationals that Canada had dealt with
12 previously, both of them ended up in Canada.

13 MR. YALE-LOEHR: Can I just ask a
14 point of clarification?

15 Were those two other individuals
16 deported back to Canada before October of 2002 or
17 after?

18 MR. FOTHERGILL: I believe it is
19 before.

20 MR. YALE-LOEHR: Okay.

21 MR. FOTHERGILL: Finally, that the
22 lawyer was contacted to attend some kind of -- I
23 hesitate to use the word hearing. It seems to be
24 more in the nature of an interview; but that there
25 was some kind of legal process underway when

1 unexpectedly, from the point of view of Canadian
2 officials, Mr. Arar was moved to Syria.

3 And I am wondering if that perhaps
4 will allow you to conclude that perhaps the
5 situation wasn't as clear as Ms Edwardh makes it
6 out to be; that the red flags may have been raised
7 but the green flags equally were being raised in
8 several instances, indicating that this was not an
9 exceptional case.

10 MR. YALE-LOEHR: Those facts to me
11 indicate that a process was going forward, that
12 there was some kind of determination that was
13 going to be made about Mr. Arar, but they do not
14 to me indicate either way where he was going to be
15 removed to.

16 I don't see anything from the
17 facts you outlined to me that I could tell from
18 those facts that he was going to end up back in
19 Canada as opposed to Syria.

20 MR. FOTHERGILL: Now there are at
21 least two other possible destinations where
22 Mr. Arar could have gone, are there not?

23 The first one, which I think was
24 quite summarily dismissed, was Guantanamo Bay.
25 But am I right in thinking that Guantanamo Bay

1 does not only hold individuals who have been
2 detained in Afghanistan, but also holds
3 individuals who were detained in Indonesia and
4 Pakistan and, I am told, although I haven't been
5 given a name, even a case of a United States
6 citizen who was detained in the Chicago area on
7 suspicion of making a dirty bomb?

8 These people also ended up in
9 Guantanamo Bay?

10 MS HALL: I am not an expert on
11 detentions at Guantanamo Bay. I think what is
12 crucial about Guantanamo Bay is that all of the
13 people who are detained there have been labeled as
14 enemy combatants and have disappeared into this
15 so-called legal black hole.

16 Again, that enemy combatant label
17 specifically derives from provisions in
18 international humanitarian law.

19 Mr. Arar's case clearly did not
20 fall within the ambit of international
21 humanitarian law. Nobody has ever argued that.
22 If that is in the facts that you have gathered at
23 your hearings, I have no knowledge of that. I
24 have never heard that before.

25 It would strike me as extremely

1 odd for that body of law to govern in any way
2 whether or not a foreigner was admissible to the
3 United States under Mr. Arar's circumstances. In
4 the same way that you say you have never heard of
5 a case of removal from expedited -- we have not
6 heard of an expedited removal procedure ending in
7 a transfer to Guantanamo Bay.

8 MR. FOTHERGILL: No, but as we
9 have made it clear from a number of different
10 perspectives now, Mr. Arar's case was not usual.

11 MS HALL: Mr. Arar's case ...

12 MR. FOTHERGILL: Mr. Arar's case
13 was not usual.

14 MS HALL: In some aspects aren't
15 you making the argument for us? If you say that
16 Mr. Arar's case is not usual, then why would all
17 the normal rules apply in terms of what your
18 consular officials believed?

19 MR. FOTHERGILL: Granted. But
20 what's interesting is that it seems that,
21 depending on which issue we are talking about,
22 somebody is arguing for something being usual and
23 somebody is arguing for something not being usual.
24 Really, what it comes down to is that the
25 situation is not clear.

1 I am not suggesting to you that
2 Guantanamo Bay was likely, but I am suggesting it
3 was a possibility in addition to Canada or Syria.

4 MS HALL: I actually would reject
5 the idea that Guantanamo Bay was a possibility.
6 The examples that I brought up with respect to
7 Guantanamo Bay related specifically to accessing
8 assurances to render them back to their home or
9 other third countries. It was not in any way to
10 indicate that I thought that that was a
11 possibility for a transfer for Mr. Arar.

12 MR. YALE-LOEHR: To add to that,
13 again I am not an expert on Guantanamo Bay either,
14 I don't know much about the Jose Padilla case,
15 which is the case that you are referring to of a
16 U.S. citizen who tried to enter at O'Hare and then
17 was taken to Guantanamo Bay.

18 But I don't know of any procedure
19 that was involved. I think he was sent directly
20 to Guantanamo Bay. By contrast here, Mr. Arar was
21 in some kind of immigration proceeding.

22 MR. FOTHERGILL: All right. And
23 what about Zurich?

24 MR. YALE-LOEHR: Zurich? As I say
25 in my report on page 12, normally if people come

1 into the United States and they are placed in
2 normal removal proceedings, and they are
3 determined to be removable, they are sent back to
4 the country from which they came, in which case
5 that would be Zurich.

6 However, Mr. Arar was not in
7 normal removal proceedings. He was in expedited
8 removal proceedings and therefore the normal
9 procedures did not apply.

10 And I say in my point here on page
11 12 that if you are not put in normal removal
12 proceedings, then the individual may designate one
13 country to which they want to return.

14 So since he did not designate
15 Zurich, I presume that was not a possibility given
16 the procedural stature of his case.

17 MR. FOTHERGILL: But you will
18 agree with me that the normal removal procedure
19 would see Mr. Arar returned to Zurich,
20 Switzerland, his last point of departure, as
21 opposed to either Canada or Syria.

22 MR. YALE-LOEHR: Under the normal
23 procedure no, he wouldn't go back to Zurich,
24 because he is a citizen of either Canada or Syria.
25 Normally you send people back to their home

1 country. The fact that the regulations say you
2 may go back to the country from which you came is
3 based on the assumption that you usually come from
4 the country of which you are a citizen.

5 MR. FOTHERGILL: Right, or one of
6 the four criteria are met.

7 MR. YALE-LOEHR: Correct.

8 MR. FOTHERGILL: The fourth one
9 being that it is considered -- let me try to use
10 the correct language. It is considered
11 prejudicial to the interests of the United States.

12 MR. YALE-LOEHR: Correct.

13 MR. FOTHERGILL: To send the
14 individual to a country which he has designated.

15 I am not sure that Switzerland
16 would help much, but that would be another option.

17 MR. YALE-LOEHR: Theoretically,
18 yes.

19 MR. FOTHERGILL: I am about to
20 move to another subject. We could break now
21 perhaps.

22 THE COMMISSIONER: All right. We
23 will take a break.

24 Why don't we break for just ten
25 minutes.

1 --- Upon recessing at 3:38 p.m. /

2 Suspension à 15 h 38

3 --- Upon resuming at 3:53 p.m. /

4 Reprise à 15 h 53

5 THE REGISTRAR: Please be seated.

6 Veuillez-vous asseoir.

7 THE COMMISSIONER:

8 Mr. Fothergill...?

9 MR. FOTHERGILL: Commissioner, I
10 understand that Ms Hall has some additional
11 comments she would like to make in relation to the
12 matter we were just discussing so I would like to
13 give her that opportunity.

14 THE COMMISSIONER: Certainly.

15 MS HALL: I would just like to
16 take off on Professor Yale-Loehr's point that what
17 you described when you were talking about the
18 so-called green flags appeared to be very
19 process-oriented. But what I was talking about in
20 terms of red flags are things that are
21 counter-intuitive in terms of ordinary process,
22 that mean that somehow there is an interruption in
23 what is normal.

24 I would point specifically,
25 at this point, to two specific things that have

1 been made known to us through the course of our
2 testimony.

3 One is the fact that an INS
4 official expressly conveyed to a Canadian consular
5 official that this case was not normal, that it
6 was, in fact, exceptional, so exceptional that the
7 Ambassador -- it should come within the auspices
8 of the Ambassador.

9 That is really extraordinary, and
10 I think that that is something quite different
11 than was the normal process being followed and a
12 significant red flag.

13 The second thing is the call to
14 the RCMP asking questions about admissibility back
15 to Canada. This is counter to normal process in
16 the most profound way.

17 He is a Canadian citizen. It
18 was obviously known to the United States
19 government that he would be admissible to his own
20 country. But then to say, "If you admit him will
21 you arrest him and detain him and then charge
22 him," and in the absence -- I mean, implicit in
23 the question is: If you say no, then what then
24 can we do? What are the alternatives to what we
25 are asking you?

1 So I have to be quite honest with
2 you, I do think that the red flags tip this in
3 favour of extra caution and a should have known or
4 should have suspected mentality on the part of
5 Canadian consular officials.

6 MR. FOTHERGILL: We risk,
7 Commissioner, descending into argument here, but I
8 think that one point that perhaps could be made in
9 relation to the first fact that you draw attention
10 to, the seriousness of the case, is at this time
11 Mr. Arar did not yet have legal counsel. Of
12 course one of the primary goals of consular
13 officials is to ensure that the individual
14 receives legal representation so that that
15 individual can be properly defended under the laws
16 of the country where that individual is detained.

17 So while it is quite possibly true
18 to say that red flags went up early from the point
19 of view of a consular official when a right of
20 consular access is given and then subsequently the
21 individual is able to retain locally trained legal
22 expertise, then the flag starts to go down a
23 little bit?

24 MS HALL: At the risk of arguing,
25 I would say that the INS official did not say,

1 "Man, this guy needs a lawyer." The INS official
2 said "Man, this guy needs your Ambassador," at a
3 very high level because the case is so serious.

4 MR. FOTHERGILL: Granted.

5 Can you remind me of the other
6 point that you wanted to emphasize?

7 MS HALL: The call to the RCMP
8 about admissibility to Canada.

9 MR. FOTHERGILL: That's right.

10 One possible interpretation is --
11 maybe you can help us here -- is it not common
12 practice when a country is delivering an
13 individual to a second country to determine
14 whether there are any outstanding warrants, or the
15 like, in relation to that person, such that the
16 individual should be delivered not just to the
17 border but actually into the custody of the
18 receiving State?

19 Is that not a common practice?

20 MS HALL: I believe that that
21 information -- what is curious to me about this
22 is -- I would like to be reminded of the date of
23 the phone call, however.

24 MR. FOTHERGILL: I believe it is
25 October 5th.

1 MS HALL: October 5th.

2 October 5th.

3 It seems pretty late in the game
4 to determine whether or not an outstanding arrest
5 warrant had been issued by the Canadian
6 authorities for this man. He had already been in
7 detention a total of 5-10 days.

8 There were opportunities within
9 those 10 days for that information to be exchanged
10 much before October 5th. It strikes me as quite
11 odd that that late in the game a piece of
12 information that would have been essential in
13 terms of sending him back to Canada, an
14 outstanding arrest warrant, which often, as well,
15 is accompanied by an extradition request by the
16 way --

17 MR. FOTHERGILL: Absolutely.

18 MS HALL: -- it strikes me as odd
19 that that information would have come into play so
20 late in the game.

21 MR. FOTHERGILL: But it needn't be
22 as formal as an outstanding arrest warrant. What
23 I am suggesting is that if a State such as the
24 United States is going to return somebody to
25 Canada, and particularly if the United States

1 understands that this individual has been, or
2 indeed is presently, of interest to law
3 enforcement authorities in Canada, it strikes me
4 as a reasonable courtesy to say, "Do you intend to
5 charge this individual? Because, if so, we will
6 deliver him into your custody as opposed to simply
7 putting him on the next plane up to Canada"?

8 Is that not a reasonable
9 inference and consistent with your understanding
10 of how these kinds of communications proceed in
11 actual rendition -- and I use that in the normal
12 sense -- transfer of one person from one country
13 to another?

14 MS HALL: I'm sorry, would you
15 repeat what you just said? I was unfortunately
16 distracted. I can hear the interpreter.

17 MR. FOTHERGILL: It is not a
18 problem.

19 I'm wondering whether from your
20 experience it is common when an individual is to
21 be transferred from one jurisdiction to another to
22 inquire whether the jurisdiction wishes to have
23 that individual delivered into custody as opposed
24 to merely taken to the border and let free?

25 MS HALL: In the rendition cases

1 we have studied, we have virtually no cases where
2 somebody would be taken to a border and let free.
3 The whole idea is that they would be immediately
4 taken into custody, either for the purpose of
5 warehousing, as I suggested before, or
6 interrogation.

7 MR. FOTHERGILL: But in terms of
8 transfer of people from the United States to
9 Canada, which I expect is not an uncommon
10 occurrence, they would not ordinarily be delivered
11 into the custody of Canadian officials unless
12 Canadian officials indicated an intention to
13 charge or detain them?

14 MS HALL: As I stated before, it
15 would occur to me that within the first 10 days of
16 detention that that information would have been
17 well-known.

18 MR. FOTHERGILL: Let me move to
19 another subject, which is the Agiza case. I
20 think, Ms Hall, you suggested there were some
21 parallels with the case of Mr. Arar.

22 I wonder if you will agree with
23 me that there are also some quite noteworthy
24 differences.

25 First of all, Mr. Agiza makes his

1 complaint in June 2003 and we receive the decision
2 finally in May of 2005.

3 Correct?

4 MS HALL: Yes.

5 MR. FOTHERGILL: So insofar as
6 these circumstances might provide some kind of
7 warning to anybody, it comes too late in the day
8 to really assist in Canadian officials'
9 understanding of what was happening to Mr. Arar at
10 the time, unless of course they were devoted
11 readers of the Washington Post?

12 MS HALL: Point taken.

13 MR. FOTHERGILL: But turning to
14 the substance, the Swedish authorities knew he was
15 going to Egypt and surely that is of critical
16 significance?

17 MS HALL: The Swedish authorities
18 knew he was going to Egypt based on assurances
19 that they themselves brokered.

20 MR. FOTHERGILL: Yes.

21 MS HALL: They did not know the
22 extent of the U.S. involvement.

23 What is crucial in terms of the
24 U.S. involvement is that there was never any --
25 that what the CAT criticized the Swedes for was

1 subordinates to the United States, utter deference
2 to the United States, no halting of what was
3 essentially a transfer to risk of torture.

4 That is where I draw the parallel
5 with these cases. Deference -- I would argue that
6 those are the parallels that make the difference
7 vis-à-vis the human rights violation at hand.

8 MR. FOTHERGILL: But if this was
9 to be a true parallel, presumably Canadian
10 officials would need to know that Mr. Arar was
11 going to be removed to Syria and would have to
12 acquiesce and would have to place reliance on
13 assurances that perhaps they ought not to?

14 MS HALL: Or just simply have
15 chosen not to act --

16 MR. FOTHERGILL: Yes.

17 MS HALL: -- in any way so that the
18 utter deference principle would have operated in
19 these circumstances as well.

20 But going back to our prior
21 discussion, I think the concern about whether
22 Canadian officials did know or should have known
23 or should have suspected still comes into play
24 here. The Swedish officials should have known
25 when U.S. authorities offered a plane and showed

1 up at the airport with a cadre of U.S. operatives
2 that something was wrong. Now, that perhaps
3 was -- that was their big red flag.

4 The key is: What was the
5 obligation of the State at that point? The
6 obligation at that point, according to the CAT,
7 was that the Swedes should have made every effort,
8 given that red flag, to halt the transfer.

9 That is where I see the parallel
10 with Canada. We don't have evidence that Canada
11 made every effort at the highest level, screaming
12 as loud as it could, to ensure that this man was
13 sent back to Canada.

14 MR. FOTHERGILL: But you are, if
15 you will forgive my saying so, assuming a
16 fundamental fact which is in issue, and that is
17 whether in fact Canadian officials knew, or
18 reasonably ought to have known, that he was going
19 to be deported to Syria. By contrast, in the
20 Swedish example, they knew full well that the
21 individual was being removed to Egypt.

22 MS HALL: That is correct.

23 MR. FOTHERGILL: I want to talk to
24 you a little bit about consular matters and the
25 manner in which consular assistance is provided.

1 I take it that you are not,
2 properly speaking, an expert in offering consular
3 services in countries with poor human rights
4 records, either of you?

5 MR. YALE-LOEHR: No.

6 MS HALL: Neither of us.

7 MR. FOTHERGILL: I don't mean that
8 as a facetious question. I understand that you
9 both have experience in international relations.

10 But you will agree with me that
11 extending consular services in difficult country
12 conditions is something of an art form, where an
13 intimate knowledge of how the country operates and
14 what is a reasonable risk to take in trying to
15 offer consular services, these are all areas of
16 expertise in their own right, are they not?

17 MS HALL: They are in fact, but I
18 would posit that the practice of diplomacy, the
19 practice of offering consular protection, is
20 juxtaposed with the absolute obligation to ensure
21 that acts of torture do not occur. One I
22 understand to be more discretionary and be very
23 practice-based, but the other is an absolute
24 obligation incumbent on every State actor to
25 ensure it does not occur, and therefore, in the

1 conduct of consular visits, in the conduct of
2 consular protection, in the conduct of the art
3 form of consular protection, protection against
4 torture should be privileged over diplomacy, over
5 form. Substance comes prior to form in this
6 particular dynamic.

7 MR. FOTHERGILL: I don't argue
8 with you about the legal principle. It is a
9 question of how it is best implemented, given a
10 set of sometimes very difficult circumstances.

11 My friend Ms Edwardh alluded to
12 the fate of two other people, two other Canadians
13 who had been detained in Syria around the same
14 time as Mr. Arar. There was no consular access
15 given to those people whatsoever. Syria quite
16 simply denied consular access.

17 So when consular access was
18 afforded to Mr. Arar consular officials considered
19 this to be a significant breakthrough. Whatever
20 international law may have to say about the right
21 of consular access, the truth of the matter is
22 that Syria did not feel itself under an obligation
23 to extend a right of consular access to Mr. Arar.
24 So this was a very precious achievement that the
25 consular official did not want to rupture.

1 I'm suggesting to you that really
2 the only person who can explain the decisions that
3 were made, for example whether it would have been
4 prudent to seek a confidential visit or not, is
5 the consular official or the Ambassador who had
6 that decision to make.

7 Would you agree with that?

8 MS HALL: To some extent I'm
9 curious about the notion of to what purpose the
10 precious achievement.

11 My understanding of the
12 achievement was to provide protection to a
13 national of your country. If that protection
14 could not be provided via the form that this
15 interaction took, then doesn't that somehow
16 undermine the whole enterprise?

17 MR. FOTHERGILL: I think
18 ultimately one might be faced with a difficult
19 choice between imperfect consular access and no
20 access at all, but presumably we live in an
21 imperfect world, and consular officials, being the
22 subject matter experts, would be in the best place
23 to explain why it was they chose, for example, not
24 to seek a confidential visit?

25 MS HALL: But from my perspective

1 as a human rights lawyer, the end-game was the
2 same: Mr. Arar was subject to torture. The
3 consular visits did not make the difference.
4 Therefore, if they could not provide the
5 protection, what is the difference between no
6 consular visits and consular visits when the
7 outcome was an Article 3 violation?

8 MR. FOTHERGILL: Again, I don't
9 want to descend into argument, and I think I will
10 leave that subject, but all I will note at the
11 moment is we haven't heard from the Ambassador and
12 he may have another perspective to offer.

13 MS HALL: Noted.

14 MR. FOTHERGILL: I would like to
15 move, then, to the burden of proof for the
16 Convention Against Torture. I think this is a
17 subject area that I can discuss equally with both
18 of you.

19 I distributed to Ms Edwardh and
20 Mr. Cavalluzzo before lunch a relatively recent
21 decision of our Federal Court of Appeal. I don't
22 know if they mentioned this to you, but I would
23 like to take a moment to discuss with you the
24 Canadian understanding of the burden of proof.

25 I wonder if I could ask the

1 Registrar to distribute copies of this case to
2 those who may want it.

3 --- Pause

4 THE COMMISSIONER: Shall we mark
5 that, Mr. Fothergill?

6 MR. FOTHERGILL: It is a case, so
7 I'm not sure it would ordinarily be marked.

8 THE COMMISSIONER: It seems odd to
9 mark it, but I'm happy to do it.

10 MR. FOTHERGILL: I'm content for
11 it not to be marked, although I know we have done
12 it in the past.

13 THE COMMISSIONER: We have.

14 MR. FOTHERGILL: Fair enough.
15 Perhaps we should.

16 THE COMMISSIONER: 123.

17 EXHIBIT NO. P-123: Federal
18 Court of Appeal case between
19 Yi Mei Li, appellant, and The
20 Minister of Citizenship and
21 Immigration, respondent,
22 heard November 30, 2004

23 MR. FOTHERGILL: Perhaps if we can
24 just turn to page 4 of this decision, you will see
25 on paragraph 17 the excerpt from the operative

1 article, Article 3 of the Convention Against
2 Torture, which of course you are familiar with.

3 "No State Party shall expel,
4 return ('refouler') or
5 extradite a person to another
6 State where there are
7 substantial grounds for
8 believing that he would be in
9 danger of being subjected to
10 torture."

11 I wonder if I could ask you, just
12 as a preliminary matter, how either Human Rights
13 Watch or other organizations with which you are
14 affiliated interpret that standard?

15 What does that standard mean? Is
16 it something less than the balance of
17 probabilities? Substantial grounds? Is it a
18 chance of torture?

19 What is the standard in your view?

20 MS HALL: Well, (a) it is quite
21 important to note that the Committee Against
22 Torture itself has interpreted this --

23 MR. FOTHERGILL: That is correct.
24 Yes.

25 MS HALL: -- under the only

1 general comment they have issued in their history
2 on individual petitions.

3 MR. FOTHERGILL: Yes.

4 MS HALL: Human Rights Watch
5 accepts the authoritative interpretation of the
6 Committee Against Torture. I would turn you in
7 the materials specifically to general comment
8 number one where the committee lays out the fact
9 that the risk cannot be merely theoretical or of
10 suspicion, but it does not have to be highly
11 probable.

12 MR. FOTHERGILL: Exactly. The
13 Committee Against Torture gives us two outer
14 limits, if I can say that.

15 MS HALL: Exactly.

16 MR. FOTHERGILL: It is something
17 more than mere possibility, but it is something
18 less than highly probable and, in fact, more
19 likely than not, does fit within that spectrum.

20 MS HALL: I believe that by
21 quantifying with a balance of probability standard
22 of proof that the United States government in its
23 understanding does something that was not
24 contemplated by the CAT. These standards of proof
25 were well-known to the committee members when they

1 were drafting and, in fact, quite well-known to
2 them when they issued the comment.

3 So had they desired to have a
4 probable cause or a reasonable suspicion standard
5 or a balance of probability standard, they would
6 have chosen and articulated that in the general
7 comment whose express purpose was to give
8 governments direction about the standard of proof.

9 MR. FOTHERGILL: Are you able
10 to comment just as a matter of general
11 international practice how many countries adopt,
12 as a practical matter, a balance of probabilities,
13 more likely than not test when adjudicating cases
14 of this kind?

15 MR. YALE-LOEHR: I don't know the
16 answer to that question.

17 MS HALL: To my knowledge, the
18 United States government is the only country that
19 has expressed vis-à-vis an understanding that that
20 is the only standard that they will use, to my
21 knowledge.

22 MR. FOTHERGILL: Do you know if
23 the Committee Against Torture has had anything to
24 say about that?

25 MS HALL: The United States

1 government will report only for the second time in
2 May of 2006. The Committee will develop its list
3 of questions for the U.S. in November of 2005. In
4 its first reporting the Committee accepted this as
5 an understanding, and because it was not a
6 reservation --

7 MR. FOTHERGILL: Yes.

8 MS HALL: -- understood the United
9 States government not to be derogating from
10 Article 3, which in any event they wouldn't have
11 been able to because there is no such thing as
12 derogation.

13 So I think the committee expressed
14 concern that the United States had entered this
15 understanding, but then looked at the language,
16 the policy articulation under the Foreign Affairs
17 Reform and Restructuring Act and saw a disparity
18 between the understanding that the U.S. lodged
19 when they lodged their reservations and et cetera,
20 and the way the policy was articulated in the
21 United States, which was almost parallel to what
22 they found in the CAT.

23 At that stage there was very
24 little jurisprudence in the United States, so my
25 suspicion is that the committee was waiting to see

1 whether the language in the FARRA, which was the
2 implementing legislation for the CAT in the United
3 States, the law in the United States, would obtain
4 and would be used in the jurisprudence, or whether
5 this language of more likely than not/a balance of
6 probability standard would play itself out in the
7 jurisprudence. I think a record of that will come
8 out when the U.S. reports the next time.

9 MR. FOTHERGILL: All right.

10 This decision, which is from the
11 Canadian Federal Court of Appeal -- and leave to
12 appeal to the Supreme Court of Canada I'm told was
13 denied -- was issued in January of 2005. We don't
14 need to review it in detail, but all I can tell
15 you is that the Court in this case found that the
16 reasonable probabilities test was consistent with
17 the language of Convention Against Torture and was
18 a proper legal test in the Canadian context.

19 I don't know if that surprises
20 you or not, whether this now is going to put
21 Canada the same as --

22 THE COMMISSIONER: Did they adopt
23 the balance of probabilities or...

24 MR. FOTHERGILL: Perhaps it would
25 be worthwhile to go to some of the paragraphs.

1 THE COMMISSIONER: Just read the
2 paragraph.

3 MR. FOTHERGILL: Yes, rather
4 than to...

5 All right. If we start with the
6 headnote, that will give you an idea of what at
7 least the editors who prepared this decision for
8 publication thought.

9 "The standard of proof for
10 the purposes of s. 97 of the
11 Immigration Refugee
12 Protection Act ... was on a
13 balance of probabilities.
14 The wording in s. 97(1) of
15 the Act mirrored that of
16 Article 3 of the United
17 States Convention Against
18 Torture Therefore, the
19 words were interpreted in the
20 same manner. Section 97(1)
21 was interpreted to mean that
22 the requisite degree of
23 torture envisages in the
24 expression 'believe on
25 substantial grounds to exist'

1 was that the danger of
2 torture was more likely than
3 not. The same standard of
4 proof applied to
5 s. 97(1)(b)."

6 THE COMMISSIONER: I'm content,
7 if you are satisfied that is an accurate
8 statement.

9 MR. FOTHERGILL: Really it ends up
10 turning on more a linguistic interpretation of
11 what might "substantial grounds" mean. The Court
12 determines that the risk must be something
13 greater --

14 THE COMMISSIONER: More likely
15 than not.

16 MR. FOTHERGILL: More likely
17 than not. So it is ultimately the same standard
18 as, I think, is adopted in the United States.

19 You are of course familiar with
20 the recent report of the Committee Against Torture
21 about Canada's compliance with the Convention
22 Against Torture.

23 MS HALL: Mm-hmm.

24 MR. FOTHERGILL: We don't need to
25 refer to it, I don't think, unless you would like

1 to, but I take it you would agree with me that
2 there is no concern expressed in the most recent
3 report of the Committee Against Torture about
4 Canada's adoption through its judicial process of
5 this standard?

6 MS HALL: Not that I know of.

7 MR. FOTHERGILL: I want to touch
8 very briefly on the issue of diplomatic
9 assurances. Let me just say at the outset, I do
10 understand the reservations you both expressed
11 very eloquently about it. There is something
12 intuitively unsatisfying about accepting
13 assurances from a country that is known to violate
14 international law.

15 But let me ask you this, because I
16 think you mentioned that Canada does sometimes
17 seek diplomatic assurances: If we accept that
18 substantial grounds or substantial risk of torture
19 is some sort of meaningful standard, and there
20 will be cases where that standard is not met but a
21 concern of some kind remains, then perhaps in that
22 case diplomatic assurances might be useful.

23 Let me break that down a little
24 bit for you.

25 We have a country, just a

1 fictitious country with a poor human rights
2 record, not an atrocious human rights record, but
3 a record where torture has been documented, and we
4 have an individual whom Canada wishes to return to
5 that country. That individual is unable to
6 establish substantial grounds, is unable to
7 satisfy the adjudicator that it is more likely
8 than not that the individual will be tortured.

9 Do you not agree with me that in a
10 case like that a diplomatic assurance could still
11 provide some added protection and be legitimate if
12 that individual is going to be returned?

13 MS HALL: As you know, Human
14 Rights Watch bases all of its conclusions and
15 legal analysis on research.

16 MR. FOTHERGILL: Yes.

17 MS HALL: We draw the conclusion
18 that diplomatic assurances are an ineffective
19 safeguard against torture on dozens of cases, as
20 reflected in the April 2004 report and the April
21 2005 report.

22 We have never come across a case
23 where a government has asked for diplomatic
24 assurances where there hasn't been a serious risk
25 of torture.

1 Having said that, what the CAT has
2 stated very clearly in general comment number 1 is
3 that a pattern of torture in a country of return,
4 or incidence of torture in a country of return,
5 are simply not enough to prove that you have a
6 claim under the Convention. The claim has to be
7 accompanied by something more, and that is
8 evidence that it is personal to you specifically.

9 In the event that the risk is
10 personal to you, I would argue that that triggers
11 the non-refoulement obligation. That would
12 trigger the non-refoulement obligation and the
13 duty not to return.

14 There is no duty, there is nothing
15 in the text that says then you go out and you seek
16 diplomatic assurances.

17 So your hypothetical, with all due
18 respect to you, is faulty in the respect that it
19 doesn't give -- it actually gives grounds just to
20 deny CAT protection, simply to deny CAT
21 protection.

22 MR. FOTHERGILL: That is correct?

23 MS HALL: Because there has been
24 no claim that personal risk obtains. It is only
25 when personal risk obtains that the

1 non-refoulement obligation is triggered.

2 Not every person who lodges a CAT
3 claim will get CAT protection.

4 Our idea, Human Rights Watch's
5 position on this, is if you can establish that
6 there is personal risk then the non-refoulement
7 obligation is triggered and assurances are not an
8 effective safeguard.

9 MR. FOTHERGILL: I understand. I
10 thank you for that clarification, because I agree
11 with you absolutely that in the example I gave you
12 the Convention Against Torture would actually
13 permit return without assurances.

14 What I'm suggesting is, in that
15 case diplomatic assurances might provide an added,
16 not compulsory, but still beneficial safeguard.

17 MS HALL: But I have argued, as
18 has Professor Yale-Loehr, that they do not, in
19 fact, provide a safeguard. They would be
20 gratuitous in that case.

21 Would you like to comment?

22 MR. YALE-LOEHR: I think what you
23 have seen -- Human Rights Watch knows this much
24 better than I do -- actual practice of diplomatic
25 assurances as a practical matter simply do not

1 provide protection. They are not worth the piece
2 of paper that they are written on. So I don't see
3 any reason for them.

4 Sure, if you want to go out and
5 feel good about having signed a diplomatic
6 assurance, that's fine, but given the instances
7 that Human Right Watch has documented, they are
8 simply not going to be effective.

9 MR. FOTHERGILL: Thank you. I'm
10 going to move to my last subject, which is what we
11 have come to refer to as the Monterey Protocol.

12 Professor Yale-Loehr, you used
13 quite emphatic language in dismissing this. You
14 said it doesn't do a damn thing.

15 I thought I would read to you
16 what our Minister of Foreign Affairs had to say.
17 I'm not sure that this will change your mind,
18 but I think you should know what he had to say in
19 defence.

20 He is addressing Mr. Cavalluzzo
21 and he began:

22 "I would not be as cynical as
23 your question suggested to
24 me, largely because my
25 experience, in terms of the

1 practice between states is,
2 once these things get
3 consulted on, you have an
4 opportunity to bring other
5 people into the picture. I
6 mean, clearly this envisages
7 that the Director General of
8 the Consular Affairs Bureau
9 in the Department of Foreign
10 Affairs and International
11 Trade will be advised by the
12 appropriate official in
13 Washington before anything
14 like this would happen
15 again."

16 Let me pause there.

17 I think there was an observation
18 from one of you that the protocol doesn't actually
19 tell you who is to do what. In fact, it does
20 identify principal points of contact, and we will
21 go to the document in a moment, but that is what
22 he is referring to there.

23 He continues:

24 "Once that is done, alarm
25 bells are going to go off all

1 over the place, and if
2 necessary, we can ratchet it
3 up, call in the Prime
4 Minister and the President.
5 But you can be sure that the
6 Prime Minister's Office could
7 phone Andy Card in the White
8 House.

9 There would be a whole
10 host of immediate responses
11 that we could get to that
12 would move this to an action
13 level that I believe would
14 make it virtually most
15 unlikely that they would go
16 ahead in the light of a
17 Canadian government
18 objection, just because you
19 are going to have such a high
20 level of action on the file.

21 So I can't put it any
22 higher than that, sir, but I
23 really do believe that this
24 is a very effective
25 protection against this

1 happening in the future,
2 because of the nature of what
3 consequences would flow from
4 consultation and the
5 opportunity that it would
6 give us to take that to the
7 highest levels for reflection
8 from the United States."

9 One final paragraph:

10 "If, as you say, they were
11 determined absolutely they
12 were going to do it, there is
13 nothing we could do to stop
14 them from doing it. But
15 that's exactly why they
16 wouldn't sign any such
17 agreement. They are not
18 going to bind themselves
19 because they can't foresee
20 unusual or unforeseen
21 circumstances in the future
22 where they would fetter their
23 discretion.

24 But I believe this is a
25 very effective protection for

1 Canadians, given the nature
2 of how things work in
3 international practice."

4 Perhaps I will give you just,
5 first of all, an opportunity to comment on that
6 and ask you whether you think there is any force
7 at all to this, if I can put this, real-politic
8 account of how the Monterey Protocol is intended
9 to work?

10 MR. YALE-LOEHR: I guess I have
11 two comments. One, it doesn't have any legal
12 force. So in that sense if the Americans want to
13 deport someone to a foreign country despite this
14 Memorandum of Understanding, they could do so with
15 impunity and basically ignore it.

16 Two, I guess we will just have to
17 see how it plays out in the real world over time.
18 Neither you nor I have the experience to know how
19 seriously the Americans are going to take this
20 Memorandum of Understanding.

21 MR. FOTHERGILL: Fair enough.

22 The next aspect of your earlier
23 comments on this that I would like to address is I
24 think you suggested that what happened in the case
25 of Mr. Arar was essentially exactly what is

1 envisaged in this protocol and so it doesn't
2 actually provide any additional protection.

3 Do you remember saying that?

4 MR. YALE-LOEHR: Yes.

5 MR. FOTHERGILL: Could we have a
6 look at the protocol itself. It is at tab 24 of
7 Exhibit P-120.

8 THE COMMISSIONER: Of Exhibit...?

9 MR. FOTHERGILL: Of Exhibit P-120.
10 It is the large binder that was prepared for these
11 witnesses. Tab 24.

12 The first thing I would like to
13 draw your attention to is the heading of this
14 understanding. You will see right away that it is
15 a "Canada-US Understanding Reached On Removal of
16 Nationals To Third Countries".

17 The point that I would like to
18 draw to your attention is this is a protocol that
19 is only activated in a case where the United
20 States acknowledges that it is contemplating
21 removing an individual to a third country. I
22 suggest to you that that is a different situation
23 from the one that obtained in the case of Mr. Arar
24 in that there was no formal notification to
25 Canadian officials that Mr. Arar was to be removed

1 to a third country.

2 Now, you may say perhaps
3 Canadian officials ought to suspect, but the fact
4 of the matter is there was no formal notification
5 to that effect.

6 So I suggest to you that that is
7 one significant difference between Mr. Arar's
8 circumstances and the circumstances in which this
9 protocol would be triggered?

10 MR. YALE-LOEHR: If I can
11 understand your question correctly, you are saying
12 that because of this understanding once the United
13 States has made the decision to remove someone to
14 a third country, like Mr. Arar, they would have
15 to, under this Memorandum of Understanding,
16 thereby at that point in time notify Canadian
17 officials?

18 MR. FOTHERGILL: Yes, they would.

19 MR. YALE-LOEHR: And they did not
20 do that in this particular case?

21 MR. FOTHERGILL: That is correct,
22 they did not.

23 I appreciate this is still a
24 matter for the Commissioner ultimately to decide,
25 but I don't think I'm mischaracterizing the

1 evidence when I say that people who have testified
2 have consistently said that they were not formally
3 notified of the U.S. intention to remove Mr. Arar
4 to Syria. I'm suggesting this protocol would
5 require an explicit acknowledgment on the part of
6 the United States that it was contemplating
7 removing a Canadian to a country other than Canada
8 and indeed would have to identify what that
9 country was.

10 MS HALL: I guess one of the
11 concerns that I would raise is why in the case of
12 Mr. Arar did the American government not notify
13 you in that case and what makes the Canadian
14 government think that a non-binding understanding
15 would lead them to do that subsequently?

16 MR. FOTHERGILL: That is a
17 fair question.

18 MR. YALE-LOEHR: I would also
19 point out, if you look at the actual text of the
20 Memorandum of Understanding, which is on
21 effectively page 2 of tab 24, this is the letter
22 from Bill Graham to Secretary of State Colin
23 Powell.

24 MR. FOTHERGILL: Right.

25 MR. YALE-LOEHR: This is

1 paragraph 4:

2 "Similarly, when a known
3 Canadian national is to be
4 subject to involuntary
5 removal from the United
6 States to a country other
7 than Canada, except in cases
8 of extradition, the United
9 States undertakes to advise
10 the Canadian principal point
11 of contact of the intended
12 removal."

13 The word "involuntary" there I
14 think is important. Again, I don't understand
15 exactly what that point means, but here there was
16 two choices: He could be removed to Canada or he
17 could be removed to Syria. So technically, under
18 a legal perspective, I'm not sure that they would
19 be bound to notify the Canadian authorities if
20 another Arar-type situation occurred.

21 MR. FOTHERGILL: I'm not sure I
22 agree with you, because presumably Mr. Arar's
23 removal to Syria rather than Canada was
24 involuntary from his perspective. So if he
25 indicates a desire to go to Canada and the United

1 States decides they would rather send him to
2 Syria, I suggest to you that had this protocol
3 been in effect at the time the United States would
4 have been obliged to inform Canada of an impending
5 involuntary removal to a third country, namely
6 Syria, and would have to, I suggest, have
7 identified that third country?

8 MR. YALE-LOEHR: Possibly. I
9 mean we need clarification of the Memorandum of
10 Understanding to make sure that your understanding
11 of it is effectively what the Americans also
12 think of this.

13 MR. FOTHERGILL: All right.

14 Then I mention just in passing in
15 fact principal points of contact are identified on
16 the same page of the letter that you took us to?

17 MR. YALE-LOEHR: Correct.

18 MR. FOTHERGILL: Then returning to
19 Ms Hall's question, if they didn't tell us last
20 time why would they tell us now?

21 I would suggest that, first of
22 all, this is a much more formal mechanism.
23 Insofar as there was any consultation in the case
24 of Mr. Arar it was either informally at the law
25 enforcement level or at a fairly low level at the

1 consular level.

2 What we have here is points of
3 contact and it is worth noting what they are. The
4 Director General of the Consular Affairs Bureau of
5 the Department of Foreign Affairs in Canada, and
6 for the United States the principal point of
7 contact is the Assistant Secretary for Consular
8 Affairs at the Department of State, so I suggest
9 that these are high-level consular points of
10 contact, unlike what happened with Mr. Arar?

11 MR. YALE-LOEHR: I don't mean to
12 be argumentative and I don't know all of the
13 facts, but I would point to two things that I
14 believe are in the record.

15 Number one, that someone, I
16 believe it was an immigration official in the
17 United States, said that you should take this up
18 with your Ambassador, this is a serious case.
19 That to me means that it was a serious case and
20 either it was raised to the Ambassador's level or
21 should have been raised to the Ambassador's level.

22 Also I believe there may be
23 something in the record about Colin Powell telling
24 Bill Graham, you know, "I know more about this
25 than you do. Why don't you know as much about

1 it." Maybe I'm mischaracterizing --

2 MR. FOTHERGILL: That was quite
3 a bit later, and certainly not at the time that
4 the Americans were still deciding what to do with
5 Mr. Arar.

6 MR. YALE-LOEHR: Okay.

7 MR. FOTHERGILL: The final thing I
8 would suggest to you that makes it exceedingly
9 unlikely that Mr. Arar's circumstances will repeat
10 is the fact quite simply of Mr. Arar's
11 circumstances and the aftermath, and the sort of
12 proceeding that we are now participating in, and
13 the fact that he has focused enormous attention on
14 his situation that has galvanized politicians at
15 the highest levels in both countries to, at a
16 minimum, enter into a protocol such as this.

17 So Mr. Arar, in fact, serves
18 as his own corrective to prevent it from happening
19 again.

20 MS HALL: May I make an
21 observation on that point?

22 MR. FOTHERGILL: Please.

23 MS HALL: I'm really struck by
24 the Canadian government putting this forward in
25 this way.

1 In personal injury cases in the
2 United States one of the key pieces of evidence
3 that is entered after the fact indicate that a
4 corporation or some other person was liable is a
5 change in practice. Why would you change the
6 practice if something hadn't gone awry in the
7 prior procedure?

8 What I'm troubled by, by entering
9 into this Commission of Inquiry is that this
10 Commission of Inquiry is tasked with trying to
11 understand the actions of Canadian officials at
12 the time that Mr. Arar was in detention in the
13 United States, at the time of transfer and, my
14 understanding is during portions of his time in
15 Syria, to determine whether or not the Canadian
16 government or Canadian government officials are
17 liable for human rights violations related to his
18 treatment.

19 MR. FOTHERGILL: If I can stop
20 you there, that isn't quite right. Indeed this
21 Commission of Inquiry is expressly precluded from
22 making findings of liability of either civil or
23 criminal law. Indeed a commission of inquiry is
24 to air the circumstances, find out what happened
25 and make recommendations to ensure that they do

1 not happen again.

2 I don't think anybody in this
3 room is pretending that there are not very
4 serious questions arising from Mr. Arar's
5 circumstances. The mere fact that he was sent to
6 Syria and detained without charge for a year is
7 clearly wrong.

8 MS HALL: Mm-hmm.

9 MR. FOTHERGILL: We are trying to
10 determine what role, if any, Canadian officials
11 played in that. That is why in that context we
12 can point to things that the Canadian government
13 has done to prevent similar circumstances from
14 happening in the future.

15 It is, I think, freely
16 acknowledged that what occurred to Mr. Arar should
17 not happen again.

18 MS HALL: Well then let me speak
19 to the character of the Monterey Protocol.

20 The Monterey Protocol has the same
21 status in law as diplomatic assurances do. They
22 are memorandums of understanding -- as a matter of
23 fact, some of the assurances that we have
24 collected actually have Memorandum of
25 Understanding at the top. They are negotiated by

1 relatively high-level officials of two different
2 governments. They are articulated actually with
3 more text in some instances than this particular
4 agreement, and yet we find that they are
5 ineffective, they are not abided by, they are
6 legally unenforceable, they are operationally
7 unworkable.

8 So I would draw a parallel between
9 the very type of bilateral understanding that we
10 have been discussing today in terms of assurances
11 and this particular accord.

12 MR. FOTHERGILL: But based on your
13 understanding of how the international arena
14 functions, surely you will at least acknowledge
15 that this protocol is better than nothing?

16 MS HALL: Acknowledged.

17 MR. YALE-LOEHR: No.

18 MR. FOTHERGILL: All right. Thank
19 you very much.

20 THE COMMISSIONER: Thank you. Did
21 you have any -- you had a question?

22 MS ROUSSEL: I would have a couple
23 of questions, if you --

24 THE COMMISSIONER: Please.

25 Do you want to come up to one of

1 the podiums? Probably this one over to my right
2 is good.

3 --- Pause

4 EXAMINATION

5 MS ROUSSEL: My name is Sylvie
6 Roussel and I act for Maureen Girvan who was the
7 consul in New York.

8 I would have a couple of questions
9 for you regarding the so-called red flags that you
10 referred to in your testimony.

11 First of all, I just want to make
12 sure that I understand correctly. It is clear
13 from your evidence that you are not aware of any
14 cases either prior or post Mr. Arar of rendition
15 out of the United States?

16 MS HALL: Not to my knowledge.

17 MR. YALE-LOEHR: Not to my
18 knowledge.

19 MS ROUSSEL: It is also your
20 evidence that you have no knowledge of other cases
21 of expedited removal?

22 MR. YALE-LOEHR: Not under
23 section 235(c).

24 MS ROUSSEL: Okay. Now, if we
25 speak of these flags that you referred to -- and I

1 will refer you to some of the evidence and I want
2 to cover what a reasonable working assumption
3 would be in the case of the Canadian officials in
4 New York, what they were dealing with at the time.

5 You have an individual who
6 has been detained and is being held at MDC, and in
7 fact what we do know from the record is that prior
8 to Mr. Arar being detained there were two other
9 individuals who had been held on the 9th floor at
10 MDC on suspicions of terrorist activities.

11 In both those cases -- and I will
12 refer to P-53 and P-54 for the evidence. I can
13 just read it to you for your information. These
14 are summaries that were prepared of the two
15 precedents that the individuals had in mind in New
16 York. One is called "A Summary of the Detention
17 and Deportation of Mr. Y".

18 "Mr. Y is a landed immigrant
19 in Canada. He was arrested
20 in New York in September
21 2001. He was held at the
22 Metropolitan Detention Centre
23 and listed on their special
24 list for high security
25 inmates who are housed in the

1 most secure wing of MDC.
2 In early December 2001,
3 while visiting another
4 Canadian detainee, Mr. X, a
5 consular official, became
6 aware of Mr. Y's detention.
7 MDC later confirmed that they
8 were, in fact, holding Mr. Y.
9 Consular visits took place in
10 December 2001, January,
11 February, and March 2002. On
12 the January visit, Mr. Y
13 indicated he had a private
14 attorney. The attorney later
15 advised that he was no longer
16 working for Mr. Y. The
17 consulate then sought to
18 arrange for legal
19 representation. The Centre
20 of Constitutional Rights then
21 advised that they would
22 represent Mr. Y.
23 In March, the consulate
24 was advised that Mr. Y would
25 be deported, and in April

1 2002 Mr. Y was deported to
2 Canada." (As read)

3 The other precedent that the
4 Canadian officials were working with is Mr. X.
5 The names of these individuals have been protected
6 for confidentiality reasons.

7 "Mr. X is a Canadian citizen.
8 He was arrested in New York
9 in September 2001 and was
10 held at the Metropolitan
11 Detention Center and listed
12 on their special list for
13 high security inmates who are
14 housed in the most secure
15 wing of MDC. Mr. X came to
16 the attention of the Canadian
17 consulate in New York in
18 October 2001, so one month
19 later, when his wife, located
20 in Toronto, advised Foreign
21 Affairs that she had not
22 heard from him in two weeks.
23 Despite repeated attempts to
24 locate Mr. X at various
25 prisons, including MDC, his

1 location remained unknown
2 until mid-November 2001 when
3 his private lawyer called the
4 consulate to advise that he
5 was at MDC and had been there
6 since September." (As read)

7 Now, it goes on.

8 "At the end of the day, in
9 April, Mr. X was sentenced to
10 time served and deported to
11 Canada." (As read)

12 So in both these cases the
13 individuals were held on the 9th floor for
14 security violations and were then deported to
15 Canada several months later.

16 Now in the case of Mr. Arar the
17 evidence has shown that, in fact, on October 1st
18 he did make a phone call to his mother-in-law.
19 The evidence also shows that the Canadian
20 consulate got confirmation that he was being held
21 at MDC.

22 We also have evidence that he then
23 made another call to his brother. We have
24 evidence that the Canadian consul was told on
25 October 1st that -- and I'm referring to tab 11.

1 If you want to use Volume 1, you have been
2 referred to this document.

3 A lot of emphasis has been put
4 on the statement that this should be brought to
5 the highest level, but prior to that, again if I
6 draw your attention to the second paragraph, we
7 say.

8 "Also contacted the
9 Deportation INS section in
10 New Jersey. Spoke to Officer
11 ... who advised us that they
12 had no INS deportation file
13 on subject, and suggested
14 that it was unlikely that
15 subject was a deportation
16 case, as MDC does not hold
17 deportation cases. He
18 referred us back to MDC..."

19 Then we have the other phone call
20 that says we need to go to the highest level.

21 Would it not be a reasonable
22 assumption that instead of being an assumption
23 that he would be deported to Syria it would be a
24 reasonable assumption that maybe the type of
25 charge that Mr. Arar would be held under was of a

1 serious nature in the sense we are talking
2 terrorism?

3 Would that be a reasonable
4 assumption of understanding from those
5 conversations, in your opinion?

6 MR. YALE-LOEHR: Is your question
7 that, based on the summary of facts, that Mr. Arar
8 was being held on more serious charges than the
9 other two Canadians that we were just told about?

10 MS ROUSSEL: Exactly. And that
11 that may be why we were told, or the Canadian
12 official was told, to contact somebody higher?

13 MS HALL: Can I just comment on
14 these cases and talk about why I do not see these
15 as parallel cases.

16 In neither one of these cases do
17 we have an issue of dual citizenship, (a).

18 MS ROUSSEL: Actually, we do have
19 dual citizenship in those cases.

20 MS HALL: In both cases? What was
21 the country of return?

22 MS ROUSSEL: One of them was, I
23 think, Pakistan? Both Pakistan.

24 MS HALL: Both were Pakistanis.

25 MS ROUSSEL: One is a permanent

1 resident and the other one is a landed immigrant.

2 MS HALL: It looks to me from
3 these two cases that these are not CAT cases, and
4 we do not have any indication from the fact
5 patterns that you have laid out for us, any
6 indications at all -- and perhaps you can
7 elaborate if there were CAT claims being made at
8 that time, if there were expressed fears of return
9 to a country where they would be at risk of
10 torture, or whether there was an assumption made
11 by everyone, including the detainees, that they
12 would be sent back to Canada.

13 That would distinguish, in fact,
14 Mr. Arar's case quite clearly, in terms of the
15 deportation itself.

16 The other question I would have
17 is, MDC was housing so-called high-security
18 detainees, but the label of an al-Qaeda
19 association was not pinned on the vast majority of
20 them.

21 I would say that that is another
22 factor that clearly distinguishes Mr. Arar's case
23 from these cases.

24 So if you can elaborate and let me
25 know whether any of the red flags that I brought

1 to your attention in terms of, you know, claims of
2 fears of torture that give rise to a CAT-level
3 consideration, whether they obtained in these
4 cases, and whether or not -- what was my second
5 point now? It is late in the day. It is very
6 late in the day. And whether or not these people
7 expressed fear that they would be returned to a
8 country other than Canada?

9 MR. YALE-LOEHR: And al-Qaeda.

10 MS HALL: And whether they had
11 been labelled as al-Qaeda or belonged to some
12 other terrorist organization on a watchlist?

13 MS ROUSSEL: Well, I am not sure
14 that I see the significance -- and I don't want to
15 argue with you. But I don't think that I see the
16 significance between being held on terrorism
17 charges and being a member of al-Qaeda.

18 I think both are related to
19 terrorism and both are serious charges --

20 MS EDWARDH: I am sorry,
21 Mr. Commissioner. I don't believe we have any
22 evidence that they were held on terrorist charges.
23 They were investigated in respect of connections,
24 but the only charges that were ever laid were
25 low-level immigration charges that resulted in

1 deportation.

2 But there were no "terrorist"
3 charges.

4 MS ROUSSEL: I may be mistaken --

5 THE COMMISSIONER: I think that is
6 the case. I don't think there were, as I recall,
7 actual charges.

8 MS ROUSSEL: Well, maybe it is a
9 wrong assumption on my behalf, but it is because
10 they were in the security wing of the 9th floor of
11 the MDC. Now, I may --

12 MS HALL: There are hundreds of
13 detainees who were categorized as persons of
14 interest, persons of high interest, and the proxy
15 for detaining them as such were visa and
16 immigration issues. This is not the reason that
17 Mr. Arar was being detained.

18 I think that the distinction
19 between these two cases and Mr. Arar's case
20 strikes me as very clear. There are clear
21 distinctions between these cases. To use these in
22 some way as an example about why prior practice
23 would have fuelled a lack of suspicion on the part
24 of Canadian consular officials quite frankly
25 strikes me as odd.

1 MR. YALE-LOEHR: I can add one
2 other factor that I think should have raised
3 eyebrows at least among Canadians, it is the fact
4 that Mr. Arar was charged under section 235(c),
5 which as I have pointed out is expedited removal,
6 very unusual generally, and 235(c) is particularly
7 unusual.

8 I don't know the facts of Mr. X
9 and Mr. Y, but based on the summaries, it looks
10 like they were placed in regular immigration
11 proceedings.

12 So that fact, too, I think could
13 be characterized, if not as not a red flag, at
14 least as an orange flag for Canadian consular
15 officials.

16 MS ROUSSEL: The point that I want
17 to make is that in both cases they are being held
18 on the 9th floor of MDC. And it is my
19 understanding that the policy of the U.S. after
20 9/11 was that if you were -- that they would hold
21 you until you were cleared by the FBI, the CIA,
22 and others, and the INS, before they would let you
23 go. So they would keep you there until they were
24 comfortable that you could leave.

25 Now, in the case of Mr. Arar, this

1 threat, the evidence shows that the threat of
2 deportation to Syria would have been made at the
3 airport, and then they transported him to MDC.

4 There is no evidence that that
5 threat was reiterated after he was at MDC.

6 Given the precedents that the
7 Canadian officials were dealing with, was it not a
8 reasonable working assumption that they were
9 dealing with somebody who would not be put on a
10 plane four days later and sent off in the middle
11 of the night to Syria; that in fact if there was
12 going to be an expedited process, that he would be
13 sent back to Canada because they had acknowledged
14 Canadian consul presence, they had acknowledged
15 Canadian consul access, they had confirmed where
16 he was, he was given the right to a lawyer; and
17 that the only reasonable working assumption, given
18 that there were no other precedents to suggest
19 that he would be deported from the United States
20 to Syria, that the only place he would be sent
21 back would be either Canada or Zurich?

22 MS HALL: Mr. Arar stated very
23 clearly to Canadian consular officials that he had
24 a fear. The fear might have been based on the
25 threat. What gives rise to a CAT claim is not the

1 threat of the officials of the state in which a
2 person is; it is the person's fear that they will
3 be sent back to a place where they are at risk of
4 torture. That is what the distinction --

5 MS ROUSSEL: But is that not
6 always a fear when you are dealing with dual
7 nationals, whether it be from Syria or Pakistan?

8 MS HALL: It doesn't seem to have
9 obtained in your other cases where they were dual
10 nationality. Is that right?

11 MS ROUSSEL: Well, I am not sure
12 what the record shows on this. I would have to
13 refresh my memory.

14 MR. CAVALLUZZO: There is no
15 evidence of --

16 MS EDWARDH: I am sorry, I can't
17 hear you, Mr. Cavalluzzo.

18 MR. CAVALLUZZO: There is no
19 evidence of such threats with the two other
20 individuals.

21 MS HALL: Which means that the
22 levelling of the threats, the labelling of
23 al-Qaeda, those two factors alone distinguish
24 Mr. Arar's case. Okay, so those are two
25 substantive points of distinction.

1 So when an INS official says you
2 need to take this to a very high level, you know,
3 Mr. Arar's fears gave rise to a claim under the
4 torture convention. All right?

5 That torture convention claim is
6 related to Article 3. Article 3 is related to a
7 transfer. It is related to a transfer to a place
8 where a person would be at risk of torture.

9 There is kind of a logical
10 procedure that unfolds based on Mr. Arar's claims
11 that are not present in these cases.

12 MS ROUSSEL: Would you agree with
13 me, with the proposition that the other factors
14 are also to be weighed in the consideration of how
15 much of a probability that is going -- that he
16 would be deported back to Syria?

17 MR. YALE-LOEHR: Other factors
18 being...?

19 MS ROUSSEL: Well, the fact that
20 we have precedents, the fact that you have
21 yourself stated in evidence that there are no
22 other precedents; that the fact that there are no
23 precedents that he would be deported to Syria.

24 MS HALL: The fact that there are
25 no precedents means that -- the fact that there

1 are no other precedents, in other words, the
2 assumption being that things would operate the way
3 they should have operated -- fair enough? When,
4 in fact, what we have are several red flags -- I
5 am sorry to be the squeaky wheel on this issue.

6 We have several red flags placed
7 throughout the course of this process that
8 indicate that what was normal, what was presumed,
9 what was anticipated, was not the case, that those
10 normal rules would not apply.

11 Mr. Arar's case was precisely
12 unique, precisely unusual. However, accompanied
13 by a series of signals, both from him and from the
14 United States authorities to the Canadian
15 authorities that should have led to a suspicion
16 that this was not going to operate like these
17 cases and it was not going to operate along the
18 norms of consular exchanges to which the Canadian
19 officials might have been used to in the past.

20 MS ROUSSEL: Let me ask you
21 another question. Given the unusual nature of the
22 proceedings used to have Mr. Arar removed to
23 Syria, would you agree with the proposition that
24 if in fact Canadian officials had brought this to
25 a higher level, as has been suggested, that in

1 fact the U.S. may have precipitated his removal?

2 MS HALL: I cannot speculate like
3 that. That is pure speculation.

4 MS ROUSSEL: But it is a
5 possibility?

6 MS HALL: I cannot comment.

7 MR. YALE-LOEHR: I don't know
8 either. I mean, they did send him to Syria. The
9 fact that -- you know, whether Canadian officials
10 had intervened at an earlier stage would have
11 delayed things or stopped things, I simply don't
12 know.

13 MS ROUSSEL: I have no more
14 questions.

15 THE COMMISSIONER: Thank you.

16 Mr. Cavalluzzo?

17 EXAMINATION

18 MR. CAVALLUZZO: Just a couple of
19 points, Commissioner.

20 You were asked a couple of
21 questions concerning the uniqueness of the Arar
22 file; in particular, whether this was the first
23 rendition from the United States and this was the
24 first occasion upon which 235(c), at least to your
25 knowledge, was used.

1 I think you would agree with me
2 another unique circumstance which should be
3 relevant in terms of the considerations taken into
4 account by Canadian officials was that this was
5 the first time that a Canadian citizen was
6 rendered or deported in these circumstances.

7 You would agree with that?

8 MS HALL: Yes.

9 MR. YALE-LOEHR: Yes.

10 MR. CAVALLUZZO: Right. And on
11 behalf of the Canadian officials, presumably at
12 that point in time they had some faith in the
13 Canadian passport and felt that it may have been
14 unlikely that Americans would deport a Canadian
15 citizen?

16 MS HALL: Conceded. Yes.

17 MR. CAVALLUZZO: In terms of the
18 situation of consular officials and access and so
19 on, you were asked about consular access in Syria
20 and whether there was any point to the consular
21 access if the torture was not terminated.

22 I think, to be fair to the
23 Canadian officials in Damascus, the evidence would
24 appear to be that the physical torture at least --
25 leaving aside the mental torture -- the physical

1 torture occurred in the first week or two that
2 Mr. Arar was in Syria.

3 Wouldn't you agree with me that
4 after that point in time, perhaps the periodic
5 visit of a Canadian consular official may have a
6 disincentive in terms of the Syrians in respect of
7 torture, continuing to physically torture the
8 individual? Or am I missing the point here?

9 MS HALL: The incommunicado
10 period, as Professor Yale-Loehr noted, is the time
11 during which most people are at risk of torture.
12 It is actually quite common, even for people who
13 are detained over a number of years, for torture
14 to be most intense right from the start in order
15 to extract information but also in order to ensure
16 the people understand where the power base lies in
17 terms of the detention.

18 MR. CAVALLUZZO: Right.

19 MS HALL: So in terms of the
20 dynamics of torture, it is not so unusual for the
21 most intense period to be right up front and then,
22 with or without consular attention to a case, for
23 torture to diminish as a routine is established
24 within the prison or the detention facility and
25 the power locus is clearly identified, recognized

1 and understood.

2 MR. CAVALLUZZO: But you would
3 agree with me that there is value -- even though
4 there may have been physical torture, intensive
5 physical torture at the beginning -- there is
6 value in having consular access to the individual
7 while they remain in detention in a country like
8 Syria with a poor human rights record.

9 You would agree with that?

10 MS HALL: I think theoretically,
11 given the fact that if the purpose of consular
12 attention to a case is to provide added
13 protection, if that obtains, that added protection
14 can be secured, then of course. And that is the
15 whole purpose of the regime.

16 MR. CAVALLUZZO: That is right.

17 MS HALL: But in the event that
18 the consular access doesn't provide that
19 protection, then one could question the value.

20 MR. CAVALLUZZO: All right.

21 The other aspect of the Syrian
22 detention that you were asked about was the
23 ambassador, and Ms Edwardh asked you questions
24 concerning him getting a statement from the
25 Syrians, which was the product of their

1 investigation, and him bringing that information
2 back to Canada.

3 I guess the question that I would
4 have -- I appreciate the point you are making,
5 that that could be construed as a mixed signal
6 from the Syrians; that on the one hand you are
7 saying "send Mr. Arar back to Canada" and on the
8 other hand you are saying "give me all the
9 information you have on him".

10 But would you not agree with me
11 that there is value in a Canadian official, such
12 as the ambassador, having as much information as
13 possible respecting how much information the
14 Syrians had on Mr. Arar so that Canada would be in
15 a far better position to understand whether
16 Mr. Arar was going to be charged, if he was going
17 to be charged, what information they had and so on
18 and so forth; in other words, to protect Mr. Arar
19 in the long run by getting as much information as
20 possible?

21 Isn't that a valid concern that
22 the ambassador might have in trying to get as much
23 information as possible?

24 MS HALL: I think what complicates
25 your question, deeply, deeply complicates it, is

1 the notion that in the first visit there were
2 suspicions that Mr. Arar was being mistreated. If
3 that fact obtains, then the idea that any Canadian
4 official would have permitted, openly permitted
5 and collaborated or cooperated with continuing
6 interrogations, all the while keeping a suspicion
7 of torture and ill-treatment, not only violates
8 Canada's obligations but then taints the very
9 evidence for future use, any future use, because
10 it would necessarily be evidence extracted by
11 torture or other ill-treatment.

12 The other question that I would
13 pose for this Commission is whether evidence that
14 is extracted under those conditions is reliable
15 for any other purpose. What value does -- I mean,
16 it is one of the key questions in human rights,
17 whether the evidence can be used because it is
18 extracted by torture but also at the practical
19 level whether that information is reliable.

20 And I would simply pose it as a
21 concern that any evidence that would have resulted
22 from Mr. Arar's interrogations would have been
23 both tainted, because it was extracted under
24 torture, and would have been unreliable and
25 therefore of little use to the Canadian

1 government.

2 MR. CAVALLUZZO: We are going to
3 be dealing with that specific issue tomorrow in
4 regard to the reliability of coerced confessions.

5 But as to the first point that you
6 raise, I understand that the Convention Against
7 Torture really only prohibits the use of such
8 statements as evidence in proceedings.

9 Isn't that correct?

10 MS HALL: This is a question I
11 believe will come into play in the next year,
12 particularly with a House of Lords procedure with
13 respect to what are the appropriate uses, if any,
14 for evidence extracted under torture.

15 For example, the U.K. government
16 has said, "Well, we are not going to use it in
17 criminal proceedings; we are only going to use it
18 in intelligence purposes."

19 So I can tell you (a), that that
20 question is under consideration, that there are
21 various international actors seized of the
22 question; that the notion of what constitutes a
23 proceeding will be a key question.

24 But in this case, if we look
25 back -- if I could just give you a different

1 example of how this might play out.

2 If evidence -- let's just take a
3 hypothetical situation since I am not fully sussed
4 on the facts in this case.

5 If evidence that was used by the
6 Canadian security service and the RCMP, if that
7 evidence that was conveyed to the United States
8 government -- and, again, this is a hypothetical
9 situation -- if that evidence itself was extracted
10 under torture, so they got their hands on some
11 kind of intelligence; they passed that on to the
12 United States authorities, who then used that
13 evidence as the basis to make the decision that
14 Mr. Arar was a member of al-Qaeda, was a threat to
15 the national security of the United States, and
16 therefore should be sent back to a place where he
17 was at risk of torture. You see in that entire
18 process violation after violation after violation
19 of the Convention and the Prohibition Against
20 Torture.

21 So I think that this question of
22 evidence extracted under torture will be the next
23 question, the next big question in international
24 law, that will be decided in the next 12 months.

25 I am afraid that I really can't

1 say anything more than that. I do know the
2 question of whether only criminal proceedings or
3 other proceedings will come to the fore.

4 MR. CAVALLUZZO: And you said that
5 is the issue, for example, of whether such
6 information can be used as security intelligence
7 or in respect of intelligence that a police force
8 has, probably will be faced by the House of Lords
9 this coming summer.

10 MS HALL: And I suspect that in
11 the context of the U.S. reporting before the CAT,
12 that that will also be an issue of interrogation
13 for the United States government.

14 MR. CAVALLUZZO: The final
15 question relates to some questions you were asked,
16 Professor Yale-Loehr, concerning getting on to the
17 watchlist, and we talked about the TECS/NAILS
18 system.

19 I would ask if the clerk could put
20 before you Exhibit P-121.

21 MR. YALE-LOEHR: Is P-121 my text
22 memo?

23 MR. CAVALLUZZO: Yes. Actually,
24 it should be P-106, the chronology.

25 MR. YALE-LOEHR: I have that,

1 thank you.

2 MR. CAVALLUZZO: You have that in
3 front of you?

4 In particular I would refer to the
5 second page. At the top it is December 1st, 2003,
6 and it says MINA. Now, MINA is the Minister of
7 Foreign Affairs. So Minister of Foreign Affairs
8 Graham and Secretary of State Colin Powell speak
9 on the telephone.

10 "Powell informs that (1) the
11 Arar affair was triggered by
12 enquiries made by Canadian
13 sources and that Arar would
14 not have been on the U.S.
15 radar screen had he not been
16 subject of attention by
17 Canadian agencies."

18 I am wondering if that assists you
19 in trying to discern whether Mr. Arar's name got
20 onto a U.S. watchlist as a result of information
21 from Canadian authorities.

22 MR. YALE-LOEHR: Well, based on
23 this sentence, if these are the facts, if
24 Secretary of State Powell is correct in his
25 summary to the Canadian authorities, it appears

1 that the information flowed from Canada -- perhaps
2 through the RCMP or through some other source --
3 and made its way on to the U.S. watchlist.

4 MR. CAVALLUZZO: The other
5 document -- Mr. Commissioner, we have seen this
6 document. It is been referred to, I believe, in
7 motions, but it has never been made an exhibit.

8 It is the letter to Representative
9 Markey from Paul Kelly, who is the Assistant
10 Secretary of Legislative Affairs in the United
11 States Department of State, that I would
12 introduce.

13 THE COMMISSIONER: Should we mark
14 this as an exhibit?

15 MR. CAVALLUZZO: Yes, please.

16 THE COMMISSIONER: It is in one of
17 the motion records, is it not? This has been
18 entered as an exhibit on a motion.

19 MR. CAVALLUZZO: I believe it was
20 part of the motion, one motion, and the motion at
21 this time I forget.

22 THE COMMISSIONER: We will mark it
23 as 124.

24 EXHIBIT NO. P-124: Letter to
25 Edward Markey, Member of

1 Congress, from Paul Kelly,
2 Assistant Secretary
3 Legislative Affairs,
4 Department of State

5 MR. CAVALLUZZO: Now, this letter
6 to Mr. Markey -- and Ed Markey has been referred
7 to earlier. He is, as you know, the House of
8 Representative Congressman who introduced
9 legislation relating to this particular issue.

10 Behind the letter from Mr. Kelly,
11 you will see a letter to the Honourable Colin
12 Powell that was sent by Mr. Markey on September
13 30th of 2003.

14 In the second paragraph,
15 Mr. Kelly, who is the Assistant Secretary,
16 Legislative Affairs, writes to Mr. Markey:

17 "While Mr. Arar's name was
18 placed on a terrorist lookout
19 list based on information
20 received from Canada, the
21 decision to remove Mr. Arar
22 from the United States was
23 made by U.S. government
24 officials based on our own
25 assessment of the security

1 threat to the United States
2 posed by Mr. Arar."

3 Now, does this document as well
4 assist you in making a determination as to how
5 Mr. Arar's name may have gotten on to the lookout
6 list in the TECS/NAILS system?

7 MR. YALE-LOEHR: Well, this seems
8 to be even clearer than the previous document you
9 showed me that the information seemed to have come
10 from Canada into the U.S. watchlist.

11 MR. CAVALLUZZO: Commissioner,
12 there is also a recent article in the New York
13 Times from Scott Shane, which I won't file as an
14 exhibit. But this is a very recent article by
15 Scott Shane where he relies on American officials
16 and a Canadian official in terms of supporting the
17 same proposition.

18 But I will not file that with you
19 this afternoon.

20 The only other document which has
21 not been filed as an exhibit is the letter to the
22 Commission itself from the Department of State on
23 September the 10th, 2004, in which the Department
24 of State indicates to the Commission that it will
25 not cooperate with us.

1 I think that this letter as well
2 should be filed as an exhibit.

3 THE COMMISSIONER: That will be
4 125.

5 EXHIBIT NO. P-125: Letter
6 from William H. Taft,
7 Department of State, to Paul
8 Cavalluzzo, dated 10
9 September 2004

10 MR. CAVALLUZZO: And this as well,
11 as you will see, Professor Yale-Loehr, in the
12 second paragraph, is not as clear as the Kelly
13 letter but certainly supportive of that suggestion
14 that Mr. Arar's name appeared on the list as a
15 result of Canadian information.

16 MR. YALE-LOEHR: Yes, it does
17 support that proposition. It is a little more
18 ambiguous. It says it is a general sharing of
19 information, so we can't tell which way the
20 information originally flowed.

21 MR. CAVALLUZZO: Now, the final
22 matter, Commissioner, is I have spoken to the
23 intervenors, and they tried to get here today and
24 it just proved to be impossible for them to be
25 here.

1 One of the representatives of the
2 intervenors asked for the opportunity to submit a
3 written question or written questions to the
4 witnesses, and the witnesses will have an
5 opportunity to respond. And no doubt we will have
6 to share that with other counsel for their
7 comments as well.

8 It is a cumbersome process, but
9 they are just in a position where they couldn't be
10 here today, and I think that I would recommend
11 that we accept that proposal.

12 THE COMMISSIONER: Well, I think
13 as a matter of fairness, if the intervenors wish
14 to do that, the question should be shared with
15 other counsel. The answer can be received, I
16 would suggest, by Commission counsel and shared
17 with other counsel, or answers. I am not sure
18 what the questions are.

19 It may be, though, if it
20 necessitated further cross-examination, that we
21 would have to consider whether or not we could
22 actually enter the questions and answers into the
23 record.

24 Why don't we deal with it that way
25 and see what comes of it.

1 MR. CAVALLUZZO: That is fine.
2 And perhaps you may have another trip back to
3 Ottawa.

4 THE COMMISSIONER: To be
5 cross-examined on one question.

6 MR. CAVALLUZZO: Hopefully not.
7 That would complete my
8 examination. Thank you very much.

9 THE COMMISSIONER: It struck me,
10 Mr. Fothergill, there may be something in
11 Mr. Cavalluzzo's re-examination. There were new
12 documents put in. I don't know if you wanted, as
13 a matter of fairness, to ask any questions about
14 those.

15 MR. FOTHERGILL: I don't think so.
16 Thank you.

17 THE COMMISSIONER: That is it,
18 then?

19 Well, let me express my gratitude
20 to both of you for coming. You have obviously
21 spent a lot of time preparing. I appreciate that
22 you gave us written reports, and that was very
23 useful, and the help in coming here today and
24 sharing your expertise with us. It was very
25 invaluable to the Commission. I appreciate it

1 very much.

2 MR. YALE-LOEHR: Thank you.

3 MS HALL: You are welcome.

4 THE COMMISSIONER: Thank you.

5 Tomorrow morning at 9:30? All
6 right. We will rise until then.

7 THE REGISTRAR: Please stand.

8 --- Whereupon the hearing adjourned at 5:07 p.m.,
9 to resume on Wednesday, June 8, 2005, at
10 9:30 a.m. / L'audience est ajournée à 17 h 07,
11 pour reprendre le mercredi 8 juin 2005
12 à 9 h 30

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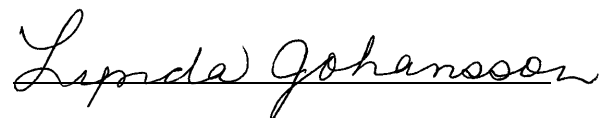
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Lynda Johansson,

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

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