



**Amnesty
International**

**Restoring his Rights,
Addressing the Wrongs**

Amnesty International's
Closing Submissions to the
Commission of Inquiry into the Actions of Canadian Officials
in Relation to Maher Arar

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I. INTRODUCTION

These are the closing submissions of Amnesty International to the factual phase of the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*. Given that there is an extensive amount of testimony and documentary evidence that has been heard and reviewed *in camera*, some of which might be further disclosed over the coming months, Amnesty International reserves the right to make additional submissions at a later date.

Over the course of the past fourteen months, the Commission has heard extensive testimony – both in public and *in camera* – and reviewed thousands of pages of documents. Before offering observations and recommendations with respect to what has emerged through that evidence, Amnesty International considers it important to underscore two critically important dimensions of the context within which this Commission has taken place: the individual lives at stake, and the global backdrop of the war on terror.

a) The lives behind the issues

The Commission's mandate has been to examine what happened to one particular Canadian citizen: Maher Arar. In the course of proceedings, however, it has become distressingly apparent that what happened to him, has happened to numerous other Canadian citizens as well, including two men who were acquaintances of Mr. Arar – Abdullah Almalki and Ahmad El Maati – and one man who Mr. Arar had never met – Muayyed Nureddin.

The inquiry has spent a great deal of time reviewing policies and documents, examining minutes and memos describing meetings between various government officials, considering the nature of briefings provided to relevant ministers, and debating how much information about police investigations can and cannot be publicly disclosed. Behind all of that, however, is a harsh reality of serious human rights violations that has had a devastating impact on the lives of these men and their families. Their experiences are a tragic reminder that that debate about human rights and counter-terrorism that has emerged around the world since September 11, 2001, is very much a Canadian issue and that it is not just about abstractions and possibilities – there is a very real human cost.

On September 26, 2002 Maher Arar was pulled aside by an immigration officer while transiting through JFK Airport in New York City. Over the coming 12 months he was imprisoned in the United States, then briefly in Jordan and finally in Syria: lost in a nightmare of lawlessness, torture and abuse. Never told what specific allegations had been made against him, he endured extensive interrogations in the United States and Syria, none of which were carried out in the presence of legal counsel. Never given a chance to confront his accusers, or refute the allegations, he was severely tortured in Syria and held in abysmal prison conditions without access to natural or artificial light for months on end. To bring the agonizing torture and mistreatment to an end, he confessed to anything that his Syrian captors demanded of him.

On November 12, 2001 Ahmad El Maati was arrested upon arrival at the airport in Damascus, Syria, where he was travelling to join his new wife. He was held in incommunicado detention, his whereabouts never disclosed to his family, and subjected to brutal torture and extensive interrogation in Syria until January 25, 2002 at which point in time he was secretly transferred to Egypt. He remained in detention in Egypt until his release on January 11, 2004. His Egyptian jailors refused to release him, despite a number of court orders requiring his release. In Egypt, interrogations and torture continued.

On May 3, 2002 Abdullah Almalki was arrested upon arrival at the airport in Damascus, Syria. Having heard that his grandmother was ill, he was returning to Syria for the first time since his family had emigrated to Canada 15 years earlier. He remained in prison until March 10, 2004. He was tortured extensively. He was interrogated relentlessly. He was never allowed legal representation or consular assistance.

On December 11, 2003 Muayyed Nureddin was arrested when he sought to cross the border between Iraq and Syria, en route back to Canada after a visit with his family in northern Iraq. He was imprisoned until January 13, 2004, given no consular or legal assistance, and like the others before him was interrogated and subjected to torture.

Throughout their time in detention and then increasingly following their return to Canada, all of these men have been haunted by the very disturbing likelihood that Canadian officials – directly or indirectly, actively or passively, officially or unofficially – had a hand in what had happened to them. That of course is the central issue being examined in the course of this Commission.

The human rights concerns that arise in all of these cases are serious and wide-ranging, including the rights to be protected from torture, not to be arbitrarily arrested and detained, to have a fair trial, to be free from discrimination and not be treated unequally due to religion, ethnicity or national origin, to be held in humane prison conditions, to have consular access, and to have privacy. All of these men face the long-term challenge of recovering from torture. They feel that their public reputations have been sorely damaged by allegations that they have been involved in or supported terrorist activities, and have not been able to defend themselves as the specifics of the allegations have never been disclosed to them.

Having suffered serious human rights violations these men have understandably looked for justice, for there to be remedy for what they have been through. Justice can play an important role in the healing process for survivors of grave abuses such as torture. But justice has not been there for them. The prospect of turning to the courts of Jordan, Syria or Egypt for accountability and redress is illusory. The Canadian government takes the position that they cannot use the Canadian courts to sue those foreign governments because Canada's *State Immunity Act* shields other governments from civil suits (even for

harm as egregious and universally criminal as torture).¹ This Commission offers what can potentially be a profoundly important means of justice for Mr. Arar. The other three men will understandably look to the report from this Commission to advance their own call for justice.

The human rights impact of these cases does not end with these four men. They have family. Both Mr. Arar and Mr. Almalki are married and have young children. They have close friends. All of these individuals too have been traumatized and deeply effected by what has happened. Many lives have been shattered.

b) The global context: counter-terrorism and human rights

... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world²

Fifty-seven years ago, in the wake of the carnage, devastation and insecurity of the Second World War, the United Nations rightly established that the protection of fundamental human rights must be at the very heart of how we live our lives and govern ourselves. The eloquent opening to the *Universal Declaration of Human Rights* highlights that “freedom, justice and peace” depend entirely on there being full respect for basic human rights. Freedom, justice and peace are of course in turn the very values that are at stake in the current global debate about security. Security is about freedom, about justice, and certainly about peace.

This first crucial universal human rights document was adopted at a time when the world was painfully aware of the depths of depravity to which human beings can descend, and the extent to which it is overwhelmingly civilians who are the primary victims of the violence and insecurity that results. When governments established the global human rights order they knew that they are often forced to confront horrifying events and take decisive action. They agreed however that their actions must always proceed within a binding human rights framework, which would bar them from violating fundamental rights directly and also require them to take steps to protect their citizens from human rights abuses that others might commit. In taking this step, governments were not somehow selling security short. Rather, they expressly noted that it is “disregard and contempt for human rights” that have “resulted in barbarous acts.”³ Security would come by embracing and committing to human rights like never before.

As the international human rights system developed, more detailed and comprehensive treaties continued to grapple with these fundamentally intertwined imperatives to protect human rights and ensure security. Some rights were therefore drafted in terms that

¹ *Bouzari v. Iran*, Quicklaw cite: [2004] O.J. No. 2800 (Quick Law), Docket C38295, para.76, June 30, 2004.

² Universal Declaration of Human Rights, adopted by the United Nations General Assembly, 10 December 1948, first preambular paragraph.

³ *Ibid.*, second preambular paragraph.

recognize an inherent balancing which takes into account the need to safeguard national security, public order or the protection of the rights of other people.⁴ Other rights are not open to balancing, but can be suspended temporarily if necessary “in time of public emergency which threatens the life of the nation.”⁵ Finally, a number of human rights are specifically identified as being of such importance as to never be subject to restriction or derogation, such as the right to life, the protection against torture and cruel treatment, the prohibition of slavery and freedom of religion.⁶

Despite the careful crafting of treaties, declarations and resolutions that recognize and accommodate the responsibility of governments to act to ensure the security of their citizens and the obligation of governments to intervene to protect individuals from human rights abuses at the hands of others, governments around the world have consistently used arguments about security as an excuse for violating the full range of universally protected human rights. Throughout more than four decades of investigating, documenting and reporting human rights violations around the world, and long before the events of September 11, 2001 brought the issue to the forefront of global debate, Amnesty International has highlighted this concern in countries on every continent.

Faced with widespread armed opposition, sporadic violent protests or vicious acts of terrorism; with sweeping peaceful opposition, active political agitation or limited underground dissent, governments have used “security” as an excuse for mass arrests of ethnic or religious minorities, for the torture of political opponents, and for launching military action that results in huge numbers of civilian deaths. Invariably the abuses have served only to create further resentment, grievance, opposition, violence and insecurity. In the end, neither human rights nor security have been advanced.

It is perhaps auspicious that we present these submissions to you on the eve of the fourth anniversary of the September 11th attacks in the United States. Following those attacks and in the aftermath of later terrorist attacks in Spain, Russia, Indonesia and elsewhere, including recently in the United Kingdom, Amnesty International has repeatedly underscored the central role that human rights must play in all laws, policies and practices that governments adopt to counter terrorism and enhance security. We have highlighted that the debate about human rights *versus* security is a false debate. This has been reiterated and affirmed again and again over the past four years by other organizations,⁷ by international⁸ and national-level⁹ political leaders,

⁴ International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly, 16 December 1966, acceded to by Canada, May 1976. The ICCPR allows restrictions of this nature on the exercise of such rights as freedom of expression (article 19), peaceful assembly (article 21) and association (article 22) on such grounds, as long as the restrictions are prescribed by law and are strictly necessary in a democratic society.

⁵ *Ibid.*, article 4(1). The public emergency must be one which threatens the life of the nation and it must be officially proclaimed. The resulting suspension of or derogation from rights can only be to the extent strictly required by the exigencies of the situation, must be consistent with other international legal obligations and cannot be applied in a discriminatory manner. This would apply to rights such as the protection against arbitrary arrest and detention (article 9) and the right to a fair trial (article 14).

⁶ *Ibid.*, article 4.

⁷ The Berlin Declaration, The International Commission of Jurists’ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, adopted 28 August, 2004, fifth preambular paragraph:

and in important court decisions.¹⁰ Human rights will always be precarious if security is not assured, and security will inevitably be tenuous at best if not firmly grounded in human rights.

It is from this global perspective that Amnesty International makes this submission to the Commission. Of course Canada must have laws, policies and practices in place to ensure thorough investigation of and effective responses to any threat to public safety, most certainly including concerns about possible terrorist activities. Canada also has a wider responsibility to contribute globally to efforts to curb terrorism in other countries. Canada's laws, policies and practices, adopted in the name of security, cannot however in any way be allowed to cause or facilitate human rights violations. This is of vital importance in ensuring the protection of the basic rights of individuals, be they Canadian citizens or not, who may be impacted by these laws. It is doubly important however in that Canada must set a model for other nations to follow. Canada is frequently recognized and often lauded on the world stage for its commitment to the protection of fundamental human rights, at home and abroad. It is all the more critical therefore to ensure that Canada's laws and practices demonstrate clearly that security can and must be pursued in a manner wholly consistent with international human rights obligations.

RECOMMENDATION 1: The Commission should assess the evidence and formulate recommendations in a manner that firmly recognizes that Canada's counter-terrorism laws, policies and practices must be wholly consistent with international human rights standards.

“There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state.”

⁸ UN High Commissioner for Human Rights, Louise Arbour, Biennial Conference of the International Commission of Jurists, 27 August 2004: “For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually works to improve human security.”

⁹ Minister of Foreign Affairs Bill Graham, Speech to the Canadian Bar Association, 12 August 2002: “Our most compelling challenge in responding to terrorism, apart from containing it, is to uphold the values and norms we cherish - democracy, respect for the rule of law and human rights.”

¹⁰ Such as in the recent decision of the House of Lords with respect to provisions of the United Kingdom's anti-terrorism legislation, *A and others v Secretary of State for the Home Department* [2004] UKHL 56, 16 December 2004, per Lord Hoffman at para 97: “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory.” Or in an eloquent Israeli Supreme Court ruling that predates 2001, *Public Committee Against Torture in Israel v The State of Israel*, HCJ 5100/94, at para. 39: “This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.”

II. THE “PUBLIC” INQUIRY

Amnesty International actively supported the call for a public inquiry to be convened into Mr. Arar’s case. Writing to former Prime Minister Chrétien on November 4, 2003, the day that Mr. Arar spoke about his ordeal in a national press conference, we noted that:

... it has become evident that the only effective way to provide a venue for Mr. Arar to obtain justice, as well as to examine what measures need to be put in place to guard against this happening again in the future, is through a public, independent inquiry. Other options are either restricted in their scope or limited in their effectiveness. The day after Mr. Arar’s return to Canada you stated that you felt there was no need for an inquiry. In light of Mr. Arar’s public testimony today, I urge you to reconsider your position and convene an inquiry without further delay.

We welcomed the government’s decision to establish the inquiry. We have actively participated in the inquiry as an Intervenor. We have made submissions at various stages. We have provided input to Commission Counsel as to areas that we felt should be explored during *in camera* sessions. We have made submissions to and participated in the policy phase of the Commission as well.

While we continue to support and have confidence in the Commission, we have been deeply dismayed and found that our ability to participate effectively has been significantly impaired by the widesweeping approach the government has taken to national security confidentiality.

We always recognized that there would be aspects of the inquiry that would not be open and accessible to the public. We were, however, surprised that the *in camera* phase extended over a period of close to eight months, while the public phase was less than half that long. It became apparent that the government and the Commissioner had differing views as to how national security confidentiality should be interpreted.¹¹ That was further underscored by the cautionary remarks made by the Commission’s *amicus curiae*, Ron Atkey in submissions in May, describing an excessive “culture of secrecy” on the part of the government.¹²

This is, after all, a “public” inquiry. The government rightly decided it should be public, but has, unfortunately, significantly curtailed the public’s ability to participate in and follow the proceedings through what appear to have been excessive and overly-broad claims of national security confidentiality. Maintaining a strong public dimension is critical, and not because it is important to cater to a public appetite for prurient details about shady allegations of terrorism. The Canadian and indeed a wider international

¹¹ Points 66 to 106, Justice O’Connor’s “Ruling on National Security Confidentiality,” December 20, 2004.

¹² “I fear that the public disclosure, your interim public report, to be submitted next fall, may never see the light of day, because of continued national security claims,” Mr. Atkey said in a formal submission at the commission’s first public hearing in nine months....This is fair neither to Mr. Arar, nor the Canadian public,” “Expert warns ‘culture of secrecy’ may block truth about Arar case,” Michael Den Tandt, *Globe and Mail*, May 4, 2005.

public, have been engaged with and followed this case because people understand that crucial principles are at stake: fundamental human rights and the rule of law, tolerance and equality in security and policing practices, freedom of expression and information. Those are the values that are at stake when the public is excluded from significant portions of these proceedings.

Our disquiet about how national security confidentiality has been handled grew when the disclosure of one particular document at two different times in the inquiry, differently redacted in each instance, revealed some of what is being withheld. In one version it had been considered appropriate to black-out the fact that a memo describing the first consular visit with Mr. Arar in Syria referred to his answers during the interview having been “dictated to him in Arabic by the Syrians.”¹³ The only possible explanation for the redaction is that someone considered it to be covered by the broad category of being something that might harm international relations, as it would be an embarrassment to Syria. At the same time, of course, it is information of obvious advantage to Mr. Arar.

Amnesty International has frequently expressed concern that “international relations” is not a recognized reason under international law for limiting public access and disclosure of evidence in the course of judicial proceedings. It raises the prospect of information being withheld from the public, from the accused in a criminal trial, and the parties to other types of legal proceedings, simply because it might embarrass Canada in its dealings with another government or become an inconvenience in international negotiations dealing with a trade or other issue. Article 14(1) of the *International Covenant on Civil and Political Rights* establishes the important right to a public trial and envisions the possibility of excluding the public from a criminal proceeding only for reasons of “morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”¹⁴ Protecting international relations is not included and does not therefore in and of itself justify excluding the public.

Amnesty International made submissions at the outset of the Commission urging that a human rights-based approach be applied in formulating and applying the definition of national security confidentiality. With respect to the issue of “international relations” we noted specifically:

To meet the test of a legitimate national security interest, a NSC claim must have, as its genuine purpose and demonstrable effect, protection of Canada’s, or an allied country’s, existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. A National Security Confidentiality claim may not be justified on the ground of national security if its genuine purpose or demonstrable effect is to protect interests unrelated to national security; including, for example, to protect a

¹³ Exhibit P-193: Memo from Pillarella to HQ DFAIT of October 23, 2002 re: Consular Visit to Mr. Arar.

¹⁴ ICCPR, *Supra*, footnote 4.

government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions. Moreover, a claim of NSC status on the grounds of “international relations” not tied to the sorts of harms anticipated in the definition of a legitimate national security interest does not, in Amnesty International’s submission, comply with international standards.¹⁵

RECOMMENDATION 2: Claims of national security confidentiality should only be allowed in the final report to the extent that they are consistent with international human rights standards and should disclose the maximum amount of information possible to the public. In the adjudication of national security confidentiality claims, the term “international relations” should be confined to instances demonstrably linked to concerns of a degree of seriousness equivalent to the use or threat of force against another nation and should not be used to protect another government from embarrassment, inconvenience or criticism.

III. MAHER ARAR

This Commission of Inquiry must answer one central question: what was the role of Canadian officials in relation to the case of Maher Arar. This is *his* inquiry. It comes in the wake of the remarkable and courageous public campaigning carried out by his wife, Monia Mazigh, during the year that Mr. Arar spent in prison in Syria. It comes following Mr. Arar’s remarkable and courageous decision to open his life and his harrowing experience to the Canadian public, with a demand that there be full transparency and accountability. In doing so he has been subjected to anonymous leaks from unnamed government sources, which were clearly designed to tarnish his reputation and diminish his credibility. In doing so he and his family have become the subjects of relentless media attention throughout the nearly two years since his return to Canada.

Mr. Arar pressed for a public inquiry for a number of reasons. He wanted to clear his name. He wanted to know why this had happened to him and who was responsible. He wanted those responsible to be held accountable. He wanted redress for the harm he suffered. He wanted to be sure that this would not happen to anyone else in the future. The final report of the Commission must grapple with these important points.

Amnesty International has not been able to review evidence that has been presented *in camera*, some of which likely seeks to explain or justify why Mr. Arar became part of a Canadian national security investigation. We are therefore not in a position to reach conclusions as to the nature and reliability of any such evidence. We approach this case, however, with full regard for the fundamental principle of the presumption of innocence, enshrined in Canadian and international law. We are also struck that after two years of unprecedented public interest in this case, the in-depth investigative coverage of numerous national journalists, several leaks of information about the case, and fourteen months of hearings (four of which were held in public), all that has emerged suggests that

¹⁵ A Human Rights Approach to National Security Confidentiality, Amnesty International’s Submission to the Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, made Pursuant to Section 37 of the Draft Rules of Procedure and Practice, May 28, 2004, at page 19.

at the very most Mr. Arar was a person of peripheral¹⁶ interest, likely primarily because of his acquaintanceship with other people, such as Mr. El Maati and Mr. Almalki. There have been no specific allegations that Mr. Arar was involved in planning, financing, assisting or otherwise supporting any terrorist activities. It is of course important to recall as well that the concerns at stake in this case do not revolve around guilt or innocence. Even if there had been evidence against Mr. Arar or any of the other men, they should have been treated in full accord with fundamental human rights and basic precepts of justice and the rule of law, which would entail criminal charges and a fair trial, not arbitrary arrest, extraordinary rendition and torture.

The nature and reliability of any evidence and allegations that exists in turn against the other men has similarly not been made public. Amnesty International is however deeply disturbed by recent revelations that one central piece of evidence in Mr. El Maati's case – a map that was often described as hand-drawn and which served as the basis for accusations that it was a guide for a planned campaign of bombings in the Ottawa region – has been shown to have been an innocuous government-issue map of an office complex in western Ottawa.¹⁷ This raises questions about the integrity of the investigations in all of these cases and casts considerable doubt as to the reliability of the extensive amounts of evidence and testimony that have been provided *in camera* and not been tested through cross-examination by lawyers for these men or the public assessment that comes through a public judicial process.

RECOMMENDATION 3: Given the failure to charge Mr. Arar with criminal acts of any description, including terrorist-related offences or to bring any allegations to his attention and provide him an opportunity to refute, the Commission should call on the government to issue a clear public statement indicating that there is no evidence linking him to such offences.

Amnesty International awaits the report from the Commission's Fact-Finder, Stephen Toope, as to his findings with regard to Mr. Arar's treatment, including possible torture, in Syria. We have to date found Mr. Arar's allegations of torture to be detailed, credible and consistent with other information.

Throughout the course of the inquiry, evidence (some of which has been confusing, contradictory and contested) has emerged pointing to a variety of ways in which acts and omissions on the part of a wide variety of Canadian officials directly and indirectly led to the circumstances that resulted in Mr. Arar's arbitrary arrest, interrogations, torture, and year-long imprisonment. Some of these points are discussed in further detail in the next section and include:

- concerns that Mr. Arar's experience was quite possibly part of a wider Canadian policy or practice and not simply a result of a series of mistakes;

¹⁶ Superintendent Michel Cabana, Officer in charge of Project AO Canada (RCMP) describes Mr. Arar as having become a person of interest, and/or a potential "witness," and/or a potential "associate" of a main target, of the RCMP's investigation (June 30, 2005 transcript, pages 8159-8165).

¹⁷ "It was hyped as a TERRORIST map It was cited by Egyptian TORTURERS It is a VISITOR'S GUIDE to Ottawa," Jeff Sallot and Colin Freeze, *Globe and Mail*, September 6, 2005, page A1.

- sharing information with police and security agencies in the United States and in Syria without the proper caveats being attached to indicate the reliability of the information;
- inadequate policies and safeguards to ensure information would not be shared with governments in ways likely to lead to human rights violations such as torture;
- showing active interest in interrogation sessions in Syria in a way that may have encouraged those sessions to continue while failing to insist that Mr. Arar be protected from torture and mistreatment;
- shortcomings, including possible negligence, in the efforts of Canadian diplomatic representatives in Syria; and
- disagreements and poor coordination among Canadian governmental departments and agencies which may have slowed and impaired high-level diplomatic efforts to secure Mr. Arar's release.

International and Canadian law requires that if the acts or omissions of Canadian officials contributed to the torture of Mr. Arar in Syria, those officials and the Canadian government may bear both criminal and civil liability. Mr. Arar has launched a lawsuit in Canada making precisely those allegations. The Commission can and should make recommendations now, however, which clarify whether any officials acted improperly, ensure accountability and pave the way for the compensation that is Mr. Arar's right.

RECOMMENDATION 4: The Commission should recommend that those responsible for what happened to Mr. Arar be held accountable through relevant disciplinary or criminal procedures. This should include responsibility for what happened to Mr. Arar in the United States, Jordan and Syria, as well as responsibility for orchestrating media leaks that took place before and after his release. Furthermore, the government should publicly acknowledge its responsibility, apologize publicly and award appropriate compensation to Maher Arar and his family.

IV. KEY CONCERNS

a) A wider pattern? A Canadian version of extraordinary rendition?

This inquiry has been established to deal with the case of Maher Arar. Amnesty International and all other intervening organizations have highlighted however, since the outset of the inquiry, that there must be careful examination of the possibility that what happened to him was not an isolated, exceptional instance, but rather might have been part of a wider pattern. The pattern might have even been tantamount to a Canadian variation of the notorious U.S. practice of extraordinary rendition, whereby individuals are transferred by one government into the hands of police and jailers in another country, outside of the usual framework of legal and human rights safeguards.

The concern arises because of information that has come to light about what has happened to three other Canadian citizens: Abdullah Almalki, Ahmad El Maati and

Muayyed Nureddin.¹⁸ All three of these men are, like Mr. Arar, Canadian citizens, Muslim, dual nationals, born in Arab countries. They have all been arrested and detained in Syria. They have all, like Mr. Arar, made allegations of being interrogated under torture. And critically, information that arises in each of these four cases raises questions about the scope and nature of the relationship between Canadian law enforcement and security agencies and their Syrian counterparts (and in Mr. El Maati's case, additionally, with Egyptian counterparts). Did their arrests come about as a result of information that was provided by Canadian agencies? Did their arrests come about as a result of some sort of request made by Canadian agencies? Did information from Canada form the basis of the interrogations they experienced in jail in Syria? Did Canadian interest in the results of the interrogation sessions interfere in any way with diplomatic efforts to protect the fundamental rights of these men while they were in detention? What use was made of the confessions and information obtained during the various interrogation sessions and in particular, did information from one interrogation flow into any of the other cases?

Amnesty International's concern about the possible nature and scope of the pattern that may lie behind these cases is outlined in the joint submission on this issue that has been made by all of the intervening organizations.¹⁹

The allegations that have been made by these other men have not been proven, but they are serious allegations. It defies belief that this was a series of unfortunate coincidences. Canadians need to know what was at play. Canadians need to know whether there was willingness to skirt or overlook Canada's human rights obligations – obligations to protect and certainly not expose people to abuses such as torture and arbitrary detention.

Amnesty International has repeatedly pressed the government to undertake independent review of these other cases. The government has not yet agreed to do so. Notably, however, Prime Minister Martin has stated that one reason that a further process is not needed is that the Commission is not only looking at the "specific instance" of Mr. Arar's case, but is "also looking at the broader issue" that involves these additional cases.²⁰

RECOMMENDATION 5: The Commission should go as far as the evidence allows with respect to determining whether what happened to Mr. Arar can be linked to a Canadian policy or practice of having or allowing Canadian citizens to be detained, and/or interrogated on their behalf in countries known for practicing torture, including whether there is *prima facie* reason to believe such a link exists.

We recognize that the Commission may not have seen enough evidence to be able to make conclusive findings of fact with respect to what happened to Mr. El Maati, Mr. Almalki and Mr. Nureddin, or with respect to issues of accountability and redress in their cases. However, if the Commissioner finds that a pattern exists or that there are *prima*

¹⁸ Chronologies submitted on behalf of Almalki, El Maati and Nureddin.

¹⁹ Joint Intervenors' Submission to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, September 10, 2005.

²⁰ *Martin rules out expanded probe of Ottawa's role in torture cases*, *The Globe and Mail*, September 9, 2005, p. A-1.

facie grounds to believe such a pattern exists it is vitally important that he recommends the thorough and independent assessment of those other cases. Amnesty International is of the view that at the very least, *prima facie* grounds do exist.

RECOMMENDATION 6: The Commission should call for a further process of independent, impartial and expert review of the cases of Abdullah Almalki, Ahmad El Maati and Muayyed Nureddin, through a second phase of this public inquiry, through the appointment of an independent expert, or through any other kind of effective independent process that the Commissioner considers sufficient to ensure full and public accountability.

b) In the face of torture: Has there been Canadian complicity, equivocation or negligence?

There are many serious human rights concerns that arise in Maher Arar's case, but none has attracted as much concern and attention as the issue of torture. Amnesty International was gravely concerned, from the early days of Mr. Arar's case, during the period he had been "disappeared" after being held in the United States and not yet re-emerged in Syrian custody, that he faced a very real risk of being tortured. We have documented the longstanding and extensive practice of torture in Syrian prisons, certainly including security-related cases.²¹ We repeatedly stressed this concern in dealings with Canadian officials, public campaigning on the case and extensive media interviews – all during the period Mr. Arar was imprisoned in Syria.

The concern became greater in July 2003, when a report emerged from the Syrian Human Rights Committee, indicating that they had received information that Mr. Arar had in fact been tortured. In retrospect now, we are also aware that in July 2002, Canadian consular officials, in their first visit with Ahmad El Maati in prison in Egypt, heard his allegation that he had been tortured in Syria.²² This information, coming almost three months before Mr. Arar was imprisoned in the same Syrian military intelligence building, should certainly have dramatically heightened concern for Mr. Arar's susceptibility to being tortured, as well as concerns about Mr. Almalki who was already in custody by that time, and Mr. Nureddin, who was imprisoned the following year.

Given this background, it is of central importance that the Commission examine the role of Canadian law enforcement, security, diplomatic and other officials, as well as government ministers, to ensure that all possible and appropriate steps were taken to protect Mr. Arar from the risk of torture and to refrain from doing anything that would increase the risk that he would be tortured. There have, of course, been no allegations that any Canadian official was present during an episode of torture, or that any Canadian official gave specific orders or made a direct request that Mr. Arar be tortured. However, possible responsibility and liability does not end there. The Commission must consider whether there was any complicity on the part of Canadian officials, either in what was done or what was not done.

²¹ Exhibit P-29: Amnesty International Report for Syria, 2002.

²² Exhibit P-192: August 12, 2002 DFAIT Camant note regarding consular visit to El Maati.

Amnesty International is of the view that there are a number of areas where policy gaps, poor training, wilful blindness and negligence may very well have contributed to the risk that Mr. Arar would be tortured. What follows are a series of concerns drawn from Amnesty International's review of evidence and testimony that has been publicly disclosed. Given the extensive amount of information that is not publicly accessible, much of which likely bears directly on these points, we are in most instances not able to draw specific conclusions.

- There were inadequate policies in place during 2002 and 2003 to govern information sharing with other governments so as to safeguard against the possibility of any such information exposing anyone to a risk of serious human rights violations, including torture.
- There were inadequate policies in place during 2002 and 2003 to govern the nature of collaboration and cooperation with foreign security agencies that are known to commit serious human rights violations, including torture.
- Canadian officials did not act to forestall the possibility that Mr. Arar would be sent to Syria from the United States, despite Mr. Arar having expressed that fear in a visit with a consular official.²³
- The actions of various government officials, including then Ambassador Pillarella and CSIS officials who visited Syria in November 2002, conveyed an impression to Syrian officials that there was considerable Canadian interest in the results of interrogations and no Canadian concern about the possibility of torture.²⁴
- Canadian Embassy officials in Syria, including the Ambassador and the consular officer assigned to Mr. Arar's case, failed to take the risk of torture seriously. This included an unacceptably poor degree of understanding about Syrian human rights concerns on the part of the Ambassador, and an attitude on the part of both men that they would only take torture seriously if they had conclusive proof of its occurrence. Apparent and possible signs of torture, including the fact that Mr. Arar had been held incommunicado for close to two weeks, that he had been submissive in his first visit, and that private visits were given little weight.²⁵ When the Ambassador learned that the Syrian Human Rights Committee had reported in the summer of 2003 that it had evidence that Mr. Arar had been tortured, he wrote in a memo to Ottawa that "a visit to Mr. Arar should help us rebut the recent charges of torture."²⁶

²³ Exhibit P-42, Tab 31 and May 11, 2005 testimony by Consular Officer Maureen Girvan (transcript pages 1850-1851).

²⁴ See for example Exhibits P-137 and P-138, which contain reports from then Ambassador Pillarella about his discussions with General Khalil, say "they would continue to interrogate" Mr. Arar, and that "General Khalil has promised to pass on to me any information they may gather on Arar's implication in terrorist activities." Ambassador Pillarella testified that he did not remember if he had asked for the information, but said that "the information that he promised to provide would be something welcome because we would know everything that we needed to know if we wanted to defend Mr. Arar's interests" (June 14, 2005 transcript page 6799).

²⁵ Ambassador Pillarella's June 14, 2005 testimony, transcript pages 6786-6794).

²⁶ Exhibit P-42, Tab 502: Memo from Mr. Pillarella to Graeme McIntyre.

- The consular officer carrying out visits with Mr. Arar did not press for private access to or legal representation for Mr. Arar because he knew that Syrian officials would refuse, given his dual nationality, and it was therefore pointless to make the request.²⁷
- The consular officer considered that the appropriate test he was to use during consular visits was to determine whether Mr. Arar was being treated any worse than other prisoners, rather than to determine whether any of Mr. Arar's basic rights were being infringed.²⁸
- Information that was provided to the Ambassador from Mr. Arar's interrogation sessions, and then delivered to Canadian intelligence officials in Ottawa was never qualified as being the possible and even likely product of torture.
- Some of the information from Mr. Arar's interrogation sessions appears to have been leaked to media by unnamed government sources during the late autumn of 2003, despite the fact that it was a possible and even likely product of torture.²⁹
- Syrian officials appeared to be under the impression that CSIS officials did not want Mr. Arar to be returned to Canada.³⁰
- Disagreements, poor communication and a lack of clear political authority among various government departments and agencies, obstructed the formulation of a unified Canadian government statement to Syrian officials regarding Mr. Arar's case, and may have delayed high-level diplomatic efforts to secure his return to Canada.³¹
- The allegations of torture in Syria that were conveyed by Mr. El Maati during a consular visit in Egypt in July 2002 do not appear to have been circulated to all appropriate officials and do not appear to have influenced how subsequent cases such as Mr. Almalki, Mr. Arar and Mr. Nureddin were approached.³²
- Mr. Nureddin did receive medical attention after his release from prison, but there is no evidence of medical assistance being provided any of the other men – in Syria, Egypt or after return to Canada – or even of them being advised of the importance of seeking medical and psychological treatment for the torture they had experienced.
- There is no evidence of the Canadian government assisting Mr. Arar or any of the other men after their release to pursue accountability or compensation from Syrian or Egyptian authorities. Instead, the Canadian government has taken the position that Canadian courts cannot be used to pursue civil redress from those governments.³³

²⁷ August 31, 2005 transcript pages 11629-11635.

²⁸ August 30, 2005 testimony by Leo Martel, transcript pages 11158-11157 and 11162-11163.

²⁹ See, for example, Exhibit P-80, page 5: Article by Juliet O'Neill, *Ottawa Citizen*, November 8, 2003.

³⁰ We have seen from several sources, including Marlene Catteral and Gar Parady, that Syrian authorities believed that CSIS had informed them that they did not want Mr. Arar returned to Canada. The frequency of this assertion leaves us questioning CSIS' denial that they ever said that.

³¹ Commission counsel summarized some of the problems on June 3, 2005 (transcript page 5367-5378).

³² Leo Martel testified on August 31, 2005 that he had not received the consular report containing Mr. El Maati's allegations of torture in Syria (transcript page 11471-11473).

³³ See *Bouzari*, footnote 1.

RECOMMENDATION 7: The Commission should assess the actions and omissions of Canadian officials at all stages of Mr. Arar's case and determine whether through direct intent, wilful blindness or negligence, there is any responsibility for having caused or contributed to any of the human rights violations he experienced, including torture, arbitrary arrest, and detention without charge or trial.

RECOMMENDATION 8: The Canadian government should develop Human Rights Protocols to be integrated into all information sharing agreements and arrangements with foreign governments. The Protocols should contain express limitations and prohibitions on the sharing of information in circumstances where it is likely to contribute to a risk of torture.

RECOMMENDATION 9: The Criminal Code should be amended to make it an offence for any person, including a law enforcement or security officer, to do or fail to do anything with the knowledge of or wilfully blind to the fact that is likely to expose someone to a risk of torture, in Canada or abroad.

RECOMMENDATION 10: Appropriate Canadian legislation, including the *Canada Evidence Act* and the *Criminal Code* should be amended to make it clear that information that there is reasonable grounds to believe may have been obtained under torture, in Canada or abroad, will not be used in the course of police or security investigations or in judicial or other legal proceedings, except investigations or proceedings regarding criminal or civil responsibility for the acts of torture. Any such information should very clearly be labelled as having possibly been obtained under torture and shall never be provided to any other person or any other agency, without that *proviso* clearly attached.

RECOMMENDATION 11: The Parliamentary Secretary responsible for Canadians Abroad should be designated as politically responsible for the development and implementation of strategies and action plans, as well as the coordination of and the development of all efforts related to the protection of Canadians imprisoned in situations where there is a serious risk of human rights violations. Any reports received of the torture of a Canadian detained abroad shall be immediately brought to the Parliamentary Secretary's attention, and shall be circulated widely to any other relevant officials, in Canada and at posts abroad. In high risk cases, where a disagreement or dispute arises among government departments or agencies with respect to the strategy to be pursued, the matter should be referred to the Prime Minister for immediate resolution.

RECOMMENDATION 12: When there is credible evidence that a Canadian detained abroad is experiencing or has experienced torture, it should receive high-level political attention, including from both the Minister of Foreign Affairs and the Prime Minister.

RECOMMENDATION 13: There should be a review of the nature of the training and continuing education with respect to human rights issues that diplomatic staff,

including Ambassadors, receive before taking up and throughout the duration of a foreign posting.

RECOMMENDATION 14: Consular officers posted to countries where there is a serious possibility that imprisoned Canadians may experience torture should receive training on how to carry out interviews in prison settings so as to best detect whether torture has in fact occurred. A specialized team of experts should be established to provide advice or guidance as needed, and for flexible deployment abroad when urgent or difficult cases arise.

RECOMMENDATION 15: In all cases of detained Canadians, including those with dual nationality, consular officials should regularly press for private visits and for detainees to be afforded the full range of their rights, including access to medical care and legal counsel, even when the foreign government is unlikely to accede to such requests.³⁴

RECOMMENDATION 16: In carrying out prison visits with detained Canadians, consular officials should seek to determine: a) whether the detainee may be experiencing treatment that is any worse than other detainees, and b) whether the detainee may be experiencing any violations of internationally protected human rights. Concerns about either of these points should be immediately raised with the detaining authorities.

RECOMMENDATION 17: Canadian citizens who are tortured abroad should receive immediate and urgent referral to expert medical and psychological treatment upon release.

RECOMMENDATION 18: Canada should amend the *State Immunity Act* so as to allow civil suits against foreign governments for compensation in situations where the alleged harm would be subject to universal criminal jurisdiction, including torture, war crimes and crimes against humanity.

RECOMMENDATION 19: Canada should immediately ratify the Optional Protocol to the United Nations Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment, which seeks to establish a global system of inspections of places of detention with the goal of preventing torture.

³⁴ A recent report from the UN Committee against Torture makes this same recommendation: "... The State party should insist on unrestricted consular access to its nationals who are in detention abroad, with facility for unmonitored meetings and, if required, of appropriate medical expertise." Conclusions and recommendations of the Committee against Torture : Canada, CAT/C/CR/34/CAN, at para. 5(d).

IV. CONCLUSION

Ever since his return to Canada Maher Arar has stressed that one of his paramount concerns is to ensure that what happened to him does not happen to anyone else. Amnesty International believes that this Commission can make a tremendous contribution to ensuring that will be the case by:

- Offering exoneration, accountability and redress for Maher Arar
- Examining as widely as possible the likelihood that his case arose as part of a wider pattern and making recommendations for a process of further independent review to examine that pattern.
- Detailing specific changes and reform that are needed to Canadian law, policy and practice to ensure that the actions or omissions of Canadian officials at all times offer the maximum possible protection against torture and do not in any way knowingly or negligently expose individuals to the risk of torture.

This case does not stand in any way for the proposition that Canada should not take concerns about terrorism – domestic and international – seriously. Preventing terrorism and protecting civilians are crucial human rights imperatives. What has happened to Maher Arar, and also to Ahmad El Maati, Abdullah Almalki and Muayyed Nureddin is, however, a stark and very human reminder of the consequences of pursuing counter-terrorism strategies that are not firmly grounded in respect for basic human rights. The result is a legacy of injustice that has shattered the lives of these men and their families, and left a cloud of fear and disenfranchisement hovering over Canada's Arab and Muslim communities. There is no security in that result. There is only injustice.