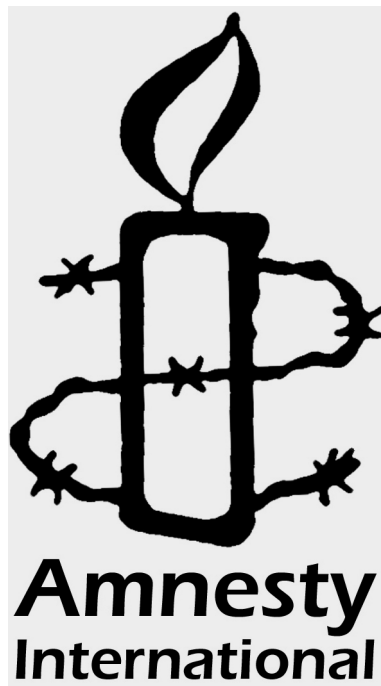


**Reply Submission of Amnesty International to the
Internal Inquiry into the Actions of Canadian Officials
in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin**



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These reply submissions address seven principal topics:

- (1) Interpretation of the phrase “resulted in”
- (2) Concerns about labeling
- (3) Evidence relied on in labeling
- (4) Level of knowledge about risk of mistreatment
- (5) Assessing torture
- (6) Taking account of human rights considerations
- (7) Consular services

“Resulted in”: Direct and indirect impact of officials’ actions

1. The government’s submission asserts emphatically that actions by CSIS, the RCMP and DFAIT did not “result in” the detention or mistreatment of the three men. The government argues that the Commissioner should essentially interpret his terms of reference as being limited to instances where government action, and nothing else, is what conclusively led to the detention or mistreatment. The government’s argument misreads and misinterprets the Terms of Reference. The Terms of Reference do not use the term “resulted in.” Rather, the Terms of Reference extend to instances where the detention or mistreatment **“resulted, directly or indirectly, from** actions of Canadian officials.” The Terms of Reference do clearly recognize, therefore that there may well be a number of different factors that led to the detention and mistreatment of the three men and that the impact of the actions of Canadian officials may be both direct and indirect. There is no requirement that the Commission limit its consideration to instances where it can be conclusively proven that the actions of Canadian officials are the sole and direct cause of the detention and mistreatment.

2. Amnesty International recognizes that identifying the impact of Canadian officials’ actions is made more difficult by the non-involvement of the United States, Syria and Egypt. It is nonetheless possible and entirely appropriate to draw inferences based on established facts. The Terms of Reference not only allow the Commission to do so but, in our view, require that such inferences be drawn.

3. The government’s assertion that it is obvious that certain of their actions, such as the sending of questions, did not impact Syria’s decision to detain, mistreat or prolong the detention of the men cannot be sustained. Syria is not party to this commission and it is therefore true that we cannot know with certainty what impact those actions did have. However, it is reasonable to conclude that officials’ actions likely did have an impact on Syria and Egypt’s decision to detain and mistreat the men. Furthermore, we believe that the evidence supports drawing such an inference.

4. While we do not have direct evidence as to the impact the sending of questions for Mr. Almalki had on Syrian officials, we do know that he remained in detention months after the questions were sent and that his risk of mistreatment and torture remained high throughout that period. Had the questions not been sent perhaps Mr. Almalki might have been released earlier. Likewise CSIS argues that there is nothing to suggest that their trip in November 2002 influenced the timing of Mr. Almalki’s release. But there is likewise no evidence suggesting that

it did not. What we do know, in both instances, is that the questions were taken seriously by Syrian officials and played a role in the interrogations of the two men. It is reasonable to infer that this would have bolstered or renewed the interest that Syrian officials had in both men.

Concerns Arising From the Use of Unsubstantiated Allegations and Labeling

5. The government argues that it is not the role of this Commission to determine either whether CSIS or the RCMP erred in their investigation into the three men, or whether the allegations against the men can be substantiated. Fairness would dictate, however that if the scope of the commission excludes an inquiry into the substance of the allegations and the use of labels that the government cannot premise its own submission on an argument that the men posed a legitimate threat which necessitated the government engaging in the various activities that have been detailed in draft factual summaries.

6. The government has made very frequent use of labels and repeats the allegations that have been made against the men throughout its submission and in other documents and evidence that are before the Commission. They have done so often without even using conditional terms such as “alleged” and “suspected.” Rather, the government’s submission would lead a reader to conclude that the men are unquestionably guilty and continue to be threats.

7. Amnesty International reminds the Commission of the government’s steadfast position on the narrow scope of this inquiry, and stresses that the presumption of innocence is a central component of human rights law both domestically and internationally.¹

8. Throughout the government’s submission there are references to there being “credible information” and that the “descriptions and terminology used by CSIS in communications ... were accurate, reliable and appropriate.”² We have yet to see any evidence that demonstrates how the allegations were substantiated. The men clearly have been given no opportunity to respond to the allegations. We strongly urge the Commission to ensure that such terms are not repeated in the final report.

9. Amnesty International submits that the government’s assessment of the impact that their use of labels and allegations in correspondence with foreign agencies has had on the men’s detention and mistreatment is flawed. The government has argued that because the United States, Syria and Egypt also used those terms (apparently based on their own investigative findings), the use of those labels and allegations by Canadian officials was of no effect.

10. This is an untenable assertion. CSIS has submitted that they did not “approve, condone, or encourage” the men’s detention and mistreatment. We submit Canada’s allegations and repeated use of labels provided legitimacy and bolstered those states’ actions in regards to the three men. If Canada, the men’s country of citizenship, believed that they were “terrorists” or “imminent threats” it is reasonable to infer that those states may have felt emboldened to act in

¹ *Canadian Charter of Rights and Freedoms, section 11d.*

² Closing Submission of the Attorney General of Canada to the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Abmad Abou-Elmaati and Muayyed Nureddin. At 125

the way that they did. At a minimum it would not have bolstered the resolve of those states to release the men or take other steps to protect their human rights.

11. The RCMP sent a fax to the United States and foreign agencies stating that Mr. Abou-Elmaati and Mr. Almalki was “linked through association to Al Qaeda, currently engaged in activities in support of politically motivated violence which pose an imminent threat to the public safety and security of Canada.”³ In its submission the government downplays the impact of these allegations and labeling by stating that a follow-up fax reiterating these points merely added Mr. Almalki’s name. It does not matter that new allegations were not presented, the fact that his name was highlighted in a follow-up fax insinuates his guilt and that he was an alleged threat to Canada. Because the United States already regarded Mr. Almalki as a threat does not negate Canadian officials’ responsibility to ensure that all measures were taken to protect a Canadian citizen from gross human rights violations like torture and that any labels or description of that citizen were borne out by reliable evidence.

12. Similarly, the RCMP cannot assert that it was not significant that an RCMP LO referred to Mr. Abou-Elmaati as a “terrorist detained in Cairo” on the grounds that his Egyptian counterpart had used the phrase. The use of this term by an RCMP official again serves to reinforce and give legitimacy to the Egyptians opinion of Mr. Abou-Elmaati. The potential impact that this had on the Egyptians cannot be dismissed as inconsequential.⁴

Evidence relied on in labeling

13. While the three men and the intervenors have not been given the opportunity to see the bulk of the evidence against Mr. Almalki, Mr. Abou-Elmaati, or Mr. Nureddin, the government’s submission raises a number of alarming concerns as to what lay behind this investigation and served as a basis for the labeling and allegations that arose. They assert, for instance, that Mr. Abou-Elmaati was suspicious because he was found at the US border with a “Know Your Rights if You are Approached by CSIS” pamphlet, his brother was an alleged terrorist, and the United States already, prior to the RCMP’s investigation, believed that Mr. Abou-Elmaati was a threat.⁵

14. As Amnesty International noted in its earlier feedback to the draft factual narratives, the “Know Your Rights” pamphlet should not be viewed as suspicious. Numerous Canadian-Arab and Muslim organizations published such pamphlets as an aid to their members in light of the increased attention from the RCMP and CSIS that members of those communities experienced after September 11th. In the 1980’s Irish-Canadian communities provided their members with similar material as a result of RCMP and CSIS’s heightened interest in potential links between Irish Canadians and the IRA. The pamphlet, which Mr. Abou-Elmaati has maintained did not belong to him, is a form of human rights education and most certainly should not be viewed as suspicious. In fact, documents of this sort play a valuable role in protecting the rights of Canadians.

³ Supra note 2 at 162.

⁴ Supra note 2 at 179.

⁵ Supra note 2 at 148, 149.

15. In a similar vein, because his brother is an alleged terrorism suspect does not mean that Mr. Abou-Elmaati is. The presumption of innocence should prevail and guilt by association should not be the basis for engaging in activities that might lead to the detention and mistreatment of a Canadian citizen.

16. Another example that highlights concerns about the well-foundedness of the information that served as a basis for the suspicions and labeling of the three men is the map found in Mr. Abou-Elmaati's possession. This map — which seems to have played a prominent role in shaping Canadian and US officials' suspicions that he was planning to bomb Parliament Hill — was later found to have been prepared by the government itself and was outdated as a number of the buildings and their designations had changed. A rudimentary investigation would have clearly demonstrated that it was hardly suspicious. Yet the map appears to have factored heavily into decisions about how to investigate Mr. Abou-Elmaati and was referred to in the information surrounding his alleged confession. We know that at some point in time RCMP officials apparently did learn that the map was outdated. We do not know what steps they took to ensure that all other Canadian and foreign agencies were made aware that the map should not be viewed as suspicious.

17. The RCMP's positive duty to protect Canadians from terrorist's threats must also imply that they have an obligation to carry out a thorough investigation domestically before engaging in activity that may compromise the well-being of Canadians.⁶

Lack of knowledge of mistreatment

18. The government frequently makes the argument that the actions of officials cannot be considered to be deficient as they were unaware of the men's mistreatment (all the while continuing to refer to such mistreatment as alleged and unproven). It is in fact a distressing read to see the frequency of assertions of various officials not knowing, not suspecting, and having no reason to suspect that the men were at risk of torture and other mistreatment. Amnesty International submits that the standard that should be applied in this regard is what officials they reasonably "ought to have known."⁷ As documented in our earlier submissions on standards and again in our recent final submission, ample information was available at the time that made it clear that there was a substantial, foreseeable risk that the three men would be tortured and otherwise mistreated on the grounds that they were suspected national security threats and had been labeled as Islamic terrorists.

19. Notably CSIS officials, when interviewing Mr. Abou Elmaati, used the term "Mukhabarat" as a means of intimidating him (officials apparently meant to use the term as a means of clarifying what type of agency CSIS was). This suggests an awareness of the harsh tactics used by Syrian and Egyptian intelligence agencies. Officials cannot later turn around and feign a lack of awareness of that notorious record. During the men's detention CSIS and the RCMP were also made aware of allegations from Mr. Abou-Elmaati and Mr. Arar of mistreatment yet this did not prevent them from sending questions and continuing ongoing efforts to interview the men while they were detained.

⁶ Supra note 2 at 143.

⁷ Ahmed Hussein Mustafa Kamil Agiza v. Sweden, *Decision CAT/C/34/D/233/2003*, 24 May 2005.

Assessing Torture

20. Above all else, Amnesty International is deeply disturbed about the approach taken in the government's submission to the issue of torture. It reveals a profound lack of familiarity with the impact of torture, the behaviour of torture survivors and well-established national and international understandings as to the most effective and sensitive way to examine allegations of torture in legal proceedings. Amnesty International would have expected the government to demonstrate a much more informed and sophisticated understanding of all of these issues.

21. The government objects to the fact that the interviews that were conducted of the three men with respect to their allegations of torture were inquisitorial and non-adversarial thus eliminating for them the opportunity to cross-examine the men. The purpose of the torture interviews was to ascertain whether or not the men were tortured and mistreated while in detention in Syria and Egypt. The interviews did not focus on the role of Canadian officials in those incidents of torture and mistreatment. To subject survivors of torture to an adversarial system where they would be cross-examined by government officials would be to unnecessarily heighten their risk of being re-traumatized.

22. The government has been clear in its position that they have doubts about the validity of the men's allegations of torture and do not believe that they carry any responsibility for the men's detention and/or mistreatment. As such one can imagine that for the men it would be extremely difficult to be questioned by government officials — especially in light of the fact that it was government officials from Syria and Egypt who tortured them — who believe that they are lying. The risk of re-traumatization is too great. Amnesty International is concerned that the government does not in any way acknowledge this risk in its submission.

23. Credibility is always an issue in such circumstances. We are of the view that the Commission adopted a process that found an appropriate balance between fairness and sensitivity on one hand and the need to be thorough and rigorous on the other. There have, notably, been other examinations of the men's allegations of torture as well, including by Mr. Toope in the course of the Arar Inquiry and by Amnesty International soon after the three men had returned to Canada and long before this Commission had been established or was even foreseen.

24. We take particular objection to the government's allegation of possible collusion between Mr. Abou-Elmaati and Mr. Almalki in the wake of the Arar Inquiry.⁸ No clear basis for this assertion has been laid out. Given that the men and the interveners were not allowed to participate in the interviewing of the witnesses, we are unable to assess the credibility of those witnesses or point to inconsistencies in their statements. In regards to this allegation about collusion Amnesty International stresses that Amnesty International interviewed all three men soon after their return to Canada. Since that time the men's accounts of their experiences have remained consistent, as evidenced by the transcripts from the torture narratives. If the men have shared their experiences with each other since the Arar Inquiry (the evidentiary phase of which did, after all, conclude three years ago), it is understandably out of a desire to seek support from

⁸ Supra note 2 at 33.

those who have shared a common experience. It would, in fact, be peculiar and unfortunate if such conversations had not taken place. The government's allegation of collusion is both unsubstantiated and unfair.

25. Amnesty International is also seriously concerned about the references made by CSIS and DFAIT pertaining to the opportunities that Mr. Abou-Elmaati had, while still in detention, to mention that he was being tortured.⁹ The suggestion that Mr. Abou-Elmaati could have discreetly told consular officials that he was being tortured and mistreated while the prison guards were briefly out of the room again suggests a profound and deeply worrying misunderstanding of the psychological impacts of torture. Amnesty International outlined in its submission on the applicable standards, torture, as defined by the Convention Against Torture, includes both physical and mental torture. The ever present threat of torture makes speaking out all but impossible. This has been well-documented in medical literature for many decades. Amnesty International is dismayed that the government's submission contains no understanding of this reality.

26. In a similar vein, the government submission asserts that the RCMP sought a face to face interview on the grounds that "evidence obtained under duress is not admissible" and that by interviewing in person it would allow them to control the interview, be informed of mistreatment, and it would be less intrusive."¹⁰ This argument again demonstrates a worrying lack of understanding about torture. Irrespective of whether torture occurred the minute before any such interview began or one month before, evidence obtained from a Canadian who was still detained and being interviewed in the same environment as when they had been tortured, would most certainly still bear the taint of torture. The RCMP might have been able to control that one particular interview and be able to ensure that no physical torture would be used. But they would have had no control over the type of physical torture used on the men before or after the interviews — a fact that the men would have been all too aware of. And they would have been unable to do anything about the impact of mental torture and the fact that they would have been interviewing the men in the same conditions were they were being detained and tortured. The experience would have almost certainly been devastating for the men's psychological well-being.

27. Finally on this point, the government highlights that Canadian officials regarded Mr. Abou-Elmaati's allegation of torture as only an allegation because they considered it be a common Al Qaeda practice to claim that one was tortured. It appears that this conclusion became a starting premise through which all allegations of torture were therefore considered to be suspect. This approach leaves one wondering whether anyone who was, for any well-founded or unfounded reason considered to possibly be a supporter of terrorist activities, would ever have allegations of torture taken seriously while still in detention.

⁹ Supra note 2 at 35.

¹⁰ Supra note 2 at 191.

Taking account of human rights considerations

27. The government argues that CSIS shared little information with foreign agencies and that when it was there was an implied caveat attached to the information. The RCMP admits to not routinely using caveats. What emerges is a pattern of relying on implied caveats and then justifying that action on the grounds that the other parties were respected partners who would not violate the goodwill that existed between them and Canada. Such a position reveals a complete failure to consider whether the countries that they were sharing information with were in fact respecting those caveats.

28. A glaring example that reveals that appropriate human rights considerations were not followed arises when a foreign agency asked Canadian officials if they could share information with Syria pertaining to Mr. Nureddin's travel itinerary. Canada said yes but asked for assurances that he would be treated properly. Canada ought to have known at the time that any assurances that involved Syria or the United States would not have provided sufficient protection for Mr. Nureddin. What is telling is that when CSIS asked a foreign agency if they could share information with other countries including Syria, that foreign agency clearly stated that Canada could not share the information with Syria. This would suggest that the foreign agency did not consider it appropriate to share information with Syria. If they could make that determination one must ask why Canadian officials failed to do so. Did officials appropriately consider relevant facts and concerns, did they defer to the interests of more powerful partners, or were they so eager to contribute to foreign agencies' investigations that they jeopardized Mr. Nureddin's well-being?

Consular services

29. Amnesty International submits that consular officials can and must play a valuable role in preventing torture. Furthermore, they can play a vital role in ensuring that torture and mistreatment does not continue indefinitely by advancing all possible strategies for gaining access to and working for the release or repatriation of Canadian citizens who are detained in circumstances where there are serious grounds for concerns about a risk of torture.¹¹

30. The government's submission suggests that even if consular officials had been more fully aware of human rights conditions in Syria and Egypt their actions would have remained the same.¹² Amnesty International submits that this should not be the case. In the draft factual narratives, for example, former DFAIT officials referred to requests that they had made in the past for private interviews with detained Canadians — a practice that was not followed by the consular officials that met with Mr. Abou-Elmaati. Had the officials been aware of human rights conditions it is reasonable to conclude that they would have more pointedly flagged mistreatment as something to focus on during interviews and placed a heightened importance on contacting and following-up on communications with Syrian and Egyptian officials.

31. The government's submission implies that the families of the three men are in some way responsible for their prolonged detention and mistreatment and contributed to the Canadian

¹¹ Supra note 2 at 207.

¹² Supra note 2 at 220

government's inability to aid the men.¹³ The families are criticized for their failure to work with consular officials and to openly share information. There is no recognition or acknowledgement of the understandable reasons that families may have had for taking such an approach.

32. Finally, there is no recognition of the fact that Maher Arar did receive numerous ongoing visits from Canadian officials while detained in Syria. Mr. Arar, as with Mr. Almalki, is a dual national with Syria. Thus dual nationality is not in all instances a bar to providing consular services. Similarly, Mr. Nureddin and Mr. Abou Elmaati were not dual nationals with Syria yet they did not receive any consular visits in Syria. There is clearly more in play in these cases than the easy assertion that it is impossible to gain consular access to dual nationals.

Conclusion

34. Notably, the government's submission gives little attention to the fact that the RCMP sent questions to Syria to be asked of Mr. Almalki; that CSIS sent questions via a third party to Syria to be asked of Mr. Abou-Elmaati; that Mr. Abou-Elmaati's itinerary was shared with the United States and other foreign agencies; that Mr. Nureddin's itinerary was shared with the above, as well as with Syria following a third party's request; that CSIS went to Syria to discuss Mr. Almalki; and that the RCMP sought to interview the men while they were in detention.

35. It is reasonable to infer that all of these actions would have had a direct or indirect impact on the initial detention, the continuation of detention and the mistreatment of the three men.

36. In sum, in our final submissions and this reply Amnesty International has highlighted a number of areas where we consider there to have been serious deficiencies coming within the Terms of Reference of the Commission. These include:

- labeling the men with exaggerated and unjustified terms such as extremists and terrorists without an adequate evidentiary basis for doing so and then sharing those labels with foreign agencies;
- sharing information about the men, including travel itineraries, with foreign agencies in reckless disregard for the likelihood of it resulting in detention and other serious human rights violations;
- sharing information about the men, including in the form of proposed lines of questioning, with foreign agencies in reckless disregard for the likelihood of it resulting in torture and other serious human rights violations;
- failing to prioritize consular efforts to secure access to the three men, protect their rights and arrange for their return to Canada;
- orchestrating leaks to the media that were intended to discredit the men's reputations, discourage efforts to advocate on their behalf, and thus prolong their detention;

¹³ Supra note 2 at 210.

- failing to ensure that officials received adequate training in human rights conditions in countries with which Canada maintains security relationships; and
- failing to ensure that officials received adequate training in a range of issues associated with torture, including how to detect torture when interviewing possible victims in prison settings, and how to assess intelligence information so as to determine when it may have been obtained under torture.

36. Amnesty International appreciates the opportunity to reply to the government's submission and respectfully submits the above as our reply.