

Commissioner Frank Iacobucci
Internal Inquiry into the Actions of Canadian Officials
In Relation to Abdullah Almaki, Ahmad Abou-Elmaati
And Muayyed Nuredding

July 9, 2007

Dear Commissioner,

As you pass the half-way point in your mandate, with your counsel having recently commenced the process of interviewing witnesses we are writing to you to share a number of observations, concerns and recommendations we have about the process that is being followed. We also wish to note what we regard as positive developments in the work of the Inquiry.

Background

Our organizations all pressed the government, over a period of two years, to convene the inquiry that has now been established and is looking into the cases of Abdullah Almaki, Ahmad Abou-Elmaati and Muayyed Nureddin (“the three men”).

We were concerned that these three cases, considered in combination with that of Maher Arar, raised troubling questions about policies and practices within Canadian law enforcement and/or security agencies that have acquiesced in or assisted the notorious U.S. practice of “extraordinary rendition” or even carried out a Canadian variation of that practice. The possibility that, in the course of domestic national security investigations, Canadian officials might have in any way tolerated, facilitated or encouraged human rights violations of suspects or persons of interest by officials of other countries, was a very disturbing prospect that needed thorough and public review.

We welcomed the government’s announcement in December 2006, in the wake of the release of the report of the Commission of Inquiry into Maher Arar’s case (“the Arar Inquiry”), that a further inquiry into these three cases would indeed be convened. We were pleased that someone of your stature and experience was named to head the inquiry. Our organizations sought and received standing as intervenors in the inquiry in order to demonstrate our ongoing concern about the issues at stake and to also show our commitment to helping ensure that the broader public interest in those issues was represented.

Inquiry Announced

We were concerned, however, about the government's decision to characterize this as an "internal inquiry" even though it was established under the Inquiries Act. We were particularly concerned that the Terms of Reference direct you to conduct proceedings "in private" and to only hold specific portions of the inquiry in public when "essential to ensure the effective conduct of the inquiry." We were also concerned about the fact that the government imposed a short deadline for the inquiry to report. While we very much support the goal of the inquiry being efficient and timely, we were concerned that setting a deadline of January 31, 2008 might not be workable, and might also limit the time available for the inquiry to conduct public proceedings, because of the latter's time-consuming nature.

In our submissions to you in April we urged that you carry out a considerable amount of your work in public, on the grounds that this was essential to the effective conduct of the inquiry. We argued that it was especially important that Messrs. Almalki, Abou-Elmaati and Nureddin should be able to participate extensively in the proceedings, including by granting some of their legal representatives the necessary security clearance to have access to all the evidence. We also underscored the importance of the other intervenors and the public being able to follow and engage with the proceedings as they unfold, and not only through the report that will be issued at the end of the process.

We were disappointed that your ruling on May 31 decided on a process that would be almost entirely secret, excluding not only the public and intervenors but, more critically, the three men who are the subject of the inquiry. We do recognize, of course, that significant portions of the Arar Inquiry were also held *in camera*. However, that was counterbalanced by the knowledge all along that there would eventually be a number of witnesses and documents that would be examined in public. Those public hearings were held between May and August 2005 and afforded Mr. Arar's legal team an important opportunity to review important documents and cross-examine witnesses. The hearings also allowed all parties to the inquiry to develop a much better understanding of the evidence. As a result, Mr. Arar's team and the intervening organizations were able to make fully informed and very constructive closing submissions to the Arar Inquiry.

In making his recommendation that the cases of Messrs. Almalki, Abou-Elmaati and Nureddin be further reviewed, Arar Inquiry Commissioner O'Connor emphasized that the review process needed to be one that "is able to investigate the matters fully and, in the end, inspire public confidence in the outcome." In the context of the present Commission of Inquiry, we remain concerned that the strict approach to secrecy in the interview and hearing process will not be conducive to inspiring public confidence.

While disappointed with the May 31 ruling, we remain engaged with the Inquiry process, to the extent possible. We have watched closely as more information has become available to us about the exact approach that has been adopted and have hoped that would ease our concerns. While there have been developments that we do welcome, our overall concerns remain.

Positive Developments

We have welcomed the opportunity to meet with counsel to the Inquiry, on two occasions now, to review the Inquiry's plans. We have a third meeting scheduled later this week. The meetings are of particular importance given that there is no other opportunity for us to follow or engage with the inquiry process at this time.

In one such meeting, we learned of initial plans for the intended process for interviewing the three men about their experiences of torture in Syria and Egypt. We had serious misgivings about those plans, which we shared in the meeting and in a follow-up letter. We were very pleased, therefore, in our most recent meeting to learn that the plans had been adjusted to accommodate the recommendations made by ourselves and by counsel for the three men. We particularly welcome the involvement of a recognized expert in the area of torture, as well as the fact that you will personally be present during these interviews and thus hear the evidence from the three men firsthand.

In our most recent meeting with counsel to the Inquiry, we also learned that documents that were submitted to you, in particular the *Chronology of public information relating to the cases of Messrs. Almalki, El Maati and Nureddin* (the Chronology), are being relied upon by counsel during the interviews that are currently underway. That was also welcome news. Unfortunately, we do not know the answers to any questions that have been asked based on the Chronology. It remains our very strong hope and expectation that the questions posed in the Chronology will be answered in your final public report.

We also welcomed the briefing that counsel to the Inquiry was able to provide at our most recent meeting, concerning what has been covered in the interviews with Foreign Affairs witnesses. The information was, however, very general in nature and there was no information at all provided with respect to the CSIS witnesses who were interviewed over that same time period.

Current Concerns

Overall, however, we have a number of serious concerns about the process that has been adopted for the conduct of this inquiry. Those concerns include:

- The fact that the three men and their lawyers, intervening parties and the general public will have no access to any documentary evidence, including evidence that can be publicly disclosed because it does not involve valid national security confidentiality claims.

- The fact that none of the interviews of witnesses will be carried out with the presence and participation of counsel for the three men, let alone in a public setting that would allow us to follow a significant amount of the proceedings.
- The fact that counsel for the three men and the intervenors are not being provided with summaries of the interviews as they transpire. We note that the Security Intelligence Review Committee provides redacted transcripts and summaries in quick and effective manner, and urge you to consider this model.
- The fact that you will not be personally present during the majority of the interviews and will thus not form your own direct assessment of the evidence, including with respect to credibility.
- The fact that two parallel streams of interviews are being conducted contemporaneously, with the risk that information being gleaned through one set of interviews will not be complete and readily available to shape the nature of the questioning pursued in the other.
- The fact that 26,000 documents have been produced by the government to date. Given that a significant portion of those 26,000 documents are those submitted at the Arar Inquiry, it would appear that relatively few new documents have come forward. Shirley Heafey and Warren Allmand have recently written to you about this concern, drawing on Mr. Allmand's experience as Solicitor General and Ms. Heafey's experience of work with the Security Intelligence Review Committee and the Commission for Public Complaints against the RCMP.

Finally, there is the issue of whether or not the inquiry will proceed with an eye to exoneration of these three men, if the evidence supports that result. We are aware that has been raised on a number of occasions by counsel for the three men, and this is understandably a key concern of theirs. They have been informed that the Inquiry will not look at the issue of exoneration as you consider that to be beyond your Terms of Reference. This leaves them however in the very difficult position of having no effective means of trying to clear their names.

The fact that Commissioner O'Connor was able to exonerate Mr. Arar became a very powerful part of his final report, leading to a formal apology and compensation. We do recognize that Commissioner O'Connor did have greater latitude with respect to this issue given that his Terms of Reference included authority to report on "any other circumstance directly related to Mr. Arar that [he] considers relevant to fulfilling this mandate." You have not been given that power.

However, we believe that the aspects of your mandate requiring you to consider whether deficient actions on the part of Canadian officials led to the detention and/or mistreatment of Messrs. Almalki, Abou-Elmaati and/or Nureddin inescapably require you to examine and evaluate the information that Canadian officials compiled against these three men.

That information is the base from which officials operated and made decisions and took action that may have led to detention or mistreatment.

We now know from the Arar Inquiry that Canadian officials had no credible evidence linking Mr. Arar to terrorism. It is quite possible that the same mistakes were made in relation to the three men who are the subject of this Inquiry. This is one reason why it is necessary for the former detainees and their counsel to have some means of confronting the information which pertains to their alleged links with terrorism and their experiences in detention.

If the evidence disclosed to you does not reveal reasonable grounds to suspect the three former detainees of involvement in criminal activities, we would urge you to highlight this as a “deficiency” in your final report. We respectfully submit at the same time, however, that unless you are to provide the men with a full and fair opportunity to know and respond to the evidence you should not reach any finding that there were well-founded grounds for believing any of these men had been involved in criminal activity.

Examining the information base for this investigation also has a public interest dimension that goes beyond the very grave human rights implications for these men. We have highlighted in our Chronology the numerous examples of Canadian officials, both on and off the record, saying that Mr. Almalki and Mr. El Maati were linked to Al Qaeda and implicated in terrorist activities and plots. We believe the very central question of whether the very agencies tasked with safeguarding public security may have, without valid evidentiary justification, heightened public fear in these cases, cannot be ignored in your analysis or your report

Conclusion

Commissioner, we find ourselves in the difficult position of trying to assist you through a process that excludes us and greatly restricts our access to the evidence. It will be difficult to effectively participate in hearings about the appropriate legal standards in September without access to this evidence; it will also be difficult to frame constructive and effective closing submissions. The concern is of course greatest for the three men themselves.

We urge you to consider revising the Inquiry process in a manner that will address the concerns we have outlined here. If necessary, we would ask you to consider seeking an extension of the Inquiry’s time limit in order to allow a process more likely to inspire public confidence.

The issues in this case are of vital importance first and foremost to Messrs. Almalki, Abou-Elmaati and Nureddin. They also concern questions of fundamental human rights and the rule of law which are of vital concern to all Canadians. The approach taken to the conduct of this inquiry must be in keeping with what is at stake.

We would welcome an opportunity to meet with you to discuss our concerns further.

Sincerely,

Alex Neve
Secretary General
Amnesty International Canada

On behalf of:

Amnesty International Canada
British Columbia Civil Liberties Association
Canadian Arab Federation
Canadian Council for American Islamic Relations
Canadian Muslim Civil Liberties Association
Human Rights Watch
International Civil Liberties Monitoring Group