

**INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN  
RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND  
MUAYYED NUREDDIN**

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**SUBMISSION IN SUPPORT OF APPLICATION REQUESTING  
GREATER DISCLOSURE**

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**AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH BRANCH)  
and  
HUMAN RIGHTS WATCH**

**INTRODUCTION**

1. Established in the wake of the report from the Arar Inquiry, which shocked Canadians and raised serious questions as to the commitment to and understanding of Canada's international human rights obligations by Canadian law enforcement and security agencies, this Inquiry was established *inter alia* because of the strong public interest in investigating fully Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin's serious allegations that they were detained, tortured and mistreated as a consequence of actions of Canadian officials.<sup>1</sup>
2. As the Inquiry advances in its work and approaches its deadline, the Canadian public, still shaken by the results of the Arar Inquiry, continues to have a strong interest in the disclosure of information about the role that Canadian officials may have played in the men's mistreatment and torture. This Inquiry has the potential to assist the rebuilding of public confidence in Canadian intelligence and security agencies, by conducting an independent, credible and transparent investigation that provides information and answers to the Canadian public concerning the actions of its government officials.

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<sup>1</sup> Commissioner Iacobucci, "Opening Statement of Commissioner," March 21, 2007. Pg. 3

3. For Mr. Almalki, Mr. Elmaati and Mr. Nureddin (the three men), this Inquiry provides their only opportunity to learn why they were detained, mistreated, and tortured and what role Canadian officials may have played in these abuses. The Commissioner's final report will contribute to ensuring that there is some justice and accountability for them and crucially, it can aid in restoring their reputations, which have been seriously harmed by the labeling of the men as terrorists by the media. There does not appear to be any other viable means for them to do so.
4. The three men do not only have a moral entitlement to this information. In these submissions, Amnesty International and Human Rights Watch contend that international human rights law recognizes that, as victims of torture and other serious human rights violations, the three men have a right to effectively participate in the Inquiry as a direct result of their right to an effective remedy. International human rights law requires a certain minimum level of transparency, public scrutiny and effective participation by interested parties in official inquiries into serious human rights violations.
5. Amnesty International and Human Rights Watch believe that this Inquiry can and should act in a manner that is consistent with international human rights law's emphasis on effective participation by the victims, and appropriate transparency and publicity. There is a serious risk that if the Inquiry continues on its present course, it will not contribute to the three men's right to an effective remedy and to know the truth, and not positively contribute to restoring public confidence in Canada's law enforcement agencies and security services. The wholly private nature of the Inquiry and the complete non-disclosure of any relevant or material documents or records of evidence from interviews to date has effectively shut out the three men, and the Canadian public, from engaging in the process, making it very difficult for them to have confidence in the Inquiry and its outcome.

6. Amnesty International and Human Rights Watch respectfully submit that granting the Application for greater public disclosure is necessary to ensure the “effective conduct of the inquiry” as it will contribute towards the Inquiry’s compliance with relevant international human rights law standards, and thereby promote both the three men’s right to effective participation and to the promotion of public confidence in the process and its outcome. Furthermore it will allow the three men, their counsel, and the interveners to keep abreast of the Inquiry’s work and contribute effectively and positively to the process.

**FAILURE OF THE INQUIRY TO DISCLOSE RELEVANT OR MATERIAL INFORMATION TO THE THREE MEN, INTERVENERS OR PUBLIC THUS FAR**

7. Paragraph (d) of the Terms of Reference directs the Commissioner to “take all steps necessary to ensure that the Inquiry is conducted in private.” Paragraph (d) is subject to paragraph (e), which authorizes the Commissioner “to conduct specific portions of the Inquiry in public if he is satisfied that it is essential to ensure the effective conduct of the Inquiry.”
8. Commissioner Iacobucci indicated in his May 31<sup>st</sup> Ruling on the Terms of Reference that he would operate under a presumption in favour of closed proceedings premised on concerns over national security confidentiality.<sup>2</sup> Commissioner Iacobucci’s application of this approach has thus far rendered the Inquiry process largely inaccessible to the parties, and wholly inaccessible to the public.
9. In particular, and despite repeated requests by the parties in “off the record” meetings with Commission Counsel, the Inquiry has hitherto not disclosed to the three men, their counsel, the interveners or the public:

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<sup>2</sup> Ruling of Commissioner Iacobucci on Terms of Reference and Procedure, dated May 31, 2007 at para 44-45, 72.1

- a. A single document – whether subject to National Security Confidentiality (NSC) claims or not;
  - b. A reliable or definitive list of witnesses who have been or will be interviewed;
  - c. Any written or otherwise documented information (such as transcripts or summaries) concerning the evidence given by individuals interviewed by the Inquiry;
  - d. Any written or otherwise documented information concerning the conduct of the Inquiry's work and more specifically, whether the Canadian Government and the relevant Agencies have cooperated with the Inquiry.
10. Moreover, the Inquiry has failed to commit to disclosing any of the information set out in Paragraph 7, and has never given particularized reasons for the non-disclosure of any or all of the above categories of information. The result, from the perspective of the interveners, has been a process troublingly inscrutable and non-transparent, in which even decisions not to disclose are neither documented nor reasoned.
11. The Inquiry has also refused to commit – neither ruling for nor against – to the holding of public sessions for the examination and cross-examination of witnesses or for the taking of any kind of evidence or submissions. Once again, this refusal has been irrespective of any particular claim of confidentiality or national security concerns in respect of any particular witness or issue.
12. In the view of Amnesty International and Human Rights Watch, this state of affairs goes well beyond the presumption in favour of closed proceedings declared by Commissioner Iacobucci in his ruling on procedure. Rather, the approach taken to date severely undermines the possibility of effective participation by the persons with a direct interest in the Inquiry, the three men. It also substantially impairs the possibility of effective participation and assistance by those who have the status of interveners in the Inquiry. Finally, it prevents the

public from following the conduct of the Inquiry, a situation that can hardly be conducive to public confidence in the process.

13. In these submissions, Amnesty International and Human Rights Watch make two arguments in support of the relief claimed in the Application for Disclosure:
  - a. International human rights standards require a minimum level of transparency, accessibility and effective participation by those with an interest in the Inquiry and its subject matter, and that these standards entails much more substantial (although potentially differentiated) levels of disclosure to the three men, the interveners, and the public.
  - b. Principles of Canadian law concerning Public Inquiries clearly require a greater degree of publicity and transparency in the conduct of the Inquiry, to ensure its “effective conduct.”

## **INTERNATIONAL HUMAN RIGHTS LAW**

14. Canada is a party to both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
15. Article 2 of the ICCPR and Article 14 of the CAT require states parties to ensure to victims of a human rights violation, such as torture, the right to an effective remedy. The right to an effective remedy includes the right of the victim to an effective and impartial official investigation of the circumstances of the violations, and the events that led to them.<sup>3</sup>
16. The European Convention on Human Rights and Fundamental Freedoms (“ECHR”) contains a comparable guarantee to an effective remedy in Article 13. This right has also been held to include an entitlement to an effective and

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<sup>3</sup> *Hugo Rodriguez v Uruguay*, United Nations Human Rights Committee, No.322/1988, paras 12-14.

impartial official investigation into allegations of torture to which state officials have contributed.<sup>4</sup>

17. In respect of the nature and conduct of such investigations, the European Court has developed an extensive jurisprudence, which has application, *mutatis mutandis*, to the concept of effective remedy found in both the ICCPR and CAT. The critical principle for the purposes of this Inquiry is that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case, taking into account, *inter alia*, national security concerns. In all cases, however, the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.<sup>5</sup>
18. It is submitted that this principle means, at a minimum, that the three men should have access to the documents, witness information and witness evidence (either *viva voce* or in transcript form) that are necessary to enable them to safeguard their legitimate interests in the Inquiry and its outcome. The relief sought in the Application for Disclosure, namely, the disclosure of all relevant and material documentation, with appropriate NSC redaction, the disclosure of a witness list (without identification of CSIS employees) and the holding of public hearings in which the three men and their representatives can participate in the examination of witnesses of significant public importance, is necessary and appropriate to their interests as alleged victims of serious human rights abuses, and as a consequence of their right to an effective remedy in international human rights law.
19. The men have a right to know information about the events surrounding their detention, mistreatment and torture. Of the parties, the three men are the ones with the most direct interest in the outcome of the Inquiry. Their reputations are at stake and they are seeking accountability for serious human rights violations.

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<sup>4</sup> *Assenov v. Bulgaria* judgment of 28 September 1998, *Reports* 1998-VII, p. 3290 para 102

<sup>5</sup> *Finucane v United Kingdom*, *Application no. 29178/95*, 1 July 2003, para. 71 (citing numerous other European Court decisions reiterating this principle).

20. Disclosure to the three men and their counsel will improve their ability to assist the Inquiry in its work. In return, the men's trust in the process can be strengthened through the opportunity to verify that documents which they regard as essential to the investigation have been reviewed and are in the possession of the Inquiry. Conditions such as being bound by a confidentiality order could be applied to protect NSC and maintain the primarily private nature of the Inquiry.
21. The principle from *Finucane*<sup>6</sup> also implies that, while the degree of public scrutiny may vary from case to case, *some* measure of publicity and transparency form an essential part of official inquiries into serious human rights violations. Thus, while Amnesty International and Human Rights Watch understand that the Terms of Reference of the Inquiry have been interpreted by the Commissioner as requiring that the Inquiry be conducted *primarily* in private, this cannot mean that the Inquiry is *wholly* inaccessible to the public, as it presently is.
22. Specifically, it is submitted that those with a lesser but still real interest in the Inquiry, such as the interveners, should receive some level of disclosure commensurate with their interests. In light of the NSC constraints under which the Inquiry functions, it may be the case that a lesser number of documents would be disclosed to interveners and the public. But at a minimum, disclosure should include key documents of public interest or significance, and such information about individuals who have been interviewed as can be disclosed without violating NSC.
23. It is submitted that the constructive and effective assistance that interveners can give to the Inquiry is contingent on their ability to know the substance of the witness evidence, through summaries of documentary and witness evidence, or redacted transcripts. The Inquiry has thus far failed to provide public reasons or an explanation as to why the disclosure of items such as key non-NSC documents,

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<sup>6</sup> *Ibid.*

a complete and comprehensive list of individuals interviewed, summaries of non-NSC evidence and documents or redacted transcripts, has not occurred or is necessarily inconsistent with the Inquiry's terms of reference.

24. The examination and cross-examination in public hearings of a limited number of key witnesses whose evidence is not subject to NSC concerns would be one measure which would make the Inquiry more accessible to the public than it has been to date.

### **PRINCIPLES OF CANADIAN LAW CONCERNING PUBLIC INQUIRIES**

25. The provisions of the Terms of Reference and the General Rules of Procedure and Practice when read separately and together clearly provide an opportunity for portions of the Inquiry to be conducted in public where NSC concerns do not arise.
26. The Terms of Reference reflecting this are echoed in Rule 11 of the General Rules of Procedure and Rules (the Rules), which further empower the Commissioner to hold specific portions of Inquiry proceedings in public. Disclosure of the kind sought in the Application is thus permitted under Rule 11 of the General Rules of Procedure and Practice, and Paragraph (e) of the Terms of Reference.
27. In the Ruling on Terms of Reference and Procedure (the "Ruling"), rendered on May 31, 2007, the Commissioner noted that "the Inquiry will be sensitive to the potential for overbroad assertions of national security confidentiality and not let that become a shield to prevent the inquiry from doing the necessary work to fulfill its mandate."<sup>7</sup>
28. An interpretation of what is meant by the "effective conduct of the Inquiry" can be found in the preambular paragraph of the Terms of Reference that states that

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<sup>7</sup> Ruling of Commissioner Iacobucci on Terms of Reference and Procedure, dated May 31, 2007 at para 45.



the Inquiry should have a “credible process ... that inspires public confidence in the outcome.”<sup>8</sup> Commissioner Iacobucci alludes to the central place that a credible process and public confidence plays in the Inquiry when he referred in his May 31<sup>st</sup> ruling to the “great importance attached to public hearings.”<sup>9</sup>

29. It is now well-recognized in Canadian law that for a process to be credible and thus inspire public confidence in its outcome, the public must be afforded the opportunity to observe and engage with the inquiry. As Justice O’Connor noted in his report in the Arar Inquiry:

“Openness and transparency are the hallmarks of legal proceedings in our system of justice. Exposure to public scrutiny is unquestionably the most effective tool in achieving accountability for those whose actions are being examined and in building public confidence in the process and resulting decisions.”<sup>10</sup>

30. Commissioner Iacobucci stated in his April 2nd Ruling on Participation and Funding that, “transparency and openness generally are valued principles in the work of courts, tribunals and inquiries. Their advantages are obvious and of fundamental importance to ensure accountability of decision makers and to inspire public confidence in the conclusions reached.”<sup>11</sup>

31. As Commissioner Iacobucci elegantly stated in *Sierra Club v. Canada (Minister of Finance)*:

“The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as “the very soul of justice”, guaranteeing that justice is administered in a non-arbitrary manner.”<sup>12</sup>

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<sup>8</sup> Terms of Reference, Preamble Paragraph.

<sup>9</sup> Ruling of Commissioner Iacobucci on Terms of Reference and Procedure, dated May 31, 2007 at para 72.3

<sup>10</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (2006) at 304.

<sup>11</sup> Ruling of Commissioner Iacobucci on Participation and Funding, April 2<sup>nd</sup>, 2007, at page 3.

<sup>12</sup> *Sierra Club v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 52

We do recognize that Commissioner Iacobucci has ruled that the open court principle does not apply in this case because this is an inquiry and not a court hearing. We submit that the values and spirit of the principle should nonetheless at all times guide the conduct of this Inquiry, especially where there is a clear public interest.

32. The current Inquiry has justified its lack of transparency and openness by a presumption of closed proceedings premised on NSC grounds. However, there is a considerable public interest in ensuring that claims advanced by government agencies that national security considerations require confidentiality are well-founded and are not used for other reasons, including avoiding embarrassing revelations. Canadians are very much aware of the cautionary note that Justice O'Connor included in the Arar Inquiry report that "experience in this Inquiry indicates that the government would take a broader view of what needs to be excluded because of the NSC than I would."<sup>13</sup>
33. Justice O'Connor's experience and concern were validated through the recent Federal Court decision requiring some 1000 previously redacted words from his report to be disclosed to the public.<sup>14</sup> It became apparent that much of what the government was seeking to disclose in those passages was embarrassing to government agencies rather than giving rise to any compelling concerns about national security.
34. This concern about unfounded and excessive national security confidentiality claims has been reported extensively by the media and has become of considerable concern to the public. It arises against the backdrop of further revelations coming out of the Air India Inquiry which has also faced serious challenges due to secrecy and disclosure of information. The lack of openness and transparency in the present Inquiry will only lead to more doubts about the

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<sup>13</sup> Ruling of Justice O'Connor on Process and Procedure, May 9<sup>th</sup> at page 9.

<sup>14</sup> *Canada (Attorney General) v. Commission of Inquiry Into the Actions of Canadian Officials Relation to Maher Arar*, [2007] FC 766

validity of NSC claims, and thus skepticism about the process, outcome and the potential role of the Government in the detention, mistreatment and torture of the three men.

35. On October 9, 2007 Amnesty International and Human Rights Watch both endorsed an open letter to Prime Minister Harper, urging that the government adopt a position at this Inquiry in favour of greater levels of disclosure and public access. That request of the Prime Minister was echoed in a national press conference held by the three men on October 12, 2007. In public comments in response the Prime Minister did not express opposition to this request. In fact, he indicated that he considers it to be very much within the Commissioner's mandate to adopt a more public approach if necessary.<sup>15</sup>

36. Ensuring the effective conduct of the Inquiry necessitates not only that the men have confidence in the process and outcome, but also that the Canadian public does. In interpreting the phrase "essential to the effective conduct of the Inquiry," Commissioner Iacobucci noted that the phrase could not be interpreted restrictively. Rather than there were times where on a case-by-case basis, the Inquiry would have to be held in public in keeping with respect for both efficiency and the need for transparency.<sup>16</sup> The Commissioner has acknowledged that possible necessity, the Prime Minister has not expressed opposition to the possibility. Amnesty International and Human Rights Watch submit that it is now time for that approach.

## CONCLUSION

37. This Inquiry can play a crucial role in ensuring that there is justice and accountability for the three men. Through a thorough and independent

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<sup>15</sup> "Justice Iacobucci has all the power necessary to decide whether something should be held in private or whether it can be held in public." Andrew Duffy "PM won't force disclosure rules on inquiry" *The Ottawa Citizen* (13 October 2007)

<sup>16</sup> Ruling of Commissioner Iacobucci on Terms of Reference and Procedure, dated May 31, 2007 para 72.3

investigation it can reveal to the men and the Canadian public why the men were detained, mistreated and tortured, and what role Canadian officials played in those events. The Inquiry forms an essential part of the men's right to an effective remedy under international human rights law. The Inquiry can also help to rebuild the Canadian public's faith in their intelligence and security agencies. To date the Inquiry has carried out its work without public scrutiny and with only limited participation by the men, their counsel and the interveners.

38. Granting the application at this stage would correct these deficiencies and enable the Inquiry to conduct itself in a manner that complies with its mandate, ensures public confidence, and allows the three men to participate more effectively.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS  
16<sup>th</sup> DAY OF OCTOBER, 2007.



for  
Alex Neve  
Secretary-General  
Amnesty International Canada (English-speaking branch)  
aneve@amnesty.ca  
Telephone: 613-744-7667, ext. 234  
Fax: 613-746-2411  
312 Laurier Avenue East  
Ottawa, Ontario  
K1N 1H9

and for  
Nehal Bhuta  
Human Rights Watch  
c/o University of Toronto  
78 Queens Park  
Toronto, Ontario  
M5S 2C5  
Tel: 416-946-7989  
Bhutan@hrw.org