Avoid Complicity, Provide Protection:

International Human Rights Standards Applicable to the Review of the Conduct of Canadian Officials in the Cases of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Submission
of Amnesty International

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This document includes in Part 1 Amnesty International's original submission with additional sources, and in Part 2 our response to the request made by the Commission during the oral hearings for further information on three subjects: information available regarding the impact of using the label 'Islamist' in 2002, the application of UNCAT and other legal norms that form the torture prohibition, and state responsibility for violations of that prohibition.

PART 1

Preface

- Amnesty International welcomes the opportunity to present our submission before the commission. Amnesty International first met individually with each of Mr. Almalki, Mr. Abou-Elmaati and Mr. Nureddin soon after their return from Syria and Egypt. They spoke in detail about their experiences of torture and the frequent violation of their human rights. They spoke of being held in abysmal conditions while in detention in countries that Amnesty International has recognized as flagrant violators of human rights. They also spoke of their concerns about the role that Canadian officials may have played in their detention and subsequent torture.

- Amnesty International is here today because we are committed to assisting the commission in its search for an answer to the question of what role Canadian officials may have played in the detention and torture of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. We are gravely concerned about the possibility that the actions of Canadian officials may have contributed to the detention and torture of these three men. We are seeking not only answers, but also accountability and a commitment from the Canadian government that no other Canadian citizen will suffer as these men did because of the failings of their own government.

- Amnesty International has reviewed and considered in detail the questions that are outlined in the Notice of Hearing. For reasons of clarity and coherence, this submission is not structured in a way that follows the specific order and phrasing of those questions. This submission does, however, offer Amnesty International's views as to the key international human rights standards applicable to the questions that have been posed.

- Amnesty International again would like to take this opportunity to express its concerns about making these submissions at a time when we have received no factual disclosure from the Commission. We are, of course, aware of relevant information already on the public record, particularly through the report from the inquiry into the case of Maher Arar. We have taken account of that information

in preparing this submission. We do, however, reserve the right to amend this submission to take account of factual information disclosed at a later date.

- Amnesty International shares the three men's concerns over the nature of the questions posed for this hearing. The questions suggest a presumption that the Canadian government had reasonable grounds to suspect that the men were engaged in activities that constituted threats to the security of Canada and/or had been involved in the possible commission of terrorism offences.

- The reasonableness and accuracy of Canadian officials assessment of the three men's activities is central to understanding whether or not the actions of the Canadian government were deficient. This issue needs to be critically examined, especially in light of the fact that Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin have never been charged in Canada for terrorism activities and they were released by Syria and Egypt after it was determined that they had no ties to terrorist groups and posed no threat to national security.

The Cases

- On November 12, 2001 Ahmad Abou-Elmaati was arrested upon arrival at the airport in Damascus, Syria, where he was traveling to join his new wife. He was held in incommunicado detention, his arrest never acknowledged publicly by Syrian authorities, his whereabouts never disclosed to his family. He has described being 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, where he indicated that the torture continued and in fact intensified. His Egyptian jailors refused to release him, despite a number of court orders requiring his release, until he was finally freed on January 11, 2004.

- 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. Like Mr. Abou-Elmaati, he has described being tortured extensively and interrogated relentlessly. He was never allowed legal representation or consular assistance.

- On December 11, 2003 Muayyed Nureddin, a Canadian citizen of Iraqi descent, 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 Mr. Abou-Elmaati and Mr. Almalki, describes being interrogated and subjected to torture.

- These cases arise in connection, of course, with that of Maher Arar. 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. He was 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. He was 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. Mr. Arar's experience, and the many ways in which deficient Canadian conduct was responsible for the serious human rights violations he suffered, are extensively documented in the reports issued by the Commission of Inquiry that examined his case.

- In all of these cases it is clear that there was extensive involvement of Canadian officials, the nature and scope of which has not yet been fully disclosed. This extended to ongoing exchanges between Canadian and foreign officials after the men had been detained, again the full nature and scope of which has not yet been fully disclosed. We do know that Canadian officials did provide Syrian officials with a list of questions that the RCMP had prepared for Mr. Almalki, while he was imprisoned in Syria. We do know that information obtained from interrogations of Mr. Abou-Elmaati in Syria was used in legal proceedings in Ontario court to obtain a telephone warrant.

Sources of Applicable Standards

- Amnesty International recognizes the valuable role that intelligence gathering and sharing plays in the protection of human rights through the prevention of acts of terrorism. The need to investigate terrorism and the protection of human rights are not incompatible goals. In fact, in light of the inherently unreliable nature of information derived from torture, respecting human rights and finding means to investigate terrorism without resorting to human rights violations may be a more fruitful means of generating reliable and legally permissible information.[1]

- The actions of the Canadian government should at all times be in accordance with Canada's obligations under international human rights law, including the obligation to uphold the prohibition of the use of torture and ill-treatment. Under Canadian and international law Canada can under no circumstances be complicit, or otherwise participate, instigate, consent to or acquiesce in the use of torture. Furthermore, Canada has a positive obligation to prevent torture from occurring and to protect the rights of Canadian citizens.

- The sources of applicable standards governing the conduct of Canadian officials obviously extend beyond international human rights obligations as well, to the Charter of Rights, Canadian law and relevant agency and departmental directives,

[1] General Assembly, *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* Note by the Secretary-General, August 2006, A/61/259. "Confessions or other information extracted by torture is usually not reliable."

policy and good practice. Amnesty International's submission focuses only on Canada international human rights legal obligations.

- The sources of Canada's international human rights obligations are many, including principles of customary international law and numerous treaty-based obligations. For the purposes of this submission Amnesty International particularly relies on the International Covenant on Civil and Political Rights (ICCPR), acceded to by Canada in 1976, and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), ratified by Canada in 1987.

- Amnesty International adopts the submission made by Human Rights Watch as to the reach of Canada's obligations under these two treaties, notably that obligations under the ICCPR are not territorially bound and do extend to individuals subject to Canada's jurisdiction, which most certainly includes Canadian citizens, when they are outside Canada. The ICCPR, as interpreted and applied by the International Court of Justice, the UN Human Rights Committee and other bodies, gives rise to a very clear obligation on Canadian officials not to expose persons to a serious risk of torture or ill-treatment.

- There are obligations under the UNCAT that are also directly applicable, regardless of any territorial or jurisdictional limitations, including obligations regarding *refoulement,* proper training, use of information obtained by torture and providing opportunities for survivors of torture to obtain redress and compensation. Importantly, the definition in article 1 of the UNCAT is widely-recognized internationally as the most authoritative description of what sort of treatment constitutes torture. Amnesty International also submits that the provisions of the UNCAT, as interpreted and applied by bodies such as the UN Committee against Torture, are highly persuasive in providing content to related obligations under the ICCPR.

- Amnesty International urges that at a minimum, the standards identified and elaborated in the report from the Arar Inquiry be applied in the present inquiry, supplemented further by international human rights law requirements, as outlined by Amnesty International and other participants.

- In keeping with these standards, Canadian officials have a heightened obligation when working on cases involving Canadian citizens being detained in countries where there are substantial grounds to believe that those detained for national security reasons will face a risk of torture, to work to protect the rights of their citizens. Amnesty International submits that the documentary record very clearly establishes that to be the case with both Syria and Egypt.

- The following principles should guide the standards employed by Canadian officials in cases where a Canadian citizen detained abroad faces a serious risk of torture.

The Actions of Canadian Officials Should be Informed by an Understanding of the Human Rights Conditions on the Ground

- An analysis of the experiences of the three men and the standards that should have been employed by Canadian officials must be rooted in a contextual understanding of human rights conditions in Syria and Egypt prior to and during the men's detention and torture.

- Since 1972, when Amnesty International first launched its worldwide campaign for the Abolition of Torture, Amnesty International has urged states to uphold their international legal obligations to prevent torture domestically and internationally. Amnesty International publishes annually a report that highlights human rights conditions in countries around the world. The report is public and easily accessible through our offices and online. The reports highlight key areas of concerns, including torture. This annual report and other reports published by Amnesty International are routinely used by governments to assess country conditions, as evidenced by the US State Department's frequent use of Amnesty International Reports in their own annual Human Rights Country Reports.

- In addition to these reports, Amnesty International on a regular basis publishes thematic reports on the issue of torture as well as actions on behalf of those who are being detained and torture. Organizations such as Human Rights Watch, and regional organizations such as the Syrian Human Rights Committee also publish reports on torture in Syria and Egypt that are readily available online.

- In light of the plethora of human rights material available to the various Canadian government bodies, Canadian officials should have been cognizant of the potential detrimental impact that their actions could have on the three men's liberty and physical security. They should have been aware of that fact that in cases involving threats to national security in Syria and Egypt, arbitrary detention was commonplace and that torture of such detainees was routine. This information should have informed the government's actions when considering the sharing of information, sending of questions, and the provision of consular services to the three men.

- Syria's record of flagrant human rights violations extends from well before the men's detention to the present day. In 2003, when Muayyed Nureddin was detained, and when Ahmad Abou-Elmaati and Abdullah Almalki had already been detained and tortured for months, Human Rights Watch noted that, "Syria has a long record of arbitrary arrests, systematic torture, prolonged detention of suspects, and grossly unfair trials."[2] That same year, Amnesty International reported that while Syria was named one of the seven state sponsors of terrorism by the US State Department, the government "had co-operated with the United

[2] Human Rights Watch, *World Report 2003,* online: Human Rights Watch http://www.hrw.org.

States and with other Foreign governments in investigating al-Qaeda and some other terrorist groups and individuals." Co-operation included providing answers from detainees to questions posed by the US government. Answers were routinely derived through interrogation involving torture.

- Irrespective of the existence of this information suggesting that torture might have been the likely outcome of their actions, Canadian officials sent questions to Syrian Intelligence to be asked of Abdullah Almalki during interrogation. Information may also have been shared with Syrian and Egyptian intelligence about the three men. This information may have been used during interrogation involving torture with the intent, on the part of the Canadians, that in sharing the information the Syrians would in return share the men's response with them. Even if this was not the intention and Canadian officials were of the opinion that the information they were sharing was harmless, they should have, in light of country conditions, recognized that even information that may be deemed insignificant in Canada could result in the men being tortured in Syria or Egypt.

- Canadian officials should have known that methods of interrogation in Syria and Egypt were legally unacceptable in Canada — and for that matter, failed to meet domestic legal standards in Syria and Egypt yet were used with impunity during the period of the men's detention. As such Canadian officials should, as Justice O'Connor determined, never provide information, "to a foreign country where there is a credible risk that it will cause or contribute to the use of torture."[3]

- Canadian officials knew or should have known that there was a credible risk of torture as a result of their actions. Each of the men, while in Syria, were held and tortured at the Palestine Branch of Syrian Military Intelligence (Far Falestin). Torture and other cruel, inhuman, or degrading treatment or punishment at Far Falestin was and continues to be routinely used. In 1998 Human Rights Watch described how the use of a torture instrument called the "German Chair" left Nizar Nayouf, a founding member of the Committees for the Defense of Democratic Freedoms and Human Rights in Syria, partially paralyzed.[4] **"**This chair contains moveable parts where detainees are tightened by arms and feet, then its back shore is pulled backward driving the body upper part, while the feet are still fastened from the other side which causes sever pressure on the chest and the spine, and consequently resulting in ripping the spine apart and later causing paralysis."[5]

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[3] Justice O'Connor*, Report of the Events Relating to Maher Arar, Analysis and Recommendations*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, at 345.
[4] *"Who is Nizar Nayouf? Imprisoned Syrian Human Rights Activist at Risk of Death."* Human Rights Watch, September 18, 1998.
[5] *"Tadmur, A Witness and a Witnessed,* Syrian Human Rights Committee, December 9th, 1998. www.shrc.org

- Amnesty International reports from 2001 and 2002 noted that detainees were held incommunicado at Far Falestin "where torture and ill-treatment were routine."[6] As early as 1996 the torture methods experienced by the three men were documented by Amnesty International as being used at Far Falestin. "Commonly cited torture methods include *falaqa* (beating on the soles of the feet) and *dullab* (the "tyre", whereby the victim is suspended from a tyre and beaten with sticks or cables*).*[7] In 2001 Amnesty International reported again that the *dullab* and *falaqa* were used on detainees.[8] As is the case with the three men, forced confessions made under duress in the face of such torture have been reported frequently.[9] This is the context in which the actions of Canadian officials and standards should be assessed.

- Information was available not only about practices in Syria broadly, but of human rights violations occurring in the very detention centre where these three men were held. There is no plausible explanation to support an assertion that Canadian officials were unaware that their actions had the potential to create a credible risk of torture for the three men.

- Similar documentation of human rights violations in Egypt was also available prior to and during Mr. Abou-Elmaati's detention and torture. In May 1996, the UN Committee Against Torture concluded that "torture is systemically practiced by the Security Forces in Egypt, in particular by State Security Intelligence."[10] Amnesty International has reported that "torture and other ill-treatment, arbitrary arrests and detention, and grossly unfair trials before emergency and military courts have all been key features of Egypt's 40 year state of emergency and counter-terrorism campaign."[11]

- As with Far Falestin, the prisons that Mr. Abou-Elmaati were held at in Egypt, such as the headquarters of the State Security Investigations Department, Lazoghly Square, in Cairo, have also been documented as places where torture and other ill-treatment routinely occurs.[12]

- The torture methods described by Mr. Abou-Elmaati have also been substantiated by numerous reports. "Commonly cited torture methods included beatings, electric shocks, suspension by the wrists or ankles, burning with cigarettes and

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[6] Amnesty International, *Amnesty International Report,* (London: Amnesty International Publications, 2001) at 233 and Amnesty International, *Amnesty International Report,* (London: Amnesty International Publications, 2002) at 237.
[7] Amnesty International, *Amnesty International Report,* (London: Amnesty International Publications, 1996) at 278.
[8] *Ibid* 5 at 235.
[9] *Ibid* 6 at 278.
[10] General Assembly, *Report of the Committee Against Torture,* UN GA, 1996, Supp. No. 44. UN Doc. A/51/44. at para. 220.
[11] *Egypt – Systemic Abuses in the Name of Security,* Amnesty International, April 2007, MDE 12/001/2007, pg. 2.
[12] *Ibid 6* at 142.

psychological torture including death threats."[13] The threat of rape or sexual abuse of female relatives has also reportedly been used and was described by Mr. Abou-Elmaati as one of the first techniques used against him when he was transferred to Egypt from Syria.[14] Being labeled as an Islamist, as he may have been by Canadian officials, would have resulted in even harsher treatment by the State Security Investigations Department in Egypt who have been engaged in a lengthy crackdown on Islamist groups.[15] The effect of such labeling would not have been hard to glean had Canadian officials examined reports available about human rights standards in Syria.

- As in Syria, torture is carried out with impunity. As the UN Committee Against Torture noted, "no investigation has ever been made and no legal action has been brought against members of the State Security Intelligence since the entry into force of the Convention for Egypt in 1987."[16] Forced confessions made under duress have been reported, as have deaths as a result of torture.[17] It was in these conditions that Mr. Abou-Elmaati received consular visits and where consular officials on five out of six occasions suggested that he speak with Canadian intelligence officials while still being held in detention in Egypt.[18]

- Canadian officials should have been aware of the human rights conditions in Syria and Egypt and received training in human rights law so as to understand the scope of the prohibition. As Justice O'Connor noted, in the case of the RCMP such training did not exist. When referring to Staff Sergeant Fiorido he noted that, *"*he did not recall ever receiving a copy of DFAITS annual report on Syria or on any of the nine other countries over which he had jurisdiction, except possibly Italy. He was not given any training on human rights conditions in Syria*."*[19] Yet he played a significant role in ensuring that the RCMP questions for Mr. Almalki were handed over to the Syrians.[20] He based his determinations on the appropriateness of such actions in an officially censured vacuum of knowledge about current human rights conditions in Syria.

The Prohibition Against the Use of Torture is Absolute

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[13] *Supra* at 142. The same techniques were cited in the 2001 report at 93.
[14] Amnesty International, *Amnesty International Report,* (London: Amnesty International Publications, 1998) at158.
[15] *Egypt: Torture Worldwide,* 2007, Human Rights Watch <www.hrw.org>
[16] Amnesty International, *Amnesty International Report,* (London: Amnesty International Publications, 1997) at 141.
[17] Amnesty International, "Egypt, Indefinited Detention and Systematic Torture: The Forgotten Victims," (1996) MDE 12/13/96 at 8, <www.amnesty.org>
[18] Kerry Pither, *Chronology of Public Information Relating to the Cases of Messrs. Almalki, Elmaati and Nureddin*, at 40.
[19] Justice O'Connor*, Report of the Events Relating to Maher Arar, Factual Background Vol. 1*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, *at 336.*
[20] Justice O'Connor*, Report of the Events Relating to Maher Arar, Analysis and Recommendations*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, *at 344.*

- The prohibition on the use of torture and other cruel, inhuman or degrading treatment is well established by treaties and customary international law. The earliest expression of this universal prohibition can be found in Article 5 of the Universal Declaration which states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[21] The International Covenant on Civil and Political Rights and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment further strengthen customary law by codifying this prohibition.[22]

- The prohibition on torture is absolute and has attained the status of jus cogens. It is a peremptory norm from which there can be no derogation, including in times or war, or in the face of terrorist threats. [23] The UN Committee Against Torture in its most recent General Comment stated the following:

  "Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances, a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or not. **The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations."[24]**

- Under no circumstances can Canada engage in activities that would render it complicit or otherwise participate, instigate, consent to or acquiesce in the use of torture. The prohibition is intransgressible.[25]

- The terms "with the consent or acquiescence" in Article 1 of the Convention Against Torture have been interpreted to include omissions or failures of public officials to act "when they had or should have had reasonable grounds to believe that torture was taking or had taken place." [26]

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[21] *Article 5,* Universal Declaration of Human Rights*, GA. Res. 217A(III) of 10 Dec. 1948.*
[22] *Article 7,* International Covenant on Civl and Political Rights *(ICCPR), G.A. res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316(1966), 9999 UNTS 171,* entered into force *Mar. 23, 1976, (ICCPR) and Article 1,* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *GA res. 39/46, annex, 39 U.N. GOAR Supp. (No 51) at 197, U.N.Doc. A/39/51(1989),* entered into force *June 26, 1987. (CAT)*
[23] *Article 2 CAT, Article 4 & 7 ICCPR, and* Prosecutor v. Furundzija, *(10 December 1998), Case No. IT-95-17/I-T (International Criminal Tribunal for the Former Yugoslavia), at paragraph 144 and 153-157.*
[24] Committee Against Torture, *General Comment No. 2, Implement of Article 2 by States Parties,* Thirty-Ninth Session, November 2007, CAT/C/GC/2/CRP.1/Rev.4 at 5.
[25] *International Court of Justice,* Legality of the Threat or Use of Nuclear Weapons, *ICJ Reports 1996, p. 226 at p. 257, para. 79*
[26] *Submission to Factual Inquiry and Policy Review of the Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar on behalf of Redress Trust, The Association for the Prevention of Torture, and the World Organisation Against Torture, pg. 15 citing from, A. Boulesbaa,* The UN Convention Against Torture and The Prospects for Enforcement *(Martin Nijhoff, The Hague, 1999) at pg. 26.*

- As such, it is submitted that when the Canadian government sends questions to be used in the interrogation of a Canadian citizen being held on national security grounds in a country with a record of widespread torture, and where they should have known that the person concerned faced a serious risk of torture or ill-treatment, the Canadian government is in breach of its obligations under international human rights law. Such actions could result in Canada being held responsible for the commission of an internationally wrongful act.[27]

- The RCMP sent questions to be asked by Syrian intelligence of Mr. Almalki while he was being held at Far Falestin. They did so after having been informed by the Department of Foreign Affairs that the answers to their questions might be derived through the use of torture. Based on the limited public factual information available it appears that the RCMP did not heed those concerns.[28] The RCMP should have been independently aware of country conditions and the use of torture at Far Falestin and by the Syrian Military Intelligence. In sending questions to be asked in conjunction with torture, the RCMP was engaging in activity that they could not legally undertake in Canada, that being the use of torture as a means of deriving information.

- The standards employed by Canada should respect not only the obligation to refrain from carrying out or being complicit or otherwise participate, instigate, consent to, or acquiesce in the use of torture and ill-treatment, but also respect Canada's positive obligation to prevent, punish, and redress acts of torture.[29] The European Court of Human Rights has recognized an obligation not to use torture and a corresponding duty to prevent torture.[30]

- As noted by the International Criminal Tribunal for the Former Yugoslavia, "States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture."[31]

- The prohibition against torture imposes on states an obligation erga omnes, one that is owed to all members of the international community.[32]

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[27] Article 16 of the International Law Commission's Articles on State Responsibility, which is recognized as a codification of customary international law.
[28] Justice O'Connor*, Report of the Events Relating to Maher Arar, Analysis and Recommendations*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, *at 209.*
[29] CAT
[30] European Court of Human Rights*, Z v. United Kingdom,* judgment of 10 May 2001*; A v. United Kingdom,* judgment of 23 September 1998 at 22.
[31] *Prosecutor v. Furundzija*, (10 December 1998), Case No. IT-95-17/I-T (International Criminal Tribunal for the Former Yugoslavia), at paragraph 148.
[32] *Supra.,* at paragraph 151.

- Thus there is a heightened positive duty for the Canadian government to take measures to ensure that its officials understand the nature of the prohibition and take steps to ensure that intelligence investigations do not violate the prohibition.

- The positive obligation also requires that those who carry out consular duties meeting with detainees are trained to look for torture and take every opportunity to urge detaining states to respect the basic human rights of Canadian citizens. The erga omnes nature of the norm necessitates that Canadian officials actively intervene to prevent torture for occurring and to call on states to uphold their obligations.

Providing or Exchanging Information and Travel Plans

- Under no circumstances can Canadian officials provide or exchange information, travel plans or questions about individuals of interest in national security investigations to other governments where there are substantial grounds to believe that doing so may reasonably put those individuals at risk of torture or ill-treatment.

- As has been noted, Amnesty International, Human Right Watch and the US State Department have all issued reports condemning Syria and Egypt for their regular use of torture and ill treatment against political prisoners and those being held for national security reasons.[33]

- Where Canadian officials know, or should have known, that there are substantial grounds to believe that an individual will face torture or other cruel, inhuman or degrading treatment or punishment, Canada cannot provide the detaining state with information or travel plans that might serve as the basis for an arrest leading to unlawful imprisonment, torture and other serious human rights abuses. Depending on the circumstances, doing so could even result in officials being legally complicit, having participated in, instigated, consented to or acquiesced in the subsequent use of torture by the foreign officials.

- In the case of these three men, Canada should have known that there were substantial grounds for believing that the three men would, in light of the information sent, including travel plans, be detained. Their detention, justified potentially in part by information sent by Canada that framed the men as national security threats, would have resulted in there being a credible risk that they would face torture. The sending of questions and information by Canadian officials

[33] *See for example: Amnesty International,* Egypt: Systematic abuses in the name of security*, April 2007;* Egypt: No protection – systematic torture continues*, November 2002;* Syria: Amnesty International's campaign to stop torture and ill-treatment in the 'war on terror'*, December, 2005;* Syria: Torture, despair and dehumanization in Tadmur Military Prison*, September 2001; US State Department,* Country Reports on Human Rights Practices, Syria *and* Egypt*; Human Rights Watch,* Egypt: Torture and Coerced Confessions Used in High-Profile Terrorism Investigation, *December 11, 2007.*

during their detention would have further increased the likelihood that the men would be tortured.

- Canadian officials should have been aware of the potential consequences of their actions. They had a positive duty to keep themselves abreast of the publicly available country reports that indicated that torture was used regularly in national security cases in both Egypt and Syria. Furthermore, Canadian officials sent questions to Syria, to be used in the case of Mr. Almalki in January 2003, and sought to exchange information with the Syrian officials even after Mr. Abou-Elmaati had informed Canadian consular officials in Cairo on August 12th, 2002, that he had been tortured during his detention in Syria.[34]

- Mr. Abou-Elmaati informed consular officials that he had been tortured while in Syria, where he had been held at Far Falestin. The same facility where Mr. Almalki was being held. In keeping with Canada's international obligation to prevent torture, his allegations of torture should have been sent immediately to all involved government agencies and used to protect the rights of Mr. Almalki and Mr. Nureddin. Instead agencies such as the RCMP continued to carry out investigations "sometimes in conflict with or to the prejudice of diplomatic efforts to have those Canadian released to Canada."[35] In continuing to actively pursue working with Syrian officials to advance intelligence interests, the human rights of these three Canadians were sacrificed.

- When considering if information or travel plans can be given or exchanged to a foreign state, Canadian officials must evaluate the situation in light of their human rights obligations and the prohibition of the use of torture. The obligation extends to situations where Canadian officials knew that the individual was in danger of being tortured and also to situations where they "ought to have known."[36]

- The obligation extends beyond the risk of torture to the risk that the information poses to causing or contributing to enforced disappearances, secret and/or arbitrary detention, unfair trials and other serious human rights violations. In the case of these three men, what role Canadian officials played in the men being detained as a result of sharing information and travel plans with foreign intelligence agencies, remains unclear. Prior to providing information and travel plans, Canadian officials should have carefully assessed whether the sharing and receiving of information was necessary for intelligence purposes. Could the information required to prevent terrorism be acquired through investigations and interviews held in Canada? For example, if Canadian officials had enquired more closely into the origins of the map of government buildings with handwritten

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[34] *Chronology of Public Information Relating to the Cases of Messrs. Almalki, Elmaati and Nureddin*, Kerry Pither at 41.
[35] Justice O'Connor, *Report of the Events Relating to Maher Arar, Factual Background Vol. 1*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, *at* 275.
[36] *Ahmed Hussein Mustafa Kamil Agiza v. Sweden,* Decision CAT/C/34/D/233/2003, 24 May 2005.

addresses found in Mr. Elmaati's possession, would they have sent information and his travel plans if they had known that it had been government issued?

- In assessing if there are substantial grounds to believe that there is a risk of torture, both the general situation of torture and ill-treatment in the country, and the specific situation of the individual (including his characterization of a 'national security' detainee and the special risks such detainees face in the country), are relevant.

- The Committee Against Torture has also cautioned states to be vigilant in their monitoring of possible cases of torture as, "the absence of a consistent pattern of gross violations of human rights does not mean that a person could not be considered to be in danger of being subjected to torture in his or her specific circumstances." As a result, Canadian officials must in all cases involving detained Canadians conduct a risk assessment to determine what level of risk of torture they face.[37] Because it is determined that the risk may be low when a Canadian is first detained, that does not mean that the risk will remain low throughout their detention, therefore the obligation is an ongoing one.

- Canada has a close national security relationship with the United States. As a result intelligence information is passed between both states. Canada's interactions with the United States should be premised on the recognition that the United States, through its use of rendition, secret detention, and detention centres such as Guantánamo Bay, has been widely criticized for serious human rights violations associated with the 'war on terror'.

- Any restrictions that may need to be applied to information-exchange with the United States should be rightly recognized to be the direct result of the pattern of violations of international law and fundamental human rights which has come to light, and not characterized as somehow being a problem created by the existence of the rights themselves. As soon as those violations cease, a foundation would exist to re-establish normal co-operation. Caveats outlining how the information can be used and to whom it can be passed should be attached to all information given to the United States.[38]

Diplomatic Assurances Do Not Remove the Risk of Torture

- In regards to the provision of information, travel plans, or questions to the United States or states such as Syria and Egypt in return for diplomatic assurances that torture will not be used, serious concerns arise as to the legality of this practice. "Assurances are inherently unreliable, not legally binding, and provide no

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[37] *Supra,* at 34.

[38] Justice O'Connor, *Report of the Events Relating to Maher Arar, Factual Background Vol. 1*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, *at 152.* Questions to be asked of Mr. Arar were given to the United States without any caveats.

recourse for the persons."[39] This has been noted by the Supreme Court of Canada[40] and the Federal Court of Canada.[41]

- The UN Special Rapporteur on Torture has noted that diplomatic assurances are usually sought from states where the practice of torture is systematic and that states cannot resort to them as a safeguard in situations were there are substantial grounds for believing that a person will be subjected to torture or ill-treatment.

- In their concluding observations on the United States, the UN Committee Against Torture declared that, "the State party should only rely on "diplomatic assurances" in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case."[42]

- Syria and Egypt are two countries that systematically violate the provisions of the UN Convention against Torture and as such Canada should under no circumstance provide information, travel plans or questions pertaining to national security detainees to their officials for the purpose of intelligence investigations in return for diplomatic assurances. The Committee Against Torture has definitively stated that diplomatic assurances coming from Egypt are not sufficient to protect against the risk of torture.[43]

- In the Agiza case involving the extradition of an Egyptian man from Sweden to Egypt, the Committee Against Torture noted that "at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons."[44] As such, diplomatic assurances in cases involving national security threats should be regarded as affording little to no protection.

Prohibition Against the Use of Information Obtained from Torture is Absolute

- The prohibition on the use of information derived from torture or ill-treatment is well entrenched. Using such material violates Article 15 of the Convention

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[39] Amnesty International, "United States of America, Justice Delayed and Justice Denied," March 2007, AMR 51/044/2007 at 70. See also General Assembly, *Note by the Secretary General, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 1 September 2004, A/59/324 at para 34.
[40] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.
[41] *Sing v. Canada (Citizenship and Immigration),* 2007 FC 361.
[42] *Committee Against Torture,* Conclusions and Recommendations of the Committtee Against Torture, United States, *25 July 2006, CAT/C/USA/CO/2 at p. 21.*
[43] *Ahmed Hussein Mustafa Kamil Agiza v. Sweden,* Decision CAT/C/34/D/233/2003, 24 May 2005 and General Assembly, "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," 30 August 2005, A/60/316.
[44] *Ahmed Hussein Mustafa Kamil Agiza v. Sweden,* Decision CAT/C/34/D/233/2003, 24 May 2005.

Against Torture and Article 7 of the ICCPR.[45] This prohibition is premised on the understanding that information obtained through torture is unreliable and that barring the use of such information removes one of the incentives to carry out torture in the first place.[46]

- Canadian officials must engage in due diligence and vigorously conduct credibility assessments when receiving information from foreign authorities, with special concern paid to the possibility that the material is the product of torture.[47]

- In cases involving national security detainees being held in countries where there are substantial grounds to believe that such types of detainees will face torture or ill-treatment, Amnesty International submits that the starting point for the assessment should be a presumption that the information is the result of torture unless Canadian officials can satisfy themselves of the contrary. That is the case in both Syria and Egypt.

- The onus is on Canadian officials to confirm that the information is not the product of torture.[48] That analysis must be driven by a contextual understanding of the physical and psychological use of torture. For example, if a detainee was physically beaten for two weeks on his arrival at a detention centre, and provides information in his fourth week, in a session where torture is not used, that information almost certainly still bears the taint of torture and its use is therefore impermissible.

Under No Circumstances Can Canada Send Questions, Attend Questionings by Foreign Authorities or Directly Question Canadians Detained in National Security Cases in Syria or Egypt

- Article 1 of the Convention Against Torture explicitly refers to those acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." As such, Canadian officials cannot send questions to foreign officials, knowing or where they ought to have known that they will lead to a serious risk of torture. In such circumstances, Canadian intelligence officials also should not attend the questioning of detained Canadians by foreign officials, and should generally refrain from seeking to question individuals directly.

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[45] CAT Article 15 & ICCPR Article 7. For an analysis of the scope of Article 15 of UNCAT see, General Assembly, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 14 August 2006, A/61/259 at section III.

[46] General Assembly, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Note by the Secretary-General, August 2006, A/61/259.

[47] Justice O'Connor*, Report of the Events Relating to Maher Arar, Analysis and Recommendations*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, *at 345-347.*

[48] UN Special Rapporteur on Torture, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report*, 14 August 2006, A/61/259, pg. 10-18.

- Such actions directly contravene the prohibition of the use of torture and result in Canadian officials taking advantage of the use of torture by foreign states to achieve Canadian intelligence objectives. Canada is benefiting from the detaining states abdication of their obligation to prevent torture. In doing so Canada undermines its own obligation to prevent torture and protect rights of its citizens.

- If Canada sought answer to their own intelligence questions they should have as a preliminary step taken measures to ensure that they were answered prior to the men leaving Canada and/or worked to secure their freedom and transfer to Canada. When back in Canada they could then question the men in accordance with Canadian and international human rights law standards. There can be no grey area as suggested by, "Corporal Rick Flewelling, an RCMP officer assigned to monitor project A-O Canada, (who) wrote in his personal notes the following questions, "Do we want him back? Do we have enough to charge? How is Syria going to play? We may have to be satisfied with the prevention side of the mandate and hope that additional information can be gleaned with respect to: his plan, other plans we are not aware of, other individuals or groups, etc."[49] Canadian officials knew or should have known that there were substantial grounds to believe that the men would be tortured as a result of the officials' actions and they did little to prevent that torture from occurring. Therefore, for Canada to seek to glean information from the Syrians would mean that Canada would knowingly be benefiting from a violation of the prohibition against torture.

- Attending the questioning of detainees or questioning detainees in foreign detention centres where the Canadian detainee has already, or faces the threat of torture, lends legitimacy to the actions of the detaining state.

- The Arar report raises serious concerns about Canada's possible complicity, participation, instigation, consenting to or acquiescing in the torture of Mr. Almalki. Justice O'Connor noted that questions were sent in January 2003 from the RCMP via DFAIT, the Canadian Ambassador in Syria, and the consul in Damascus, to General Khalil of the Syrian Intelligence Ministry. The questions were intended to be asked of Mr. Almalki. In sending the questions, Canadian officials took advantage of, accepted, and effectively implicitly approved of the imprisonment and interrogation of Mr. Almalki in this way. These actions are all the more troubling when considered in conjunction with the fact that Mr. Abou-Elmaati had already by this time informed Canadian consular officials in Cairo that he had been tortured at Far Falestin in Syria.

- Rather than work for his release or for formal charges to be laid against him, it appears that Canadian officials sought to take advantage of his vulnerable position to advance their own intelligence interests.

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[49] Justice O'Connor, *Report of the Events Relating to Maher Arar, Factual Background Vol. 11*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, *at* 563.

- Mr. Almalki was being detained by Syria, a country with a well-documented history of gross human rights violations and the use of torture. The risk of torture faced by Mr. Almalki was heightened by the fact that he was being held on national security grounds. Canadian officials ought to have known that there were substantial grounds for believing that he was in danger of being tortured or ill-treated and under no circumstances should they have sent questions to be asked of him, or sought to attend or question him or the other men directly. Their focus should have been on ensuring he would be protected from torture. Any effort to question him should have been deferred to such time that he was back in Canada or in some other situation where he was no longer at risk of torture.

Consular Services

- Canadians around the world turn to their embassies and consulates in their times of need. DFAIT itself states that its mandate is to help Canadian's abroad.[50] In carrying out their duties, Canadian consular official should at all times be guided by recognition of a legal obligation to take measures to prevent the torture, ill treatment and the serious violation of the human rights of Canadian's detained abroad.

- The obligation, enshrined in Canadian and international law is a positive one. As has been noted already, the prohibition of torture is a jus cogens and erga omnes norm and thus there can be no derogation, even it times of war or when facing terrorism threats. Therefore even if, as the Attorney General posits, "consular services are provided as a matter of discretion by virtue of the royal prerogative," and is not necessarily a legal right, the Canadian government has an obligation to take measures to prevent torture from occurring. If it is known, or suspected that a Canadian abroad is facing torture, the government has an obligation to intervene to prevent torture, especially when their actions may have contributed to the individuals detention and subsequent torture. The best manner to do so may very well be through the provision of consular assistance and diplomatic measures undertaken by a Canadian embassy and DFAIT.

- Canadian consular officials should afford all Canadians in like situations with equal treatment. They should carry out their actions with a respect for the presumption of innocence and should take every measure possible to advocate for the respect of detained Canadians' human rights.

- In countries where gross human rights violations have been well documented, and where there are substantial grounds to believe that a Canadian national faces a risk of torture, cruel, inhuman and degrading treatment, the responsibility of Canadian consular officials to act to prevent such abuse will necessitate more concerted and frequent attention and action.

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[50] *A Guide for Canadians Imprisoned Abroad,* Foreign Affairs and International Trade Canada, 2007, at 3.

- Similarly, in cases where Canadians hold dual-citizenship, or where their Canadian citizenship is not recognized by a state, as is the case with Syria and Egypt, consular officials cannot under the guise of respecting state sovereignty fail to try to provide consular assistance to a Canadian, particularly where there are substantial grounds to believe that the person is being tortured or faces a threat of torture. In such cases where consular officials know that a person's dual citizenship may mean that they will be treated as a national and thus subjected to harsher treatment, the need and urgency in providing assistance is even greater. DFAIT's own website tells Canadians with dual citizenship that they "should always travel as a Canadian citizen and use your Canadian passport. Not doing so may put serious limitations on our ability to assist you if you encounter difficulties," thus suggesting that consular officials will try to assists dual-citizens.[51]

- In this case the three men each traveled on their Canadian passport and regarded themselves as Canadian citizens. Because Syria or Egypt may have put up more obstacles to consular officials gaining access and information about a detained Canadian does not justify inaction or the adoption of lower standards by Canadian consular officials. The principle of equality should apply irrespective of one's status in regards to dual-citizenship.

- Consular officials should in all cases urge foreign states holding Canadian citizens to respect the Vienna Convention on Consular Rights. The following specific standards should govern in situations where there are substantial reasons to believe a detained Canadian citizen faces a serious risk of torture or ill-treatment. These standards are premised on the following principles:
  - Canada has an obligation to take measures, including diplomatic measures, on behalf of Canadian citizens overseas.
  - The principle that a state has the duty to protect their nationals abroad against foreign states has been recognized by the German constitutional court, the US Seventh Circuit Court of Appeals, and the Federal Court of Australia.[52]
  - In those cases the courts placed a duty on states to enquire into the circumstances of their citizen's detention, deploy diplomatic measures to bring them back, and protect the rights of nationals abroad.
  - In the Canadian case of *Purdy v. Canada,* the British Colombia Court of Appeal ordered Canadian authorities to release information that could help defend a Canadian citizen against criminal charges in the United States.[53]
  - Canadian consular officials have a positive obligation to take measures to prevent torture from occurring and to advance the human rights of detained Canadian citizens.
  - Canadian consular officials should in all cases where there is credible evidence of a violation of fundamental human rights, or the threat thereof,

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[51] Foreign Affairs and International Trade, *Dual Nationality,* <www.voyage.gc.ca>

[52] *Hicks v. Ruddock (*2007) FCA 299 (8 March 2007)*, Flynn v. Schultz*, 748 F.2d 1186, 1195 (7th Cir. 1984), and *Hess Berge* 55, 349 (1980).

[53] Purdy v. A.G. *(Canada), 2003 BCCA 447.*

> make diplomatic representations on behalf of Canadian citizens. Such actions have been recognized by the UN Human Rights Committee as a legitimate tool of foreign policy. They have stated that "to draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a result of legitimate community interest."[54]

Principle of Equality Amongst Canadians.

- All detained Canadian citizens who face a serious risk of torture are entitled to be treated equally. That means the same degree of effort should be expended on behalf of each and every one with respect to frequency of diplomatic protests, forcefulness of attempts to gain consular access, persistence in seeking private visits, and the degree to which senior government officials become involved.

- As such Canadian consular officials should have taken in each case similar measures to request consular visits, gain access, work for their release, communicate with their families, and aid them on their release and in their return to Canada. Their should have been equality and consistency with respect to assistance provided following their release as well, such as being able to seek safety at Canadian embassies and being provided escorts for travel back to Canada.

- There are numerous examples of apparent inequity in the treatment of the three men by consular officials. In the case of Mr. Arar, consular official Leo Martel, sent a diplomatic note to the Syrian Foreign Minister on Mr. Arar's behalf. A diplomatic note was also sent a week or two after Mr. Abou-Elmaati's detention.[55] A diplomatic note is considered to be a serious diplomatic tool. In the case of Mr. Almalki, it appears that DFAIT waited five months before sending a diplomatic note and one was never sent on Mr. Nureddin's behalf. Why Mr. Arar and Mr. Abou-Elmaati's case warranted such action yet the other two men's did not is concerning and suggests a possible inequality in their treatment.

- After experiencing months of torture, solitary confinement, and detention in abysmal living conditions with no medical treatment, all three men received dramatically different treatment from Canadian consular officials on their release. Mr. Nureddin was met at Far Falestin by Canadian counsel Leo Martel who ensured that he had a medical exam and met with DFAIT officials and the Ambassador. On his day of release he was asked to sign a repayment agreement for a jacket, his hotel stay prior to his departure and his flight back to Canada.

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[54] UN Human Rights Committee*, General Comment No. 31, Nature of the General Legal Obilgation on States Parties to the Covenant,* 2004, UN Doc, CCPR/C/21/Rev.1/Add.13.

[55] "Chronology of events" contained in October 28, 2003 email from Ms. Pastyr-Lupul to Badr Elmaati

- Mr. Abou-Elmaati was released and when he arrived at a relatives home received a call from the Canadian embassy congratulating him on his release. He was asked to come to the embassy three days later at which time he told them again that he had been tortured. Even though Mr. Abou-Elmaati had previously told consular officials that he had been tortured, they at no point facilitated him having a medical exam nor suggested any form of medical or psychological assistance in light of his allegations of having been tortured. He did not meet with the ambassador nor receive assistance in making his travel arrangements back to Canada.

- Mr. Almalki on his release went to the Canadian embassy to seek assistance in renewing his passport. He spoke with Mr. Martel and told him that he had been tortured. Mr. Martel instructed him that he should wait to speak to the media until Mr. Martel had had the opportunity to inform DFAIT officials in Ottawa of Mr. Almalki's allegations. Four days later on March 22, 2004, Mr. Almalki met with Mr. Martel and other officials including Mr. McTeague, to discuss his detention and court proceedings pertaining to his alleged failure to complete his Syrian military service, which as a dual citizen he was apparently obligated to complete. Mr. Almalki was apparently told that the embassy had to respect the local legal process but that if he was not released from the charges in three weeks Mr. McTeague promised to return and assist him. Three weeks passed with no assistance. After three months of court proceedings the embassy and Canadian Ambassador reportedly intervened to request that the rights of Mr. Almalki be upheld by telling the judge that the Canadian government wanted an open and fair trial. [56] At no point did consular officials recommend or arrange for him to receive medical or psychological assistance.

- Similarly distressing is the fact that while Mr. Nureddin and Mr. Arar were escorted back to Canada, and Mr. Abou-Elmaati and Mr. Almalki were left to find their own way home. What is all the more shocking is that Mr. Almalki sought refuge in the embassy after being told by a DFAIT official in Canada that he was at risk of being detained again and that he should stay overnight at either the embassy or at the ambassador's residence — yet on arrival at the embassy he was denied assistance and spent the evening on the streets of Damascus too afraid to return to his family's home.[57]

- There was no equality in the treatment received by the three men during their detention or on their release. All Canadian citizens should be, where possible given local realities, treated equally and afforded the same consular protection and service standards. The principle of equality and non-discrimination is enshrined

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[56] *Chronology of Public Information Relating to the Cases of Messrs. Almalki, Elmaati and Nureddin*, Kerry Pither at 94.
[57] *Chronology of Public Information Relating to the Cases of Messrs. Almalki, Elmaati and Nureddin*, Kerry Pither at 95.

in the Canadian Charter of Rights and Freedoms in Article 15 and Article 2 of the International Covenant on Civil and Political Rights.[58]

Canada Should At All Times Urge States to Respect the Vienna Convention on Consular Relations

- Canada, Egypt, and Syria are all signatories of the Vienna Convention on Consular Relations and as such are entitled to request of host states the right of consular access to their detained citizens.[59]

- Article 36 1(b) of the Convention states that consular officers will be informed without delay if one of their nationals is "arrested or committed to prison or to custody pending trial or is detained in any other matter." When it becomes clear that a foreign government has failed to provide that prompt notification after detaining a Canadian citizen, Canadian officials should protest forcefully that breach of the Vienna Convention and insist that it not happen again.

- Article 36(c) of the Convention states that consular officials "shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."

- This right expresses what the consensus was in 1963 as to the nature of consular services for detained citizens. At a bare minimum those who are detained should expect that their state will persistently and actively press detaining authorities to allow them to visit with the detainee.

Canadian Consular Officials Actions Should be informed by their Obligation to Prevent Torture and the Presumption That Those Being Held on National Security Grounds in Egypt and Syria Face Torture

- As has been noted, Canadian Consular officials have an obligation to act on behalf of Canadian citizens detained abroad. That obligation is not diminished when the individual holds dual nationality with the state that is detaining them.

- In light of the obligation to prevent torture, Canadian consular officials should approach each consular visit with an understanding that there are substantial grounds to suggest that the detained Canadian is experiencing torture. As a result they must from the outset in each consular visit actively look for signs of torture. This must be done, as Justice O'Connor has noted, with recognition that torture often does not always leave physical scars.[60]

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[58] *Canadian Charter of Rights and Freedoms, Article 15, ICCPR Article 2.*

[59] Vienna Convention on Consular Relations, 24 April, 1963, Accession, Egypt Jan 21st, 1965. Accession**,** Syria, Oct 13, 1978. Accession**,** Canada, 18 July 1974.

[60] Justice O'Connor*, Report of the Events Relating to Maher Arar, Analysis and Recommendations*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006 at 351.

- In 2005 the UN Committee Against Torture in its concluding observations on Canada stated that in order to comply with the Convention, "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."[61]

- The Optional Protocol to the Convention Against Torture and the European Convention Against Torture, both specify that every effort must be made to speak to the detainee in private.[62] Every effort should be made to speak directly to the detainee, without the use of interpreters provided by detaining officials.

- The Arar report noted that in each of Mr. Arar's consular visits he was forced sit away from the consular official, Mr. Martel, and could only speak in Arabic through a translator. Guards were also present in the room throughout the meeting.[63] At no point did Mr. Martel request to speak to Mr. Arar alone or in English. At a bare minimum such requests should be made.

- Given the difficulty frequently associated with recognizing torture it would be preferable for two or more consular officials to be present at the visit, as is suggested in the European Convention. This would allow each of them to pick up on subtleties that the others missed.

- In Mr. Arar's case, Mr. Martel did not speak Arabic. As a result he was unable to understand what was being said between Mr. Arar, his captors, or the interpreter. In all cases, consular officials should strive to have someone who understands the local language participate in consular visits.

- Under Article 10 of the Convention Against Torture, Canada has an obligation to "ensure that education and information regarding the prohibition against torture are fully incorporated into the training" of individuals such as consular officials.[64] Such training should stress that in situations such as that of the three men, consular officials should approach their visits with the presumption that torture may be occurring. Therefore they should regard skeptically verbal assertions from the detained individual to the effect that they are not being tortured. As was noted in the Arar Report, Mr. Arar told Canadian consular officials that he was not being tortured when he in fact was.[65] Mr. Abou-Elmaati during his first consular visit in Egypt informed Canadian officials that he had been tortured in

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[61] Committee Against Torture*, Concluding Observations/Comments on 4th and 5th periodic reports of Canada*, CAT/C/CR/34/CAN. 7 July 2005, paragraphs 4(b) and 5(d).
[62] *European Convention for the Punishment of Torture and Inhuman or Degrading Treatment or Punishment,* Strasbourg, 26. XI. 1987.
[63] Justice O'Connor*, Report of the Events Relating to Maher Arar, Analysis and Recommendations*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006 at 40.
[64] CAT Article 10
[65] Justice O'Connor*, Report of the Events Relating to Maher Arar, Analysis and Recommendations*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, at 44.

Syria but did not feel comfortable disclosing that he had also been tortured in Egypt out of fear that his captors were punish him for speaking out.[66]

- Such statements and other possible indications of torture should be documented and sent immediately to senior Foreign Affairs officials for consideration as to what actions should be taken in response to the possible torture of a Canadian citizen and of other Canadians in a similar position.

All Detained Canadians Should Be Presumed Innocent Unless and Until Proven Guilty

- Serious concerns were raised during the Arar Inquiry over the labeling of Mr. Arar as a terrorist. This labeling had very serious consequences, including very likely influencing the treatment that he received from Canadian consular officials who may have regarded him as potential threats to Canada. There is a very real possibility that those same concerns arise with respect to these three men.

- The presumption of innocence is well entrenched in Canadian law and should be respected by Canadian officials at all times, and should guide the approach taken in consular cases.[67]

- As has been noted, rather than work towards securing their freedom, Canadian consular officials at times were pre-occupied with such things as demanding that the men speak to Canadian intelligence officers. Such actions suggest that the men were not presumed innocent and as such were denied the type of consular service entitled to them.

Consular Officials Should Work to Ensure that Basic Human Rights are Protected

- Canadian consular officials should remind foreign officials who are detaining Canadians of the prohibition of the use of torture and of arbitrary arrest or detention.[68] Pursuant to the International Covenant on Civil and Political Rights, Canadian consular officials should also request on behalf of the detained Canadian that formal charges be laid so as to end their indefinite detention.[69]

- Canadian Consular officials also have an obligation to request that foreign states respect the right to a fair trial for all Canadians overseas and that they are afforded legal representation.

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[66] *Chronology of Public Information Relating to the Cases of Messrs. Almalki, Elmaati and Nureddin*, Kerry Pither, at 41.
[67] Canadian Charter of Rights and Freedoms, section 11d.
[68] *CAT, Article 3, ICCPR re Torture, Article 9, International Covenant on Civil and Political Rights.*
[69] *ICCPR Article 9*

- Furthermore, they should at all times stress that the right to be treated "with humanity and with respect for the inherent dignity of the human person" must be respected.[70]

- If consular officials ever become aware of specific allegations that a detained Canadian has been subjected to torture, officials must immediately and forcefully insist that there be an impartial investigation of the allegations and that the detainee be provided with independent medical attention.

- In August of 2002 Mr. Abou-Elmaati told consular officials in Cairo that he had been tortured during his period of detention in Syria and that the confessions he made during that time were false.[71] At the time that he made these statements Mr. Almalki in detention at Far Falestin in Syria. No additional measures were taken to inquire into the well-being of Mr. Almalki. A diplomatic note was sent around this time but given the limited factual information that is public Amnesty International is unable to ascertain if the note was precipitated by Mr. Abou-Elmaati's allegation of torture or not. What is known is that Mr. Almalki did not receive any consular visits, nor did Mr. Nureddin when he was later detained at Far Falestin.

Communication, the Provision of Information and Assistance in Questioning Detained Canadians Between, DFAIT, the RCMP and CSIS

- Consular officials have an obligation to provide consular services and advance the protection of a detained Canadian's human rights. Their actions should also be informed by the reality that when they meet with Canadian citizens who are being detained abroad, those individuals are often in a vulnerable state if and when they meet.

- Individuals detained abroad in such circumstances are seeking help from their government and as such should not have to fear that the information that they disclose, in their fragile state, will be shared with other government agencies or departments who and may later be used against them.

- The Department of Foreign Affairs and International Trade in its publication, "*A Guide for Canadians Imprisoned Abroad*," states that any information that is given to a consular official will "remain confidential subject to the provisions of the privacy act."[72] Disclosure will normally only occur with the individual's permission unless the disclosure is in the public's best interest. This exemption from the requirement to seek permission to release personal information should be

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[70] *ICCPR Article 10,* In the context of those deprived of their liberty the Human Rights Committee stated in *General Comment 21,* 10 April 1992, para 4 that, "treating all persons deprived of their liberty with humanity and respect for their dignity is a fundamentally and universally applicable rule."

[71] *Chronology of Public Information Relating to the Cases of Messrs. Almalki, Elmaati and Nureddin*, Kerry Pither, at 41.

[72] *A Guide for Canadians Imprisoned Abroad,* Foreign Affairs and International Trade Canada, 2007. Pg. 3

undertaken only when the consequences will not result in substantial grounds to believe that torture or other serious human rights violations will occur. There must be an oversight mechanism put in place and information can only be disclosed after the reliability and nature of its origins is critically examined.

- In all instances where it appears likely that a Canadian citizen is being tortured, that information should be disclosed to relevant Canadian authorities and appropriate action taken to prevent the torture from continuing.

- Information that is ascertained through consular visits with individuals for whom there are substantial grounds to believe that they are risk of torture, should not be used for intelligence purposes by the RCMP and CSIS. That information bears the taint of torture and is not reliable and its use contravenes international law.

- Furthermore, DFAIT should exercise the same degree of caution and respect the same standards in regards to the use of information obtained from detained Canadian's family members. In the case of Mr. Abou-Elmaati, consular officials asked his family to verify, while he was being held in detention in Syria, that he had Canadian and Egyptian citizenship and not Syrian citizenship. It is unclear as to if their answers contributed to his being transferred to Egypt where he was again tortured. In light of the possibility that the information given to DFAIT officials by Mr. Abou-Elmaati's family may have led to that result, it is important that the same standard of care is employed when it comes to the use of information derived from the families of detained Canadians.

In what circumstances and under what consideration could DFAIT help RCMP/CSIS with their information sharing and questioning?

- DFAIT's actions should be guided by their mandate and a recognition that they play a protective and not investigative role when it comes to detained Canadians.

- On January 15, 2003, Canadian counsel in Damascus, Leo Martel delivered a letter from the RCMP to General Khalil on the instructions of Ambassador Pillarella. The letter contained a series of questions to be asked of Mr. Almalki. The letter also extended an offer to share with the Syrian authorities "large volumes of highly sensitive documents and information, seized during investigative efforts or obtained from confidential informants associated to terrorist cells operating in Canada."[73] While certain officials with DFAIT had reservations about the RCMP sending questions to the Syrian government, and were apprehensive about DFAIT participating in such an endeavour, their concern was never communicated clearly and forcefully to the RCMP. The fact that it was a DFAIT official who delivered the questions shows a failure in DFAIT's internal and external communications.

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[73] Justice O'Connor, *Report of the Events Relating to Maher Arar, Factual Background Vol. 1*, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar,* 2006, *at 343.*

- The problems that arise from DFAIT participating in the RCMP/CSIS's information sharing with Syria and Egypt and questioning of Mr. Almalki is evidenced in Mr. Martel's actions. Mr. Martel as counsel at the embassy in Damascus, was the person that Mr. Almalki, Mr. Arar, and Mr. Nureddin interacted with either during or after their detention and torture. In providing questions to General Khalil, director of Military Intelligence, who oversaw the routine use of torture in interrogations and ensured that impunity prevailed, his role in attempting to safeguard Mr. Almalki's rights may have been compromised. DFAIT's role, if any, when it comes to information sharing and the sending of questions should be one of informing their partner agencies of human rights conditions in countries of interest. DFAIT can play a valuable role as a trouble shooter for the RCMP and CSIS by informing them of what country conditions are like and what standards must then be followed.

Conclusion

- The prohibition on the use of torture is the product of global consensus rooted in the need to respect human dignity and protect individual physical security.

- The prohibition on the use of torture is not something that can be derogated from during times of war. It is absolute and its genesis can be found in the some of the world's bleakest moments. The prohibition was born in the wake of a war unprecedented in its brutality and disregard for humanity and human rights.
- No individual should have to experience what these three men experienced. They were held in solitary confinement for weeks and months on end. They were tortured repeatedly. They were forcibly separated from their families and from the security of their homes in Canada. Their lives were shattered and their names tarnished. Ahmad Elmaati was held for 2 years, 2 months and 2 days. Abdullah Almalki was held for 1 year, 10 months and 7 days. Muayyed Nureddin was held for 34 days. If the actions of Canadian officials failed to meet the standards outlined in this submission, and are found by the commission to be deficient, the Canadian government must be held accountable and justice must be served for these three men.

- Amnesty International thanks the commission for the opportunity to present this submission. It is our hope that this will be the last time that such an inquiry will be needed.

PART 2

Being Labeled an 'Islamist' in 2002 Could Contribute to Detention and Torture

- Going back over 40 years, both Syria and Egypt have publicly declared that they have been engaged in a struggle with terrorism and political opponents linked to Islamic elements of their society. In both countries supporters and members of Islamic groups, such as the Muslim Brotherhood, have routinely been targeted for arbitrary detention, subjected to torture and/or ill-treatment, disappeared, or been killed as a result of their alleged Islamist sympathies.

- As such ample human rights material was readily and publicly available in 2002 which would have made it very clear to the Canadian government of the possible negative consequences associated with labeling a Canadian citizen in Syria or Egypt as an 'Islamist'. Given the historical and political context in which intelligence officials in these two states would have evaluated such a label, it is clear that the label 'Islamist' would have been regarded as being synonymous with membership in an Islamic group dedicated to the overthrow of the two governments.

- Both countries have a long history of terrorism and political dissidence carried out by Islamic groups, the largest of which is the Muslim Brotherhood.[74]

Syria

- Syria has been under a state of emergency since the enactment of Legislative Decree No. 51 of the 9th of March, 1963. The justification for the continued use of martial law is the state of war with Israel and past domestic terrorist acts and threats from Islamist groups. [75] In 2001 the United Nations declared that the quasi-permanent state of emergency was jeopardizing human rights in Syria. [76]

- Using the label 'Islamist' when communicating with Syrian officials would have evoked for them associations with acts of terrorism and political dissidence that occurred in Syria in the 1980's. During that time the Muslim Brotherhood carried out numerous bomb attacks and attempted to assassinate President Hafez Al-Assad. The government's response was swift. In 1980, Law No. 49 made membership in the Muslim Brotherhood punishable by death.[77]

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[74] *The Muslim Brotherhood was formed in 1928 in Egypt. Today is has branches throughout the Middle East and Africa and has a strong presence in Syria and Egypt.*
[75] *US Department of State, Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Syria, 1999, February 23, 2000, <www.state.gov/g/drl/rls/hrrpt/1999/427.htm>*
[76] *Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, CCPR/CO/71/SYR, 24 April 2001, page 2.*
[77] *Human Rights Watch, Syria, World Report, 1999, www.hrw.org/wr2k/Mena-09.htm*

- Human Rights Watch in a 1992 report on Syria made reference to further actions taken by the Syrian government in response to the threat posed by Islamic groups like the Muslim Brotherhood:

  "The Syrian government's legendary ruthlessness in stamping out opposition continued to lead political opponents either to cease public adversarial political activity or to go into exile. Political opponents still remember the drastic actions taken by the Syrian government from 1980 to 1982 against the Muslim Brotherhood and the PCA. During the spring of 1981, after some Muslim Brotherhood elements were suspected of committing terrorist acts against government and party officials, security forces swept through the city of Hama, a stronghold of the Brotherhood, and killed hundreds of suspected members. When that did not end the Brotherhood's opposition, the Syrian army laid siege to the city in January and February 1982, and then shelled its residential neighborhoods. The historic downtown area was flattened, and other areas were similarly savaged. Approximately ten thousand residents are believed to have been killed and many more made homeless."[78]

- In 1995, Amnesty International noted that the state of emergency ensures that "different branches of security forces have been able to arbitrarily arrest and detain political suspects as they please and for as long as they please … Tens of thousands of people have been rounded up in successive waves of mass arrests targeted as suspected members of left-wing, *Islamist* or Arab nationalist organizations, or at anyone engaged in activities opposed to the government."[79] Even though the Muslim Brotherhood did not engage in terrorist activity to the same degree after the 1980's, there were still regarded as both a terrorist organization and a political opponent of the government. Thus their members and sympathizers were still regarded as threats to the government resulting in continued negative connotations arising from being labeled an 'Islamist'. "Several thousand other political detainees, including prisoners of conscience, are currently believed to be held in detention without charge or trial. They include political suspects from various banned or unauthorized political organizations, particularly the Muslim Brotherhood."[80]

- Throughout the 1990s and 2000s, alleged members and supporters of Islamic groups like the Muslim Brotherhood continued to be targeted by the government. The UN Special Rapporteur on Torture stated in 1999 that individuals who were suspected of being members of the Islamic militant group 'Al-Gamaa Al-Ismeya' were arrested and possibly tortured. He also noted that being labeled an Islamist had an impact not only on the individual but also on their family as he gave the example of one young man who was detained because his brother was "allegedly

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[78] *Human Rights Watch, " Syria and Syrian-Controlled Lebanon", World Report 1992, http://www.hrw.org/reports/1992/WR92/MEW2-03.htm#P511_190122*

[79] *Amnesty International, "Syria Repression and Impunity: The Forgotten Victims," April 1995, MDE 24/02/95*

[80] *Amnesty International, "Syria Repression and Impunity: The Forgotten Victims," April 1995, MDE 24/02/95*

a member of the armed Islamist group Al-Jihad."[81] In 2000, Amnesty International reported that it had the names of "scores of prisoners of conscience and thousands of political prisoners, mainly from the Muslim brotherhood, who have been detained or "disappeared" since the early 1980's in Syria."[82]

- Not only were Islamists routinely targeted, but as was noted by the US Department of State in 1999 and in 2001, "facilities for political or national security prisoners generally are worse than those for common criminals."[83] They went on to document that, "the government reportedly tortured some of the Islamist prisoners who were detained during the large scale arrests in late 1999 and early 2000."[84] In 2000 the US Department of State reported that in political or national security cases, "arrests generally are carried out in secret, and suspects may be detained incommunicado for prolonged periods without charge or trial."[85] This echoes concerns raised in an earlier report from 1995 by Amnesty International that stated, "those now held in total isolation are mostly detainees held in connection with the Muslim Brotherhood."[86]

Egypt

- Egypt's Emergency Law, established to counter terrorist threats has been in effect since 1981. Since that time terrorist attacks carried out by armed Islamist groups have targeted civilians, the Coptic community and tourists in Egypt.[87] In 1996 Amnesty International stated that "thousands of sympathizers, members and suspected members of unauthorized Islamist groups have been administratively detained without charge or trial … torture continues to be used systematically on political detainees."[88]

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[81] *Sir Nigel Rodley, "Civil and Political Rights Including Questions of Torture and Detention," Report of the Special Rapporteur. Economic and Social Council, Commission on Human Rights, E/CN.4/2000/9, 2 February 2000, pg. 72.*

[82] *Amnesty International, "Syria:Amnesty International Welcomes the Release of Political Prisoners," 16 November, 2000, MDE 24/031/2000*

[83] *US Department of State, Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Syria, 1999, February 23, 2000, <www.state.gov/g/drl/rls/hrrpt/1999/427.htm> and US Department of State, Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Syria, 2001, March 4, 2002, <www.state.gov/g/drl/rls/hrrpt/2001/nea/8298.htm>*

[84] *US Department of State, Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Syria, 2001, March 4, 2002, <www.state.gov/g/drl/rls/hrrpt/2001/nea/8298.htm>*

[85] *US Department of State, Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Syria, 1999, February 23, 2000, <www.state.gov/g/drl/rls/hrrpt/1999/427.htm>*

[86] *Amnesty International, "Syria Repression and Impunity: The Forgotten Victims," April 1995, MDE 24/02/95.*

[87] *Amnesty International, "Egypt: Indefinite Detention and Systematic Torture: The Forgotten Victims," July 3rd, 1996, MDE 12/13/96 at pg. 15.*

[88] *Amnesty International, "Egypt: Indefinite Detention and Systematic Torture: The Forgotten Victims," July 3rd, 1996, MDE 12/13/96 at pg. 1.*

- In 2000, two members of the Islamic Group of Egypt were killed by the government as part of an ongoing antiterrorism campaign.[89] A further 5,000 persons were arrested because of their alleged association with the officially banned, Islamist opposition group, the Muslim Brotherhood, a dramatic increase from 1999 where 249 were arrested for their alleged association with the organization.[90]

- In 2001 the US Department of State reported that the Emergency Law had resulted in the restriction of human rights as, "security forces continued to arrest and detain suspected members of terrorist groups. In combating terrorism, the security forces continued to mistreat and torture prisoners, arbitrarily arrest and detains persons, hold detainees in prolonged pretrial detention, and occasionally engage in mass arrest." It went on to state that 243 supporters of the Muslim Brotherhood were arrested by the government to undermine their support.[91]

- As with Syria, being detained as an Islamist and thus both a political opponent and possible terrorist, has significant consequences for the type of treatment one could expect in detention. An Amnesty International report from 2002 noted that "in Egypt everyone taken into detention is at risk of torture. Political detainees face a heightened risk. Those most at risk are alleged members of Islamist organizations."[92] The torture they faced, as outlined by the Special Rapporteur on Torture in 2000, included the following:

  > "Detainees being stripped naked; hung by their wrists with their feet touching the ground or forced to stand for prolonged periods; doused with cold or hot water; beaten; forced to stand outdoors in cold weather; and subjected to electric shock treatment. Torture is reportedly used to extract information, coerce the victims to end their anti-government activities and deter others from such activities."[93]

- All of the above information was readily available to the Canadian government on the Internet and in a hardcopy from each of the mentioned organizations and government bodies. In light of their existence, the Canadian government should have been aware that arbitrary detention, torture, ill-treatment, and even potentially death, was a possible outcome of referring to a Canadian citizen as an 'Islamist' when communicating with Syrian and Egyptian officials.

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[89] *US Department of State, Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Egypt, 2000, February 23, 2001, <www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm>*

[90] *US Department of State, Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Egypt, 2000, February 23, 2001,pg. 3 <www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm> see also the 1999 report.*

[91] *US Department of State, Bureau of Democracy, "Human Rights, and Labour, Country Reports on Human Rights Practices, Egypt, 2001", March 4, 2002, <www.state.gov/g/drl/rls/hrrpt/2001/nea/8248.htm>*

[92] *Amnesty International, "Egypt No Protection – Systemic Torture Continues," 13 November 2002, MDE 12/031/2002 at pg. 1.*

[93] *Sir Nigel Rodley, "Civil and Political Rights Including Questions of Torture and Detention, Report of the Special Rapporteur", Economic and Social Council, Commission on Human Rights, E/CN.4/2000/9, 2 February 2000, at pg. 72.*

Application of the UNCAT and Other Applicable Legal Source of the Prohibition

- The Government's position in their submissions is that the United Nations Convention Against Torture does not apply to the actions of the Canadian government in the case of these three men. Their narrow interpretation of the convention suggests that the Canadian government is only responsible for preventing torture that occurs on its own territory. Amnesty International submits that the UNCAT is applicable in this case, as are numerous other legal sources that uphold the prohibition of the use of torture.

- As was noted in Amnesty International's oral submissions, the Committee Against Torture has, in its various general comments and decisions, expanded its interpretation of the convention's scope and application.[94] Thus far the Committee has not had the opportunity to render a decision on a complaint with facts similar to those of these three men. In the Agiza case involving extraordinary rendition, Sweden found to have violated the principle of non-refoulement and was criticized for relying on diplomatic assurances from Egypt.[95] In the Committees Concluding Observations on Canada from 2005 they expressed concern over Maher Arar's case and reminded Canada of its obligations under UNCAT to observe Article 3. While these cases are similar to the one at hand, we are not dealing with a clear situation of extraordinary rendition and thus far the Committee has not had the opportunity to render a decision on a complaint with facts similar to those of these three men.

- It is important to recognize that the UNCAT to the actions undertaken by Canadian officials. Article 2.1 states that, "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." It is important in light of this article to remember that the majority of the decisions made by Canadian officials were undertaken by such officials within Canadian territory. The decision to send travel information, intelligence information and to send questions were all made by Canadian agents who were within the territorial jurisdiction of Canada. The obligation is linked to the agent who is under the jurisdiction of the signatory state.

- As has been noted, this is an evolving body of law. For tools of interpretation it is useful to look to examples derived from regional bodies. The European Court of Human Rights in *Ilascu v. Moldova* stated that under the European Convention on Human Rights, in "exceptional circumstances the acts of Contracting States performed outside their territory, or which produce effects there, may amount to

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[94] *See for example, Human Rights Committee, "Concluding Observations of the Human Rights Committee on Canada," 20 April 2006, CCPR/C/CAN/CO/5 and Committee Against Torture, "General Comment No. 2," 23 November 2007, CAT/C/GC/2/CRP.1/Rev.4 at para 7.*

[95] *General Assembly, "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Note by the Secretary-General," 20 August 2005, A/60/316*

exercise by them of their jurisdiction."[96] Furthermore, "a State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction." In this case, responsibility is tied to the effects of the state agents actions. Given the regional focus of the convention one could argue that there would be an implied territorial limitation to it that would not necessarily be endemic in international treaties. Yet here we see the court focusing on effect rather than on territorial limitations and developing a method of interpretation that could be applicable when interpreting the applicability of the UNCAT. Such an approach would be more in keeping with the aspirations and principles that the prohibition encapsulates.

- The UNCAT encompasses provisions that are relevant to this case irrespective of any possible territorial limitations, for example article 15 prohibits the use of evidence derived from torture. In dismissing the relevance of the UNCAT the government has failed to acknowledge the scope of the Convention and that it is a codification of pre-existing norms that are applicable to this inquiry.[97] In the 1980 US case of Filartiga v. Pena-Irala the court stated, "the torturer has become, like the pirate and slave trader before him, *hostis humani geenris,* an enemy of all mankind."[98] As has been noted by Burgers and Danelius who were both involved in the drafting of the UNCAT, "the principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures."[99] The prohibition on the use of torture has been recognized by the International Criminal Tribunal for the Former Yugoslavia as being part of international customary law.[100] In Furundzijia, the courts stated that:

  > "Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed."[101]

- The court goes on to note that the nature of the prohibition of torture is jus cogens and that it is an erga omnes norm. It is an obligation owed to all and "an absolute value from which nobody must deviate."[102] Thus irrespective of UNCAT, all states must ensure that the actions of their agents, irrespective of territorial

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[96] *Illascu v. Moldova and Russia, (*2005*)* 40 E.H.R.R. 46.
[97] *For example Article 5 of the 1948 Universal Declaration of Human Rights, the 1949 Geneva Conventions and the 1966 International Covenant on Civil and Political Rights.*
[98] Filartiga v. Pena-Irala, *630 F. 2d 876 (2d Cir. 1980).*
[99] *JH Brurgers and H Danelius,* The United Nations Convention Against Torture *(Nijhoff, 1988), p.1, cited by Lord Milled in* Pinochet (No. 3) *at [2000] 1 AC 147, 276C.*
[100] Prosecutor v. Furundzija, *(10 December 1998), Case No. IT-95-17/I-T (International Criminal Tribunal for the Former Yugoslavia).*
[101] Prosecutor v. Furundzija, *(10 December 1998), Case No. IT-95-17/I-T (International Criminal Tribunal for the Former Yugoslavia) at para 148.*
[102] Prosecutor v. Furundzija, *(10 December 1998), Case No. IT-95-17/I-T (International Criminal Tribunal for the Former Yugoslavia) at para 151, 154.*

limitations must be in accordance with their obligation to prevent torture from occurring. To say that Canada cannot be held responsible for actions undertaken in Canada that may have contributed to the three men being tortured abroad, is to ignore the well-established jus cogens and erga omnes nature of the prohibition. As such all states must refrain from actions within their territory or jurisdiction that would expose a person both inside and outside of their territory or jurisdiction, to a substantial risk of torture.

- The ICCPR provides another valuable source of the prohibition. Article 7 states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." The Human Rights Committee has interpreted this article to also include a prohibition against refoulement, "states parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[103] In this case there can be no doubt that the ICCPR applies to the actions of Canadian officials, as there is no territorial limitation in the convention.[104]

- Finally, the International Law Commissions Draft Articles on State Responsibility, recognized as a customary international law, provide yet another source of the prohibition. States can be responsible for aiding or assisting another state in the commission of an internationally wrongful act, such as torture.[105] Article 40 notes state responsibility arises where there is a serious breach of a peremptory norm — torture is one such norm. Finally article 41.2 is especially relevant to this inquiry as one could argue that Canada's actions in sending questions to be asked of Mr. Almalki, after officials were informed by Mr. El Maati that he had been tortured in Syria, and with the knowledge that torture would be likely, would be tantamount to both recognizing a situation as lawful and rendering aid or assistance to maintaining that situation.

- The UNCAT is applicable to this Inquiry. The articles enshrined in it reflect principles of international customary law and aid us in understanding other legal sources associated with the prohibition. The UNCAT also includes provisions that contain no territorial limitations such as article 15, as well as norms whose scope are still being determined by courts and the Committee Against Torture. In addition to the UNCAT, numerous other legal sources exist that uphold the prohibition thus there is no way that the Canadian government can claim that it is only responsible for preventing torture that occurs on Canadian territory.

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[103] Human Rights Committee*, "General Comment No. 20 (1992) at para 9.*
[104] Human Rights Committee*, "General Comment No. 20 (1992) at para 3,* "The text of article 7 allows of no limitation."
[105] International Law Commission*, "*Draft Articles on Responsibility of States for Internationally Wrongful Acts"*,* 2001, Articles 16, 40, and 41.

Legal Standards Regarding State Responsibility

- As with the application and scope of the UNCAT, the body of law around state responsibility and complicity is relatively new and constantly evolving to keep up with unforeseen cases such as this one where one state may be responsible for the violation of the torture prohibition when the actual torture was carried out by another state. In examining state responsibility for violations of the torture prohibition it is important to understand that the term 'complicity' is more commonly associated with individual criminal law, whereas state responsibility and attribution are more applicable to the culpability of states in violations. The language of state responsibility and attribution stems from the Draft Articles on State Responsibility, which have been recognized as international customary law.[106] The Draft Articles define when a state will be held responsible for the commission of an internationally wrongful act. The difference in language is not meant to suggest that they are not related as there is a link between state responsibility and individual criminal responsibility. States have an obligation to ensure that their agents do not act in a manner that will make them individually complicit and thus render the state also responsible for the violation. State and criminal responsibility arises irrespective of whether the participant was physically present or removed in time and space from the actual commission of the violation or crime.[107]

- The starting point for any analysis of state responsibility is an examination of the text of the treaty against torture.

- Article 1 of UNCAT defines torture as:

  For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or *at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.* It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[108]

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[106] International Law Commission*, "*Draft Articles on Responsibility of States for Internationally Wrongful Acts"*,* 2001, Article 16, *(Aid or assistance in the commission of an internationally wrongful act), UN Genera Assembly Resolution 56/83, UN Doc. A/RES/56/83, 12 December 2001. The International Court of Justice has held that Article 16 reflects a rule of customary international law, binding on all States: International Court of Justice,* Bosnia and Herzegovina v. Serbia (Genocide Convention), Judgment (26 February 2007), paragraph 420.

[107] *ICTY,* Blaškić Appeal Judgment, para. 48*; Delalić ("Celebici")* Appeal Judgment (20 February 2001), para. 352.

[108] CAT article 1, italics added.

- A necessary component of the definition of torture requires that "such pain or suffering is *inflicted by* or at the *instigation of* or with the *consent* or *acquiescence* of a public official or other person acting in an official capacity." The Committee Against Torture and the Special Rapporteur on Torture have not delved closely into defining what is meant by these terms beyond reiterating that even in times of threats to national security, a state can be held responsible for acts of torture on the above grounds.[109] In this Inquiry we have no evidence to suggest that Canadian officials inflicted acts of torture. Rather the question becomes, "was torture instigated by the acts of Canadian officials or the result of their acquiescence or consent?" Beyond the question of whether the actions of officials may have come directly within the definition of torture it is also necessary to determine wehther the state is responsible for complicit actions of individual Canadian officials? Looking to the judgments of the international criminal tribunals provides some insights into individual criminal responsibility and possibly into understanding state responsibility, when it comes to complicity.

- In the Semanza case, the court provides a definition of complicity in the context of genocide and individual criminal responsibility that includes aiding, abetting, instigating, procuring.[110] The Draft Articles on State Responsibility use similar language: aiding, abetting, and rendering assistance. Drawing from International Criminal Tribunal jurisprudence regarding individual responsibility the next step in the test of complicity and correspondingly state responsibility involves assessing if the acts of assistance or encouragement have a) substantially contributed or b) had a substantial effect on the violation. If yes, then there has been complicity and state responsibility in the violation of the torture prohibition.[111] To assess whether or not an act has "substantially contributed" or "had a substantial effect" one must ask, did the acts "expand and amplify" or otherwise affect the way in which the violation occurred? The standard is not such that you need to establish that the torture would not have occurred without the state undertaking the act rather it is met if the violation "would not have occurred in the same way" had the parties not acted the way they did.[112] While the full factual background has not yet been disclosed to participants, beyond the government, in the case of the three men there is a very strong reason to conclude that the sending of information, travel plans, and questions would have had a "substantial effect" and "substantially contributed" to the violation of the torture prohibition.

- A further step involves assessing intent to commit the violation and knowledge of the possibility of a violation as a result of certain actions being taken. Under international criminal law the intent of the individual is relevant to a finding of complicity. An individual need not know the precise crime that was to be

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[109] General Assembly, *"Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General,"* 1 September 2004, A/59/324 at para 15.
[110] *The Prosecutor v. Laurent Semanza,* ICTR No 97-20-T, at para 395
[111] *The Prosecutor v. Laurent Semanza,* ICTR No 97-20-T at para 395
[112] *Doe v. Unocal, No. 00-56603, 2002* (9th Cir. Court of Appeals, 18 September 2002) at para 12.

committed; it is enough that he or she is aware that one of a number of crimes may likely be committed and one of those crimes is in fact committed.[113]

- At the state level, intent is not a relevant test. Article 16 of the Draft Articles dictates that an objective test for aiding and assisting must be used — the state must have knowledge of the circumstances of the internationally wrongful act to be held responsible.[114] Article 41 which refers to rendering aid or assistance to a state that is violating a peremptory norm such as torture and thus recognizing such a situation as lawful, includes no reference to the need for intent. The draft commentaries do note that knowledge of the possibility of a violation is a requirement.[115] One could argue that Canada's actions, through the provision of questions and information during interrogations could be regarded as providing aid and assistance to Syrian Intelligence Officials and thus facilitated the violation of a peremptory norm. Furthermore, in continuing to send questions and information, especially after Mr. El Maati's allegations of torture, Canadian officials could be seen as participating in maintaining the situation. Article 41 states that "no State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render assistance in maintaining that situation." In addition to send questions and information, in their meetings with Mr. El Maati after his allegations of torture while in Syria, and in light of the potential risk that the Egyptian might have also been torturing him, Canadian officials continued to request, in front of his captors, that he meet with Canadian Intelligence Officials. In doing so they may have added legitimacy to Egypt's claim that he was a security threat and thus, may have played a role in recognizing as lawful his subsequent torture.

- It is interesting to note that the Canadian government in refugee exclusion cases has denied claims on the grounds that individuals were complicit in grave human rights abuses because of information that they shared with government bodies such as secret intelligence agencies.[116] The standard used by the Minister in these cases is one of knowledge. Were they aware that their actions could cause a substantial risk of torture?[117] The government in these cases deems actions, while

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[113] ICTY*, Blaškić Appeal Judgment (*29 July 2004), para. 50; Special Court for Sierra Leone, *Brima and others,* Trial Judgment (20 June 2007), para. 776. Note that this degree of knowledge, required for criminal responsibility of an individual, may be higher than the "knowledge of the circumstances" required for State responsibility. Note also that a higher degree of knowledge may be required in relation to genocide, than in relation to other crimes and human rights violations.

[114] International Law Commission*, "*Draft Articles on Responsibility of States for Internationally Wrongful Acts"*,* 2001, Article 16.

[115] International Law Commission*, "*Draft Articles on Responsibility of States for Internationally Wrongful Acts"*,* 2001, Article 41.

[116] J Rikhof, *"Complicity in International Criminal Law and Canadian Refugee Law: Comparison."* Journal of International Criminal Justice (1 September 2006 ICJ 4 4 (702))

[117]*Rasuli v. Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. No. 1417 and *Srour v. Canada* (Solicitor General) 1995, 91 F.T.R. 24, Rouleau J said that a refugee claimant who kenw that the person arrested by him might be tortured, was exclued.

not identical, certainly similar to those undertaken by Canadian government officials in the present inquiry, such as sharing information, to be complicity and grounds for exclusion – a serious determination that rests on knowledge that one's "actions were likely to facilitate torture and murder." [118]

- In assessing what criteria Canadian officials should have used in determining whether or not they had knowledge that torture might occur as a result of their actions, we submit that the standard found in UNCAT article 3 is applicable.

  No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

  For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

- The Committee Against Torture in its first General Comment noted that the risk did not have to meet the "test of being highly probable."[119] Rather, Canadian officials should not engage in activity where there are substantial grounds for believing that as a result of their actions, an individual would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment. The Committee Against Torture has stated that when determining whether or not there are "substantial grounds" one must look at the local realities of each case and not merely for any consistent patterns of gross, flagrant or mass violation of human rights. They have further expanded on this and argued that in cases involving national security it is important to look at the possibility of torture from that perspective of personal circumstances.[120] The committee has noted that, "the absence of a consistent pattern of gross violations of human rights does not mean that a person could not be considered to be in danger of being subjected to torture in his or her specific circumstances."[121] This again affirms that when assessing what Canadian officials knew or should have known in regards to determining if there actions posed a substantial risk and thus might lead to a violation if undertaken, one needs to look at each case contextually.

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[118] *Rasuli v. Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. No. 1417 at 3.
[119] Committee Against Torture, *"General Comment No. 1,"* 21 November 1997, A/53/44.
[120] General Assembly, *"Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General,"* 1 September 2004, A/59/324 at para 34.
[121] Committee Against Torture, *"Communication No. 233/2003,"* 24 May 2005, CAT/C/34/D/233/2003.