

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

**OUTLINE OF SUBMISSIONS ON BEHALF OF AHMAD EL MAATI
CONCERNING STANDARDS OF CONDUCT**

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A. Overview:

1. Mr. El Maati makes these submissions subject to his expressed concern about the lack of factual disclosure by the Commission. It is inappropriate to ask for submissions about the proper conduct of Canadian officials when the facts to which such standards will be applied are not known in their entirety. Further, to the extent that the questions posed by the Commission assume reasonable grounds for Canadian officials to share information or otherwise take action in relation to other states, it is inappropriate to draw such assumptions in respect of Mr. El Maati.

2. The known facts, drawn from the findings of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the Arar Inquiry), have been summarized by both Human Rights Watch and Amnesty International in their submissions. Mr. El Maati relies on these summaries and agrees with the submissions to this Commission of these organizations, the ICLMG and those of Mr. Almalki and Mr. Nureddin.

3. There are six general points that must underlie an analysis of the actions of Canadian officials when dealing with Canadians who are outside of Canada.
 - A. Canadian officials are obligated to protect the human rights of those within its borders and its citizens abroad. The obligation is rooted in Canada's domestic human rights framework and in its international obligations. The *Charter of Rights*

and Freedoms entrenches human rights protection, and this protection extends to govern the conduct of Canadian officials who are acting outside of Canada.¹ Canada's international obligations are rooted in its ratification of international and regional human rights conventions and in customary law.² Consular officials, in particular, are obligated to protect the interests not just of their state, but of its nationals, within the limits provided by international law (which includes human rights protections) and are further obligated to help and assist its nationals.³

B. The time frame for the questions are posed ought not affect the answers given. September 11, 2001 was a tragedy. However, there have been other tragedies and horrific events, such as the Holocaust, the Rwandan genocide, and Hiroshima. Such events can never justify reactive conduct which leads to severe human rights violations. Officials cannot be absolved of responsibility because they were in 'crisis mode', acting without thinking of their human rights responsibilities. It was the horrors of war which led to the development of humanitarian law, and it was the horrors of the Second World War which acted

¹ A New Review Mechanism for The RCMP's National Security Activities, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the O'Connor Report), p. 431, International Cooperation, Point 4

² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/RES/39/46 (1984); *Universal Declaration of Human Rights*, G.A. Res. 217 A (III) Doc. A810 (1948); *International Covenant of Civil and Political Rights*, CTS 1976/47; *Inter-American Declaration on the Rights and Duties of Man*, OAS

³ *Vienna Convention on Diplomatic Relations* (1964), UNTS, 500, p. 95, Art. 3(b); *Vienna Convention on Consular Relations* (1963), UNTS 596, p. 261, Art. 5(a), (e). While there exists a measure of discretion not to assist a national, where human rights protection is at issue the obligation to assist becomes paramount.

as a catalyst for the further codification and development of international human rights law. International human rights and humanitarian law protections are meant to be applied in times of war, times of crisis, and national emergency as well as in times of peace, unless there are specific provisions for derogation, which must be clearly articulated and justified. There is no authority authorizing a derogation from the obligation not to subject a person to torture or to cruel inhuman or degrading treatment.⁴ In the context of protection from torture, the excuse of not thinking of the consequences because of the perceived urgency of responding to a perceived threat is not a legal justification for complicity in the torture of another person.

C. Both the nature and strength of the concerns about the person and the human rights records of other states with whom Canadian officials interact are relevant in assessing the conduct of Canadian officials. Evidence must be objective, credible, reliable, accurate, relevant to the purpose for which it is being shared or otherwise used and must be subject to caveats about its use. States which are human rights abusers cannot be treated the same as states which respect human rights. A state which protects the human rights of its citizens within its borders, but violates the human rights of its citizens or nationals of other states beyond its borders, is not a state which respects human rights.

⁴ Article 4 of the *International Covenant on Civil and Political Rights*, for example, permits derogations in some instances, but specifically not in respect of Article 7, the prohibition against torture or other forms of cruel, inhuman or degrading treatment or punishment. Article 2 of the *Convention Against Torture* provides that no exceptional circumstances may be invoked as a justification for torture.

Extraordinary renditions are human rights violations.⁵ The analysis of state compliance cannot depend on whether the state in question is a neighbour, a friend or an ally. The assessment must be objective and must be attenuated to the circumstances of the Canadian whose human rights are in jeopardy.⁶

D. Sharing information, seeking information, or otherwise dealing with another state in respect of a Canadian citizen, requires in the first instance an assessment of whether it is necessary and lawful. In each case there must be a clear and necessary purpose and a clear understanding of what is to be gained. For example, sending questions to be asked of a Canadian detained abroad, when the information could be sought once the person is back in Canada or could have been sought before the person left Canada, would not be necessary. Further it would not be justified, nor lawful, where the person is held in a state which tortures to get answers to questions. Evidence obtained under torture is not reliable, may not be used for any lawful purpose in Canada,⁷ and where

⁵ See Scheinen, Martin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, E/CN.4/2006/98, Dec. 28, 2005, UN Economic and Social Council, Commission on Human Rights, p. 16, para. 56.b; *Canadian Council of Refugees et al v A.G. Canada*, [2007] FC 1262 in respect of US non-compliance with its obligations under the *Convention Relating to the Status of Refugees* and the *Convention Against Torture*.

⁶ It is not an excuse for Canadian officials to state that it was not known in the aftermath of 9/11 that the United States was engaging in or would engage in extraordinary renditions and abductions, in disappearances, in indefinite and arbitrary detentions, and in torture. The US has a lengthy and well documented history of both the direct commission of grave human rights violations, including torture by its own officials, and complicity in the commission of such breaches by other states.

⁷ *A (FC) v Secretary of State for the Home Department*, [2005] UKHL 71; *Criminal Code*, s. 269.1

deliberately induced through making a request for information from a detainee in a state which practices torture, opens Canadian officials to charges of complicity in torture.⁸

E. Canada's Supreme Court has indicated that extradition to face the death penalty or deportation to torture is a breach of section 7 of the *Charter*.⁹ The Court recognized on a theoretical level that there may be exceptional circumstances where this might be justified. However, in Canada's jurisprudential history this has been interpreted as existing "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like."¹⁰ Canada has faced no such crisis as a result of September 11,

⁸ *Ramirez v M.E.I.*, [1992] F.C.J. No. 109, at p. 4 (QL); *R v Kirkness*, [1990] S.C.J. No. 119, at para. 34-36; *R v Horsburgh*, [1967] S.C.J. No. 68 (QL) at p. 10; *R v MacDonald*, [1946] S.C.J. No. 38, at p. 3-4 (QL); *R v Steele*, [2007] S.C.J. No. 36, at para. 53; S. 21 of the *Criminal Code*, states:

(1) Every one is a party to an offence who (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it

2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

⁹ *Suresh v. M.C.I.*, [2002] S.C.J. No. 3; *U.S.A. v. Burns*, [2001] 1 S.C.R. 283, [2001] S.C.J. No. 8; *R. v. Schmidt*, [1987] 1 S.C.R. 500, per LaForest J. at p. 522; Wilson J. at p. 532; *Kindler v. Canada*, [1991] 2 S.C.R. 779, per LaForest at p. 832; McLachlin at p. 851

¹⁰ *Reference Re S. 94(2) of the Motor Vehicle Act (B.C.)* (1985), 23 C.C.C. (3d) 289, at p. 313; *Suresh v. M.C.I.*, [2002] S.C.J. No. 3, at para. 78; *U.S.A. v. Burns*, [2001] 1 S.C.R. 283, [2001] S.C.J. No. 8, at paras. 133-134; see also *Cooperative Committee on Japanese Canadians v. A.G. Canada*, [1947] A.C. 87 (P.C.), at p. 101; *Reference Re Wartime Leasehold Regulations, P.C. 9029*, [1950] S.C.R. 124, (QL) at p. 12; *Russell v. The Queen* (1882), 7 A.C. 829 (P.C.); *A.G. Canada v. A.G. Alberta* (1921), 60 D.L.R. 513 (P.C.) (Q.L.) at pp. 3-5;

2001 or since then. Just as Canada cannot extradite or deport to torture, its officials cannot engage in activities which have the same effect. Activities such as sharing information about or sending questions for examination of a Canadian detained in a country which results in a Canadian being torture or subjected to cruel, inhuman or degrading treatment is no different in principle than extraditing or deporting a person to torture.¹¹

F. The principle of non-discrimination must inform the conduct of Canadian officials in relation to Canadian citizens.¹² In the case of Mr. El Maati, as well as those of Mr. Almalki, Mr. Nureddin and Mr. Arar, the concerns about them were rooted in stereotypical assumptions about Islamic extremists, no matter how tenuous and unfounded these assumptions were. Yet given that the stereotype framed the conclusions drawn by Canadian officials, it was not taken into account in assessing whether to share information with the United States, Syria and Egypt. Those most at risk of being subjected to torture or other forms of cruel, inhuman or degrading treatment in those countries are perceived Islamic extremists. Their particular profile had to be considered. A country like the United

Reference Re Dairy Industry Act, "The Margarine Case", [1949] S.C.R. 1 (QL) at pp. 26, 49-50; *Toronto Electric Commissioners v. Snider*, [1925] 2 D.L.R. 5 (P.C.) (QL) at pp. 8-9

¹¹ *Committee Against Torture*, General Comment No. 2, para. 16; *Kindler v Canada*, UNHRC, Communication No. 470/1991, at para. 13.1; *Ng v Canada*, UNHRC, Communication No. 469/1991, para. 6.2

¹² See *Slaight Communications v Davidson*, [1989] 1 S.C.R. 1038; [1989] S.C.J. No. 45; *Andrews v. Law Society of B.C.*, [1989] 1 SCR 143; [1989] S.C.J. No. 6, para. 48-49; *Lavoie v. Canada*, [2002] 1 S.C.R. 769, at para. 45

States may generally respect the human rights of those within its borders,¹³ but it does not in all instances. It is not justifiable to pass information to a country like the US when the person is believed to fall within the class of persons at risk of egregious human rights violations in that country, notwithstanding a general commitment to human rights protection. Determining if a person falls within a targeted class is a standard consideration in the determination of refugee protection¹⁴ and in assessments under the *Convention Against Torture*.¹⁵ Similar considerations ought to have informed information sharing by Canadian police and security officials.

B. Sharing information with foreign authorities:

4. In summary the questions posed on sharing information include:

- a. During 2001-2004, when would it have been appropriate for Canadian security and police officials to share information, including the travel plans of Canadians, with a foreign state.
- b. If there were instances where sharing information would be appropriate what considerations should have been taken into account.

¹³ This, however, becomes more difficult to credibly assert as time goes on and cases like that of Benatta, the asylum seeker detained in the US for five years after being unlawfully returned to the US when seeking Canada's protection, come to light.

¹⁴ *Salibian v M.E.I.*, [1990] F.C.J. NO. 454 (C.A.)

¹⁵ UN Committee Against Torture, General Comment No. 2, CAT/C/GC/2/CRP.1/Rev. 4, November 23, 2007, at para. 20-24

B.1. Appropriate Basis for Sharing Information:

5. It is difficult to set out every instance where it would be appropriate to share information. Certainly in the context of Mr. El Maati (and Mr. Almalki and Mr. Nureddin) no circumstances justified the sharing of information with the United States, Syria or Egypt. Egypt and Syria have a sorry record of engaging in torture and other human rights abuses. The United States' record, while perhaps not as well known, equally shows a pattern of human rights abuses against particular classes of persons, perceived to be its enemies.¹⁶
6. It is perhaps easier to address when it is not appropriate to share information about a Canadian. The decision to share information must be informed by the human rights practices of the state in question. If the state engages in human rights abuses, whether within or outside of its borders, or passes information to a state which engages in human rights abuses, then information should not be shared with that state. It would never be appropriate to share information with another state where this could result in exposing the individual to torture or other forms of cruel, inhuman or degrading treatment.
7. Factors which inform the sharing of information should not differ with the nature of the investigation. What matters, whether it is a criminal or a security intelligence investigation, is the quality and strength of the evidence. Where the information has been collected and assessed on a low evidentiary standard -

¹⁶ McCoy, Alfred, *A Question of Torture, CIA Interrogation, from the Cold War to the War on Terror*, Holt and Company, New York, 2006

*reasonable grounds to suspect*¹⁷ activities constitute a threat or the *possible* commission of terrorism offences - this is relevant to a decision to share information. It would never be appropriate to share information about a person which is not accurate, precise, credible, reliable and objective. And where it may be appropriate to share information, it would not be appropriate to do so without caveats.

B.2 Factors to Consider in Deciding to Share Information:

8. From what is known of the cases of Mr. El Maati, Mr. Almalki and Mr. Nureddin there was no appropriate basis for sharing information. As such the answer to the second question is purely theoretical and not grounded in any facts before this Commission.
9. The factors outlined above in answer to the first part of this question essentially set out the factors which ought to govern a decision to share information with another state: information should not be shared with a state which engages in torture or other forms of cruel, inhuman or degrading treatment or which may pass on the information to a state which engages in such practices. Any information shared must be accurate, precise, credible, reliable and objective and subject to caveats restricting further use.

¹⁷ Reasonable grounds has been interpreted to mean a possibility that the person is engaging in activities which pose a threat to the security of Canada, on the basis of evidence which is possibly accurate. This is such a low standard that almost any suspicion may be considered sufficient to ground a case against the person. See *Chiau v M.C.I.*, [2001] F.C.J. No. 2043 (C.A.), at para. 60-61. There are valid criticisms of the use of this standard within Canada, where torture is prohibited. These concerns are exponentially magnified where the consequences to the person may be torture.

10. In addition, as noted in the introduction to these submissions, a question which must always be asked is what is the purpose of sharing information. Stopping a terrorist action may be a justifiable reason to alert authorities in another state where the evidence is accurate, precise, credible, reliable and objective and the threat is real and imminent. This does not arise on the known facts about Mr. El Maati, Mr. Nureddin or Mr. Almalki. Alerting another state, which engages in human rights abuses or passes on information to another state which engages in human rights abuses, to the presence or travel plans of a person about whom there may be some suspicion can serve no lawful purpose. If the intention is to have the person detained and questioned, this would not be a lawful purpose - a Canadian official cannot directly or indirectly induce torture. It would equally be unlawful if information is shared, without a direct intention to have the person subjected to torture, where there is evidence of a state practice of torture and the risk of torture ought to have been foreseen.¹⁸

C. Questioning Canadian citizens detained in foreign states

11. In summary the questions posed on participating in the questioning of Canadians detained abroad include:
- a. During 2001-2004, when would it have been appropriate for Canadian security and police officials to send questions to a foreign state for questioning of a detained Canadian.

¹⁸ See footnote 8 above, on complicity.

b. If there were instances where involvement in questioning of a Canadian detained abroad would be appropriate what considerations should have been taken into account.

C.1. Appropriate Basis for Participation in Questioning:

12. It would never be appropriate for Canadian officials to send questions to be asked of a Canadian detained in a state which engages in torture or other forms of cruel, inhuman or degrading treatment. It would never be appropriate to engage in direct questioning or otherwise participate in the questioning of the detained Canadian in that state.

13. Involvement by Canadian officials in any manner in the questioning of a Canadian who may be subject to torture, even if not in the presence of Canadian officials, amounts to complicity in torture and other forms of cruel, inhuman or degrading treatment.¹⁹

C.2 Factors to Consider in Deciding to Participate in Questioning:

14. On the basis of the facts as known, there were no circumstances where it would have been justifiable for Canadian officials to participate in any way - by sending questions, attending questioning, or engaging in direct questioning of Mr. El

¹⁹ The Federal Court of Appeal noted that complicity rests "... on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (e.g., s. 21(2) of the Criminal Code), and ... is the best interpretation of international law." *Ramirez v M.E.I.*, [1992] F.C.J. No. 109, at p. 4 (QL). Wilful blindness to the perpetration of human rights abuses is not an acceptable defence.

Maati and the other two men in Syria, or for Mr. El Maati in Egypt. Both states are notorious for engaging in egregious human rights violations, including torture, and as such this consideration should have operated to prevent Canadian participation in questioning of any of the three men.

15. A professed lack of knowledge on the part of Canadian officials about the routine human rights breaches of Syria, Egypt and the United States is not an acceptable excuse. Canadian officials were obligated to make themselves aware of the human rights of these countries prior to taking any action in relation to Mr. El Maati or the other two men. The obligation to be aware of state practices in relation to human rights cannot be limited to the Department of Foreign Affairs, when the actions of other Canadian officials, in police or security agencies will impact on the human rights of Canadians. Such officials have an obligation to comply with *Charter* norms, which includes ensuring that Canadians are not subjected to torture. This is a positive obligation on all Canadian officials.

D. Provision of consular services to Canadian citizens detained in foreign states:

16. In summary the questions posed on participating in the questioning of Canadians detained abroad include:
 - a. During 2001-2004, what was a reasonable standard of consular services for a Canadian detained in Syria or Egypt.

- b. What considerations should have governed the standards of service provided to a Canadian citizen detained in Syria or Egypt.
 - c. What practices should have been followed when meeting a Canadian detained in Syria or Egypt.
17. We would suggest, as Human Rights Watch does in its submissions to this Commission, that experts be called on this issue. Further, Justice O'Connor has addressed these issues in his report and his conclusions ought to be taken into account in answering these questions.
18. In Mr. El Maati's case consular officials were deficient in providing assistance to him. From the information on the public record, it is not apparent that Canadian officials made strenuous efforts to locate him, advocated for regular or private visits with him, exhibited any concern with his well being when they did see him, or sought any assurances from Syrian or Egyptian officials that he would not be tortured or subjected to cruel, inhuman or degrading treatment. Rather, Mr. El Maati was pressed by Canadian consular officials to meet and be examined by Canadian security officials, which likely left the impression with Egyptian officials that Canada viewed him more as a criminal suspect or security threat than a Canadian citizen entitled to human rights protection. The wrong message was sent.

19. It should be self evident that measures taken by Canadian consular officials ought to have been proactive because Mr. El Maati was detained in Syria and Egypt, countries well known to commit grave human rights violations, particularly against persons suspected of fitting a profile of an Islamic extremist - a profile which was advanced by Canadian officials about Mr. El Maati. Canadian consular officials ought to have made strenuous efforts to locate Mr. El Maati, to arrange for regular and frequent contact with him²⁰, including private visits, and to have investigated the conditions under which he was detained and advocated for assurances of fair treatment.
20. Further, Canadian consular officials ought to have ensured that the Egyptian and Syrian authorities were correctly applying their own laws and to call them to account if prison conditions were determined to be unacceptable, which is the standard of assistance which Canada purports to maintain.²¹ It is clear in Mr. El Maati's case that Egypt was not following its own laws, as three release orders were issued by the Egyptian courts and were not honoured. There is no indication on the basis of the information presently known, that would indicate

²⁰ DFAIT recognizes the need for more frequent visits for persons held in some countries, including those in the Middle East. DFAIT, Service Standards, Part B, Prisoners.

²¹ DFAIT, Arrest or Detention, October, 2007, p. 1; This is also the standard applied by the Netherlands, see Assistance to Prisoners, Policy and Communications Department, Communications Division, The Hague, February , 2005, p. 44, Annex 2. Further the Philippines in its 2003 Department of Foreign Affairs Report, indicated that it sent out legal and consular teams to various countries, including Syria, to assist its nationals whose cases had dragged on before the courts for lengthy periods of time and to conduct independent investigations of these cases. See DFA Accomplishment Report, 2003, Philippines, Department of Foreign Affairs, Jan. 2004, p. 18, "Assistance to Nationals"

that Canadian officials complained on Mr. El Maati's behalf about this. When it became apparent that Mr. El Maati was not subject to charges being laid against him within a reasonable time after his detention, Canadian officials ought to have advocated for his release and his return to Canada.

E. Disclosure of information obtained by consular officials:

21. In summary the questions posed about DFAIT sharing information with other Canadian officials, include:
 - a. During 2001-2004, in what circumstances would it have been appropriate for Canadian police or security officials to seek from DFAIT officials information obtained from a detained Canadian.
 - b. If there were appropriate circumstances to seek such information, what considerations should have been taken into account in deciding to seek it.
 - c. During 2001-2004 in what circumstances would it have been appropriate for DFAIT officials to share information with Canadian police or security officials which they had obtained from a detained Canadian.
 - d. If there were appropriate circumstances to disclose such information, what considerations should have been taken into account in deciding to disclose it.

22. As noted above, we would suggest, as Human Rights Watch does in its submissions to this Commission, that experts be called on this issue as well.

23. It is apparent that information from Mr. El Maati was disclosed to Canadian security and/or police officials. It is also apparent that statements made by Mr. El Maati under torture were used by Canadian officials in court proceedings in Canada without disclosing to the Court that this information was likely obtained under torture.
24. DFAIT indicates in its publications that it will not disclose information received from a Canadian detained in another state subject only to the provisions of the *Privacy Act*.²² This Act does permit disclosure in some instances, but it is not apparent in Mr. El Maati's case that the disclosure of information would have been justified under the *Privacy Act*.

F. Role of consular officials in national security or law enforcement matters:

25. In summary the questions posed about DFAIT's role in security or law enforcement matters, include:
- a. During 2001-2004, in what circumstances would it have been appropriate for DFAIT officials to assist police or security officials in their investigations.
 - b. If there were appropriate circumstances for DFAIT officials to assist in security or criminal investigations, what considerations should have been taken into account in deciding to do this.

²² DFAIT, A Guide for Canadians Imprisoned Abroad, "Protection, Advice and Assistance". The advice reads "... If you are detained or arrested in a foreign country and you choose to talk to Canadian consular officials, any information you give them will remain confidential, subject to the provisions of the Privacy Act. It will not normally be passed on to anyone ?- other than consular officials concerned with your case ?- without your permission.

26. It would not have been appropriate for DFAIT officials to become, in effect, criminal or security investigators, in the course of providing consular services to a Canadian detained abroad. This is fundamentally incompatible with the role which consular officials must play in assisting Canadians who are in trouble in a foreign state and would appear to be outside the scope of consular functions set out in the *Vienna Convention on Consular Relations*.²³
27. By analogy, the kinds of principles analysed by the Supreme Court of Canada as to the role played by a designated judge in a secret hearing concerning the reasonableness of a security certificate are applicable here.²⁴ Of concern in that case was whether a judge was called upon to play contradictory roles in the secret part of the hearing leading to a lack of impartiality. While the Court concluded that the scheme at issue did not lead to this result, in the case of consular officials who become security or police officials, the contradictory functions lead to a conclusion that the official cannot fairly fulfill consular functions while playing at being a police or security officer. A consular official has a specific role to play - he or she is expected to and required to assist a national detained and facing or experiencing human rights abuses in a foreign state. A consular officer cannot play the role of helping a vulnerable Canadian and advocating to ensure that the human rights of that person are protected, while at

²³ *Vienna Convention on Consular Relations*, U.N.T.S. 596/261, 1963, Art. 5

²⁴ *Charkaoui v M.C.I.*, [2007] S.C.J. No. 9, at para. 36-47

the same time participating as an adversary to pursue a criminal or security investigation.

28. Mr. El Maati may have further comments in his oral submissions before this Commission in January, 2008.

ALL OF WHICH is submitted at Toronto, this 19th day of December, 2007.

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