

*Commission of Inquiry into the Actions of
Canadian Officials in Relation to Maher Arar*

OPENING STATEMENT

ON BEHALF OF:

THE REDRESS TRUST

**THE ASSOCIATION FOR
THE PREVENTION OF TORTURE and**

THE WORLD ORGANISATION AGAINST TORTURE

(INTERVENORS)

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I: GENERAL INTRODUCTION

1. These are the opening submissions of the Redress Trust, the Association for the Prevention of Torture, and the World Organisation Against Torture (“the Intervenors”).
2. The Intervenors are all members of the Coalition of International Non-Governmental Organisations Against Torture (CINAT), an international body composed of seven leading international non-governmental organisations committed to ending and preventing torture, to bringing torturers to account, providing rehabilitation and obtaining justice and reparations for survivors of torture.
3. The Intervenors will bring to these hearings their broad international experience in the application of international human rights law and in the practice and jurisprudence of national and international mechanisms for the protection of human rights, including torture.
4. The Intervenors’ experience is global, but their concerns remain focused on individuals. In this case, that individual is Maher Arar. The United Nations Commission on Human Rights has recognized that the public interest in government accountability merges with the most intimate interests of the individual who has suffered human rights abuses:

“[The Commission on Human Rights] recognises that, for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including their accomplices, of these violations are essential steps towards rehabilitation and reconciliation, and urges States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to participate in such a process.”¹

5. While the mandate of this Inquiry engages principles of the greatest importance to Canadian society and the community of nations, at heart its purpose is to obtain the truth about Mr. Arar's experience following his detention in the United States.

1. HISTORICAL CONTEXT

6. Both the factual inquiry and the policy review are being undertaken in a world where many nations describe themselves as being engaged in a "war on terror." The Attorney General, in submissions on procedural issues, has stated categorically that national security is the most important of all public interests. The Intervenors challenge that assertion. The most essential characteristic of a civil society is the degree to which it promotes and protects human rights. The purpose of the state is to foster civil society. The state is not an end unto itself. A secure state is necessary to protect those who dwell within in it, but any argument that human rights must necessarily be subordinated to the security of the state should be regarded with caution.
7. A state may be said to be secure only when *all* its constituent elements – its territory, its inhabitants, and its government – are secure. Security of the inhabitants includes the inviolability of their human rights. In a state where human rights are insecure the state itself is insecure.² Therefore, the Intervenors maintain that any fight against terrorism that does not maintain scrupulous respect for human rights cannot achieve national security, but instead undermines it.
8. Liberal democracies, including Canada, sometimes show a tendency to sacrifice human rights unnecessarily in times of perceived danger. Consider the internment of Canadians of Japanese ethnicity during the second world war and the red scare of the 1950s. When the crisis has passed the abuses may be recognized for what they are, but that only begs the question of why the abuses were condoned in the first case. Perhaps distance allows us to put the danger and the response in proper

perspective. But if these failures of the past are more a reflection of shortsightedness than abdication of principle, it should be easy to guard against recurrences. Little more is required than an attitude of reasonable scepticism towards claims that the government and its security agencies are in the best position to judge where the balance lies between the security of the state and the human rights of the individuals under its jurisdiction.

9. International bodies have begun to ask whether counter-terrorism measures have proven disproportionate to the threats posed, and to the aims of enhancing national security and many violate fundamental principles of human rights. International human rights law recognises only a limited ability of states to derogate from human rights protections. For example, Article 4 of the International Covenant on Civil and Political Rights, provides that states may abridge human rights in very limited circumstances:

“in times of public emergency *which threatens the life of the nation* and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation...”³

10. Counter-terrorism measures have ranged from the strengthening of mutual cooperation and intelligence-sharing between police departments and security intelligence services and the adoption of new legislation to deal with the financing of terrorist activity,⁴ to the adoption of new national security legislation to provide additional powers to investigative authorities and which introduce separate procedural frameworks for the investigation of terrorist offences,⁵ including procedures for arrests, detentions⁶ and trial. Under the stated intention of combating terrorism certain governments have applied these separate procedural frameworks to oppress on minority groups and political opponents.⁷ The reach of counter-terrorism measures extends far beyond the criminal law. In many instances it impacts upon border controls and asylum and refugee processes and procedures for accessing information held by governments.⁸

11. Of particular relevance to this Inquiry are violations of the absolute prohibition on the extradition, expulsion or deportation of persons to locations where the state knows, or ought to know, that there are substantial grounds to believe that they would be in danger of torture. This prohibition has been violated in this “war on terror” (discussed further below). Of great concern is the practice of certain states to ‘render’ suspects to other countries in the complete absence of legal process.
12. Since both the factual inquiry and the policy review are concerned with the interaction between Canadian officials and those of other states, the international climate provides necessary context for both phases of the Inquiry’s mandate.

II. LEGAL PRINCIPLES

13. In our submission, the two principles of international law of greatest significance to this Inquiry are:
 - (a) the absolute prohibition against a state forcibly sending a person to another state where there is a substantial likelihood that he or she may suffer torture; and
 - (b) the obligation of states to prevent and prohibit torture in international law.
14. In this Opening Statement the Intervenors will first set out the law on the prohibition of torture, and then turn to rendition and *refoulement* (the forcible sending of persons to other countries).

2. THE DEFINITION OF TORTURE

15. Article 1(1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

"... 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."⁹

16. This definition is now considered as part of customary international law.¹⁰
17. The definition of torture has the following elements:
 - (a) severe pain or suffering, whether physical or mental;
 - (b) intentionally inflicted on a person;
 - (c) 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;
 - (d) 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; and
 - (e) does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
18. Recent jurisprudence has taken a 'purposive' approach in the determination as to whether an act constitutes torture.¹¹ For example, the International Criminal Tribunal for the Former Yugoslavia has held that "to the extent that the confinement of the victim can be shown to pursue one of the prohibited purpose of torture and to have caused the victim severe pain or suffering, the act of putting or keeping someone in solitary confinement may amount to torture".¹²

2.1 LEGAL RESPONSIBILITY FOR TORTURE

19. The prohibition of torture is absolute and encompasses not only the obligation not to commit torture, but also the obligation to forestall and pre-empt any such acts.¹³ States are responsible for acts of torture committed "*by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*"¹⁴.

2.2 RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

20. Article 16 of the "Draft articles on Responsibility of States for Internationally Wrongful Acts" adopted by the International Law Commission (ILC) in 2001 provides:

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with the knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State".¹⁵

21. In its commentary on the draft articles, the ILC notes that:

"Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct".¹⁶

22. The International Criminal Tribunal for the former Yugoslavia described states' responsibilities in relation to torture as follows:

"This prohibition (torture) is so extensive that States are even barred by international law from expelling, returning or extraditing a person

to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture (.....) ***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.***¹⁷

23. If this Inquiry determines that Canadian officials were implicated in the actions of the United States to send Mr. Arar forcibly to Syria, the next question is what Canadian officials knew, or ought to have known, about Syria's record as a nation that practices torture.
24. For many years the United States Department of State (State Department) has denounced the systematic practice of torture in Syria. In its March 2003 report the State Department wrote:

Despite the existence of constitutional provisions and several Penal Code penalties for abusers, there was credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners, detainees, and the London-based Syrian Human Rights Organization reported that torture methods included administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine. In 2001 AI published a report claiming that authorities at Tadmur Prison regularly tortured prisoners, or forced prisoners to torture each other. Although it occurs in prisons, torture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, especially while the authorities were attempting to extract a confession or information.¹⁸

25. Amnesty International in its 2004 report provides, in relation to Syria, that: "Torture and ill-treatment were widespread and allegations of such treatment were not investigated by the authorities." Further, the report affirms that "hundreds of political prisoners, mostly Islamists" are being held in detention without trial and

that “scores of Syrians were arrested and detained on their voluntary or forced return” and that “most of them were suspected of having links with the Muslim Brotherhood.”¹⁹

26. It has been reported that Mr. Arar was forcibly sent to Syria precisely because he was suspected of involvement in terrorist activities linked to Islamic groups. If this Inquiry determines this to be true, the risk of torture on his removal to Syria must be considered to have been both “real and foreseeable” and “personal and present”.

2.3 INDIVIDUAL CRIMINAL RESPONSIBILITY

27. If officials aided or abetted in the perpetration of torture, they may be criminally responsible under international law for the underlying offence.²⁰

3. THE LEGALITY OF ‘RENDITIONS’ AND THE PRINCIPLE OF NON-*REFOULEMENT*

28. International law recognizes an absolute prohibition against forcibly sending or returning a person to a country where he or she may be submitted to torture. This principle has been affirmed in the provisions of numerous international instruments, including:

- (a) Article 33(1) of UN Convention Relating to the Status of Refugees;²¹
- (b) Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²²
- (c) Art. 13 (4) of the Inter-American Convention to Prevent and Punish Torture;²³ Art. 22 (8), (general clause on non-*refoulement*) American Convention on Human Rights;²⁴

- (d) Article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance;²⁵
 - (e) Article 3 (1) of the Declaration on Territorial Asylum;²⁶
and
 - (f) Article II (3) of the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa.²⁷
29. For example, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which states:
- 1. 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.
 - 2. 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 consisted pattern of gross, flagrant or mass violations of human rights.
30. In addition, the jurisprudence of international legal and quasi-judicial bodies have recognized, developed and clarified the application of this principle, as will be seen below.
31. The jurisprudence that has developed within the European Human Rights system recognizes the protection of persons against expulsion to a country where he or she is at risk of torture and inhuman or degrading treatment or punishment, which is inspired by the drafters of the Convention against Torture.²⁸
32. The United Nations Human Rights Committee also considers that the prohibition against torture present in art. 7 of the UN Covenant on Civil and Political Rights encompasses the prohibition against forcibly sending persons to countries where

they may be subjected to torture or ill-treatment. In its General Comment 20 the UN Human Rights Committee stated that:

In the view of the Committee, 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*. States parties should indicate in their reports what measures they have adopted to that end.²⁹

33. The principle of non-return or of non-*refoulement* has traditionally been associated with refugee law. The prohibition of the return of a refugee to “territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group” was recognized previously in Article 33(1) of the 1951 UN Convention on the Status of Refugees. The scope of the principle of non-*refoulement* is now considered to apply to torture or cruel, inhuman or degrading treatment.³⁰
34. However, the application of this principle under human rights law is broader and applies to all person and not only to refugees. This principle is now widely regarded as an obligation under customary international law and has been the object of numerous resolutions and declarations within different United Nations bodies and organs and the actions of its mechanisms.³¹

3.1 THE PRACTICE OF ‘RENDITION’

35. Along with other measures adopted in the ‘war against terrorism,’ a disturbing and unlawful measure involves the forceful transfer of persons suspected of terrorist acts inter-state to be held in detention facilities in known or undisclosed locations. The practice of what states sometimes describe as “rendition” involves the forcible transfer of persons inter-state through means that are not recognized by law; that is, not involving judicial extradition or deportation procedures.

36. The reference to such transfers as “renditions” wrongly ascribes a degree of formality or “quasi-legal respectability,” however the term should not detract from the illegal or irregular means through which the transfers are executed.³² Legal transfers of persons inter-state are carried out through extraditions, deportations or expulsions and must comply with legal and procedural safeguards.
37. Articles in the media have reported anonymous declarations by United States’ officials describing the practice of “rendition” as a deliberate policy adopted in order to sidestep US law that prohibits the use of torture and ill-treatment. While the present Inquiry is concerned with the conduct of Canadian officials, the principles set out above (under which one nation may be legally responsible for a wrong committed by another through the assistance of the first) may raise the question of what information Canadian officials had, or should have had, about US rendition policies.
38. The circumstances of the removal of Mr. Arar to Syria via Jordan raise the question of whether this was an illegal “rendition”. It also raises the question of whether Canadian officials know, or ought to have known, about the possibility of such rendition. In respect to Canada’s potential role in this matter, the United Nations Human Rights Committee admonished Canada in the following terms:
- "The Committee is concerned that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee refers to its General Comment on article 7 and recommends that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk."³³
39. It is submitted that the Inquiry may wish answers to the following questions:
- (a) Was Mr. Arar legally detained in the United States, and what did Canadian officials know about the legality of that detention?

- (b) Was Mr. Arar advised of his right to the assistance of Canadian consular officials?
- (c) Was he given practical access to that right?
- (d) What steps did Canadian officials take to ensure that, if the United States was intent on expelling Mr. Arar, he would be expelled to Canada rather than to a country that has a history of practicing torture?
- (e) Did Canada seek assurances that Mr. Arar would not be rendered to a state that practices torture?
- (f) What monitoring mechanisms, if any, were put in place?
- (g) Were Canadian officials in Syria made aware of Mr. Arar's presence in Syria?
- (h) If they were, what steps, if any, did they take on Mr. Arar's behalf?

3.2 THE 'RETURN' OF PERSONS - PRINCIPLES AND LIMITS

40. In its General Comment N° 1, the United Nations Committee Against Torture (CAT), the treaty monitoring body established by the Convention against Torture, set out the general principles by which it examines communications sent to it claiming a possible violation of article 3.³⁴ The Committee has applied these standards to virtually all communications examined under article 3.
41. The following are particularly relevant to this Inquiry:
- (a) The CAT considers that to be protected under article 3, individuals must face a "real and foreseeable" risk of torture.³⁵ The risk however, does not have to "meet the test of being highly probable" though it should be "personal and present".³⁶

- (b) The CAT has also considered that the existence of a “consistent pattern of gross, flagrant or mass violations of human rights” present in art. 3.2 of the Convention, “does not as such constitute sufficient ground” for a situation to fall under the scope of article 3.³⁷
 - (c) The CAT also held that the obligation not to return is not limited to the risk of a person being tortured in the country he or she will be returned to but extends to “any other country where he runs a risk of being expelled or returned.”³⁸
 - (d) Finally, CAT has stated that: “The nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with article 3 of the Convention.”³⁹
42. The United Nations Human Rights Committee has held, in its views on communications and concluding observations on reports of States parties, that extradition or deportation of a person would constitute a violation of art. 7 of International Covenant on Civil and Political Rights.⁴⁰ The United Nations Human Rights Committee considers that the risk of ill-treatment must “be real, i.e. be the necessary and foreseeable consequence” of the deportation.⁴¹ Such a risk “is to be deducted from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases”.⁴² In the present case, evidence about Syria’s record as a nation that practices torture may be considered.

3.3 ASSURANCES

43. Since the attacks of September 11 there has been increased use of diplomatic assurances in order to justify the deportation or expulsion of persons towards countries known to systematically or routinely engage in the practice of torture. Generally, states will obtain assurances in advance that the person in question will

not be tortured and sometimes agree on a monitoring mechanism, usually involving visits by diplomatic representatives to the person.⁴³

44. In a number of cases diplomatic assurances have not been complied with or appear to have been ineffective.⁴⁴
45. The interveners submit that while assurances may be acceptable in certain cases,⁴⁵ it is difficult if not impossible to justify their use in cases of expulsions of persons toward countries that systematically or routinely practice torture. In particular, when the expulsion is not part of a legal procedure (i.e. an extradition). The use of assurances in such cases would imply that the sending state believes that while the receiving state routinely engages in grave human rights violations and serious crimes under international law, they will definitely refrain from such acts in the one particular case. This is inherently contradictory. Monitoring mechanisms can, at best, function on a very limited basis as countries that engage in the practice of torture usually restrict access of detainees to lawyers, doctors and other outside persons. In addition, any monitoring mechanism would normally function for only a limited time period, subsequently exposing the returned person to torture and ill-treatment.

4. THE NATURE AND EXTENT OF THE OBLIGATION TO PROTECT CITIZENS ABROAD

46. Article 36 (1) of the Vienna Convention on Consular Relations⁴⁶ provides that:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any

other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (c) consular officers 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. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”

47. If the factual inquiry reveals that the United States did not afford Canada the notice that Article 36(1) of the Convention requires, the United States may have deprived Canada of the right to provide consular assistance to its national, which constitutes a clear breach of international law. In this respect, the International Court of Justice determined that Article 36 of the 1963 Convention on Consular Relations creates individual rights of detained persons to have consular access, and that the failure of the United States to inform the relevant consulate that nationals were being held constitutes a breach of this obligation.⁴⁷
48. The Inquiry may wish to consider whether Canada took adequate and sufficient steps to assert its consular rights and the rights of Mr. Arar. It is submitted that once Canada had information at its disposal to suggest that Mr. Arar may be ‘rendered’ to Syria or any other location where there was a substantial likelihood that he could be subjected to torture, Canada was entitled, if not obliged, to take adequate and sufficient steps to avoid that occurrence.
49. In this respect, it is submitted that the traditional conception of diplomatic protection⁴⁸ has been significantly impacted by the growing recognition of the duty of states to protect the individual rights of their citizens. This was the view taken by the Special Rapporteur of the International Law Commission in his report on Article 4 of the International Law Commission’s draft articles on diplomatic protection.⁴⁹ The Special Rapporteur noted that:

“today there is general agreement that norms of *jus cogens* reflect the most fundamental values of the international community and are therefore most deserving of international protection. It is not unreasonable therefore to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*. If a state party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a state of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.”⁵⁰

50. The principle that there is an obligation for a State to intervene on behalf of its nationals when *jus cogens* rights are at stake is strengthened by the language of the Convention against Torture, which Canada has ratified, which provides in Article 2 that “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. The Convention against Torture specifically allows for States Parties to make communications to the Committee against Torture when they wish to raise issues regarding the non-fulfilment by another State Party of its obligations under the Convention,⁵¹ and the Committee has procedures for urgent measures.⁵² The Canadian government could also have sought interim measures before the International Court of Justice.⁵³
51. Consequently, the Inquiry may wish to question the Canadian Government as to:
1. the exact time it was advised of Mr. Arar’s detention;
 2. the nature and extent of the correspondence between Canadian and American officials while Mr. Arar was in US detention;
 3. what steps, if any, Canada took to preserve Mr Arar’s interests.

5. THE RIGHT TO, AND NATURE OF, REPARATION FOR INTERNATIONAL BREACHES

52. The Commissioner may determine, as a consequence of the factual inquiry, that Canada breached one or several of its obligations towards Mr Arar. If this the finding of the Inquiry, the Intervenors will submit that the Commissioner should be mindful of the well-established principle that an international breach will give rise to a right to reparation.⁵⁴ The form and extent of reparations will depend on a range of factors including the nature of the breach(es), the degree of liability, and the harm done to the individual.
53. It would be premature to make submissions on the appropriateness of reparations at this stage as there has been no finding of wrongdoing.

III. THE FACTUAL AND POLICY INQUIRIES

54. The Inquiry's work has been divided into two broad areas: the factual inquiry, and a policy review. The Intervenors are pleased the Government of Canada has invited the Inquiry not only to investigate Mr. Arar's case, but also to review policies and procedures affecting the balance between human rights and national security elsewhere in the world, for possible application in Canada. The Intervenors hope they may be of assistance to the Inquiry in this regard.
55. While there are many good reasons for conducting the work of the factual inquiry and the policy review in parallel, it remains that they are inextricably linked. It is submitted that the legal and policy principles set out above will provide a framework for the factual inquiry, and the evidence about the treatment of Mr. Arar will provide a real-world example of the law and policy in practice.

5.1 REMEDIES UNDER THE FACTUAL INQUIRY AND THE POLICY REVIEW

56. The terms of reference for the factual inquiry include the mandate to report on:

“any other circumstances related to Mr. Arar that Justice O’Connor considers relevant to fulfilling his mandate.”

57. This is a broad mandate. It is submitted that it enables the Commissioner not only to report on the facts, but also to make findings about whether the treatment of Mr. Arar is consistent with international criminal and civil law governing individuals, as well on international law on state responsibility.

58. However, the terms of reference for the policy review appear to assume that if Mr. Arar was mistreated the appropriate remedy would be to develop or improve mechanisms for reviewing the activities of the R.C.M.P. The terms of reference state that the object of the policy review is:

(b) to make any recommendations that he considers advisable on an independent, arm’s length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security based on

(i) an examination of models, both domestic and international, for that review mechanism, and

(ii) an assessment of how the review mechanism would interact with existing review mechanisms.

59. The Intervenors agree that the Inquiry should consider such mechanisms for monitoring the R.C.M.P., but it is submitted that the Inquiry should not, and need not, end there. The factual inquiry may reveal that further or additional measures are necessary to remedy any wrongs that the Commissioner may find during the factual inquiry. For example, the Commissioner may find that errors or wrongdoing were committed by members of diplomatic service, CSIS, other government departments, or the government as a whole. It is submitted that the mandate to report on “any other circumstances related to Mr. Arar that Justice O’Connor considers relevant to fulfilling his mandate” enables the Commissioner to make recommendations that go far beyond merely assessing mechanisms for

reviewing the conduct of the R.C.M.P. as suggested by the terms of reference for the policy review.

60. It is submitted that if the Commissioner finds that Canadian officials (and therefore the state of Canada) are responsible for a breach of international law, the terms of reference are broad enough to authorize him to make recommendations on the adequate form and extent of reparation. For example, if the Commissioner determines that civil wrongs were committed, the terms of reference are broad enough to authorize him to make recommendations about compensation. Similarly, it is submitted that if the Commissioner finds breaches of national or international criminal law, the terms of reference authorize him to recommend that the competent authorities take appropriate action. The recommendations should take into account the principles of international law governing the right to a remedy and reparation for victims of violations of international human rights law.
61. It may be that as a result of the factual inquiry the Commissioner considers the terms of reference of the policy inquiry to be too narrow to consider appropriate recommendations that would address any errors or wrongdoing that the Commissioner may find. It is submitted that in such case the ability to report on “any other circumstances related to Mr. Arar that Justice O’Connor considers relevant to fulfilling his mandate” would include the authority to recommend that the terms of reference be amended to allow the Inquiry to make appropriate policy recommendations.

5.2 SCOPE OF THE FACTUAL INQUIRY AND THE POLICY REVIEW

62. Although the factual inquiry and the policy review will to some extent move along parallel tracks, it remains that they are two aspects of the same Inquiry. It is submitted that the factual inquiry must be broad enough not only to determine the facts of Mr. Arar’s case, but also to provide a factual basis for the policy review. For example, it is submitted that paragraph (b)(ii) of the terms of reference of the

policy review requires a factual assessment of the real world cooperation between the R.C.M.P. and foreign agencies, not just in the Arar case, but more generally. It is therefore submitted that the Inquiry should take a broad view of questions of relevance.

63. As just one example, when considering communications between Canada and the United States, it is submitted that the Inquiry should not limit itself to communications about Mr. Arar, but should also inquire into communications between Canada and the United States more generally on questions of cross-border treatment of persons of interest to security agencies. At the policy review stage it will be necessary to understand the case of Mr. Arar in its broader factual context, and this broader factual context will be provided by the factual inquiry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

__ June, 2004

E. David Crossin, Q.C.

M. Kevin Woodall

COUNSEL FOR THE INTERVENORS

ENDNOTES

For ease of reference, most of the citations referred to below are ‘hyperlinked’ to the actual documents. The Intervenors have not included hard copies but will provide assistance to the Inquiry or other interested parties in obtaining copies of the references cited below.

¹ Para 8, **Commission on Human Rights Resolution on Impunity**, 25 April 2001, E/CN.4/RES/2001/70

² See Bert B Lockwood, Jr., Janet Finn and Grace Jubinsky, “Working Paper for the Committee of Experts on limitation Provisions”, *Human Rights Quarterly*, vol. 7, no.1 (1985), p.72

³ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. See also, Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), available at: <http://www1.umn.edu/humanrts/gencomm/hrc29.html>; “The Siracusa Principles on the Limitation and Derogations Provisions in the International Covenant on Civil and Political Rights,” *Human Rights Quarterly*, vol. 7, no. 1 (1985).

⁴ See, for example, UN Security Council Resolution 1373 (2001) of 28 September 2001, S/RES/1373 (2001); UN Security Resolution 1267/1999 of 15 October 1999; Council Regulation (EC) 881/2002, 27 May 2002; Council Regulation (EC) 2580/2001, 27 December 2001; Executive Order 13224 of 23 September 2001 (USA).

⁵ E.g., use of ‘stress and duress’ techniques during investigation; recourse to computer profiling and other restrictions on privacy; unlimited rights of search and seizure.

⁶ E.g., the holding of so called ‘enemy combatants’ in Guantanamo Bay, Cuba outside of the reach of the law; the adoptions of new powers which allow for the indefinite detention of terror suspects (United Kingdom).

⁷ This has been reported in respect of Russia, Uzbekistan, among other states. See, generally, International Helsinki Federation for Human Rights, *Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11*, April 2003, available at: http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=390 (last accessed June 2004).

⁸ This has been documented most recently in Sweden and the United States. See, International Helsinki Federation report, *ibid*. See also, European Commission Working Document, *The relationship between safeguarding internal security and complying with international protection obligations*, 5 December 2001 (COM 743/2001), at http://europa.eu.int/lex/en/com/wdc/2001/com2001_0743en01.pdf.

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- ⁹ Adopted by General Assembly resolution 39/46 of 10 December 1984, *entry into force* 26 June 1987, available at: http://www.unhcr.ch/html/menu3/b/h_cat39.htm.
- ¹⁰ See, for example, the International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Anto Furundzija*, 10 December 1998, IT-95-17/1-T, available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>, paras. 160-61.
- ¹¹ See, for example, the International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Milorad Krnojelac*, 15 March 2002, IT-97-25-T, at para. 183, http://www.legalapt.ch/MECHANISMS/International_Justice/International_Tribunals/ICTY/Jurisprudence/Krnojelac%2015%20March%202002.pdf.
- ¹² Krnojelac, *ibid.*, at para. 183.
- ¹³ See, *Furundzija* case, at paras. 144 and 148, *supra*.
- ¹⁴ Article 1 UNCAT.
- ¹⁵ http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.
- ¹⁶ *Ibid.*
- ¹⁷ See, *Furundzija* case, at paras. 144 and 148, *supra*.
- ¹⁸ Country Reports on Human Rights Practices, Released by the Bureau of Democracy, Human Rights, and Labor March 31, 2003 at <http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm>.
- ¹⁹ Amnesty International, Report 2004, at <http://web.amnesty.org/report2004/syr-summary-eng>.
- ²⁰ Article 25 (3)(c) of the International Criminal Court Statute provides that: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission." [http://www.icc-cpi.int/library/basicdocuments/rome_statute\(e\).html](http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).html). See also, Article 7(1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, which provides that "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." This provision was interpreted in the *Furundzija* decision, *supra*, where it was held that "*to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.*" [para. 257]
- ²¹ United Nations Convention Relating to the Status of Refugees, adopted 28 July 1951 and entry into force 22 April 1954, available at: http://www.unhcr.ch/cgi-bin/texis/vtx/home/+LwwBmeJAIS_www3wwwwwwwxFqzvqXsK69s6mFqA72ZR0gR

routinely intervenes in cases where there is serious risk of extradition or deportation to a State or territory where the person in question would reportedly be in danger of being subjected to torture, see Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, E/CN.4/2003/68, 17 December 2002 para. 8.

³² Fitzpatrick, J “Rendition and transfer in the war against terrorism: Guantanamo and beyond” 25 Loy. L.A. Int’l & comp. L. Rev. 457.

³³ Concluding observations of the Human Rights Committee: Canada, 7 April 1999, CCPR/C/79/Add. 105, paragraph 13, at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e656258ac70f9bbb802567630046f2f2?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e656258ac70f9bbb802567630046f2f2?Opendocument).

³⁴ General Comment N°1, Implementation of article 3 of the Convention in the context of art. 22 at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13719f169a8a4ff78025672b0050eba1?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13719f169a8a4ff78025672b0050eba1?Opendocument).

³⁵ For example see Committee Against Torture, *E.A. v. Switzerland*, 10 November 1997, CAT/C/19/D/28/1995 of; *X.Y.Z. v. Sweden*, 6 May 1998, CAT/C/20/D/61/1996; CAT/C/20/D/65/1997, *I.A.O. v. Sweden*, 6 May 1998; *G.R.B. v. Sweden*, 15 May 1998, CAT/C/20/D/83/1997; *A.L.N. v. Switzerland*, 19 May 1998, CAT/C/20/D/90/1997; *K.N. v. Switzerland*, 20 May 1998, CAT/C/20/D/94/1997; *J.U.A v. Switzerland* , (16 December 1998, CAT/C/21/D/100/1997; *H.D. v. Switzerland*, 3 June 1999, CAT/C/22/D/112/1998; *N.P. v. Australia*, 3 June 1999, CAT/C/22/D/106/1998; *S.M.R. and M.M.R v. Sweden*, 11 June 1999, CAT/C/22/D/103/1998; *A.R. v. the Netherlands*, CAT/C/31/D/203/2002, 21 November 2003.

³⁶ *M.O. v. Denmark* 17 November 2003, CAT/C/31/D/209/2002 ; *A.R. v. the Netherlands*, 21 November 2003, CAT/C/31/D/203/2002.

³⁷ **See cases:** CAT/C/16/D/36/1995 (8 May 1996, X v. The Netherlands); CAT/C/18/D/27/1995 (28 April 1997, X v. Switzerland); CAT/C/18/D/38/1995 (9 May 1997, X v. Switzerland); CAT/C/19/D/28/1995 (10 November 1997, E.A. v. Switzerland); CAT/C/19/D/57/1996 (17 November 1997, P.Q.L. v. Canada); CAT/C/20/D/61/1996 (6 May 1998, X, Y, Z v. Sweden); CAT/C/20/D/65/1997 (6 May 1998, I. A.O. v. Sweden); CAT/C/20/D/83/1997 (15 May 1998, G.R.B. v. Sweden); CAT/C/20/D/90/1998 (19 May 1998, A.L.N. v. Switzerland); CAT/C/20/D/94/1997 (20 May 1998, K.N. v. Switzerland); CAT/C/21/D/91/1997 (13 November 1998, A. v. The Netherlands); CAT/C/21/D/100/1997 (16 December 1998, J.U.A. v. The Netherlands); CAT/C/22/D/112/1998 (3 June 1999, H.D. v. Switzerland); CAT/C/22/D/106/1998 (3 June 1999, N.P. v. Sweden); CAT/C/22/D/103/1998 (11 June 1999, S.M.R. and M.M.R v. Sweden); CAT/C/22/D/104/1998 (21 June 1999, M.B.B. v. Sweden); CAT/C/23/D/118/1998 (18 April 2000, K.T. v. Switzerland); CAT/C/23/D/137/1999 (4 June 2000, G.T. v. Switzerland); CAT/C/23/D/107/1998 (4 July 2000, K.M. v. Switzerland); CAT/C/24/D/130 & 131/1999 (2 September 2000, V.X.N. and H.N. v. Sweden); CAT/C/23/D/96/1997 (24 January 2000, A.D. v. the Netherlands) CAT/C/24/D/142/1999 (3 September 2000, S.C. v.

Sweden); CAT/C/24/D/99/1997 (4 September 2000, T.P.S. v. Canada); CAT/C/24/D/116/1998 (4 September 2000, N.M. v. Switzerland); CAT/C/24/D/126/1999 (6 September 2000, H.A.D. v. Switzerland); CAT/C/25/D/144/1999 (15 February 2001, A.M. v. Switzerland);); CAT/C/25/D/122/1998 (15 February 2001, M.R.P. v. Switzerland); CAT/C/26/D/49/1996, (15 May 2001 S.V.et. al. V. Canada); CAT/C/31/D/210/2002 (21 November 2003, V.R v. Denmark) ;CAT/C/27/D/162/2002 (27 March 2002, Y.H.A. v. Australia); CAT/C/31/D/209/2002 (17 November 2003, M.O. v. Denmark); CAT/C/31/D/215/2002 (18 November 2003, JAGV v. Sweden; CAT/C/31/D/153/2000 (19 November 2003, ZT v. Australia); CAT/C/27/D/175/2000 (23 November 2001, S.T. v. The Netherlands); CAT/C27/D/154/2000 (23 November 2001, M.S. v. Australia); CAT/C/31D/199/2002 (24 November 2003, Ms. HAFAEKA v. Sweden); CAT/C/31/D/186/2001 (28 November, K.K. v. Switzerland); CAT/C/31/D/213/2002 (28 November 2003, Mr. E.J.V.M v. Sweden) CAT/C/31/D/228/2003 (2 December 2003, T.M. v. Sweden) (2) CAT/C/12/D/13/1993 (27 April 1994, Mr. Balabou Mutombo v. Switzerland); CAT/C/13/D/15/1994 (18 November 1994, Tahir Hussain Khan v. Canada); CAT/C/16/D/21/1995 (8 May 1996, Ismail Alan v. Switzerland); CAT/C/16/D/41/1996 (8 May 1996, Ms. Pauline Muzonzo Paku Kisoki v. Sweden); CAT/C/17/D/43/1996 (15 November 1996, Mr. Kaveh Yaragh Tala v. Sweden); CAT/C/18/D/39/1996 (28 April 1997, Mr. Gorki Ernest Tapia Paez v. Sweden); CAT/C/18/D/34/1995 (29 May 1997, Mr. Seid Mortesa Aemei v. Switzerland); CAT/C/20/D/89/1997 (8 May 1998, A.F. v. Sweden); CAT/C/21/D/97/1997 (12 November 1998, Orhan Ayas v. Sweden); CAT/C/21/D/88/1997 (16 November 1998, Avedes Hamayak Koeban v. Sweden); CAT/C/21/D/110/1998 (16 December 1998, Cecilia Rosana Nuñez Chipana v. Venezuela); CAT/C/21/D/101/1997 (16 December 1998, Halil Haydin v. Sweden); CAT/C/22/D/120/1998 (25 May 1999, Sadiq Shek Elmi v. Australia).

³⁸ Committee Against Torture, *Mutombo v. Switzerland*, 27 April 1997, CAT/C/12/D/13/1993, para 10.

³⁹ Committee Against Torture, *Case Seid Mortesa Aemei v Switzerland*, 29 May 1997, Communication No 34/1995, CAT/C/18/D/34/199.

⁴⁰ See for example, *Charles Chitat Ng v. Canada A/49/40*, Communication No. 469/1991; CCPR/C/76/D/900/1999 (28 October 2002.), par. 8.5.

⁴¹ Human Rights Committee, *ARJ v. Australia*, 28 July 1997, CCPR/C/60/D/692/1996, par. 6.14.

⁴² Human Rights Committee, *Views on Communications GT, on behalf of T., author's husband v. Australia*, 4 November 1997, CCPR/C/61/D/706/1996, par. 8.4; *C. v. Australia*, 27 August 2001, CCPR/CO/72/PRK, Paragraph 21; *Observations and Recommendations on : North Korea*, observations and recommendations; *Canada*, observations and recommendations, CCPR/C/79/Add. 105, paragraph.13.

⁴³ See Human Rights Watch, “Empty Promises”: Diplomatic Assurances No Safeguard against Torture, April 2004, Vol 16 N°4. (D) at <http://hrw.org/reports/2004/un0404/>.

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- ⁴⁴ See for example the case of *Shamayev and 12 others* where the Russian government did not guarantee the European Court access to Chechen detainees extradited from Georgia despite assurances, European Court of Human Rights, *Shamayev and 12 others v. Georgia and Russia*, Application N° 36378/02 October 4, 2002; another example is the case of Ahmed Agiza and Mohammed al-Zairi who were returned by Sweden to Egypt following diplomatic assurances. On their return they were held for five weeks in incommunicado detention and, in spite later visits by Swedish diplomatic representatives it was later alleged that they had been tortured.
- ⁴⁵ See declaration of the Special Rapporteur on Torture in his 2002 interim report to the General Assembly, where he called on states not to extradite anyone “unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity.” Interim Report of the Special Rapporteur on Torture, Theo van Boven, to the General Assembly, July 2002, A/57/173.
- ⁴⁶ U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, done at Vienna, 24 April 1963, available at: <http://www.un.org/law/ilc/texts/consul.htm>.
- ⁴⁷ *Avena and other Mexican Nationals (Mexico v. United States of America)*, International Court of Justice, General List no. 128, 31 March 2004, available at: <http://www.icj-cij.org/ijcwww/idocket/imus/imusframe.htm>; *LaGrand (Germany v US)*, International Court of Justice, General List No. 104, Decision of 27 June 2001, available at: <http://www.icj-cij.org/ijcwww/idocket/igus/igusframe.htm>.
- ⁴⁸ where the State has the discretionary *right* as opposed to the *obligation* to espouse the claims of its nationals.
- ⁴⁹ John Dugard, Special Rapporteur, First Report on Diplomatic Protection. International Law Commission Fifty-second session Geneva, 1 May-9 June and 10 July-18 August 2000. A/CN.4/506, at <http://www.un.org/law/ilc/sessions/52/52docs.htm>. Article 4 stipulates that:
1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his or her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State. 2. The State of nationality is relieved of this obligation if: a. The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people; b. Another State exercises diplomatic protection on behalf of the injured person; c. The injured person does not have the effective and dominant nationality of the State. 3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.
- ⁵⁰ *Ibid*, at para. 89.

⁵¹ Article 21 of the Convention. Canada recognised the competence of this Article on 13 November 1989. The United States has equally recognised the competence of this Article.

See, **Declarations and Reservations to the Convention against Torture**, available at:

<http://www.unhcr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>.

⁵² Rule 108 of the Committee's procedures states that: "1. At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) for new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations."

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.3.Rev.4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.3.Rev.4.En?OpenDocument)

⁵³ Article 41 of the Statute of the International Court of Justice, available at: http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm#CHAPTER_III; Articles 73-75 of the Rules of Court, available at: http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicrulesofcourt_20001205.html.

⁵⁴ Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); Corfu Channel Case; (UK v. Albania), ICJ Reports 23 (1949).