

Witness Statement for Appearance before Foreign Affairs Subcommittees on International Organizations, Human Rights and Oversight and Judiciary's Subcommittee on the Constitution, Civil Rights and Civil Liberties on Rendition to Torture: The Case of Maher Arar, October 18, 2007

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I am a Professor of Law at the University of Toronto. I teach and research in the area of anti-terrorism law and policy. From 2004 to 2006, I served on a five person research advisory committee appointed by Justice Dennis O'Connor to assist him in his work on the Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar. It is Justice O'Connor's policy to let his report speak for itself. To that end, I will quote at times from passages in his reports. I will also provide my own commentary.

The Inquiry Process

In February, 2004, the Canadian government appointed Justice O'Connor, a leading justice on the Ontario Court of Appeal, to head a public inquiry into the actions of Canadian officials in Relation to Maher Arar. The inquiry was asked to examine the actions of Canadian officials with respect to Mr. Arar's detention in the United States, his deportation to Syria via Jordan, his imprisonment in Syria and his eventual return to Canada. A public inquiry in Canada is a strong instrument for investigation and accountability. It has full power to subpoena relevant documents and enjoys de facto independence from the executive and legislative branches of government. The Canadian inquiry obviously did not have jurisdiction to assess the actions of American officials. It invited the governments of both the United States and Syria to participate in its process, but they both declined. This placed limitations on the ability of the Canadian inquiry to discover the truth about the actions of American officials in relation to Mr. Arar.

The inquiry conducted a thorough investigation of the actions of Canadian officials. It examined more than 21,500 government documents with 6,500 government documents entered as exhibits. The staff of the Commission, who were cleared to top-secret, saw the classified versions of all documents. The Commission heard from 83 witnesses over 75 days of in camera testimony and 45 days of public testimony. In camera hearings were held because of the inquiry's mandate not to release information that would harm national security, national defence or international relations. Mr. Arar and his counsel were not present during the in camera hearings. Commission counsel were, however, instructed by Justice O'Connor to cross-examine various governmental officials. Mr Arar was not asked to and did not testify at the hearings because of concerns that it would be unfair for him to testify without disclosure of all the relevant information. Justice O'Connor, however, concluded that he could discharge his mandate without Mr. Arar testifying.

There were disputes between the inquiry and the government of Canada over whether information could be made public without harming national security. Justice O'Connor was critical of the government's approach to national security confidentiality (NSC)

claims. He commented that:

I am raising the issue of the Government's overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings....Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted.¹

The final dispute between the commission and the government over what information could be made public was resolved earlier this year by a court decision that authorized the release of the majority of disputed passages.²

Rendition and torture are done in secret. The experience of the Canadian commission suggests that governments may be tempted to make overbroad claims of secrecy to protect themselves from embarrassment and to hinder accountability processes. It also suggests, however, that much information about even contemporary national security activities can be made public without harming national security. In the end, the inquiry produced a public three volume report dealing with the circumstances of Mr. Arar's case. This report received much public attention in Canada and abroad. Finally, claims of secrecy can also put people in Mr. Arar's position in an impossible position in which they are unable to know what if any evidence is being used against them.

Some Findings of the Commission of Inquiry

Justice O'Connor concluded: "I have heard evidence concerning all of the information collected about Mr. Arar in Canadian investigations, and there is nothing to indicate that Mr. Arar committed an offence or that his activities constitute a threat to the security of Canada."³ He stated that this conclusion "should remove any taint or suspicion about Mr. Arar that has resulted from the publicity surrounding his case."⁴

Justice O'Connor found that Mr. Arar was tortured in Syria by being repeatedly beaten by a black cable and threats of other torture. He was imprisoned in a cell seven feet high, six feet long and three feet wide for ten months and ten days.⁵ He also found that information obtained from Syria's from the interrogation of Mr. Arar was distributed within the Canadian government without adequate caution about its reliability as a product of torture and despite the fact that Canadian officials "should have proceeded on the assumption"⁶ from the time of their first consular visit with Mr. Arar in Syria on October 23, 2002 that he had been tortured during the initial stages of his imprisonment and his statements were the product of torture.

* I am not the recipient of any grant from the federal government of the United States.

¹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at pp 304.

² *Canada v. Commission of Inquiry into the Actions of Canada Officials in Relation to Maher Arar* 2007 FC 766 at para 91.

³ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at 9.

⁴ *Ibid* at 59.

⁵ *Ibid* at 56-57.

⁶ *Ibid* at 34.

How did Mr. Arar find himself in a Syrian jail? The Commission found that Mr. Arar first came to the attention of the RCMP on October 12, 2001 when he had a three hour meeting with Mr. Abdullah Almalki who was the target of an RCMP terrorism investigation. The RCMP subsequently requested that both Canadian and American customs keep both Mr. Arar and his wife Dr. Monia Mazigh on lookouts, describing them as “Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement.”⁷ Justice O’Connor concluded that “The RCMP had no basis for this description, which had serious consequences for Mr. Arar in light of American attitudes and practices at the time.”⁸

The report details the extensive exchange of information between the RCMP and the FBI. For example, the RCMP gave the FBI three compact discs of information without caveats being imposed on the subsequent use or distribution of the information or the information being vetted by Canadian officials for relevance or personal information. This information included the above noted letter describing Mr. Arar and Dr. Mazigh as “Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement”..⁹ Justice O’Connor also found that other information given by the RCMP to American officials about Mr. Arar was inaccurate, including statements that Mr. Arar had refused to an interview request from the RCMP and had left Canada suddenly after the request. Justice O’Connor concluded that the cumulative effect of these inaccuracies “painted an incorrect and potentially inflammatory picture”¹⁰ of Mr. Arar.

Because of the lack of evidence from American officials, it was not possible for Justice O’Connor to conclude whether American officials had information about Mr. Arar that the Canadian officials did not have.¹¹ The CIA and FBI did not share with Canadian officials any information that linked Mr. Arar to al Qaeda despite extensive information sharing.¹² Justice O’Connor concluded that it was “very likely”¹³ that American officials relied on information provided by the RCMP about Mr. Arar in their decision to detain and remove him to Syria, but he could not say conclusively what information was relied upon. He could not exclude the possibility that American officials relied upon inaccurate and unfair information that Canadian officials gave them.

The Commission was able to examine the unclassified INS decision of October 7, 2002 that concluded that Mr. Arar was a member of al Qaeda and that removal to Syria would

⁷ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Factual Background* Vol 1 (2006) at 62.

⁸ *Ibid* at 62.

⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at 13.

¹⁰ *Ibid* at 28.

¹¹ *Ibid* at 116.

¹² *Ibid* at 160 (addendum)

¹³ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at 14.

be consistent with Article 3 of the UN Convention Against Torture.¹⁴ The Commission heard evidence that such expedited removal orders on security grounds would have to be certified by the US Attorney General and that the Attorney's General decision was not reviewable by an immigration judge.¹⁵ The Commission also saw notes taken by Canadian officials of a conversation between Secretary of State Colin Powell and Minister of Foreign Affairs Bill Graham. The notes stated that Mr. Powell indicated that "the Arar affair was triggered by enquiries by Canadian sources and that Arar would not have been on the US radar screen had he not been the subject of attention by Canadian agencies."¹⁶

Mr. Arar was detained at a New York City airport on September 26, 2002. He was bound for Montreal on a trip that had started for him in Tunisia. The FBI informed the RCMP that Mr. Arar would be detained and deported from the United States. The RCMP sent questions to the FBI for Mr. Arar to answer. These questions contained some inaccurate information about Mr. Arar including false suggestions that Mr. Arar had refused to be interviewed by the RCMP and left Canada shortly thereafter. On October 3, 2002, the CIA faxed questions to the RCMP about Mr. Arar. These questions suggested that the CIA considered Mr. Arar to be a member of Al Qaeda.¹⁷ The RCMP's reply "made it clear that Project A-O Canada had yet to establish definitive ties between Mr. Arar and al-Qaeda".¹⁸ The RCMP "considered Mr. Arar to be, at best, a person of interest that the RCMP wished to interview as a witness. The RCMP did not have evidence to support a search warrant or a wiretap, let alone evidence needed to lay criminal charges."¹⁹

A Canadian consular official was shown an immigration document by Mr. Arar during a visit on October 3 that alleged that he was a member of Al Qaeda.²⁰ The same Canadian consular official assured Mr. Arar's wife on October 8, 2002 that he would not be removed to Syria "since the American authorities knew he was a Canadian citizen traveling on a Canadian passport."²¹ The Commission heard evidence relating the removal of Mr. Arar to post 9/11 American practices of rendition, but also stated that the use of expedited removal under American immigration law and Mr. Arar's Canadian citizenship were "unique features"²². The subsequent Monterrey Protocol requires the United States to advise and consult the Canadian Department of Foreign Affairs if they plan to remove a Canadian citizen to a country other than Canada.²³ The Protocol is not a treaty and it does not provide that Canadian citizens will always be removed to Canada, a particular concern for the more than half million of Canadians with dual citizenship.

¹⁴ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Factual Background* Vol 1 (2006) at 62.

¹⁵ *Ibid* at 206-207.

¹⁶ *Ibid* at 484.

¹⁷ *Ibid* at 157 as supplemented by addendum

¹⁸ *ibid* at 160.

¹⁹ *Ibid* at 113.

²⁰ *Ibid* at 190.

²¹ *Ibid* at 201.

²² *Ibid* at 525.

²³ *Ibid* at 528.

On October 5, a RCMP officer indicated in a conversation with a FBI official that Mr. Arar would not be denied entry or be charged criminally if he was removed to Canada. This officer testified that he did not suspect that rendition to Syria was an option and indeed was not familiar with the term at that time.²⁴ Nevertheless one of the reasons why the RCMP did not go to New York to interview Mr. Arar was a concern about being perceived that they had anything to do with his removal to Syria.²⁵

An overriding theme in Justice O'Connor's report is the importance of the accuracy of information that is produced and exchanged in investigations. He commented:

Inaccurate information can have grossly unfair consequences for individuals, and the more often it is repeated, the more credibility it seems to assume. Inaccurate information is particularly dangerous with respect to terrorism investigations in the post 9/11 environment. Officials and the public are understandably concerned about the threats of terrorism. However, it is essential that those responsible for collecting, recording and sharing information be aware of the potentially devastating consequences of not getting it right.²⁶

Justice O'Connor also considered evidence by a leading researcher on false confessions and expressed concerns about the reliability and accuracy of statements that are a product of torture or other abuses.²⁷

Recommendations Made by the Inquiry

Justice O'Connor made 23 recommendations.²⁸ He recommended that the RCMP should respect its mandate as a police force and the distinct mandate of CSIS with respect to the collection and analysis of intelligence. Many of the failures of Canadian officials in relation to Mr. Arar and his wife revolve around a misuse of intelligence without adequate attention to concerns about its reliability and accuracy and about the need for restrictions on the use of intelligence for law enforcement purposes including the immigration proceedings that resulted in Mr. Arar being removed from the United States and sent to Syria.

Justice O'Connor found that the RCMP investigators who passed on inaccurate information to American officials had "a lack of expertise and training in national security investigations"²⁹ including in dealing with foreign agencies and specifically with the CIA. He recommended that the RCMP receive more social context training especially with respect to Muslim and Arab communities and that they have clear policies prohibiting racial, ethnic or religious profiling.

Justice O'Connor recognized the importance of information sharing, but stressed that the

²⁴ Ibid at 169.

²⁵ Ibid at 175-176.

²⁶ Ibid at 61-62.

²⁷ Ibid at 193.

²⁸ He also made additional recommendations in a second report for enhanced review of the national security activities of the RCMP and other agencies with which the Force interacts including enhanced and self-initiated review of information sharing practices

²⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Analysis and Recommendations* (2006) at 323.

information shared be relevant, accurate and reliable and consistent with relevant privacy laws He found that the RCMP did not observe the critical distinction between suspects and persons of interest. He also noted that “the danger of guilt by association is particularly great in national security investigations, as the police often have a legitimate interest in collecting information about anyone associating with a suspect.”³⁰ He went on to stress that the identification of someone as an “Islamic extremist” or “jihadist” “can open the door to a slipshod and casual process in which guilt is assigned by association. Such emotive labels can blur the distinction between a suspect and a person of interest...Labels, even inaccurate ones, have a way of sticking.”³¹

Justice O’Connor stressed the importance of placing caveats on information shared with other agencies to restrict the subsequent use of such information. Caveats are not necessarily an absolute barrier to the sharing of information, but require the originating agency to consent to subsequent use and distribution of information. He recommended that information should not be supplied to a foreign country where there is a credible risk that it will cause or contribute to torture.

Justice O’Connor recommended that the government of Canada should register a formal objection with the government of the United States and Syria over Mr. Arar’s treatment. He concluded that “the American authorities who handled Mr. Arar’s case treated Mr. Arar in a most regrettable manner.”³² The initial detention of Mr. Arar in New York for four days without contact from Canadian officials or a lawyer or his family violated the Vienna Convention on Consular Relations.³³ He also found that American officials likely did not respect caveats placed on information especially with regard to its use of information in the immigration proceedings. He recommended that Canada clarify the inaccuracies in the information that was shared with American officials.

He also recommended that Canada object to Syria for its conduct in torturing a Canadian citizen and holding him in degrading conditions and stressed that torture “for, any purpose, is so fundamental a violation of human dignity that it can never be legally justified.”³⁴ Torture, even with respect to a person who, unlike Mr Arar, is a terrorist suspect or a threat to national security, cannot be legally justified. In addition, the information that is produced from torture is of suspect reliability.

³⁰ Ibid at 336.

³¹ Ibid at 337.

³² Ibid at 361.

³³ Ibid at 361.

³⁴ Ibid at 51.