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Chair

The Honourable Robert Nault

Standing Committee on Foreign Affairs and International Development

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● (1555)

[*English*]

The Chair (Hon. Robert Nault (Kenora, Lib.)): Colleagues, we'll bring this meeting to order, please. Pursuant to Standing Order 108(2), we have a study of provision of assistance to Canadians in difficulty abroad, consular affairs.

Before us today is Alex Neve, secretary general of Amnesty International. Welcome, Alex, to the committee, and to Mohamed Fahmy, co-founder of the Fahmy Foundation, who's on video.

I understand, Alex, you're going to kick it off, and then we're going to go over to Mohamed, and back and forth, and then we'll get into Q and A.

I apologize for being late. There were a number of votes today. We'll try to accommodate by using up as much time as we can for the two witnesses, and then make up a little bit of time at the back end.

With that, I just want to turn the floor over to you. Welcome to the committee.

Mr. Alex Neve (Secretary General, Amnesty International Canada): Thank you very much, Mr. Chair. Good afternoon, committee members. It's always a pleasure to be in front of this committee. I very much welcome the opportunity to address you on this issue.

I want to begin by highlighting to you that in the course of my 18 years now—I'm getting to be an old-timer—as secretary general of Amnesty International Canada, the number of Canadian citizens, permanent residents, and other individuals with close Canadian connections who are imprisoned abroad in circumstances where there are very serious human rights concerns has grown exponentially. From perhaps one or two cases per year, it is now common for us to be monitoring 20 to 25 such cases at any one time, something I once rarely imagined would arise in my human rights work. Canadians held as Amnesty International prisoners of conscience, political prisoners facing unfair trials, prisoners at risk of torture and executions—these people have now, unfortunately, become relatively commonplace and a significant part of our human rights program.

What accounts for that dramatic increase? First of all, the world is a much smaller place and business, work, studies, humanitarian work, journalism, family visits, and personal travel take more Canadians to more corners, including dangerous corners of the world, more frequently. Second, there are growing numbers of Canadians who hold multiple nationalities and many governments that refuse to recognize their Canadian nationality. Finally, in a post-September 11 world, we find that many governments have felt increasingly emboldened to disregard fundamental due process and human rights safeguards for prisoners when they invoke allegations, spurious or well-founded, on grounds of national security. Mohamed Fahmy's experience is one such example. You will hear from him in a moment.

When Mohamed returned to Canada he was passionate about wanting to pursue a reform agenda—reforms on many fronts, including Egypt, which is no small challenge. He very much wanted to draw from his experience, and the similar cases taken up by Amnesty International over the years, to formulate an agenda for reform in Canada as well, to strengthen consular laws, policies, and practices so as to ensure that Canadian officials are doing all they can to protect Canadians imprisoned abroad in circumstances involving serious human rights violations.

That is why we launched the protection charter in January 2016, two years ago. We welcome this opportunity to be here to highlight some of the charter's key recommendations to you. There are 12. I'll just refer to each of them without going into detail.

One, enshrine the right to consular assistance and equal treatment in Canadian law. Two, develop transparent criteria regarding such matters as support to families, issues around medical treatment, and collaboration with civil society and lawyers. Three, do more to protect Canadian journalists abroad. Four, actively defend Canadian nationality in cases involving dual or multiple nationalities. Five, do not allow unjust foreign laws or practices to deter or limit Canadian action. Six, establish an independent office for review of consular assistance. Seven, provide consistent support for death penalty clemency. Eight, institute review and oversight of Canadian national security agencies. Nine, address post-release concerns such as access to justice and freedom of movement. Ten, ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Eleven, develop a network of governments ready to assist each other with consular cases. Finally, twelve, establish guidelines regarding government action on behalf of detained permanent residents and other prisoners with close Canadian connections.

Two years later, we have welcomed significant progress in four of these areas: death penalty clemency is restored; review of Canadian national security agencies is part of Bill C-59; consultations regarding ratification of the Optional Protocol to the Convention against Torture are under way with provinces and territories; and there is a developing intergovernmental network through the Global Consular Forum.

● (1600)

Mohamed and I would like to highlight five of the eight remaining recommendations, which we continue to urge the government to adopt.

Before we turn to Mohamed and then back to me, I want to also begin, though, by reminding us all why this matters so very much: Ronald Smith, Canadian citizen on death row in Montana since 1983; Wang Bing Zhang, one of the first Chinese post-graduate university students to study in Canada, with numerous family members who are Canadian citizens, including his daughter, imprisoned in China since 2002; Huseyin Celil, citizen, imprisoned in China since 2006; Bashir Makhtal, citizen, imprisoned in Ethiopia since 2007; Mohamed el-Atar, citizen, imprisoned in Egypt since 2007; Saeed Malekpour, permanent resident, imprisoned in Iran since 2008; Raif Badawi, whose wife and three children are Canadian permanent residents, imprisoned and sentenced to flogging in Saudi Arabia in 2012; and Li Xiaobo, whose son is a Canadian citizen, imprisoned in China since 2014 immediately following an earlier eight-year term of imprisonment.

Those are some of the most entrenched cases of concern for us at this time. We're also following other cases in China, Iran, Saudi Arabia, Turkey, and Syria. These are the individuals and the families for whom your study and proposals for consular reform have real consequences for life, liberty, safety, and justice.

I will now turn things over to Mohamed.

Mr. Mohamed Fahmy (Co-Founder, Fahmy Foundation): Thank you, Alex.

Good afternoon, everyone. I am thankful and privileged that I have been given the chance to share my first-hand experience with you, and I would have preferred to be there in person.

I started drafting parts of the protection charter in prison after a careful, constructive assessment of the situation. I'm honoured to present you with the first-hand experience that led me to pursue this call for reform and, most specifically, an urgent call to enshrine a law that obligates the right to consular assistance and equal treatment in Canadian law.

As a journalist, I was caught up in a security sweep at a very turbulent time in Egypt, in 2013, when the government was in a violent conflict with the Muslim Brotherhood, a group designated as terrorist by Saudi Arabia, Egypt, the United Arab Emirates, Bahrain, Syria, and Russia. I faced trumped-up charges of belonging to the Muslim Brotherhood and accusations of fabricating news to serve their agenda.

I spent over a month in solitary with a broken shoulder, in a maximum security prison, and was incarcerated with terrorists and Islamic extremists who were considered enemies of the state. I am very grateful for the intervention of the Canadian consular team at the time, who visited me in my place of detention and communicated with my family.

Unfortunately, it became quickly evident that the case was of a complicated political nature and based on geopolitical score-settling between regional powers. The intervention of the embassy to move me to a hospital to get the proper medical care for my broken shoulder was not successful. There was a malunion in my shoulder bone, as I continued to sleep on the floor in solitary confinement and was transported in handcuffs many times in uncomfortable positions in police vehicles while my shoulder was broken.

I was only transferred to the hospital seven months later, where I underwent surgery, after my unjust seven-year sentence, and today I continue to live with a permanent disability, a fate I've accepted. I consider myself lucky as I watch other journalists and Canadian citizens beheaded at the hands of Islamic extremists in many parts of the world.

I understand that there is a protocol in place, but I am also convinced that our previous prime minister could have alleviated and improved my treatment in prison had the highest order of the government been obligated to intervene effectively and swiftly from the start and to communicate with the highest order in Egypt.

Through my experience as a journalist, a human rights defender with the International Committee of the Red Cross, and a former political prisoner, I know that an immediate and effective intervention from the government when a Canadian is detained abroad could really mean life or death. Torture and disappearance of prisoners usually happens in the first hours and days of the incarceration. A swift and powerful intervention from the highest order of the government, without political, trade, or other considerations, could save a life.

Let us not forget the case of Canadian photographer Zahra Kazemi, who was raped and killed in Evin prison in Iran, and the case of the academic Kavous Emami, who died a questionable death this week, also in an Iranian prison.

Many observers were critical of the intervention process during my case, because some felt there was discrimination in the level of consular support I received in comparison to other cases in the past. Right or wrong, I believe that this perception and uncertainty—and the fear I faced—which surely many of the hundreds of Canadians detained abroad experience today, can be eliminated when there is a law set in stone: legislation that obligates the government to follow specific guidelines of intervention so that it is not left to the discretion of the Minister of Foreign Affairs.

Uncertainty and fear are every prisoner's nightmare. Is the government going to bat for me hard enough? Am I on the agenda on the next trip? Legislation would end this dilemma and allow every Canadian leader to operate relieved of red tape and any political concerns of the case at hand.

During the course of my multiple-decade career in the field, I have not witnessed such an unprecedented attack on journalists and human rights defenders as we are seeing today, with more than 250 journalists behind bars worldwide.

● (1605)

Some Canadians have lost their lives and/or remain behind bars due to this increasing danger. That is why article 4 of the protection charter calls on Canada to put new mechanisms in place to better protect journalists abroad.

Finally, I will always remember a conversation with my former lawyer, Amal Clooney, during the course of the two-year battle for freedom, and how frustrated I was. I was anxious to receive more information from the government in Ottawa about their efforts, and had to worry about access to information and privacy laws, or about the government being simply too busy. She would say that there was no obligation, and then continue her mission to free me.

In this age of terrorism and the vague laws that I experienced during my trial, as well as increasing threats to Canadians travelling abroad, I believe that establishing the position of an independent officer of Parliament, through the Minister of Foreign Affairs, is extremely essential to providing equal consular assistance and advocacy on behalf of fellow citizens.

I have joined dozens of human rights advocates and NGOs in a recent campaign calling on the United Nations to appoint a special representative who deals specifically with the safety of journalists because of similar concerns that the attack and jailing of innocent journalists doing their job is unprecedented and requires more attention and a specific office that will virtually save lives. I believe this is the same case, when we call for the appointment of a special representative to deal with consular affairs, an independent officer.

Once again, I am privileged enough to speak worldwide about my experiences as a journalist and former prisoner through many lectures in Canadian universities. Specifically, students always ask me the same question—why do the United States, Brazil, Mexico, and many countries in the EU have some sort of legislation that obligates the government to intervene while Canada doesn't? I can't answer that. But I always tell them that Canada remains a model to the world when it comes to education, democracy, inclusion, and diversity. So I am extremely excited to continue to pursue this call for reform and, hopefully, provide better protection for fellow Canadians abroad.

Thank you very much.

● (1610)

Mr. Alex Neve: I will just wrap up by referring to two other recommendation in the protection charter, each of which deals with issues that often get a bit overlooked when we consider the consular realm. The first is justice after release. Once freed and back to family and safety in Canada, understandably many individuals think of justice, accountability, and redress. It's important personally. The desire for an apology, for the truth to be acknowledged, for compensation for terrible violations, is an essential part of healing. It is also important more broadly, as part of tackling impunity. Many released prisoners—Mohamed certainly did—talk of how important it is to seek justice as a means of preventing others from experiencing the same injustice. But once back in Canada one key avenue of justice is closed off. It is not possible for a released prisoner to turn to the Canadian courts and launch a lawsuit against the foreign government officials responsible for the torture and other violations they have endured because those officials are shielded by the State Immunity Act, which protects foreign governments from being sued in Canadian courts for actions outside Canada. There is an exception for commercial activities, but not for grave human rights violations. A foreign government can be sued for a breach of contract that occurs outside of Canada, but not for a brutal act of torture. It's time to open up this avenue of justice.

Finally, it's also important to turn our attention to permanent residents and other individuals with strong connections to Canada, usually because they have close family members who are citizens or permanent residents. They are not citizens, and thus, of course, do not legally under international or national law constitute consular cases. But very often these individuals have no closer connection to any other government aside from Canada. Their spouses, children, parents, siblings call Canada home. Understandably they look to Canada for assistance.

Going back decades, government's standard responses have been that in such cases generally there's not much that can be done because the individual is not a citizen. However, some of these cases do nonetheless still get taken up by government in various ways. I know for instance the government at this time, rightly so, is engaged in the cases of Saeed Malekpour, a permanent resident in Iran, and Raif Badawi, the husband and father of permanent residents in Saudi Arabia. What is lacking, though, is predictability and consistency. There is a need for guidelines that will clearly establish when and in what ways the Canadian government will take up cases of non-citizens with close Canadian connections facing serious human rights violations.

Let me end by highlighting how important it is to be innovative and imaginative in advocacy with respect to what are often termed “complex consular cases”. Years ago Prime Minister Jean Chrétien sent Senator De Bané to Syria with a personal letter from the Prime Minister, and Maher Arar was free several weeks later. Canada recently turned to the Government of Oman, an unlikely partner perhaps, for assistance with the case of Homa Hoodfar, and she was released soon after. The Prime Minister's national security adviser leads a mission to North Korea and Pastor Hyeon Soo Lim is freed from imprisonment in that country.

Appointing special envoys, finding help from unexpected allies, exploring new avenues by leveraging trade, business, and investment channels, more can be done to draw on the experience, insights, and connections of family members, relevant diaspora communities, and civil society groups, who often have “out of the box” strategies to share that may help move difficult cases forward.

Thank you. Those are our comments, and we look forward to the exchange.

The Chair: Thank you very much to both witnesses.

We're going to move along quickly and go to Mr. O'Toole, please.

Hon. Erin O'Toole (Durham, CPC): I'd like to thank both witnesses for being here today.

It's nice to see you again, Mr. Neve. I know we always don't see eye to eye on everything, but I admire your many years of work highlighting the cases of many Canadians in difficult circumstances.

We've seen one of the most horrific examples just in the last few days. Iran came up in both of your commentaries today. We have the case of Professor Seyed-Emami, who died in Evin prison. That prison in particular was referenced in commentary today. In Amnesty's experience, is it known that prisoners there are tortured, mistreated, and in some cases killed?

● (1615)

Mr. Alex Neve: There's absolutely no question of that. We have documented that going back decades and decades, in fact, going way back to the time of the Shah. Evin Prison has always been notorious as a place of rampant torture. As Mohamed reminded us, it has previously claimed a Canadian victim, Zahra Kazemi, who died after rape and torture in 2003. Again, in the last couple of months, notoriously so, Dr. Emami's case is obviously a very tragic instance. His is the third case in just six weeks now of prisoners held at Evin who suddenly and mysteriously committed suicide, apparently, but in circumstances where the government refuses to allow any investigation or independent autopsy.

Hon. Erin O'Toole: Absolutely, and I think all members of the House and this committee offer our condolences to the family, and we all want to get to the bottom of it.

This is, as you said, the third case in similar circumstances. In your network of contacts, how many people have been detained, with no charge in the aftermath, in the last two months of the Iranian protests? Is there a number of detentions? I've seen deaths in the two dozen range, with three to five being in custody or detention, and the rest being on the streets. Are those numbers accurate? What is Amnesty hearing?

Mr. Alex Neve: We don't have a number that we're confident to put out there publicly yet, because one of the things that was different from this wave of protests compared to earlier waves of protests we've often seen in Iran is that it was truly nationwide, including in a lot of small towns and villages where it's very difficult to get real information, where we, for instance, an organization that's not allowed to come into Iran and do work on the ground, don't have established contacts. We do know that it was thousands who were taken into prison. At one point, I believe, we were generally using the reported figure of 3,000, but the true number is probably much higher. We hope, at a certain point, to come out with something a bit more authoritative, but the crackdown was widespread.

Hon. Erin O'Toole: Canada has been silent. The Prime Minister and the Minister of Foreign Affairs are virtually silent in the face of the protest. We're looking at the consular case in this tragic death. As a human rights organization, do you think countries like Canada should remain silent when we know this is going on, or should there be an active statement in light of thousands detained, deaths, and clearly a struggle for democratic rights and freedom?

Mr. Alex Neve: We're certainly looking for governments, including the Canadian government, to be forceful and outspoken, and importantly, I would say, to do so in concert. We know that Iran is an example of a country where bilateral, one-on-one efforts by a particular state are, perhaps, not going to be all that successful, but by banding together, then perhaps we can see some progress. I think, in particular, what has happened now is that obviously Canada has grave concern about Dr. Seyed-Emami's death, but as I say, it is part of a wider pattern, so that points to the advisability of Canada perhaps joining with EU partners and others to raise the cases as a pattern and try to get some progress in that way.

Hon. Erin O'Toole: I know some organizations like Freedom House and others have rankings of countries with human rights problems. Where do you view Iran? I heard Iran mentioned several times in the presentations here this morning with respect to consular cases, but with respect to suppression of human rights, unlawful detention, and torture, is it the worst offender or one of the worst? Where does Amnesty view Iran?

Mr. Alex Neve: We don't do a numeric ranking because it's impossible to do so. Academics have tried to see if there's a way you can take all the data and come up with a ranking, but it's impossible. We don't do so, so I won't say that it is the worst, that it's in the bottom 10 or the bottom 20, but I will say that year upon year, for decades now, it has featured prominently in Amnesty International reports across the entire range of human rights concerns: civil and political rights, economic, social, and cultural rights, women's equality, and the protection of minorities.

It's just about the only country left in the world now that will execute juvenile offenders. We're in the midst of two cases of concern right now of individuals on death row who face imminent execution for crimes they committed when they were children. It's a country that I think we can safely say, in every way possible, shows contempt for human rights.

● (1620)

Hon. Erin O'Toole: My final question—I think I'm almost out of time—is, in the situation of a Canadian who's abroad who commits a crime or is involved in a terrorist act.... We're not talking about wrongfully detained people or people who are political prisoners; we're talking about someone who has been involved in something nefarious, and they're detained in another country. What do you view as Canada's role, if we don't have full trust in the judicial system there? What do you think Canada's role is for that Canadian while they're detained for malicious acts elsewhere?

Mr. Alex Neve: It's important to recognize that the international human rights system is not about guilt or innocence. There are many human rights provisions that apply universally to all people in all circumstances. Even when there is every reason to think someone has committed a crime—and there may be questions, depending on the nature of the justice system in that country as to how reliable the allegations and conviction are, and we always have to hold that lightly—the rights to a fair trial, to have access to Canadian consular assistance, to have legal representation, family visits, and all of those due process rights are fundamental. They're not just icing on the cake; they go to the very heart of what it is to have justice done. Canada needs to champion that through consular efforts.

With respect to many of those exact cases you're talking about, especially if there are terrorism and national security allegations, we know that in many countries torture is almost certainly a very real possibility. Again, that has nothing to do with guilt and innocence. International law is very clear there.

Canada needs to be prepared. As Mohamed reminded us earlier, torture is in particular one of those things that happens almost always in the early days, so that's the kind of case that points to the importance, as he was highlighting, of an immediate and urgent intervention.

The Chair: Thank you.

We will now go to Mr. Wrzesnewskyj, please.

Mr. Borys Wrzesnewskyj (Etobicoke Centre, Lib.): Let me begin by thanking both of our witnesses, but in particular Mr. Fahmy, for appearing before the committee. You've taken your horrific personal experience of torture, maltreatment, and are trying to transform it into a positive to make sure that in the future, no Canadian under any government would end up languishing, injured in a prison cell, while a government decides whether or not to use its discretion to come to their aid. So thank you.

Mr. Mohamed Fahmy: Thank you very much.

Mr. Borys Wrzesnewskyj: I'd like to just clarify something that was referenced.

Our government has been clear, and our minister has been clear and unequivocal, in condemning the crackdown in Iran. In fact, the minister put out a statement in which she expressed her deep trouble by the recent deaths and detentions and once again called on the Iranian government to allow freedom of assembly and speech without a risk of facing violence or imprisonment.

I think the record should be clarified when it comes to that particular point.

Mr. Neve, a parliamentary colleague, the Honourable Judy Sgro, has been championing the cases of five Canadians of Turkish descent who have been detained in Turkey because of alleged ties to the Gülen movement, three of whom have been convicted in trials without due process.

I think it's important to name them. They are: Davud Hanci, Ilhan Erdem, Ahmed Basoglu, Nadir Bakiçi, and Mete Bagdat.

I know that Amnesty has championed these cases. Would you like to make some comments as to how the Turkish and Canadian governments have interacted in these particular cases?

Mr. Alex Neve: The opening comment is that I'm sure everyone is aware of how disastrous the state of human rights protection is in Turkey at this time, following the attempted coup in the summer of 2016. There's been a massive crackdown that has affected all sectors, including my own Amnesty International colleagues, two of whom have been arrested and imprisoned on absurd charges of terrorism—one, the chair of our Turkish section, is still behind bars eight months later—and their trials continue. That sets the frame for the situation that's unfolding.

We are very much aware of those five cases. I was approached by many of those family members very early on. I've had opportunities to have a fair bit of engagement back and forth with the Canadian government and have welcomed the fact that Canada was very forcefully seeking consular access, which was being denied, which is very problematic, distressing, and outrageous given that Turkey is a NATO ally.

It wasn't specific to Canada. Turkey was denying access to all dual nationals imprisoned in the crackdown.

We remain concerned, in particular about due process issues related to the cases. While some have been convicted—although we have concerns about the fairness of the proceedings and we're looking into some of those concerns—others still have not been brought to trial and are simply brought to court on an occasional basis, only to have the matter adjourned and set over to a future date.

That too is not specific to Canada; it's symptomatic of what we're seeing with respect to all of the ways in which the thousands of prisoners who have been ensnared in the crackdown following 2016 are being treated.

● (1625)

Mr. Borys Wrzesnewskyj: In this protection charter, one of the basic principles is that every Canadian deserves equal treatment by our government. I would think most Canadians travelling would have assumed that was not discretionary. However, there's one part to this that you reference in your charter, which is special considerations for journalists. We all understand and are very supportive of the incredible work of journalists, especially in parts of the world that don't subscribe to the rule of law or democratic principles, but there's an inconsistency. You can't have one set of protections for journalists and a different set for everyone else.

My question has, perhaps, two parts. The questions on the charter are the first. The second is how and at what points do your charter and the private member's bill of my former colleague Irwin Cotler agree and, perhaps, not coincide?

Mr. Alex Neve: I'll certainly leave it to Mohamed to answer the question about journalists. I would just point out that we're not saying that journalists deserve more protection. I think what we're saying is that journalists, because of their particular situation, deserve specific kinds of protection that respond to the kinds of risks they face. It's not that they should be treated more specially or anything, just uniquely and particularly.

I actually have to admit it's been a while since I've looked at Irwin's private member's bill, and I, therefore, am foggy on the details, but I can certainly undertake to do that kind of a comparison and to provide that information to the committee if it would be of interest.

Mr. Borys Wrzesnewskyj: I think that undertaking would be.

Mr. Alex Neve: Okay.

Mr. Borys Wrzesnewskyj: Mr. Fahmy.

Mr. Mohamed Fahmy: There is definitely a real issue at the moment with how journalists are being treated. Also, governments in the Middle East and other autocratic governments that are clamping down on journalists are very fragile, so the rhetoric that comes out of the Canadian government is something that is extremely important and it's disseminated in the Arabic press. In my own experience, for example, in my trial, the American government issued a statement by Mr. John Kerry who said it was a draconian sentence, while the Canadian government said it was very disappointed. These nuances and these minor details and language make a huge difference, and they show how a government is dealing with the situation.

To go back to your question about journalists, indeed because journalists are on the front line and we are now facing an unprecedented attack, not only in regions in the Middle East where there are war zones and conflicts but also in the United States, it has become highlighted more than ever how important it is to implement a more transparent approach to the handling of journalists and human rights defenders.

If I had written a protection charter a couple of months ago, I would have added something about human rights defenders, because there is extreme unprecedented targeting, which has prompted many Canadian NGOs to call on Mr. Trudeau, through a letter that we at the Fahmy Foundation participated in, to lobby the United Nations to appoint a special envoy to deal from within the United Nations with issues related to the safety of journalists.

Again, with these fragile governments, when they see that the Canadian government is focusing on journalists on the ground and that the consular team is very dedicated to protecting its Canadian journalists in many countries in the region, they will think twice before throwing a Canadian journalist in prison. They will think twice before torturing a Canadian journalist, let alone a Canadian citizen.

I'm very dedicated to the issue of better protection of journalists and human rights defenders, at least providing more transparent rhetoric and being more protective of their rights to do their job.

● (1630)

Mr. Borys Wrzesnewskyj: Thank you.

The Chair: We'll go to Madame Laverdière.

[*Translation*]

Ms. Hélène Laverdière (Laurier—Sainte-Marie, NDP): Thank you, Mr. Chair.

Thank you all for coming today and for your presentations.

I would like to start with a few comments.

Firstly, I am pleased that the case of the five Canadians detained in Turkey was brought up. I wrote to the Minister of Foreign Affairs on this issue a year ago. I finally received an answer last week. I hope any future answers will arrive more promptly. That would be useful.

Moreover, you spoke of collaborating with the Government of Oman and certain partners through a network. Gar Pardy, whom you may know, testified here last week. He spoke about the work done in co-operation with the Red Cross and local churches. In that kind of situation, you realize that having a good network on the ground is essential to deal with problems.

It is indeed true that in the past, some people had the impression that unequal treatment was given to certain prisoners. It is still perhaps the case. Those decisions remain the prerogative of the Crown.

I like the idea of being entitled to consular services. I would like a bit more information, however. Would consular services be solely offered to persons detained or victims of human rights abuses, or would everyone have the right to consular assistance?

[*English*]

Mr. Alex Neve: I'll start, and Mohamed may have something he wants to add.

This is one of those areas where the Amnesty International response would be that our area of concern is with respect to human rights cases, which isn't necessarily only about imprisonment obviously. Canadian find themselves in situations of human rights violations in former countries through other avenues as well.

That said, that would not suggest we are closing off the possibility that it should be pitched more broadly than that and made clear. I think Gar Pardy in particular made the point that Canadians pay for this, and have paid...I think he's tallied it's hundreds of millions of dollars over the years for consular services, through the fee we pay in our passport applications. I think what he probably said to you is there should be a right to get something back for that money and that it should be enshrined in law.

I think also, given that it's sometimes maybe a little hard to very precisely define the cases where there are human rights concerns and the cases where there aren't—it might be too difficult to draw that line—it should be described more widely.

Do you want to add anything, Mohamed?

Mr. Mohamed Fahmy: As a former Red Cross employee, ICRC, my job was to visit prisons, and I visited many prisons. The first law or rule that we applied is to never really look much into the actual case of the person, whether it's political or common law, because they all have rights.

Unfortunately, in my experience with most of the prisoners—and I visited hundreds of prisoners and interviewed hundreds of prisoners before becoming a prisoner myself—there's almost always a lack of full guaranteed rights in the prison. I won't even use human rights violations. There are rights that they do not receive that would not even be imagined in Canada for us. That is why I strongly believe that by having it as legislation, not only does it relieve the family and the Canadian citizen, but it also sends a clear message to the jailer, the dictator, and the torturer that it will not be unseen. Anything they do will be monitored, and the government, regardless of politics or trade or money, will come after them, come to protect that person, and that's what it's all about.

● (1635)

[*Translation*]

Ms. Hélène Laverdière: Mr. Fahmy talked about legislation. He spoke of legislation in Brazil, the United States and other countries, which is obviously stronger than ours, because our legislation does not amount to much.

Could you tell us more about this and perhaps also send some information to our clerk, who could then forward it to committee members?

[*English*]

Mr. Alex Neve: Most certainly we would be pleased to provide some of that to you.

I don't know if Mohamed has some of that information at his fingertips but we can certainly compile some examples of how other jurisdictions have dealt with this and provide it to the committee.

Ms. Hélène Laverdière: Thank you.

The Chair: We'll move to Anita Vandenbeld please.

Ms. Anita Vandenbeld (Ottawa West—Nepean, Lib.): Thank you very much to both of you for being here with your very compelling testimony. Putting a face to this issue is...of course Mr. Fahmy is always very compelling. Those of us who have had to talk to the families of those like Bashir Makhtal who has been gone for so many years...they have worries about his health. Particularly as members of Parliament we often feel what more can we do? I think everyone around this table would like to do more.

What you've done in this protection charter is extremely helpful because it gives us tangible things we can look at, analyze, and see what can be done. I appreciate, Mr. Neve, that you talked about the areas where there has been progress. I think you mentioned death penalty cases, national security oversight, the work toward the optional protocol and intergovernmental networks, and the treatment of dual citizens.

I think our government has been very clear that a Canadian is a Canadian and in trying to minimize the inconsistencies. At the same time, when I hear there is no obligation for consular assistance, that flies in the face of the Vienna convention and a number of rights that people have.

Could you talk a little about what it would look like if we eliminated the crown prerogative, which says there is no obligation to come to assistance? Also, have you seen progress in the last few years in treating everybody the same? If you're a Canadian citizen, you have the right to have your government come to your aid if you're in a very difficult situation like this.

Mr. Alex Neve: I'll begin, and I'm sure Mohamed will have something he wants to add.

We have not sat down to draft the provision. That might be a helpful next step; I don't think it would be lengthy. We're not looking at pages and pages of legislation, at least for this particular aspect of enshrining the rights to consular assistance in law. Very importantly, I think we would want to ensure that it gets crafted in terms that make that notion of equal access, equal protection, very clear.

As I think has come up several times here in the past, sometimes well-founded perhaps, other times maybe more as a matter of perception, there have been concerns about unequal treatment of two tiers of citizens, some of whom get senior levels of attention, others not. The nature of the intervention is very uneven, and legislation that tries to address that would be very helpful.

● (1640)

Ms. Anita Vandenbeld: Of course, each case is different.

In terms of consular assistance, in some cases you want to go to the media. You want noise. You want pressure. In some cases, it can be very helpful to have a number of people, including members of Parliament and others, talking openly about a case.

In other cases, that might have a negative impact on the case, especially if delicate discussions are happening at the diplomatic level. Could you comment a little because that could give the perception that assistance isn't being provided? Every case requires a different kind of assistance. You yourself said sometimes we're creative using third parties.

How would we be able to enforce something like that and say whether or not that assistance was done in the right way?

Mr. Alex Neve: I would agree with that, and that describes Amnesty International's work too. We're always making those exact same assessments, go public or not, big campaign, behind the scenes lobbying, press release yes or no, for exactly the reasons you've highlighted. You want to pursue strategies that will be effective but even more crucial, you don't want to be doing something that will make things worse.

I would totally agree with you, it would be impossible to begin to define and specify that in legislation or even in the regulation that went with it. We're not looking for that.

I think the other piece though, and this was one of the other things that Mohamed highlighted, is the companion to this that I think addresses the point you're raising, Ms. Vandenbeld, the need for—different terms have been used for it—a commissioner, an officer, an ombudsperson, someone who would play an oversight and review role around consular cases.

When they do arise, and they have arisen in the past, I think there are times when those concerns have been well founded, other times when it's been more a matter of perception. Somewhere you would have an expert, independent person who would review and order corrective action of some kind if the concerns were well founded.

Ms. Anita Vandenbeld: How important is it to have diplomatic channels open? In the case of human rights-abusing states, some have called for us to end those diplomatic channels of communication. How important is it in these cases to have open channels?

Mr. Alex Neve: Amnesty International in no circumstances ever calls on any government to rupture diplomatic relations. We don't call on governments to maintain them. We largely recognize that this is more than anything a political assessment. We do note that if diplomatic channels are open, it offers an avenue for advocacy, diplomacy, and more regular consular access, including in-person consular access from Canada rather than from a partner country. These options won't be there if the channels are closed.

At the same time, I think it is perfectly legitimate to recognize that, in the case of some countries where all options have been pursued, there's very little left, and if an assessment is made that a threat of cutting off diplomatic relations might change the balance, might bring some new pressure to the equation, that could be a perfectly legitimate strategy. We wouldn't criticize it, but it's not necessarily something we would propose ourselves.

Ms. Anita Vandenbeld: We're talking about Canadian citizens and their having equal access. With respect, however, to permanent residents and those who have, as you put it, close ties to Canada—their children are living here, say—it becomes more complicated. I think we would all agree, especially those of us who have people in our constituencies with a parent or a sibling in jail, that it is really hard to tell these people you can't help them because they don't have Canadian citizenship. All of us would love to be able to find more avenues, but under the Vienna convention, most states don't have to grant us access when it comes to those who are not Canadian citizens.

Mr. Alex Neve: No. Let me specify, however, a few things about what we are or are not saying about those other kinds of cases. For exactly the reason you've described, we're not saying there should be a legal right for permanent residents and others to consular assistance. That's not the law. It's not international law. It's not national law.

We've highlighted this because over the years—and this has crossed all governments going back my 18 years—we have seen real inconsistencies in the response families get when they show up in an MP's office, or some other government office, on behalf of a permanent resident or a loved one. Sometimes they're simply told there is nothing they can do for a non-citizen; sometimes there is some effort to explore some avenues; and sometimes fairly active advocacy is taken up even at high levels of government.

We're suggesting that it would be really helpful for all concerned, including MPs sitting in their offices, if there were some guidelines that sought to bring greater predictability, consistency, and fairness to how these cases are dealt with.

● (1645)

Ms. Anita Vandenbeld: Thank you.

The Chair: Thank you.

Colleagues, to make up some time with our next witness, we're going to have to call it a day for these two. I want to thank Mr. Neve and Mr. Fahmy in particular. I understand you're in England, so it's a later time and we very much appreciate all your efforts to present to this committee. It has been very enlightening and we enjoyed listening to the charter. I'm sure we're going to have more discussion about these sections of the charter.

Colleagues, I am going to suspend for a short time, and then go on to the next witness.

Thank you very much.

● (1645)

(Pause)

● (1645)

The Chair: We will bring this meeting back to order. In front of us is Mark Warren, human rights researcher. Mr. Warren, thanks for coming to the committee. Our apologies for the late start. Votes in the House do these things to us, but we will try and manoeuvre our way as best we can.

With no further ado, I want to pass the floor over to you. You can start with your presentation, and then we will get right into questions.

Mr. Mark Warren (Human Rights Researcher, As an Individual): Thank you, Mr. Chairman.

Just by way of introduction, I'm a human rights researcher and a legal consultant. Over the last 20 years or so, my specialty has been addressing issues involving the arrest and detention of foreign nationals abroad. Of course, consular access issues are a major part of the work I do.

It's a privilege to appear before the standing committee and to participate in this vitally important discussion. Going through the list of topics for this study, I was struck by the fact that most are not uniquely Canadian concerns. Instead, the list includes a number of issues confronting consular services worldwide. Since much of my research examines how other countries are responding to these same complex challenges, I'm framing my remarks today within an international context.

First and foremost, many other nations view consular assistance as a legal obligation, not as a discretionary prerogative. By my count, at least 45 countries have enacted laws imposing a mandatory consular duty to protect all citizens abroad. Our closest neighbours long ago adopted provisions that enshrine consular assistance as a right of citizenship. For example, Mexican law recognizes that the primary obligation of Mexican consulates is to protect and defend the rights and interests of overseas citizens. Mexican consulates are also required to protest any denial of rights or mistreatment of their citizens by foreign authorities.

Regulations adopted by the United States also mandate consular protection for nationals abroad. For example, consulates must provide emergency medical and dietary assistance for incarcerated U.S. nationals. The Department of State has instructed its consulates that:

> Our most important function as consular officers is to protect and assist private U. S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail.

Elsewhere, the European Union Charter of Fundamental Rights guarantees that every citizen from its 28 member countries shall be:

> ...entitled to protection by the diplomatic or consular authorities of any Member State....

According to the European Commission, this provision:

> ...enshrined the right to consular and diplomatic protection as a fundamental right of the European citizen;

Further afield, the law in Kazakhstan requires that the republic:

> ...shall guarantee its citizens protection and patronage outside its boundaries.

Even China has enshrined this basic responsibility, declaring in its constitution that it:

> ...protects the legitimate rights and interests of Chinese nationals residing abroad....

There are many other examples of legislative enactment, and they all prompt the same important question. Are Canadians less deserving of a legally binding duty to protect their human rights while abroad than the citizens of Mexico, the United States, or China? Surely, we all deserve better from our government than selective protection based on vague and shifting policy guidelines that have no legal force.

The second point I'd raise about international consular practice relates to death penalty casework, which is an area that I'm particularly familiar with. Fortunately, cases of Canadians facing the death penalty abroad are comparatively rare, but when they do occur, the results can be fatal.

This is particularly true when consular interventions begin only after the defendant has been sentenced to death. While the death penalty has been abolished in law or in practice in 142 countries, its use is still widespread in some parts of the world: the United States, but also the Middle East and parts of Asia.

Significantly, the countries that routinely execute prisoners also tend to routinely delay or restrict consular access. However, there are two positive trends within most nations that still cling to the death penalty, which I'd like to briefly touch on. Both are relevant, I think, to consular interventions in capital cases.

● (1650)

The first trend is gradual restriction in the number of offences for which the death penalty is prescribed. The second is the elimination of mandatory death sentences and its replacement with a discretionary process in which the courts may apply a lesser sentence. Both changes provide greater latitude for pretrial consular interventions, either through encouraging prosecutors not to bring capital charges in the case, or by assisting in developing character evidence about the accused in support of a less severe punishment. These are new developments.

Until quite recently in many parts of the world, if a country had the death penalty, the death penalty would be mandatory for certain offences. In essence, it largely tied the hands of consular authorities when a foreign national was facing capital charges. That's less and less true, and it's a critically important point that is often not raised sufficiently.

Now under Canada's current consular standards, the focus in death penalty cases is on what's called clemency interventions. Global Affairs has defined this term as “any diplomatic effort, taken at any stage of the process after detention, aimed at avoiding imposition of the death penalty or the sentence being carried out”. I think the key phrase there is “diplomatic effort” and the experience of other consular services contradicts this emphasis on purely diplomatic efforts. They've learned that the only certain way of preventing the execution of their nationals abroad is to avert the imposition of the death sentences by any appropriate means.

This approach requires early, vigorous, and extensive consular interventions that go beyond diplomatic discourse. A focus on early consular intervention, for example, necessarily means working closely with the defendant's legal representatives to develop a thorough and effective defence. It means providing a consular presence at every important court hearing and frequent consular visits with the detainee. When appropriate, it also includes outreach to prosecutors, prison authorities, and other officials to ensure that the defendant is treated fairly and humanely. When necessary, some consulates have secured the appointment of qualified lawyers, provided missing resources crucial to the defence, or themselves filed legal briefs.

I want to emphasize that none of these efforts constitutes interference in the domestic legal process. They are, instead, legitimate interventions to protect the human rights of foreigners detained abroad. In fact, there's a growing recognition in international jurisprudence that prompt consular assistance can be an indispensable component of fair trials in death penalty cases. Notably, Canadian consular authorities have in the past intervened promptly and effectively in the early stages of some death penalty cases.

Diplomacy alone is not enough. Canada's consular program should provide for enhanced involvement in the pretrial stages of all potential death penalty cases involving Canadian defendants.

Finally, some of the lessons learned in death penalty casework may also apply to other complex consular cases, such as torture. Success depends largely on early and extensive interventions, including a willingness to work closely with non-governmental organizations, the capacity to recognize the signs of ill treatment, and the resolve to confront the state actors responsible for these abuses. Most of all, I believe that achieving real progress depends ultimately on enshrining a consular duty to protect within Canadian law. Legislation is the best way to guarantee consistent and effective consular services for those who are most in need of that assistance. Anything less, I would submit, threatens to reduce Canadians to second-class status among the citizens of the world.

Thank you.

● (1655)

The Chair: Thank you very much, Mr. Warren.

We're going to go right to Mr. Genuis, please.

Mr. Garnett Genuis (Sherwood Park—Fort Saskatchewan, CPC): Thank you, Mr. Warren, for being with us today and for your testimony.

I wanted to start by following up with one question on the case my colleague raised of Mr. Seyed-Emami, who was recently killed in an Iranian prison. I raised this issue in question period yesterday, and the parliamentary secretary—and by the way, Mr. Alghabra, it's great to have you here with us today—responded with the following. I'm not quoting his full statement, but one of the things he said is, "We call on the Iranian government to conduct a thorough and transparent investigation into his death."

I wonder what you think of this approach of asking the government, which many people would suspect is very complicit in his death, to conduct an investigation. How much credibility would you ascribe to the results of an Iranian government investigation, however thorough or transparent it might profess to be?

● (1700)

Mr. Mark Warren: I share your concerns, of course. I think we all do.

On the other hand, the Iranian government has access to that prison, and it's at least a place to start. If there were, for example, an autopsy, which as I understand it is one of the main considerations here, that would at least provide Canadian authorities with a document that they could then refer to other experts. It's a start.

Obviously, in closed countries especially, there are distinct limits to what a foreign government can do. I think we all recognize that. On the other hand, it's a reasonable request and I think it would be difficult for most countries to say, "No, no, we're not going to do that for you."

Mr. Garnett Genuis: We've lost a few Canadians in the last couple of years. You spoke about the case of Mr. Seyed-Emami, and also Robert Hall. We spoke a bit at a previous hearing on this issue about the government's no-ransom policy. We've heard some critical testimony about that. We heard at the time from Mr. Pardy, I think it was, who said that when you say "no ransom", you effectively close a channel of communication. Even if you don't end up paying a ransom in the end, having that channel of communication open is worthwhile.

Do you have thoughts on the Hall case in particular, or the no-ransom policy in general?

Mr. Mark Warren: It really hasn't come up in my particular area of work. I'm not sure that my opinion would carry a whole lot of merit.

I can tell you that Canada's no-ransom policy is not unique in the world, but neither is it, I would say, the norm. Other countries, of course, struggle with this issue. The general trend, I think, is to say we will not, as a rule, countenance payment of ransom, but we won't stand in the way of that sort of negotiation taking place.

I do have concerns when a country takes a hard line on an issue that is, let's face it, a case-by-case kind of challenge; and speaking personally, only as a concerned Canadian, I would prefer more flexibility in the policy.

Mr. Garnett Genuis: Sorry to jump around, but I just want to go back. I was just thinking in the back of my mind to my previous question.

If we were to get back some kinds of results of a notional investigation from Iran, and they were to say they conducted an autopsy and they concluded—as they've claimed—it's suicide, and provided the documents that were associated with it, presumably it's very easy for a state that is trying to cover up its own crimes to falsify any manner of documentation.

I suppose what you're saying is we might ask for that investigation but we would still have a high level of skepticism about whether that's actually going to lead anywhere. Would you say that the government ought to pursue other things concurrently with asking for that investigation?

Mr. Mark Warren: If you're speaking, as we are, specifically about Iran, one of the challenges, of course, is that Canada and Iran do not have full diplomatic relations. Some of the ordinary avenues that might be open in a situation like this are not open. I can say that in similar cases around the world, for example, not to name any particular countries, but in other parts of Asia, where a country does not have full diplomatic relations, it generally has another consulate of another country that will represent its interests as vigorously as it can. I don't know, but I would assume that some of those backdoor channels are being explored, and that what we are hearing in terms of the public pronouncements of the government may or may not encompass everything that's going on.

Certainly, I would encourage the government to pursue every possible opportunity. I notice that Mohamed Fahmy mentioned the work of the Red Cross, for example. If there is any possibility at all of accessing information, or getting into prisons, I think the Canadian government should explore every one of those possibilities. The challenge after the fact when a prisoner has lost their life unfortunately involves dealing with incomplete documentation; but a full autopsy, if that's what we're talking about, would presumably include some sort of forensic information. It would at least be something that could be examined by other independent experts. I'm not suggesting it's sufficient by any means, but I do think that this, combined with, hopefully, some backdoor negotiations, would offer some hope of obtaining more information about this tragic case.

● (1705)

The Chair: Thank you.

Borys.

Mr. Borys Wrzesnewskyj: Thank you, Mr. Warren, for your testimony.

We heard the poignant testimony of Mr. Fahmy in the previous session and about the sorts of consequences he had to bear because the government decided not to use its discretion. As a human rights researcher, do you have a table, perhaps, that could concisely and clearly provide the data showing what Canadians suffered and what the consequences were as a result of the government's discretion in its cases? If there isn't such a piece of information, perhaps your research, if that could be provided, could provide concise clarity of what happens when you don't have the sort of legislation that guarantees Canadians their government's support. Perhaps, if you don't have that data, you could undertake to provide that.

Mr. Mark Warren: I have case summaries of Canadians abroad who have suffered the consequences of human rights violations in foreign custody. The larger challenge would be to equate that in some way with what the government did or did not do. There's always an element of uncertainty here. If the government had followed a different course of action, would it necessarily have resulted in an improvement?

The documentation that comes immediately to mind would be the formal inquiries that have taken place in Canada, at great length, into cases like Maher Arar's. I don't think we need, necessarily, to speculate about what the consequences are when Justice Iacobucci has laid them out in considerable detail. I would certainly encourage the standing committee to look back at those documents, at those inquiries, because they not only outline the consequences; they outline the chain of events and the sequence of decisions that resulted in those consequences. There's an opportunity there to explore how the existing chain of command may have failed, for example, and how a culture of inaction may have contributed to some of these consequences.

I would certainly be happy to provide the committee with whatever information I have on individual Canadian cases, though, if that would be helpful.

Mr. Borys Wrzesnewskyj: Thank you.

I'll move to a different question. Our government reversed the previous government's stance and will now always advocate for Canadians facing the death penalty, but what do we do in a situation like the one in Iran? We've had two Canadians now who have died in very strange circumstances in Iranian prisons. It appears that if you're a Canadian and you're incarcerated in Iran, you—

Hon. Erin O'Toole: On a point of order, Mr. Chair, I'd like the honourable member to table a policy with respect to the allegation he just made about the last government. If and until he can do that, I'd like him to withdraw that comment.

The Chair: Let's just debate. Let's carry on. We'll get the information for the member. It sounds as though there's a disagreement, but we'll follow through on that.

Mr. Borys Wrzesnewskyj: Thank you.

The question is, what do we do in cases such as those in Iran, where it appears, for all intents and purposes, that there's a good chance that if you're a Canadian and you've been doing good journalistic work or perhaps human rights work and you're incarcerated, you may in fact face a death penalty? How do we address those categories of countries?

● (1710)

Mr. Mark Warren: I think this raises, indirectly at least, the very thorny issue of dual nationality. Both cases that you're referring to are of people who are of Iranian and Canadian nationality. Iran is one country that is very, very reluctant to recognize this concept of dual nationality.

It's a murky subject in international law. There is really no consensus on whether a country has an obligation to afford consular access to what it sees as its own citizen detained in their own country of origin when they happen to also have foreign nationality. One way that other countries have addressed this—and in fact Canada has done this, too—is through bilateral consular agreements. For example, this has been a problem with Chinese Canadian nationals. Canada, as well as, I think, Australia, New Zealand, the United States, and possibly some other western countries, has negotiated bilateral treaties with China, under which—and again, China doesn't recognize dual nationality—they adopt a kind of legal fiction where, provided that the Canadian enters China on their Canadian documentation, they are treated as though they were solely Canadian nationals during their time in China.

I'm not sure how encouraging it would be to open those negotiations with the Iranians, but at least it's an avenue worth exploring.

Mr. Borys Wrzesnewskyj: I have one last quick question. We recently passed Magnitsky legislation unanimously in our House. The intent was to put people under sanction when they were gross human rights abusers of their own people. I reference Canadians who were incarcerated in Turkey and we believe tortured. In those sorts of cases would you think that perhaps we should take a look at the legislation we recently passed and say torturers, prosecutors, judges in these show trials should perhaps be sanctioned under this legislation?

Mr. Mark Warren: There is a distinction in international law between state actors and non-state actors. It gets a little blurry sometimes.

I'm going to have to give some thought to that one. It opens more doors than it closes, in my mind.

Mr. Borys Wrzesnewskyj: Thank you. Perhaps you can undertake to provide an answer.

Mr. Mark Warren: Yes, I'll certainly give it some thought.

The Chair: We'll go to Madam Laverdière, *s'il vous plaît*.

[*Translation*]

Ms. Hélène Laverdière: Thank you, Mr. Chair.

Mr. Warren, thank you for being here today.

I will ask you the same question that I put to Mr. Neve and Mr. Fahmy: could you give us some good examples of legislation that guarantees the right to consular services? If you have any comments, do make them, and if any good examples come to mind, please send them to us afterwards. Our committee members would find this quite useful.

[*English*]

Mr. Mark Warren: I do, and the point I would make, first of all, is that the legislation in most other countries is very simple. It's not complex, as I think Alex mentioned. We're not looking at page after page of detailed procedures of what we do and what we don't do.

It basically just enshrines a universal, equal responsibility to protect. Typically the legislation in the countries with which I am familiar will say something like, it shall be the responsibility of this nation to protect and assist its nationals abroad, subject to regulations created under such-and-such an act. In other words, there's an attempt to balance this fundamental bedrock principle with the recognition that there has to be ministerial discretion in how you go about acting in individual cases.

You do not want to tie the hands of your government by making the good the enemy of the best. There has to be some degree of latitude, but at the same time there needs to be a clear and simple statement in law to which whoever is assessing these cases can then go back and refer. Whether that is the courts or an ombudsperson of some kind, or a parliamentary committee, those are mechanisms that this committee and the House of Commons, more largely, should be able to address and come up with some mechanism that they think is appropriate for the Canadian situation.

I will say that most of the legislation I've seen is no more than a sentence or two long.

● (1715)

[*Translation*]

Ms. Hélène Laverdière: Thank you for the information.

I would like to ask you a question about people who have dual citizenship. You answered my question in part. This is an important issue, especially in Canada. It's becoming more and more frequent because of our presence on the world stage.

The agreement we signed with China is interesting. Do you think it would be possible and indeed a good idea to have the same kind of agreement with other countries such as Egypt and Turkey?

[*English*]

Mr. Mark Warren: Yes, it is possible. The fact that we don't explore these options doesn't mean that they aren't possible. In fact, Canada does have a bilateral consular agreement with Egypt; it just doesn't happen to address detention issues.

It is not only possible, but I think it is the most effective way forward under international law. Some people have suggested that we should reopen the Vienna Convention on Consular Relations, for example. My response is that even the convention itself, in its final provisions, recognizes that any issues that are not adequately dealt with under the convention can be the subject of bilateral agreements.

I recently undertook a study of bilateral consular agreements, those that were adopted after the Vienna convention. I looked at I think 75 bilateral agreements, and almost all of them specified, what exactly do we mean by “consular access without delay”? What do we mean by “notification without delay”? What do we do about dual nationals? How do we address those concerns?

I think the bilateral consular mechanism is tailor-made for addressing these problems. That's not to say that every country would be willing, and that may well be something we need to work on diplomatically and politically. I do think that if Canada were to make it clear that it wants to resolve these problems through a time-honoured international legal mechanism, that's another card in our hand that at the present time we don't seem to be playing at all.

[*Translation*]

Ms. Hélène Laverdière: I was fascinated to hear you say that it would even be possible to file briefs for the defence and that it would not be considered interference in the domestic legal process.

Could you briefly explain why this is?

[*English*]

Mr. Mark Warren: Yes. I put that in intentionally to see if anybody would respond.

There is, in consular law, a doctrine called the rule of non-interference. I don't know if other witnesses have raised this or not. Basically it says that a consulate may not interfere in the internal affairs of the state to which they've been posted.

At the same time, the Vienna convention makes it very, very clear that consulates can address the authorities when their nationals' rights have been violated. They can represent them in court when they can't represent their own interests. They can arrange for their legal representation. They can assist them in that representation. In other words, there must be some kind of a distinction to be made between interference and intervention.

I would say that the distinction is straightforward. If a legal system abroad allows, for example, the filing of friend of the court, amicus curiae, briefs, as most common law jurisdictions do, as well as some others, there is no reason at all why a consulate cannot file a brief, provided it has something to bring to the court's attention that's important, such as a violation of the Vienna convention.

That, in fact, is something that Canada has done in some cases in the past. Other countries do it with some regularity. It is not interference. It is simply making sure that your national is vigorously defended and that you're making full use of the mechanisms available to any case in that particular court or jurisdiction.

Now, it would be interference, for example, to seek preferential treatment or to ask for an exemption under domestic law, or to, I don't know, bribe a judge, but it is not interference to intervene in the proceedings to ensure that your national's basic rights are protected on an equal footing.

● (1720)

The Chair: Thank you, Mr. Warren.

We'll go to Mr. Saini, please.

Mr. Raj Saini (Kitchener Centre, Lib.): Good afternoon, Mr. Warren.

I want a comment on a couple of things that you wrote. You wrote a guide for defence attorneys, and you highlighted two cases in that guide, which I think have substantial ramifications in international law. One was the LaGrand case, and one was the Avena case.

However, your paper was written eight years ago, so I'm wondering if you can maybe update us. Has there been anything else significant that has come through, especially from the International Court of Justice, where there has been an impact on providing consular services abroad?

Mr. Mark Warren: Yes, in fact, India has brought a case against Pakistan before the International Court of Justice on precisely these same provisions of the Vienna Convention on Consular Relations. There's an Indian national on death row in Pakistan who was accused and convicted of espionage. Pakistan used the fact that this person was an accused spy as justification for not granting consular access. India's argument is that there is no such exception under international law, certainly not anything in the Vienna convention. That case has now proceeded to the stage of written proceedings. In other words, we'll probably have a decision relatively soon, perhaps within a year or so.

On the Avena front, there have been a number of attempts.... Is there anyone here who isn't familiar with the case? It's a decision of the International Court of Justice in favour of Mexico and against the United States in which the court found that, in cases where a foreign national—a Mexican national, particularly—has been sentenced to death without timely access to consular assistance, the domestic courts must review and reconsider the case. The clear implication here is that, if there's a finding of actual prejudice, that will require the case to be reconsidered in the truly meaningful sense.

There have been a number of attempts to implement Avena in U.S. law. In fact, the 2018 budget proposal, which I suppose is now defunct, included just such a provision in the Department of State section. It's not sufficient, I think, so many years after the fact, for this still to be an issue of discourse and discussion. It's clear, I believe, at least, that the United States is paying a heavy price for not practising what it preaches when it comes to consular access and consular remedies.

However, individual states in the United States are now starting to take note. For example, the State of Illinois recently passed a consular provision whereby foreign nationals, upon their first appearance in court, will be readvised, one hopes, of their consular rights and the presiding judge will have the authority to ensure that it has, in fact, taken place.

Mr. Raj Saini: Has that improved in the United States since you have written this paper? Article 36 seems to me to be not fully accepted by the United States. There are always other countries that ask for binding judgments. Issuances have been ordered by the ICJ, even in terms of the LaGrand case. There was no U.S. comment after that and there was no attempt to comply with it. For me, if the United States is doing it, are there any other bad actors or any other countries in the world, or is the United States improving? The reason I use the United States is that your paper is heavily ensconced in U. S. law. I'm not familiar with other jurisdictions, comparatively.

Mr. Mark Warren: One of the important consequences of the Avena judgment is that the Federal Constitutional Court in Germany found not only that German authorities were under a binding obligation to provide consular access, but that the German courts could, in fact, remedy violations of that obligation. You have a dichotomy here, where a country that wasn't even involved in the Avena litigation has said, well, this applies to all of us. This is a binding judgment; it's an interpretation of a multilateral treaty and should apply to all countries equally. There is certainly language in the Avena judgment to support that.

I would say that, in my experience, the compliance is improving in the United States. I'm not sure it's because of the ICJ. It's improving because the awareness of consular rights issues has percolated through the criminal defence community and through the prosecutorial and police communities. There are now police organizations that, as part of their accreditation standards, require that there be a policy in place to advise foreign nationals of their consular rights, a policy to ensure that consulates have access. These things are baby steps; they're incremental, but they're important elements toward a fuller compliance.

On remedies, I just worked on a case in Nevada of a Mexican national under sentence of death where, lo and behold, the court, on appeal, on remand, found that the denial of timely consular access was prejudicial and tossed out the death sentence.

● (1725)

Mr. Raj Saini: The United States signed article 36 of the Vienna convention in 1969. Right now, according to your paper, you said there are about 120 nationals, at that time maybe 200.

Mr. Mark Warren: It's more now.

Mr. Raj Saini: Could it be that maybe we need to revisit that article to make sure? At that time 170 countries signed that charter. Is it time maybe to revisit it, to reactivate it, or to re-emphasize what it is? Could it be there are certain jurisdictions that don't know, may not have had the experience of knowing? Is it maybe an opportunity to re-highlight or underline that this is something that's important for every country to take note of?

Mr. Mark Warren: I'm not quite sure what you mean by "reactivate".

Mr. Raj Saini: Not reactivate, but in terms of re-emphasizing the fact of making sure that countries provide the avenue for—

Mr. Mark Warren: It could start at home. Canada ratified the Vienna convention in 1974, I believe it was. Many parts of the Vienna convention were implemented under Canadian law by Parliament in 1991, but not article 36. Consequently, compliance with those consular notification and access provisions by Canadian jurisdictions has been, I would say, haphazard at best. This matters because it weakens our arguments abroad when we go to another country and say, "Give us access to our nationals, and be assured that of course your nationals would receive the same consideration." Well, that isn't necessarily so in Canada. It would require an act of Parliament. It's not easy because of course criminal jurisdictions are multi-tiered in Canada. We don't have a single unitary system. But I think it's an important element. If you are talking about reactivating article 36, why don't we start at home?

The Chair: Thank you.

Colleagues, that will wrap it up for today.

I want to thank Mr. Warren for his very good presentation. It was very enjoyable and much appreciated.

Colleagues, on Thursday we will do the first hour of consular affairs, and then the last hour will be DFI. That's the plan for Thursday before the break.

A heads-up, I think it's well known that the budget presentation is on the Tuesday that we get back. Originally we were going to go right into clause-by-clause of the Arms Trade Treaty implementation, but I think we're all going to be in our seats in the budget process at four o'clock, or whatever it is, so that meeting likely will be cancelled, unless I have objections by our colleagues.

Having said that, I'll see you on Thursday.

The meeting is adjourned.