Under the Inquiries Act 2013

In the matter of a Government Inquiry into Operation Burnham and Related Matters

I have been asked, as an expert, to provide a report on the international legal framework relevant to the Inquiry. I am to cover the applicable sources of law, including International Humanitarian Law, International Human Rights Law, customary international law and the United Nations Charter. I am to explain the role and impact of relevant United Nations Security Council resolutions.

Among the items I am to cover are the following:

(a) Law of distinction.
(b) Law on proportionality.
(c) Law on precaution.
(d) Law on humane treatment of persons who are not directly taking part in hostilities.
(e) The application of the relevant provisions of the 1949 Geneva Conventions to the situation in Afghanistan and the additional Protocols to the Convention.

The legal analysis will deal with such matters as the obligations on combatants in non-international armed conflict, the duties to avoid civilian casualties, the requirements to render aid to the injured, including medical care and attention, and the checks and balances on the use of lethal force.

I begin with a little history (Section 1) and with texts from the late nineteenth century (Section 2). I then address the sources of the law (Section 3), followed by a general account of the differences between the law applicable in international armed conflicts and non-international armed conflicts (Section 4). Section 5 concerns the items listed above. Section 6 deals with the protection of those detained in the course of "partnering and close support operations".

1 Introduction

The law of arms, the law and customs of war, the law of armed conflict or international humanitarian law, to use the expression commonly used today, has a long history. To take a text from 700 years ago, as recorded in Holinshed's Chronicles, the law applicable to the English and Welsh forces in 1415 and applicable to the battles fought by Henry V in France against Charles VI prohibited the taking of religious objects, required payment for private property taken during the campaign, protected the heralds appointed by each side to communicate with the other, protected prisoners, protected civilians from violence such as the boys behind the English lines in charge of documents and treasure, and perhaps prohibited reprisals. William Shakespeare records the application of those rules and has Henry V provide the reason for them:

> When lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner.

Scholars from the 17th century set out their understanding of the law of war. The significance of that body of law appears in the title of the basic work of Hugo Grotius, regarded by many as a founding father of international law, *De Iure Belli ac Pacis (*1625) – war before peace. By the nineteenth century, with the development of major standing armies and great advances in weaponry and naval power, the experience of recent warfare (particularly the Battle of Solferino (1859) and the American Civil War (1861-65)), and the mobility of armed forces, the attention of diplomats, civil society and scholarly bodies began to call for and develop the basic principles, balancing military necessity and humanity, and more detailed rules relating to the protection of victims of armed conflict and the methods and means of warfare.

2 The development of texts, particularly by governments

Major texts from that period are

> Instructions for the Government of Armies of the United States in the Field (General Order No 100 of the War Department) 24 April 1863
>
> Geneva Convention for the Amelioration of the condition of the Wounded in Armies in the Field 22 August 1864 and additional articles of 1868
>
> The Declaration of St Petersburg of 1863 prohibiting the use of certain projectiles in wartime

Draft International Declaration concerning the laws and customs of war Brussels 27 August 1874

The Oxford Manual of the laws of war on land adopted by the Institute of International Law 9 September 1880

The Conventions, Regulations and Declarations adopted at the Hague Peace Conferences of 1899 and 1907

Several features of those texts stand out. One is their interaction – General Order No 100 (often referred to as the Lieber Code after its author Professor Francis Lieber), prepared for a single internal armed conflict, influenced in major ways, European scholars and, more importantly, European States in their military manuals, the 1874 Brussels draft, the 1880 Oxford Manual and the 1899 (and 1907) Hague Regulations. In 1887 the English jurist Henry Summer Maine declared that Lieber had set an example of 'the formation of a practical Manual' that could be adapted to suit 'the officers of each nation'. The Lieber Code, reprinted by his son Judge Advocate General Norman Lieber, was also in action in the Philippines Civil War of 1899-1902, with the Secretary of War Elihu Root assuring Congress that all orders in the Philippines had conformed with the "Old Hundred".

A second feature is that in some respects no lines are drawn between wars between states and civil and internal wars.

A third is that the provisions of the treaty texts were applied beyond their terms. The 1868 additional articles, for instance, although not in force were applied to the Franco-German War of 1870-71 and the Spanish American Wars of 1898 by the agreement of the belligerent states. And court decisions have held that the limitation of the treaties to wars where all the States were Parties (the si omnes clause) was not effective.

A final feature is that the texts are a combination of principles and rules; they build particular rules on the basis of principles which they articulate. That elaboration has increased over the years – the 10 articles and one page of the initial 1864 convention now extends in its 1949 version to 64 articles and two annexes and 30 pages; the three further 1949 Conventions and the 1977 Additional Protocols take another 260 pages. Their essence is however captured in a 1978 unofficial ICRC text of just seven fundamental rules drawn from the texts adopted over the past 110 years. It is attached.

3 The sources of the law

The relevant law is to be found, as with other parts of international law, in treaties (notably the 1949 Geneva Conventions which have universal acceptance and the 1977 Additional Protocol II accepted by 168 States including Afghanistan and New Zealand, in customary international law as found in state practice (now greatly helped by the ICRC publication *Customary International Humanitarian Law*; in general principle; and in a growing volume of decisions of international and national courts and tribunals, the rulings and comments of committees established under human rights treaties (such as the Human Rights Committee in respect of the International Covenant on Civil and Political Rights (ICCPR) and the Committee against Torture set up under the Convention against Torture and much commentary, notably by the ICRC on each of the Conventions (two recently updated) and the 1977 Protocols, and also by military, government and academic commentators.

I am also to explain the role and impact of United Nations Security Council resolutions. It is convenient to deal with that matter first. On 5 December 2001, the Security Council endorsed the Bonn Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions signed that day (SC Resn 1368 (2001)). That Agreement provided for an International Security Force which "will assist in the maintenance of security for Kabul and its surrounding areas. Such a Force could, as appropriate, be expanded to other urban centres and other areas". On 20 December 2001, the Council reiterated its endorsement of the Agreement, expressed its determination to ensure the full implementation of the mandate of the Force in consultation with the Afghan Interim Authority established by the Bonn Agreement and, acting under Chapter VII of the UN Charter,

1. *Authorizes*, as envisaged in Annex 1 to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment;

…

3. *Authorizes* the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate;

…

(SC Resn 1386 (2001))

That authority was extended in temporal and in 2003 geographic terms (on the latter see SC Resn 1510 (2003)). ISAF completed its mission on 31 December 2014 (see SC Resn 2120 (2013)).

My understanding is that a resolution adopted by the Security Council under Chapter VII authorising the taking of all necessary measures" to fulfil its mandate – here assisting in the maintenance of security throughout Afghanistan – authorises the use of armed force. That is certainly how the series of resolutions have been understood in practice. But the use of armed force by ISAF members must comply with the relevant requirements of international law. Again that is not contested.

The series of Security Council resolutions and the Chapter VII authority they confer on the member states participating in ISAF "to take all necessary steps to fulfil its mandate" are relevant to the question of the authority to detain persons for security or other reasons. What is the source of that authority? So far as the actions of the Afghan authorities are concerned they presumably may depend on their national law. But the States participating in ISAF? In the absence of any agreement with the Afghan government, three sources have been suggested – a power implied in common Article 3 or Article 5 of AP II, customary international law or Security Council Resolution 1386 (2001) and its successors including 1890 (2009) and 1943 (2010). The matter was exhaustively considered by the UK Supreme Court in 2016 and 2017 (*Al-Waheed v Ministry of Defence* [2017] UKSC 2). All who addressed the issue agreed that the Security council resolutions provided the authority (paras 28, 119, 168, 224, 323). (There were differences, not relevant in the present Inquiry, about the impact on that power of the European Convention on Human Rights and other matters.) Two members rejected the other two arguments for reasons which they set out in detail and with which I agree (paras 243-277). I also agree that the resolutions provide the authority to detain.

The role played in that case by the European Convention highlights another issue which I am asked to address – the relationship between international human rights law and international humanitarian law. As Lord Sumption, in particular, notes this matter has been considered by the International Court of Justice (paras 43 and 48) and the European Court of Human Rights (paras 45-68). But I do not see it as giving any difficulty in the present context: the only significant area of overlap is in respect of the prohibition on torture where the texts align, although as will appear there may be differences in terms of their territorial scope.

So far as customary international law is concerned, I draw on the ICRC customary law Study. By its very nature, it does not have binding legal force. But to quote Elizabeth Wilmshurst, a former deputy legal adviser in the British Foreign and Commonwealth Office, speaking on behalf, as well, of 14 experts who engaged in a detailed study of the work, it represents a valuable work of great service to international humanitarian law. The book, in which she said that, is "intended as a complement to the Study – and a compliment to it" (*Perspectives on the ICRC Study* … (2007) vii). The Study, undertaken at the request of the 1995 International Conference of the Red Cross and Red Crescent (which includes representatives of the States Parties to the Geneva Conventions and of National Red Cross and Red Crescent Societies) involved the gathering of state practice from many countries, relevant treaties, case law, scholarly works; international research teams; and academic and governmental experts meeting and commentary on drafts. The NZDF Interim Manual of 1992 is one of the many sources. And relevant practice continues to be collected. As a foreword to the Study notes, it will have served its purpose only if it is considered not as the end of a process but as a beginning. The customary law continues to evolve as the recent NZDF Manual on the *Law of Armed Conflict* (DM 69 (2ed) vol 4, 2017) also recognises (3.4.8). The Manual instances the recognition of the fundamental guarantees set out in article 75 of AP I as stating customary international law applicable in all forms of armed conflict. The UN General Assembly has also welcomed the important contribution to the protection of the victims of armed conflicts made by the significant debate generated by the Study and by its efforts to regularly update the database (eg GA Resn 73/204).

4 The distinction between the law applicable to international armed conflicts (IAC) and non-international armed conflicts (NIAC)

All of the texts listed in the distinction section 2 of this paper, with the important exception of the Lieber Code of 1863, apply in their terms only to IACS. That was also the case of the Geneva Protocol of 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare and the three Geneva Conventions of 1929. In 1921 and 1938, the International Conference of the Red Cross adopted resolutions addressing humanitarian concerns during civil wars. The resolutions (the second adopted during the Spanish civil war) affirmed the right and duty of the Red Cross to afford relief in

civil wars in accordance with the general principle of the Red Cross. The matter was to be taken up at the 1942 International Conference. After the end of the Second World War and against the background of the Greek as well as the Spanish civil war difficult negotiations finally resulted in Article 3 common the four 1949 Conventions, often referred to as a Mini Convention, regarding armed conflict not of an international character:

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those places 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) Taking of hostages;
(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by regularly constituted course, affording all the judicial guarantee which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisos shall not affect the legal status of the Parties to the conflict.

Article 3 (1) (a) and (2) are or may be relevant to issues before the Inquiry.

The great increase in what have been referred to as wars of national liberation, civil wars and other internal armed conflicts and the deaths and destruction resulting from them meant that when the preparation of treaty texts relating to armed constrict was undertaken, following the Teheran Conference held to mark the 20th anniversary of the Universal Declaration of Human Rights, Article 3 common to the four 1949 Conventions had to be elaborated. After extensive preparatory work, from the late 1960s to 1972 the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts 1974-1977 adopted two Protocols additional to the 1949 Conventions, the first protecting the victims of international armed conflicts (API), the second the victims of non international armed conflicts (APII). The 1974 session provisionally adopted a text which in its final form included within the first protocol as an international armed conflict "armed conflicts in which people are fighting against colonial domination and alien occupation and racist regimes in exercise of their rights of self determination". For several delegations that decision meant that a second protocol relating to NIACS was not needed. But for others no distinction should be made between victims of armed conflict depending on its categorisation. In the course of the 1975 and 1976 sessions a text was developed including extensive parts of Protocol I – both were being prepared in parallel. That text was however severely reduced at the final 1977 session with only 18 substantive articles compared with 90 in Protocol I, suggesting that there was a sharp difference between the law applicable to IACs and that applicable to NIACs. But subsequent practice, as reflected in the 2005 ICRC study, has greatly reduced the differences. The introduction to the 2005 volume setting out 161 Rules of customary international law, with commentaries, supported by two extensive volumes of state practice which continue to be updated, makes the general point about the expansion of the law applicable to NIACs, in particular relating to the conduct of hostilities (xxix). That process, reflected as well in national practice especially in Military Manuals, demonstrates that the law continues to evolve. That was recognised in 1899 in the de Martens clause incorporated in the Hague Convention IV:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

5 The principles – the listed issues

I am asked to address the principles of distinction, proportionality, precautions in attack and the humane treatment of those not directly participating in the armed conflict. A convenient way of reporting on these matters is to use the Rules set out in the ICRC's Customary Law Study. Each of the Rules is supported by extensive references to the relevant treaty provisions, practice of states and international organisations, legislation, military manuals, court and tribunal decisions and commentaries by the ICRC and others. Each of the Rules I refer to are cited in the recent NZDF Manual and are not questioned.

In the following text I mention the practice and commentary only very selectively. It is available in the 2005 volumes along with extensive updates online.

The principle of distinction has been long recognised, for instance at Agincourt in respect of both combatants and civilians and military objectives and civilian objects,

The Customary Law Study begins with that principle which it says applies in both IACs and NIACs:

> **Rule 1.** The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
>
> **Rule 7.** The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.

The commentary begins with the Saint Petersburg Declaration – "the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy".

The new NZDF manual may be added to that practice (4.5.1). For a valuable discussion in support of the propositions stated in the Study by a former Director of Legal Services of the British Army see Major General APV Rogers *Law on the Battlefield* (2nd ed 2004)7-17.

The two rules are to be read with the prohibition in Rule 11 on indiscriminate attacks also applicable in IACs and NIACs (for the definition of indiscriminate attacks see Rule 12 and also Rule 13 on bombardment).

The requirement of proportionality in attack appears in this form in Rule 14:

> **Rule 14.** Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

Again the commentary says that this provision applies in both IACs and NIACs. To that commentary may be added the NZDF Manual 4.4.1. New Zealand when ratifying API stated that the references to military advantage meant the advantage anticipated from the attack as a whole. See also the declaration it made in respect of precautions in attack considered next. Again see Rogers pp 23-27.

The obligation to take precautions in attack takes this form in Rule 15:

> **Rule 15.** In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

The commentary says that state practice establishes this as a rule of customary international law applicable in both IACs and NIACs. As it points out, the relevant provision of AP I – Article 57(1) – was adopted by 90-0-4 while the related provision of AP II was dropped at the last stage of the conference as part of a package aimed at a simplified text. I mentioned that process earlier. The commentary makes the argument in respect of NIACs by reference to other treaty texts, state practice and an ICTY decision.

As the word "feasible" indicates practical considerations are important. New Zealand made that point in one of the declarations it made on the ratification of API:

> In relation to Articles 51 to 58 inclusive, it is the understanding of the Government of New Zealand that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.

That declaration appears in the NZDF manual 8.7.1-4, n 43.

The obligation is related to the requirement to be found in AP I, Article 82, which is the basis for Rule 141:

> **Rule 141.** Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law.

The obligation to collect and care for the wounded and sick has been in treaty form since 1864. It appears for NIACs in Common Article 3 quoted earlier. It takes this form in Rule 109:

> **Rule 109.** Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.

It is supported by the obligation reflected in Rule 110:

> **Rule 110.** The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones.

The NZDF Manual 11.1.1-11.2.20 is consistent with those propositions; it also cites Rule 87 about humane treatment and Article 75 of AP I on fundamental guarantees which, as noted, is accepted as declarations of customary international law.

6 Protection of those in detention

I here address the legal issues relating to paragraphs 6.3 and 7.8 of the Terms of Reference. Common Article 3 of the conventions, article 4(2)(a) of AP II, Article 7 of the International Covenant on Civil and Political Rights, the Convention against torture and other cruel, inhumane and degrading treatment or punishment and customary international law all prohibit the use of torture in all circumstances. (See also article 7(1)(f) of the Rome Statute of the International Criminal Court and the four Conventions include related prohibitions for IACs.)

The ICJ has declared that the prohibition is a peremptory norm (*ius cogens*), *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)* 2012 ICJ Reps 422, para 99. There can be no derogations from the prohibition.

The form of the prohibition in common Article 3 appears earlier. In APII it takes this form:

> Article 4 – Fundamental Guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever.

(a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.

…

Under the Convention against torture "[n]o State Parties shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be subjected to torture". Article 12 of the Third Geneva Convention relative to the treatment of prisoners of war and Article 45 of the Fourth Convention relative to the protection of civilian persons in time of war, along with article 33 of the Convention relating to the Status of Refugees, contain provisions reflecting the same principle. Those last three provisions are not directly applicable because of their subject matter – IACs and refugees – but their fundamental humanitarian purpose may be seen as relevant. That purpose also appears in the requirement in Article 5(4) of AP II that if persons deprived of their liberty in a NIAC are to be released necessary measures must be taken to ensure their safety; that is, they should not be released if their safety cannot be ensured (see ICRC commentary para 4596).

Obligations under international law in relation to the particular terms of reference may be established in four ways –

1. Common Article 3 insofar as it may be read as prohibiting the transfer of detainees where they may be in danger of being tortured.
2. Common Article I in terms of the obligations of High Contracting Parties to ensure respect for the Conventions including Common Article 3 in all circumstances.
3. Article 3 of the Torture Convention.
4. Aiding or assisting another State in the commission of an unlawful act.

I consider the four ways in turn.

1 Common Article 3

It will be recalled that Common Article 3 required that, among others those in detention in all circumstances be treated humanely. To that end. among the acts prohibited is torture. The issue which arises in the present context is whether that prohibition extends to a State party to the Convention which transfers to another body a person who is to be detained, with knowledge that there is a real risk that that person may be tortured. There is support for the view that the prohibition does so extend – that the prohibition on non-transfer or non-return (non refoulement) in such circumstances is a breach as well of customary international law (see the 2016 ICRC commentary on Common Article 3 paras 708-716). The State should not be able to avoid its own obligation by passing the person on to another State where there is a real risk of torture. Those propositions are supported by practice, governmental statements, court and tribunal decisions, comments by human rights treaty monitoring bodies and scholarly commentary (nn 636-657). There is also broad acceptance that the fundamental rights elaborated in Article 75 of AP I, including its absolute prohibition on torture apply in NIACs, for instance in the ICRC Customary Law Study 299-383. If the situation with which the Inquiry is concerned does involve transfer in reality then the position adopted in the ICRC commentary, supported by the sources it cites, may become applicable. It appears to me however that a more direct proposition of law is available when Common Article 3 is read with Common Article 1 to which I now turn.

2 Common Article 1

Common Article 1 of the 1949 Conventions in its single sentence requires the State parties in all circumstances not only to respect the Conventions but also to ensure respect for them. That is to say, the obligations undertaken in the Conventions, including the prohibition of torture in article 3, are owed not simply on a bilateral basis to the other party to the conflict. They are unilateral obligations owed by each and every State party to all others, or really to the people who are to be protected; the principle of humanity is at stake. The ICRC Commentary to the article states two propositions, among others, relating to the obligation that the interests protected by the conventions are of such fundamental importance to the human person that every State party has a legal interest in their observance, wherever a conflict may take place and wherever its victims may be; and that they do everything reasonably in their power to ensure that the provisions are respected universally – by other States and non-state parties.

The ICJ has confirmed that reading (*Military and Paramilitary Activities in and against Nicaragua* 1986 ICJ Reps 14, para 220, *Legal consequences of the construction of a wall in the occupied Palestinian territory* 2004 ICJ Reps 136, paras 158-159, 163D; see also *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965* 2019 ICJ Reps 1, paras 182 and 183(5)). It is also supported by State practice.

I also recall the principle which underlies the provisions in the 1949 Conventions, the Refugee Convention, the ICCPR and the Convention against Torture, prohibiting the transfer of detainees to other authorities where they are at real risk of torture.

The provisions, particularly that in Common Article 3 do not indicate the procedures which are to be followed by the State which is not principally responsible for the detention and for protecting the detainee from being tortured. A model is provided by the Arrangement of 12 August 2009 between the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan and the New Zealand Defence Force concerning the transfer of persons between the New Zealand Defence Force and the Afghan authorities.

The Afghan authorities are responsible for maintaining and safeguarding all persons transferred in accordance with applicable domestic law and international law. Various bodies including the NZDF and the ICRC are to have full access to those transferred. The Afghan authorities are to keep records and make them available to the NZDF. The authorities are also to notify the NZDF before initiating any legal process against those persons. And any transfer to a third party is to take place only when that party has affirmed its commitment to comply with applicable international law. (For a helpful discussion of the issues by a former legal adviser to the State Department and a colleague see John B Bellinger II and Vijay M Padmanabhan, "Detention operations in Contemporary Conflicts…" (2011) 105 AJIL 201, 234-243.)

I do appreciate that this arrangement regulates transfer and that in its precise terms it may not extend to partnering or close support situations. But the obligations included in it, along with the guidance provided in cases such as *R (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1 445 (Admin) para 320 and *Othman (Abu Qatada) v United Kingdom* European Court of Human Rights 8139/09 pars 188-189 (relating to assurances about treatment and their detail) and particularly the *Copenhagen process, principles and guidelines on the handling of detainees in international military operations* drawn up between 2007 and 2012 by representatives from 24 countries including New Zealand and observers from the

African Union, the United Nations, the EU, NATO and the ICRC (51 ILM 1364) do provide support for the fundamental humanitarian principles engaged.

I return to the basic obligation of the State parties under Common Article 1 read with Common Article 3 to ensure respect, to the best of their ability, with the prohibition on torture. That obligation is founded on the essential humanitarian purpose of their protection and of the law stated in article 75 of AP I which is widely recognised as having customary law status (see eg Bellinger at 206-208).

3 Convention against torture

Both New Zealand and Afghanistan are parties to this Convention. As mentioned earlier, under Article 3:

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

Two questions of law appear to arise in the present context:

(a) Does the obligation imposed by Article 3 apply to actions taken outside New Zealand by the NZDF;
(b) What is involved in "return (refouler)"?

That the obligation in respect of the handover (to take a neutral term) by one State to the territorial State may operate beyond the territory of the former appears to me to follow from the terms of the Convention. Article 3 contains none of the territorial, jurisdictional or nationality limitations which are to be found in Articles 2, 5 (which refers back to Article 4), 6, 7, 11, 12, 13 and 16. Moreover the essential humanitarian purpose of the peremptory norm prohibiting torture is engaged, if not directly since the State handing over the person is not the torturer (see eg *Zaoui v Attorney General* (No 2) [2006] 1 NZLR 289, para [51] on the peremptory nature of the basic prohibition and the cases cited in n 43 and para [79] and the cases cited, n 79 on the extra territorial scope of the provisions; on the latter see similarly two decisions of the Supreme Court of Canada: *Canada (Justice) v Khadr* [2008] 2 SCR 125 and *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44).

That humanitarian purpose appears to me to be relevant as well to the understanding of the word "return (*refouler*)".

The inclusion of the French term in the text of a UN human rights convention is unusual. (The same phrasing appears in Article 33 of the 1951 Refugees Convention.) As I understand it *refouler* means to press back, to force back, to turn back – perhaps a meaning broader than return – just as *ordre public* appears after public order in some of the limitation provisions in the ICCPR, with, as I understand it, a narrowing intention. The French text of Article 3 has only the three verbs.)

I do not however take this further since I think that common article 3 (read with common article 1) and aiding and abetting which I consider next may have more direct application, depending, of course, on the findings of fact which the Inquiry makes.

4 Aiding or assisting another State in the commission of *an unlawful act*.

Over the course of more than 30 years the United Nations International Law Commission prepared Articles on the responsibility of States for internationally wrongful acts. The process included extensive studies by the UN Secretariat, by successive Special Rapporteurs and commission members of the relevant sources, many comments by States on the developing drafts and commentary by the scholarly community. Since 2001 when the articles were completed and the UN General Assembly noted then and commended them to the attention of Governments (GA Resn 56/83), courts, tribunals and other bodies have made extensive use of the provisions as statements of customary international law. The particular provision relevant here, Article 16 on aiding or assisting, was based on state practice and General Assembly and Security Council resolutions to which the commission refers in its Commentaries and has been recognised by the ICJ (Application of the Genocide Convention (*Bosnia and Herzegovina* v *Serbia*) 2007 ICJ Reps 43, para 420), a World Trade Organisation dispute panel and the European Court of Human Rights as reflecting international law. It reads as follows:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) That State does so with knowledge of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State.

In its Commentary, the Commission says that where the assistance is a necessary element in the wrongful act, in the absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State. But Article 16 does not require that element of necessity. Nor do I think that the customary law underlying that provision requires that the aid or assistance be given with a view to facilitating the commission of the

wrongful act, as the commission says in its commentary. It need not share the intention. As has been said in the ICTY and the ICJ such a requirement would have meant that those who provided poisonous gas to German authorities in the Second World War and knew of the intent of the purchasers to use the gas to commit genocide would not be held to be complicit even if the suppliers themselves did not share that intent (*Prosecutor v Krstic* IT 98-33-A, Judgment of 19 April 2004, Judge Shahabuddeen, separate opinion, para 67 and *Application of the Genocide Convention (Bosnia and Herzogovina v Serbia* 2007 ICJ Reps at 352-354). The ICTY Appeals judgment, drawing on extensive national practice, made it clear that knowledge of the wrongdoing was enough. To be complicit or to aid and assist did not require that the intent be shared. The ICJ, proceeding on the basis of Article 16 did not rule on the point since for a majority of the Judges it was not conclusively shown that the decision to eliminate physically the adult population of the Muslims from Srebrenica was brought to the attention of the Serbian authorities at the relevant time (pp 216-219, paras 418-424).

As in that case, like others, the application of the law of aiding or assisting or complicity is very fact dependent. In the present situation the particular characteristics of the provision of "partnering, including close support and technical support" or more generally the "provision of assistance" by the NZDF with the Afghan authorities may well be decisive in determining whether the NZDF is in breach of the duty to ensure respect, to the best of its ability, for the prohibition on torture in terms of Articles 1 and 3 or is complicit in torture under customary international law.

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Fundamental rules of international humanitarian law applicable in armed conflicts[1]

1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.

2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.

3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *matériel*. The emblems of the red cross, red crescent and red crystal are the signs of such protection and must be respected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

[1] This text is not vested with the authority of an international legal instrument but it summarizes the fundamental rules of international humanitarian law applicable in armed conflicts. Its sole purpose is to facilitate their dissemination.