UNDER THE INQUIRIES ACT 2003

IN THE MATTER **A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

Date of Hearing: 29 July 2019, commenced at 11.00 a.m.

Inquiry Members:
Sir Terence Arnold QC - Chair
Sir Geoffrey Palmer QC

Counsel Appearing:
Ms K McDonald QC and Mr Andru Isac QC, Counsel Assisting the Inquiry
Mr S Humphrey appears for Jon Stephenson
Mr P Rishworth QC and Mr I Auld appear for Crown Agencies/ Crown Law
Mr P Radich QC and Ms L Richardson appears for NZDF
Mr S Worthy appears for Hon Dr Wayne Mapp

Venue:
The Thorndon Hotel
24 Hawkestone Street
Wellington

TRANSCRIPT OF PROCEEDINGS

I N D E X

OPENING REMARKS

SIR TERENCE: Welcome to the third of the three public hearings that the Inquiry is holding on legal and other issues arising from its Terms of Reference. You are all most welcome, in particular the members of the public and representatives of the media, which is not to say of course our presenters and lawyers aren't welcome as well.

The hearing will be spread over two days and will cover two matters that are fundamental to the Inquiry's work. The first concerns the principles of international humanitarian law and other similar bodies of law applicable to the armed conflict in Afghanistan.

And the second, the use of the Prioritised Effects List or JPEL, to identify insurgent parties.

We will begin today with a presentation by Emeritus Professor Sir Kenneth Keith QC, a former Judge of the International Court of Justice on the applicable legal framework. Sir Kenneth will speak as an independent expert in this area and Sir Geoffrey and I are most grateful to him for undertaking this task.

Following Sir Kenneth's presentation, there will be a break for lunch, after which we will hear submissions on behalf of Crown agencies on the applicable legal framework. Following those submissions, we will hear submissions on behalf of Mr Stephenson and from Mr Hager on the same topic. That will round out the first day.

I should mention at this point, that the Inquiry has recently received a paper on this topic from Kevin Riordan in his personal capacity. That will be placed on

the Inquiry's website and will be publicly available as a consequence.

Tomorrow we begin with another presentation from an independent expert, Professor Dapo Akande of Oxford University. Again, we're most grateful to him for making his presentation. Professor Akande will discuss the principles relating to the use of JPEL, or the Joint Prioritised Effects List, to identify insurgent targets.

Following his presentation, Brigadier Lisa Ferris, the Director of Legal Services with the New Zealand Defence Force, will address the same topic, focusing on the process by which people were put on the JPEL.

Following the luncheon adjournment tomorrow, Mr Hager will make a presentation on the JPEL.

As with our earlier hearings, the proceedings will be recorded, and a transcript will be prepared and will be posted on the Inquiry's website as soon as it's available.

The presentations and submissions will also be available on the website.

Finally, I should mention that, as with the previous hearings, core participants will have the opportunity to make any further submissions on the matters covered within two weeks following the conclusion of the hearing.

Now, just before I call on Sir Kenneth Keith to start, could I just make a note of who is here.

First, counsel for NZDF, Mr Paul Radich QC, thank you.

MR RADICH: Yes, Sir.

SIR TERENCE: And you have Brigadier Ferris with you who will be doing a presentation later.

Mr Paul Rishworth QC on behalf of the Crown agencies and Mr Auld, thank you.

Counsel for Jon Stephenson, Mr Humphrey, good morning.

MR HUMPHREY: Good morning.

SIR TERENCE: Dr Mapp is here in his personal capacity and Mr Worthy, I think, yes, welcome.

Have I covered off everyone? Oh, of course, the only people I have omitted are Counsel Assisting. So, Counsel Assisting, Kristy McDonald QC, good morning.

MS McDONALD: Good morning.

SIR TERENCE: And Andru Isac QC, good morning.

Sir Kenneth, you're most welcome to sit or stand, it's entirely up to you.

SIR KENNETH: I've been sitting for two hours, so I will stand from over here.

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EXPERT PRESENTATION ON APPLICABLE LAW

BY PROFESSOR SIR KENNETH KEITH

SIR KENNETH: In terms of the task I've been given, I'm to report on the international legal framework, as Sir Terence has said, relevant to the Inquiry. I am to cover a number of matters, 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 Security Council resolutions.

I am to look at:

(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 Geneva Conventions to the situation in Afghanistan and the Additional Protocols.

I am to deal with matters such 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", which I gather is the real issue of contention that comes out of what I have to say.

The handbook, which I didn't bring, of the ICRC is about that large but a lot of this can be reduced.

I then talk a little about the difference between the law applicable in international armed conflicts and that applicable in non-international armed conflicts, and then a section dealing with the items that I listed distinction, and so on. The final section deals with the protection of those detained in the course of armed conflict and close support operations which I gather is the real issue of contention which comes out of what I have to say.

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. They prohibited the taking of religious objects, required payment for private property taken during the campaign, they protected the heralds appointed by each side, they protected civilians from violence such as the boys behind

the English lines in charge of documents and treasure, and perhaps they prohibited reprisals. I know all that not from reading *Holinshed* but where 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) putting war ahead of 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.

I stress again the difference between military necessity and humanity, something that has governed the development of this law for a long time.

If you look at the documents, the texts that were prepared at that time, the first one in my list is the Lieber Code (General Order No 100 of the War Department), prepared by Francis Lieber and published under the authority of President Lincoln. Instructions for the Government of Armies of the United States in the Field.

Then very soon after that, in 1864, there is the First Geneva Convention resulting from Henry Dunant being at the battle of Solferino and helping create the International Red Cross Unit, now the International Red Cross and Red Crescent Movement.

The Declaration of St Petersburg of 1863.

The draft Declaration prepared in Brussels on the Law and Customs Law of War, 1874.

The Oxford Manual of the Laws of War on Land prepared by the Institute of International Law in 1880.

And then the 1899 and 1907 Conventions, Regulations and Declarations adopted at that major conference, those two major conferences.

One interesting feature of these cases, of these texts, is their interaction. The Lieber Code was prepared for a single internal armed conflict but it influenced in major ways European scholars, and more importantly European States in their military manuals, influenced as well by the 1874 Brussels draft, the 1880 Oxford Manual and the two Hague sets of regulations. Henry Summer Maine, the great English jurist, declared that Lieber had set an example of the formation of a practical manual that could be adapted to suit the offices of each nation.

The Lieber Code was then used by the Americans, by the son of - one of the sons of Francis Lieber; earlier sons had fought on the two sides of the American Civil War but this younger Lieber, Norman Lieber, issued it for the Philippines Civil War of 1902, with the secretary of war Elihu Root assuring Congress that all orders in the Philippines had conformed with the "Old Hundred".

No lines were drawn in terms of a second feature. No lines were drawn between wars between states and civil

and internal wars. I think it's still the case, isn't it, that more Americans were killed in their Civil War, their internal war, than have been killed in other wars put together.

A third feature is that the Treaty texts were applied beyond their terms. And I give some examples of that in the paper.

And a final feature which recurs in the modern law, is there are a combination of principles of 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. And I point to the fact that there's the 1978 text attached to this paper which tries to draw out seven fundamental rules from the texts adopted over that lengthy period.

As I've just indicated briefly, the relevant law, as with other parts of international law, is to be found partly in treaties: primarily really in this case, the 1949 Conventions which have universal acceptance and the 1977 Additional Protocol II adopted now by 168 states, the Second Protocol, including Afghanistan and New Zealand. And customary international law is found in state practice and that discovery of state practice is now greatly held by the ICRC publication *Customary International Humanitarian Law*. The law is also to be found 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 ICCPR, and the Committee Against Torture set up under the Convention against Torture and much commentary, notably by the ICRC. Further, there are the commentators, military and government, and academic commentators.

I deal first in terms of the request that I explain the role and impact of UN Security Council Resolutions, I deal with that matter first.

On 5 December 2001, the Security Council endorsed the Bonn Agreement; this is just short of three months since the attacks on the Twin Towers and Pentagon. The Security Council endorsed the Bonn Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions. It was an agreement signed on that day in Bonn. That agreement provided for an International Security Force which "will assist in the maintenance of security for Kabul and its sounding areas. Such a force could, as appropriate, be expanded to other centres and other areas".

On 20 December, 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, then acting under Chapter VII of the Charter (the provisions which enable binding decisions to be taken):

Authorises, as envisaged in Annex 1 to the Bonn Agreement, the establishment of the Security Force for six months to assist the Afghan Interim Authority in the maintenance of security in Kabul and its sounding areas, so the that the Afghan Interim Authority, as well as the

personnel of the United Nations, can operate in a secure environment.

And then, very importantly, authorises the member states participating in the ISAF, International Security Assistance Force, to take all necessary measures to fulfil its mandate.

That authority was extended in temporal and (in 2003) geographic terms, and ISAF completed its mission at the end of 2014.

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 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, and there's no dispute about this, with the relevant requirements of international law.

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" or more accurately all necessary measures to fulfil its mandate deal for me, I think, with the question of the authority to detain persons for security or other reasons.

There's been some discussion about this in respect of the ISAF forces and the matter was exhaustively considered by the United Kingdom Supreme Court a couple of years back. And all who endorsed the issue agreed that the Security Council Resolutions provided the authority. There was no need to go back to some of the other arguments that I think have been raised before this

Inquiry already. And I give the references there to the judges who rejected the other arguments.

So, the Security Council Resolution provides authority for detention by ISAF, quite apart from any other source.

The European Convention on Human Rights was an issue in that case and I've been asked to look at the relationship between International Human Rights Law and IHL. As Lord Sumption, in particular notes, this matter has been considered by the International Court of Justice and the European Court of Human Rights. But I do not see it as causing any difficulty here. 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 the 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, who is the former deputy legal adviser in the British Foreign and Commonwealth Office, speaking on behalf, as well, of the 14 experts who engaged in a detailed study that appears in that work, that represents a valuable work of great service to International Humanitarian Law.

The book, she said, is "intended as a complement to the study - and a compliment to it", with the two different spellings. The Study, the ICRC Study undertaken at the request of the 1995 International Conference of the Red Cross and Red Crescent movement (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 meetings of academic and governmental experts and with many commentaries being made.

The NZDF Manual of 1992 is one of the many sources. And relevant practice continues to be collected.

As a forward 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 international law continues to evolve as the very recent NZDF Manual notes. The manual instances the recognition of the fundamental guarantees set out in article 75 of Additional Protocol 1 as stating customary international law applicable to all forms of armed conflict. That is the one dealing with basic human rights. 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.

I now turn to the distinction between international armed conflicts and non-international armed conflicts.

All of the texts listed in the introduction, in the distinction, in section 2 of this paper (with the important exception of the Lieber Code) apply in their terms only to IACs, International Armed Conflicts. 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 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 in 1942 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 to the four Conventions often referred to as a Mini Convention which concerns armed conflict not of an international character. And you have that set out.

I just pick up one provision in the numbered paragraph 1 of Article 3:

"Persons taking no part in the hostilities, including members of the armed forces who have laid down their arms and so on, 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;" which is arguably relevant in this case.

And then paragraph 2:

"The wounded and sick shall be collected and cared for".

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 conflict was undertaken, following the Teheran Conference held to mark the 20th

anniversary of the Universal Declaration of Human Rights, (that's in 1968, right in the middle of the Vietnam War) it was plain that Article 3 had to be elaborated. After extensive preparatory work in 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 additional protocols. The first protecting the victims of armed conflicts, the second the victims of non-international armed conflicts.

The 1974 session provisionally adopted a text which declared that "armed conflicts in which people are fighting against colonial domination and alien occupation and racist regimes in exercise of their rights of self-determination" are to be considered international.

Now, that exclusion, which took up the whole of the 1974 session essentially, meant for some delegations that there was no need for the Additional Protocol II. The real issue relating to wars of national liberation had been dealt with and other internal matters should be left just with Common Article 3.

But, on the other side, there was the view that 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, was developed including those extensive parts.

I have particular memories of this because I led the New Zealand Delegation in 1975 and 1976. Professor Quentin Baxter had that first frustrating year in 1974 when there was all that argument about wars of national liberation, about national liberation movements, and then

he headed the delegation in 1977 when there was a very substantial cutback on the provisions in the Additional Protocol II.

I had a much better time in 1975 and 1976 but did grieve somewhat over the loss of a lot of the provisions from the draft second edition Protocol. But it is interesting that as the introduction of the 2005 ICRC volume says, the expansion of the law applicable to NIACs, in particular relating to the conduct of hostilities, has now become much closer to the provisions of the first edition of Protocol and the Geneva Conventions more generally.

That process of the two bodies of law being seen as somewhat closer now than they used to be, reflects the very basic principle that was stated back in 1899 in The Hague Convention IV, the Frederick de Martens clause, a very distinguished Russian diplomat:

"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 civilised peoples, from the laws of humanity, and the dictates of the public conscience."

There again you see the underlying principles on the side of humanity, while the text is of course dealing with the business of warfare.

I am asked to address a number of principles, and I've done that in some detail, although it's possible to say much, much more about them, by reference to the work

of the International Committee of the Red Cross and its very extensive teams.

I note that each of the rules I mention are cited in the recent NZDF Manual and they're not questioned there.

As I mention these relevant rules, a handful of them, I mention a very little bit of the practice and commentary to those rules. It's available in the extensive updates online and in the original 2005 volumes.

And so, the study begins with the principle that it says applies both in 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" - sorry, "attacks must at all times distinguish between civilian objects and military objectives. Attacks may be only 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, and I also refer to the very valuable book of Major General Tony Rogers, a former Director of the Legal Services to the British Army to the same effect.

Those rules are to be read with the prohibition in Rule 11 on indiscriminate attacks also applicable, says

the study to IACs and NIACs, and there are definitions of indiscriminate attacks.

The requirement of proportionality appears in Rule 14 in these terms:

"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 this provision applies to both IACs and NIACs. To that commentary may be added a paragraph from the NZDF Manual, the new one.

New Zealand, when ratifying the Additional Protocol I, stated that the references to military advantage meant the advantage anticipated from the attack as a whole. It also made a significant declaration in respect of precautions in attack to which I now turn.

The obligation to take precautions in attack appears in 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 minimise incidental loss of civilian life, injury to civilians and damage to civilian objects".

The commentary says that state practice establishes that this is a rule of customary international law applicable in both IACs and NIACs. As it points out, the relevant provision of their first edition of the Protocol was adopted by 90 votes with 4 abstentions, while the related provision in the Additional Protocol II was dropped at the last stage of the conference as part of

the package aimed at a simplified deal. The deal was done, as I said, in 1977.

In a way, that provision should logically come earlier. If you think of rules about disaster and avoiding disasters, precaution really comes at the beginning of the list, but it appears there in that sequence.

So far as the word "feasible" which turns up in this context is concerned, New Zealand, in ratifying Additional Protocol I in its declaration, said:

"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 manual.

That obligation is related to the requirement to be found in Additional Protocol I, which is the basis for one of the rules which states:

"Each state must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law."

To move now to a different topic, the obligation to collect and care for the wounded and sick has been in Treaty form since 1964. It appears for NIACs in Common Article 3, as I read earlier, and it takes this form in the customary law study:

"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."

That obligation is supported by another obligation in the next rule:

"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."

That goes back to the principle which Henry Dunant stated at Solferino: "we are all brothers, every person, whichever side of the war they were on, 30,000 casualties just in that one day" were to be treated equally.

The manual, as I say, is consistent with those propositions. It also cites another rule about humane treatment and the provision of article 75 of the Protocol I which I mentioned earlier on fundamental guarantees. That, as I think I also said, is considered declaratory of international law.

I now come to the final part of this paper relating to the issues in 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 ICCPR, the Convention against torture and customary international law all prohibit the use of torture in all circumstances.

The International Court of Justice has declared that the prohibition is a peremptory norm of international law (*jus cogens*). There can be no derogations from that prohibition.

The form of the prohibition in Common Article 3 I mentioned earlier.

In addition to, Protocol II, it takes a somewhat similar form. Just reading the last sentence of paragraph 1 of Article 4, "The parties shall in all circumstances" - oh sorry, "The people who are no longer involved in hostilities or who are not involved in hostilities shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors".

And then without prejudice to the generality of the foregoing, among other things, it's prohibited torture.

Under the Convention Against Torture:

"[n]o state parties shall expel, return [(*refouler*)" in French] 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 relating to POWs, and Article 45 relating to 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 three provisions are not directly applicable because of their subject matter they are about IACs and refugees but their fundamental humanitarian purpose may be seen as relevant.

That purpose also appears in Article 5(4) of the 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, referring there to the ICRC commentary.

Now, obligations under international law relating to the particular Terms of Reference I mentioned earlier may be established in four ways:

Common Article 3, insofar as it may be read as prohibiting the transfer of detainees where there may be a danger of being tortured.

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.

Article 3 of the Torture Convention.

Finally, aiding or assisting another state in the Commission of an unlawful act.

I now run through those four different ways.

Common Article 3 requires that, among other things, those in detention in all circumstances shall be treated humanely. 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 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 (or *non-refoulement*) in such circumstances is a breach as well of customary international law. I refer there to the new commentary on Common Article 3 adopted just three years ago.

The State should not be able to avoid its own obligation bypassing the person in question on to another State where there is a real risk of torture.

Those propositions are supported by practice, government statements, court and tribunal decisions, comments by human rights treaty monitoring bodies and scholarly commentary, and you find the reference in the notes to the ICRC commentary.

There is also broad acceptance of the fundamental rights elaborated in Article 75, as I've said before, including its absolute prohibition on torture and wide support for the proposition that that extends to NIACs again the ICRC customary law study supports that proposition. But again, as I said, that's a recent commentary.

If the situation with which the Inquiry is concerned does involve transfer in reality, then the position adopted by the ICRC commentary, supported by the sources it cites, may become relevant. 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.

Common Article 1, 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 protected; the principle of humanity is at stake.

The ICRC commentary to the Article states two propositions, among others, relating to the obligations 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; that is the first proposition. And the second is that they do everything reasonably in their power to ensure that the provisions

are reflected universally - by other states and non-state parties.

The International Court of Justice has confirmed that reading in the US *Nicaragua* Case back in 1986 and in the *Wall* Case in 2004. And some reflection of the same idea in the very recent opinion relating to the *Chagos Archipelago* Opinion of the ICJ.

I also recall the principle which underlies the provisions of 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. There is a model provided by the agreement between the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan and the New Zealand Defence Force, and I spell out some of the detail of how that mechanism is to work.

I refer as well to a paper by John Bellinger III, I think he is the third rather than the second, relating to the challenges presented by that former Legal Adviser to the State Department.

I appreciate that this arrangement regulates the transfer and 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 the Maya Evans case and the Ottoman case which I refer to there, do help support the Copenhagen process as well. They do provide support for the fundamental humanitarian principles engaged.

I return to the basic obligations of State parties under Common Article 1 read with Common Article 3 to ensure to the best of their ability the prohibition on torture. The obligation is founded on the essential humanitarian purpose of their protection and of the law stated in Article 75 of Additional Protocol 1.

The Convention Against Torture is an issue as well. "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".

Does that obligation apply to actions taken outside New Zealand by the NZDF? What is involved in "return (*refouler*)"?

That the obligation in respect of the handover, to use the neutral term, by one state to the territorial state may operate beyond its territory, 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 other provisions of the Convention. 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. I refer there to a case which is familiar to a number of people in this room. There have also been cases in Canada about the extra territorial scope of the provisions.

The 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 don't take that any further because I think the more direct argument, the argument which may have more direct application, is the argument depending on 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 United Nations Secretariat, by successive Special Rapporteurs and Commission members of the relevant sources, many comments by states on the developing drafts and much commentary by the scholarly community.

Since 2001 when the articles were completed and the UN General Assembly noted them and commended them for the attention of governments 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 commentary, the commission refers in its commentaries, and has been recognised by the International Court of Justice in the Bosnia and Herzegovina v Serbia. Also recognised in the World Trade

Organisation Dispute Panel and in the International Court of Human Rights, they also say as did the ICJ that that provision reflects international law.

It reads as follows, and its wording is important:

"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 would not have occurred, the injury suffered can be concurrently attributed to the assisting and 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 that 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. That view was expressed by the Tribunal as a whole and Judge Shahabuddeen in a separate opinion said the same thing. And so it was said by a judge in the International Court, earlier I said in the International Court, not by the International Court, and I am that

judge who thought that knowledge by itself was sufficient. I can explain that further if needed.

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. All this in the context of genocide where an essential part of the offence of the crime of genocide is that there must be an intent to destroy in whole or in part the particular racial, national and so on ethnic group.

The ICJ, proceeding on the basis of Article 16, did not rule on the point because 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.

So, going back to that text of Article 16 of the ILC provisions on state responsibility, paragraph (a) was not satisfied, in view of the Judges of the Court and the view of the Court on the facts. The authorities in Serbia, and the loss of each Government, did not know what Melovich and Calovich had in mind. I took a different view on the facts, as did other Members of the Court, but the Court did not add to the requirement of knowledge a shared intention.

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 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 was in breach of the duty to ensure respect, to the best of

its ability, for the prohibition of torture in terms of Articles 1 and 3 or is complicit in torture under customary international law.

And fortunately, it's not for me to try to determine the facts. I have done my best to state the law on that point and I have a very clear recollection of the process that was undergone at the end of that very difficult case between Bosnia and Serbia about the dreadful killings that happened in Srebrenica.

SIR TERENCE: Thank you very much, Sir Kenneth.

We have some questions. I wonder if I could start just really where you've left off because you made the comment when you said that in your view knowledge of the wrongdoing was enough and you could explain that further if required, and I note that the Crown challenges that view in its submissions at paragraph 91 and following.

SIR KENNETH: Right.

SIR TERENCE: So, I thought it might be helpful if you could give a brief explanation of that, and it may be that the Crown will make some further observations in their submissions.

SIR KENNETH: Right. If I go to the Court's judgment which was given in early 2007, they say at paragraph 418 of its Judgment, it is a Judgment of the Court. I was always very clear in my time never to refer to the majority, I refer to the Court and on a rare occasion I disagreed and this was one of them:

"A more delicate question is whether it can be accepted that acts which could be characterized as "complicity in genocide", within the meaning of Article III, paragraph (e), can be attributed to

organs of the Respondent or to persons acting under its instructions or under its effective control".

It then fairly soon after that, in paragraph 420, sets out Article 16. And then it said:

"The Court sees no reason to make any distinction of substance between "complicity in genocide" within the meaning of Article III, paragraph (e) of the Convention, and the "aid or assistance" of a state as set out by the ILC in Article 16."

The Court then, in paragraph 421, says:

"Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (*dolus specialis*) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime: the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above".

That is the legal point that the assisting state shared that knowledge.

The Court then immediately says:

"The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which were provided. However, the sole task of the Court is to establish the legal responsibility of the respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied - and continue to supply - the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place."

So, it is not established that that was beyond any doubt. The Court refuses to say reasonable doubt since 1947, part of the civilian influence within the reasoning of the Court.

So, the Court in the next paragraph repeats itself:

"It has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide".

So, the factual basis that is to be found in paragraph (a) of Article 16 is not satisfied. So, the Court did not have to get to that question which it stated in paragraph 421. And that was a critical element in the Court's decision-making. They weren't persuaded by the facts which were set out by two other Judges as well as me that there was knowledge, not shared intent but that there was knowledge of the law.

One of the important things to be said about this is that we're not here concerned with individual criminal responsibility. This is State responsibility, responsibility of a State. And there's nothing in the ILC text to identify any of these obligations as civil or criminal, they're just obligations. They're about the responsibility of the State to act in a certain way.

So, I think it's clear on the face of the Judgment that the Court did not have to - well, they say they did not have to decide that question if the factual basis was not established. And applying a high standard of proof, which I try to apply as well, they came to the conclusion that the facts were not there and, therefore, the issue of law about sharing intent did not have to be approached.

But it's a case that turns on the fact that the critical element of the crime in question was that the intention was to destroy in whole or in part the ethnic and so on group.

SIR TERENCE: Thank you. I want to ask another question that focuses on the role of the State as the principal, the perpetrator, rather than as an aider and abettor.

SIR KENNETH: Yes.

SIR TERENCE: One of the issues - well, I wonder if I could put it in terms of a hypothetical. It's accepted that if New Zealand Forces detained somebody and handed that person to, in this case, the Afghan detention facilities, a range of obligations followed with that and there's no argument about it. There's an argument in this case because the detaining authority was an Afghan entity; police entity.

And the question I have is, when one considers whether the introduction or that change in the factual circumstances is significant, to what extent does one look at it at the level of substance or can one look at it simply at the level of what formerly has happened?

In other words, if a detention is made, in this case by an Afghan authority, does that necessarily mean that the obligations that New Zealand would have as principal would not arise?

SIR KENNETH: Well, they have an obligation as principal in terms of Common Article 1 to ensure respect. But that can be disputed and the point is being made that that depends on what the ICRC has said, except that, you know, the International Court in the cases that I mentioned, the Nicaragua US case, the Chagos opinion, do refer to obligations of [an erga omnesr obligations] owed by every state party to the Geneva Convention, owed in respect of any breaches.

Now, obviously, that's subject to very serious limits in terms of feasibility because what can Tuvalu do about what's happening in Syria at the moment, for instance? And so, there are obviously practical limits.

But that was a deliberate attempt, as I understand it, in Article I to provide primary obligations, not just to comply with but also to secure compliance. That was an attempt to take that point more widely.

That position has been taken as well by meetings of the state parties to the Geneva Conventions in respect of some of the things that have happened in occupied Palestine too.

So, there is a primary obligation there but, as I think I indicated in the paper, I think in a way the more direct route by way of aiding and assisting which runs as well, doesn't it, but I was careful just a moment ago to say this is not individual criminal responsibility because you're in danger of getting into the felony murder rule, aren't you, in some respect, in some of these matters.

SIR TERENCE: Well then, that does raise the question, if you're going to use the aiding and abetting mechanism, what is the state of knowledge? Because, of course, the obligation under the Convention Against Torture arises where there are substantial grounds for believing that something might happen. Is the kind of knowledge that you're talking about in the accessory context, knowledge at a higher level than that?

SIR KENNETH: Well, Article 16 does seem to state a really quite high standard, doesn't it, that "any state which aids or assists is responsible, if it does so with knowledge of the internationally wrongful act". That doesn't seem to allow a real risk or a high probability or whatever verbs and adverbs, adjectives, you want to use there. It's written in a much clearer way.

There is a problem in this area of applying - trying to understand general terminology, general tests, in a particular context, it is a standard common law problem or international law problem, isn't it? You have generally stated principles which then have to be related to particular circumstances and that's why I said in the last paragraph that an awful lot does depend on the particular circumstances of partnering and so on.

It's not a complete answer obviously but I think the strongest argument, in terms of - the strongest direct argument relevant to this is in terms of the aiding or abetting in terms of the primary responsibility, primary wrongdoing.

I discuss in my declaration or opinion or whatever I call it back in 2007, I use various in addition to the cases that are cited, I use various dictionary definitions from French and English and American sources that accomplices and aiders and abettors and so on and so on. And I was conscious when I was doing that of the possible overreach that can come in the application of some of those principles.

There's a decision at the appeal level in the ICTY in which the rather tightly drawn definitions of aiding and abetting were just overwhelmed by a general proposition by that tribunal about the common purpose or something, ignoring the careful detail that had been written into that document.

So, there is a real test here, in terms of general propositions, general principles, which then have to be applied in particular circumstances.

SIR TERENCE: All right. I had one final matter. It's slightly incidental, in a sense, but I was just curious about it.

You made the point that the effects of Protocol II was severely reduced, as you put it, in the final session in 1997 but it's effectively been filled in by customary practice subsequently.

But what were the reasons that the text was significantly reduced? Was it simply effectively a political matter as between some form of colonial powers and freedom movements or was there something substantive to it?

SIR KENNETH: Well, the freedom movements issue had essentially disappeared. At the end of 1974, you can check me on this, the Portuguese Empire fell. The only areas that were left were South Africa, Southern Rhodesia and Israel. They were the only others who were potentially covered. They were going to have - those countries were going to have absolutely nothing to do with this text. So, 1974 was a sort of rhetorical time for the national liberation movements.

They then attended, they were in attendance in 1975 and 1976 when we did all that work and where there was that clear divide between major countries like Brazil, for instance, who kept insisting that there was no need for the Protocol II and quite a number of others but then the Norwegians - it was in French alphabetical order so I was sitting next to Nordesh, they were terribly insistent. One of their main negotiators - there is a danger in this but one of their major negotiators was the legal adviser who handled the Tampa affair some decades later but they were very insistent that war is war and it didn't make any difference whether you're in civil war or internal armed conflict or whatever else. And so, there was this attempt in which the New Zealand delegation was

heavily involved, I mean all three of us, to try to build up that law.

But then, as I said, I wasn't at the final session but there was a deal struck between say Pakistan on the one side, supported, and I never got an explanation from my Canadian friends, supported by the Canadians, and to some extent by the ICRC, to do this deal and strip a whole lot of stuff out, and that's what happened in a very brutal way in 1977.

But, you know, I think there's been a recognition since of the kind of position that was after all recognised by Lieber back in 1863. You know, one of his sons, the one fighting for the confederacy was killed, another one was badly injured fighting for the north. He fought Napoleon as a youngster, he was born in Berlin, and they were, you know, the experience there, and then the experience in the Philippines with one of his other sons, was that all war should be treated more or less in the same way.

Now, that can't be completely true because the insurgents or the rebels are not combatants in the formal sense but one of the things that happened in the Philippines war was a senior military officer, a lawyer too I think, was convicted of waterboarding by the American Court Martials, that was torture. Waterboarding is not a new thing.

So, the real cutting that happened in 1977 has, I think, in subsequent practice, just been recognised as a mistake and there has been this substantial assimilation, not complete obviously but substantial assimilation.

SIR TERENCE: That's all I had, thank you.

SIR GEOFFREY: Thank you. Sir Kenneth, is it fair to say that there is some confusion in the various

decisions of the former Tribunal for Yugoslavia on the points that you have been dealing with?

SIR KENNETH: Well, I haven't - this is in terms of the genesis, definition of genocide?

SIR GEOFFREY: Yes.

SIR KENNETH: Not as I read them. No, the view that was taken then was in respect of people who were aiding but, I mean, no-one has been convicted, I don't think yet, have they, of genocide? Is that right? Milosevic died before that happened.

One of the points that we made both in the Bosnia case and the Croatia case, was that there had been no - there had been almost no prosecutions for genocide at the ICTY. I think there had been a policy there of indicting people, including Milosevic, for far too many things and I think they started to cut back on that.

But Karadzic was prosecuted as an accomplice and that did lead to that ruling by the ICTY but others would be more up-to-date on the more recent, I mean on the later decisions of the ICTY.

SIR GEOFFREY: Can I ask you another question relating to this, and that is, if we accepted the position that you've set out in your expert opinion, is there any decided authority in existence to support that or would that be an extension of what has gone before?

SIR KENNETH: Sorry, on the complicity, aiding and abetting one?

SIR GEOFFREY: Yes, on the aiding and abetting.

SIR KENNETH: Well, that's what happened to Karadzic.

SIR GEOFFREY: Yes.

SIR KENNETH: And I don't know what would have happened if my colleagues had had a different view of the facts.

SIR GEOFFREY: Yes.

SIR KENNETH: I mean, there had been very few proceedings brought in respect of genocide. There had been just the two in the ICJ and Bosnia. Now, that book ended my time, it began with Bosnia complaining about genocide and then Croatia complaining and Serbia counterclaiming. They are the only two that have got to the ICJ and I don't think there's been any other inter-state case.

As I was just saying, searching for other views in the room, I don't think there have been - there have been only a handful of prosecutions for genocide in the ICTY.

In the case of the Rwanda Tribunal, there was no problem, that was genocide, if you accept Hutu and Tutsi are two different groups, which can be disputed apparently.

But that was setup on the basis of genocide being committed, so that was not - there wasn't really a dispute there.

SIR GEOFFREY: So, in the application of this to a torture situation, what have we got in the way of authority on that?

SIR KENNETH: In terms of aiding and abetting?

SIR GEOFFREY: Yes.

SIR KENNETH: I'm probably not up-to-date with all of the - I mean, there are domestic prosecutions for torture quite frequently, aren't there? And sometimes, I imagine, there have been accomplices or people aiding and abetting. I mean, that as a matter of law is quite straightforward within a

national jurisdiction. As I've stressed a couple of times, the Inquiry isn't actually concerned, as I understand it, with criminal liability.

SIR GEOFFREY: No.

SIR KENNETH: It's concerned with State responsibility.

SIR GEOFFREY: State responsibility. But in terms of State responsibility, would any view that we had, that the State was responsible, be in a situation like the hypothetical Sir Terence put to you, would there be anything to support that or would we be extending existing doctrine?

SIR KENNETH: I don't know that I agree with the opposition. I think it's applying existing doctrine.

There is the law widely approved, as widely understood, as reflecting international law in Article 16 of that IRC document and that seems to me to be applicable, depending of course on the facts as I say in the last few sentences, to this situation. So, it would be a matter of applying accepted principle to fact.

SIR GEOFFREY: So, if I can summarise it as I understand it and ask for your comment on it.

If we applied the position as you argue it, depending on what facts we find, that would be a relatively conventional application of existing principle?

SIR KENNETH: Yes, I would see it that way, yes.

SIR GEOFFREY: There is one other matter that I would like to put to you.

There is a New Zealand scholar called Dr Myra Williamson who's written a book called "*Terrorism, war and international law: the legality of the use of force*"

and it's published by Ashgate in 2009 and it's about Afghanistan in 2001.

This author, who hailed originally from the University of Waikato and is I think now an academic in Kuwait, has written this very extensive book making arguments that test to some degree what you said in the beginning of your submission about the power of the resolutions of the Security Council in this matter.

She basically says, "Compelling arguments exist which support the proposition that the use of force against Afghanistan in 2001 was unlawful". That is to say, the decision of the Security Council wasn't lawful.

I just wondered if you had the opportunity to look at those arguments and can you give us your view about them?

SIR KENNETH: Yes, I have looked at that book. Well, she's dealing with the space between 11 September and the date in December of the Security Council Resolution which provides for the taking of all necessary or authorises the taking of all necessary measures. And it seems to me that, well it's always been understood that the Security Council has these enormous powers. No-one would have thought in 1945 that it would have the power to setup a tribunal of the kind that has operated in respect of Rwanda, former Yugoslavia, more recently Lebanon and so on and so on. But those actions have been taken.

And so, the Security Council does have, once it's declared there's a threat to international peace and security or a breach of it, does have these very wide law-making powers.

So, as from that time, I don't think there's any problem at all.

Part of her argument, I think the main part of her argument really is in the period in-between. And in respect of that period in-between, she relies in part on a brief, a very, very brief comment by the International Court of Justice in the *Wall* case where it says that self-defence could be pleaded only if the action being taken against Israel was by a State.

Well, there is no argument given by the ICJ for that proposition and that proposition is unnecessary for the purposes of the ruling it made.

I mean, it made a straightforward ruling that under the 1949 Convention, and really under the rules that go back to 1899 and 1907 Conventions you couldn't use force, you couldn't inhabit and occupy territory with your own people and so on, you couldn't build a wall of the kind that they were building. And all the judges were unanimous on that. There was one judge who said that the court didn't have sufficient facts but on the very basic proposition, he agreed with the basic proposition and so did the rest of the court.

Unfortunately, in that case Israel and the States which were in support or slightly in support of Israel did not present argument. And the only reference that I could find to Article 51 in the pleadings is a couple of statements by Israel in the political organs of the UN where it referred to Article 51 and that wasn't contested, so far as I can see. And there's a comment by France in its written submissions, it didn't appear orally, to Article 51 but it discusses it but without any reference to the State versus State point.

So, I don't think the State versus State point actually works. And there were some separate opinions in which that State versus State position was rejected by other members of the court.

If you go to the Friendly Relations Resolution of 1970, which was adopted unanimously on the 24th of October, it was the 25th anniversary of the UN that says that acquiescing in armed forces, in other people's armed forces against you, is unlawful and is a breach of the obligations in respect of the non-use of force.

So, I just don't find that persuasive but really the main point is that it's not relevant in the present context because it just dealt with those last few months of the year.

It's also the case that the letters written in terms of Article 51 by the United States and the United Kingdom to the Security Council saying they were acting in individual and collective self-defence were not questioned by anybody. So, you know, that's another piece of practice that moves the story along.

SIR GEOFFREY: So, in terms of page five of your expert submission, really when the Security Council takes action under Chapter 7 of the Charter and authorises the taking of all necessary measures to fulfil its mandate, that includes the use of lethal force and detention?

SIR KENNETH: Yes, yes.

SIR GEOFFREY: Thank you very much.

SIR TERENCE: Thank you very much, Sir Kenneth, it's been very helpful.

Well, we are due to stop in 5 minutes anyway, so we'll take the lunch break now and resume at 1.40 p.m.

Hearing adjourned from 12.35 p.m. until 1.40 p.m.

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CROWN AGENCIES JOINT PRESENTATION
BY PAUL RISHWORTH QC

SIR TERENCE: We are now going to move on to submissions from various of the parties on the topics we covered this morning.

First, Mr Rishworth QC will present a submission on behalf of the Crown agencies.

You're free to do it from here and how you go about it is up to you but we will interrupt as you go along if we have questions, rather than wait until the end.

MR RISHWORTH: Certainly, Sir. All right, I'll get straight into it.

The Crown agencies have been invited to provide a presentation on the international law applicable to matters that arise under the Inquiry's Terms of Reference. And the issues are applicable sources of law, including International Humanitarian Law (or IHL) and International Human Rights Law (IHRL) and the interaction of those two bodies of law, customary international law as well and the UN Charter. There's the UN Security Council Resolutions; there's the Geneva Conventions, the additional protocols, and as Sir Kenneth discussed this morning, the law relating to certain aspects of IHL which is distinction, proportionality, precaution and the humane treatment of persons who are not taking a direct part in hostilities.

Now, the Crown's submissions respond to the papers provided by Sir Kenneth and Professor Dapo Akande. They also address other issues not specifically dealt with in

the expert presentations but which the Crown agencies consider are relevant to the Inquiry's Terms of Reference.

It begins with the factual context. In order to consider the legal frameworks that applied to the relevant operations under examination, it is important to consider their factual contexts. For the purpose of this presentation, the following facts are relevant:

a. First, the situation in Afghanistan in 2010 to 2014 constituted a non-international armed conflict, involving an unlawful armed insurrection against the legitimate Government of the Islamic Republic of Afghanistan. Accordingly, IHL applied throughout Afghanistan during this period.

b. Second, there does not appear to be a dispute that the individuals who were the objectives of "Operation Burnham" Abdullah Kalta (Objective Burnham) and Maulawi Nematullah (Objective Nova) were members of the insurgent group involved in the armed conflict, and had been involved in armed attacks against Afghan Government and/or ISAF forces. This is relevant to consideration of whether their capture was a legitimate military objective.

c. There now also does not appear to be a dispute (at least between two of the three core participants) that NZDF had reasonable grounds to believe that insurgent leaders were in the relevant village in Tirgiran Valley on or around the night of the operation. Accordingly, it now generally appears to be accepted that the objective of Operation Burnham itself was legitimate.

d. It has been accepted by NZDF that it is possible unintended civilian casualties occurred when a malfunction in a gunsight on a helicopter providing air

support for the operation caused rounds to impact a building.

e. In respect of the other individuals targeted in operations following their listing on the Joint Prioritized Effects List (JPEL), specifically Allawudin and Qari Musa, there does not appear to be a dispute that they were also involved in the insurgency against the Government of Afghanistan. Again, this is relevant to the determination as to whether they could be lawfully targeted, and whether their targeting could be expected to result in concrete military advantage.

That was the factual background of some matters apparently not in dispute.

The next heading is the "Sources of international law relevant to ISAF operations in Afghanistan".

Here the Crown agencies broadly agree with the general propositions about the sources of international law relevant to the events in this Inquiry, as set out in pages 1 to 6 of Sir Kenneth's report.

It may assist to consider the applicable international legal frameworks from two perspectives. The first is the international legal framework which authorised the use of force by New Zealand forces in Afghanistan. And second, the international framework which regulated the use of force.

And while the Crown agencies anticipate the Inquiry is most interested in the latter, it is also important to consider the former, as it has a bearing on a number of issues before the Inquiry.

There is now a section in the written submission which, with the Inquiry's leave, I will skip, that is the part about the authorisation of the use of force. That

will take me to page 7 where there is the heading "Insurgents" before paragraph 15.

If I might explain the connection between the authorisation of the operation which is the part I've skipped and the subheading "Insurgents": it is to make the point that unlike ISAF (the authorised personnel), the organised armed groups against whom the NZDF were operating at the relevant time were not authorised under either international law (for example under the UN Charter), or the domestic law of Afghanistan to use force against the legitimate Government of Afghanistan or the ISAF forces.

IHL permits members of the armed forces of a State party to a non-international armed conflict and associated militias who fulfil the requisite criteria to directly engage in hostilities. They are generally considered lawful, or privileged, combatants who may not be prosecuted for the taking part in hostilities as long as they respect IHL. Upon capture they are entitled to prisoner of war status. However, civilians who directly participate in hostilities in a non-international armed conflict are not lawful combatants, and may be prosecuted under the domestic law of the relevant state for such action.

Accordingly, the domestic law of Afghanistan is relevant because actions of insurgents by way of direct participation in hostilities (DPH) would be unlawful under that law, rendering such persons subject to arrest and prosecution by Afghan authorities under Afghan criminal law.

That being said, while the insurgents were not authorised to use force, they were nevertheless “parties”

to the armed conflict, and therefore required to observe IHL (as further discussed below).

The next heading is the second of the two propositions I said before one is the authorisation of the use of force and the second, the regulation of the use of force.

We turn to the relevant principles of IHL.

The Crown has been invited to address the principles of distinction, proportionality, precautions in attack, and humane treatment of persons not directly participating in hostilities, including the obligation to collect and provide aid to the sick and wounded. Given its potential relevance to the matters at issue in this Inquiry, these submissions also address the law relating to command responsibility in the context of multi-national military operations.

There is no question that the use of force by ISAF forces in Afghanistan was governed by IHL, both as contained in the relevant body of treaties, and customary international law. It is also generally accepted that the IHL rules applicable to non-international armed conflicts bind organised armed groups and civilians directly participating in hostilities.

Crown agencies generally agree with the propositions set out by Sir Kenneth in relation to the relevant principles of IHL. As Sir Kenneth notes, the texts dealing with the law of armed conflict, or IHL, arose out of and apply in their terms only to international armed conflicts, not non-international armed conflicts. Recognition of non-international armed conflicts came later, by way of common Article 3 to the Geneva Conventions and the subsequent protocols. Crown agencies agree common Article 3 applies in the present context.

They agree that the relevant principles are, in any event, incorporated in customary international law, applying both to international and non-international armed conflict. They also agree that the Red Cross' (ICRC) *Customary International Humanitarian Law Volume 1: Rules* are a convenient resource.

Turning to further discussion of some aspects of relevant principles. First, "Distinction". Common Article 3 by its terms establishes protection for persons taking no active part in hostilities, implicitly withholding such protection for persons who do take such a part. Other IHL provisions reflect the same idea: Article 51(3) of the Additional Protocol I and 13(3) of the Additional Protocol II: they each say civilians may not be targeted "unless and for such time as they take a direct part in hostilities".

The Crown agencies agree with both Sir Kenneth and Professor Akande that the principle of distinction has been incorporated into customary international law applicable to both international and non-international conflicts. The rules numbered 1-7 of the ICRC commentary or the *Rules*, Rules 1-7, deal with distinction and are designed to be read together.

Rule 1 is qualified by Rule 6, which provides:

"Civilians are protected against attack *unless and for such time as they take a direct part in hostilities*".

As the commentary on Rule 1 of the ICRC CIHL Rules notes, and as is apparent from Professor Akande's paper, in the context of non-international armed conflict, there is an ongoing discussion as to whether people who are not members of the armed forces, but who nevertheless directly participate in hostilities against the Government are to be treated as “combatants” for the

purpose of Rule 1, such that they can be lawfully targeted at all times on the basis of their status, rather than on the basis of their conduct.

Strictly, combatant status is only relevant in international armed conflict. The implications of being recognised as a combatant in an international armed conflict are significant, as only combatants have the right to participate directly in hostilities. Upon capture, combatants are entitled to prisoner-of-war status and may neither be tried for their participation in the hostilities nor for acts that do not violate IHL.

One possible view is that civilians who directly participate in hostilities in the course of non-international armed conflict, without lawful authorization under either international or domestic law, forfeit civilian status and are so-called "unlawful combatants" or "unprivileged belligerents". As such they both lose the protections to which civilians are entitled, and lack the benefit of combatant status, most notably combatant immunity from prosecution.

However, New Zealand does not take that approach. Under New Zealand's approach there are only two categories of individual in an armed conflict: combatants and civilians. Specific legal liabilities and protections apply to each category. Although direct participation in hostilities deprives civilians of immunity from attack, they do not lose their status as civilians *per se*, and are accordingly subject to the relevant liabilities and entitled to the relevant protections. Accordingly, the NZDF, in its current manual on the Law of Armed Conflict, specifically avoids the use of terms such as "unlawful combatant" in order to avoid a suggestion that such persons fall between

combatant and civilian status and can be denied fundamental rights.

SIR TERENCE: Can I inquire about this? Is the effect of recognising only those two categories, that the combatant class in a non-international armed conflict could only include government forces and evolutions I guess supporting the Government?

MR RISHWORTH: Yes, yes, yes.

SIR TERENCE: So that the insurgent forces, no matter how organised they are, will nevertheless be conceptually civilians?

MR RISHWORTH: Civilians who may be taking a direct part in hostilities, yes.

SIR TERENCE: That does seem slightly odd to me but is there a practical difference between taking that view and the other view?

MR RISHWORTH: The view that Professor Akande makes?

SIR TERENCE: Yes.

MR RISHWORTH: No. The end point one reaches would be the same.

SIR TERENCE: Okay.

MR RISHWORTH: That is a position that is I think recorded on the next page.

Just to continue, that was at paragraph 31, on New Zealand's approach members of organised armed groups are civilians. However, membership of an organised group may provide evidence that a civilian is directly participating in hostilities, as those that are sufficiently connected to the combat capability or function of an organised armed group will be seen as taking a part of "continuous" DPH (continuous direct participation in hostilities) and therefore lose

protection from attack for so long as they remain a member.

I would add here, Sir, being civilians: conceptually subject to Afghanistan law with no special immunities that would arise out of being combatants.

I have then set out in the submissions the NZDF Law of Armed Conflict manual which states the proposition, I can omit that.

Moving to 32. On this approach, membership of an organised armed group is evident from which the fact of direct participation in hostilities may be determined. This allows for targeting of members of organised armed groups for such time as they directly participate in hostilities on the basis of their conduct, rather than the fact of membership providing, in itself, a lawful basis for targeting due to some form of combatant status. It is for this reason that the Crown takes a slightly different conceptual approach to the status of members of organised armed groups in non-international armed conflict than that described by Professor Akande in paragraph 14(a) of his paper.

However, as noted by Professor Akande, his preferred analysis of the status of members of organised armed groups and the approach of New Zealand, while conceptually different, in practice lead to practically equivalent results.

SIR TERENCE: In that sentence in 32. The second sentence "for such time as they directly participate in hostilities", are you talking about the organised armed groups or a member?

MR RISHWORTH: It would be the members for such time as they directly participate on the basis of their

conduct, that is their ongoing membership of the organised group.

SIR TERENCE: So you would have to establish not simply that somebody is a member of an organised armed group but they are continuing to support that armed group in its endeavours?

MR RISHWORTH: That would be correct.

I am halfway through paragraph 33. It's this conclusion, perhaps I should just go back a bit. That led to a fuller result, so a member of an armed group that is engaged in continuous hostilities may be target for attack.

It is this conclusion that formed the basis for Rule H of the Rules of Engagement for Operation Wâtea, including the authority to target members of the specific organised armed groups referred to in that rule. To the extent that Professor Akande's analysis supports the lawfulness of this ROE, and targeting on the basis of this ROE, the Crown agrees with his analysis.

Evidence of membership of an organised armed group is also not the only basis upon which a person may be determined to be directly participating in hostilities. It is, of course, also possible to determine that a person is directly participating in hostilities on the basis of their conduct (for example, hostile acts or demonstrations of hostile intent), without determining whether they are a member of an organised armed group. This will be discussed further.

The concept of DPH and New Zealand's interpretation of this concept is discussed in detail in the manual, the NZDF Manual, and further discussed tomorrow by Brigadier Ferris, so I won't discuss it further in this presentation.

Moving to the principle of distinction. And the heading is, "The principle of distinction concerns intentional targeting".

The principle of distinction is concerned with direct attacks. It does not prohibit attacks against legitimate military targets that incidentally result in harm to civilians or civilian objects. Such attacks are lawful, provided they comply with the principle of proportionality (to be further discussed).

Similarly, the rule is concerned with prohibiting intentional targeting of civilians or civilian objects. This is illustrated by the fact that Article 8(2)(e)(i) of the Rome Statute of the International Criminal Court (ICC) provides that it is an offence to "intentionally" direct attacks against the civilian population or against individual civilians not taking direct part in hostilities. It is the intent that matters.

Accordingly, an intended attack on civilians or civilian objects will be unlawful regardless of whether civilians are in fact harmed. Conversely, an unintentional attack on a civilian or civilian object, for example based on a genuine mistake as to their status, will not be a breach of the principle of distinction. However, depending on the circumstances, it may involve a breach of the obligation to take precautions in attack.

The next heading is "Situations of doubt as to the character of a person". In the event of doubt as to whether a person to be attacked is a civilian or a combatant (or a civilian directly participating in hostilities), he or she shall be assumed to be a civilian.

Although there is agreement that this principle reflects customary international law in both international and non-international armed conflict, concern has been expressed as to how this rule is to be interpreted. At the time of ratification of API, which codified the principle in international armed conflict, some States expressed their understanding that the presumption of civilian status does not override a commander's duty to protect their forces.

The commentary on the ICRC CIHL Rules notes that, “The issue of how to classify a person in case of doubt is complex and difficult.” The commentary also cites, with some approval, the following quote from the US Naval Handbook:

"Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behaviour, location and attire, and other information available at the time".

Accordingly, the commentary concludes that “When there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious.”

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has recognised that, in certain situations, particularly due to the failure by a party to hostilities to properly distinguish themselves from the civilian population as required by IHL, it may be difficult to ascertain the status of a particular person. In such cases, “the clothing, activity, age, or sex of a

person are among the factors which may be considered in deciding whether he or she is a civilian".

The ICTY has also held that in order to satisfy the *mens rea* element to establish an offence of intentionally targeting a civilian, the prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked and to do this "the Prosecution must show that in the given circumstances *a reasonable person could not have believed* that the individual he or she attacked was a combatant."

The above discussion is reflected in the NZDF Manual on the Law of Armed Conflict, as follows and again, I'll take the quotation there as read, unless you'd prefer me to read it.

The next heading is, "The obligation for combatants to distinguish themselves".

The principle of distinction also requires those taking part in hostilities to distinguish themselves from civilians, in order to allow for distinction to be made, and to therefore promote the protection of the civilian population.

In international armed conflicts, combatants who fail to distinguish themselves do not qualify for prisoner-of-war status, and combatants who deliberately feign civilian or non-combatant status may be guilty of perfidy. These rules are strictly only applicable in international armed conflicts, as there are no "combatants" in non-international armed conflicts.

However, under the Statute of the International Criminal Court, "killing or wounding treacherously a combatant adversary" constitutes a war crime in non-international armed conflicts, which indicates that it is unlawful for a party to a non-international armed

conflict (including a member of an organised armed group) to feign civilian status in order to attack an adversary. The ICRC has also posited that "if civilians are to be respected in non-international armed conflicts as prescribed by the applicable provisions of IHL, those conducting military operations must be able to distinguish those who fight from those who do not fight, and this is only possible if those who fight distinguish themselves from those who do not fight."

So, the next heading is, "Proportionality in attack".

The principle of proportionality is codified in the context of international armed conflicts in Article 51 of API. It is also found, in the context of precautions in attack, in Article 57(2). Although no explicit reference is found in AP II, it is widely viewed as customary international law in both international and non-international armed conflict. Accordingly, ICRC CIHL Rule 14 provides as follows:

"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".

In essence, the principle of proportionality is a recognition that harm to civilians and civilian property can be an unavoidable result of attack on a military objective. Accordingly, it has been described as an explicit effort to achieve balance between military and humanitarian requirements.

The test is whether the incidental loss of civilian life, damage to civilian objects, or a combination thereof, would be excessive in relation to the

anticipated military advantage. This is a relative standard, requiring a balancing of military and humanitarian considerations. Accordingly, an attack against a legitimate military target is lawful, notwithstanding that it may cause incidental harm to civilians, so long as the expected harm to civilians is not excessive when balanced against the anticipated military advantage gained through the attack. This is reflected in Rule I of the ROE for Operation Wâtea.

Civilians who directly participate in hostilities are deprived of the normal civilian immunity from attack, and therefore harm to them is not factored into the proportionality calculation.

The applicable standard relates to the 'expected' harm and 'anticipated' advantage. Accordingly, the rule applies as of the time an attack is planned, approved and executed, rather than involving hindsight examination of the incidental harm caused to civilians and civilian property or the actual military advantage that resulted.

The test is also an objective one. The question is what degree of harm (on the one hand) and military advantage (on the other) would a reasonable planner, commander or combatant in the field have concluded was likely, on the basis of the information available to them at the relevant time?

SIR TERENCE: That last bit "on the information available to them at the relevant time", there's no concept of reasonability built in at that point? In other words, is a planner, a reasonable planner, under an obligation to attempt to find out the sort of information that he or she would expect to have or can they just rely on the information that they in fact have?

MR RISHWORTH: Yes, that's not a question I can answer just right now but one that we can address in written submissions.

SIR TERENCE: Okay, thank you.

MR RISHWORTH: I'll take it up at the next page, at page 17, the heading of "Precaution in attack".

Customary international law applicable in non-international armed conflict imposes obligations on the parties to a conflict to take all feasible precautions in attack to avoid, and in any event minimise, incidental injury to civilians or collateral damage to civilian objects.

The obligation to take all “feasible” precautions has been interpreted by many States (including New Zealand) as being all those precautions which are practicable or practically possible, taking into account all circumstances at the time, including humanitarian and military considerations. In other words, it is a contextual determination. Factors which determine feasibility include, for instance, enemy defences and the placement of military objectives relative to civilian property. Ultimately, feasibility is a matter of 'common sense and good faith'.

The requirement to take feasible precautions in attack includes a requirement to take all feasible efforts to verify the target and to assess the likely incidental harm to civilians. The intent of this requirement is to provide sufficient information to permit an attack to be conducted with reasonable certainty that the target is a military objective (i.e. to comply with the principle of distinction) and that the attack will comply with the principle of proportionality. The requirement to verify targets is contained in Rule H

of the ROE for Operation Wâtea after its amendment in December 2009.

The level of certainty required to comply with this requirement will vary according to the circumstances, and what the available time, resources, intelligence, and other factors allow. This will obviously be influenced by the factual context of the attack, and the role of the individual planning or executing the attack. So, for example, it is logical that it will be more feasible for a military planner to take various steps to verify that a deliberate target is in fact a military objective during the planning of an operation, than it would be for a soldier during the heat of an engagement to verify whether a particular individual is directly participating in hostilities.

SIR GEOFFREY: Mr Rishworth, the problem here is we have to apply this law in a situation of what I might call asymmetrical warfare, where you have a disciplined armed force on the one hand and a group of insurgents who are not clearly identified, and you have to be able to do some research on that in advance by planning a military operation. But it's really very difficult, isn't it?

MR RISHWORTH: I expect it is and it would be something that you could take up in particular with Brigadier Ferris I expect tomorrow relating to the operational side of it.

SIR GEOFFREY: Yes.

MR RISHWORTH: But, no, there would be no disagreement with the proposition you've just put.

At paragraph 58 is where I am. The requirement to verify targets may require steps to verify whether a person is directly participating in hostilities. Similar

to the condition noted by States prior to the ratification of AP I in respect of the presumption of civilian status in cases of doubt when determining what steps are feasible in verifying that a person is directly participating in hostilities, a commander is also entitled to consider his or her obligation to ensure the security of their own forces. Accordingly, for example, it would not be required for a commander, or individual soldier, to wait to be fired upon before launching an attack, even though to do so would be a 'feasible' way to verify that an individual or group was directly participating in hostilities.

The principle of precaution must also be read alongside the principle of proportionality. Accordingly, the obligation to take precautions to avoid or minimize civilian casualties does not mean that any attack that might result in civilian casualties, notwithstanding such precautions, is unlawful. So long as precautions are taken to minimise civilian casualties, and the expected civilian casualties are not excessive in relation to the anticipated military advantage, such attacks are lawful. Accordingly, the requirement to take precautions does not equate to a requirement to avoid any attack that might result in civilian casualties.

And the next heading is, "Precautions against the effects of attacks".

Parties to a conflict who are subject to attack shall, to the extent feasible, endeavour to remove civilians and other protected persons and objects under their control from the vicinity of military objectives, avoid locating military objectives within or near protected persons or objects, and take other measures that are necessary to protect civilians and civilian

objects under their control against the dangers resulting from military operations.

This obligation prohibits, for example, a party to the conflict from placing a military objective within a civilian building.

Similarly, under no circumstances may the presence or movements of civilians be used to shield a legitimate target from attack, or to otherwise enhance a party's operations or impede her or his enemy's.

A violation of the prohibition on human shielding does not release a party to depart from its legal obligation with respect to civilians.

I am just going to check the time because it's possible that you might wish me to be getting to the detention part and the IHL. The next section is the obligation to collect and care for wounded and that is to be addressed tomorrow. I could just omit that section and go to the next and return to it -

SIR TERENCE: That is probably the way to do it, yes.

MR RISHWORTH: That will take me to page 20 and the next heading is, "Command responsibility in multinational operations".

I am at paragraph 70. The Inquiry may consider the responsibility of members of the NZDF for the actions of members of the military of another State during Operation Burnham is a relevant issue before the Inquiry.

Under treaty law and customary international law, commanders can, under certain circumstances, be responsible for war crimes committed by their subordinates. While they are phrased slightly differently in different cases, there is general consensus around the essential elements for the proof of command responsibility. In the Confirmation of Charges

Decision in *Bemba*, the ICC Pre-Trial Chamber summarised the material and subjective elements required for criminal responsibility under Article 28(a) Rome Statute as follows:

(a) The suspect must be either a military commander or a person effectively acting as such;

(b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute;

(c) The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them;

(d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in article 6 to 8 of the Statute; and

(e) The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution."

The NZDF has provided a description of the command relationship between the coalition forces in the relevant operation in a recent memorandum.

As the above elements show, any liability of a NZDF commander for acts committed by members of another State's forces would first require that the acts were unlawful, and that the commander had knowledge of them.

SIR TERENCE: Can I pause there? The only practical context in which this might arise, I imagine, is in terms of the relationship between the Ground Force

Commander and the air assets. If we were to assume that the air assets did act in breach of their Rules of Engagement or something of that sort, and therefore arguably breached the International Humanitarian Law, we would have to look at the basis on which the Ground Force Commander cleared the action that the air assets took, assuming they sought its clearance.

Now, if the Ground Force Commander, let's assume, gave a clearance to engage that didn't fully meet the criteria, for example he didn't ask whether insurgents had been positively identified or he didn't say/inquire about the possibility of collateral damage, would that Ground Force Commander have knowledge under this test or not?

MR RISHWORTH: I would find that a difficult question to address on the vantage point of not being aware of all of the facts operationally that are in play on the evening in question. But I would say that the question as to what events before the Inquiry do these propositions relate; yes, substantially the events that Your Honour is describing.

SIR TERENCE: Well, let me put it another way. I mean, does it require knowledge that the air asset is not going to comply with its ROE and, therefore, may well breach International Humanitarian Law or does one look at it on the basis that the Ground Force Commander did not fulfil his proper role and this damage resulted and that is enough? That's my query.

In other words, is it a kind of recklessness approach or does it require positive knowledge that the air asset would not act appropriately?

MR RISHWORTH: Yes, I understand the question. My hesitation in hazarding a direct answer to it, although promising to prepare a written one, is because of my concern about some prior questions that would come before that one about the nature and role of the Ground Force Commander.

SIR TERENCE: Right, okay.

MR RISHWORTH: I certainly appreciate the question.

SIR GEOFFREY: The Defence memorandum, to which you earlier referred, points out that the ground force has a set of ROEs and the air assets have a different ROE, they may be similar but they're not the same, and each of these forces has to follow its own ROE.

MR RISHWORTH: Indeed, Sir, yes.

SIR GEOFFREY: And that seems to indicate there's a difference between - I mean, the result might be the same but it might be different?

MR RISHWORTH: Yes. To the extent that the air assets following or the commanders there need to propose questions to the Ground Force Commander in order to establish the criteria for their ROE, that's one thing. But, as I say, I think it's going to be best to answer those questions in a way that teases it out in a more comprehensive way than I feel I can do justice to.

SIR GEOFFREY: Okay, thank you.

MR RISHWORTH: That would take us then to page 22 and the next heading which is, "Protection of those in detention".

This is the matter upon which we were dealing with just before lunch with Sir Kenneth's presentation.

In part 6 of Sir Kenneth's opinion he directly addresses the law relating to the protection of those in detention, with reference to the named paragraphs of this Inquiry's Terms of Reference concerning the transfer and/or transportation of Qari Miraj.

Issues related to detention have been addressed in detail in the Crown's presentations in Module 2 and the submissions of 13 June that followed Module 2.

What follows is essentially a response to the points Sir Kenneth has made in his presentation rather than an attempt to traverse that ground again comprehensively.

I say in paragraph 78, the application of the law in this area is highly fact-dependent. For this reason, the Crown agencies anticipate they will need to make further submissions based on the Inquiry's preliminary findings of fact in due course.

Sir Kenneth sets out four ways obligations under international law might be established with respect to the Terms of Reference. He addresses each in turn. The Crown agencies will not traverse these topics in detail in light of the attention that was given to matters concerning detention in the presentations and submissions during Module 2. However, Crown agencies take the opportunity to respond in brief to Sir Kenneth's comments.

At the outset, the Crown agencies reiterate the point made in submissions that to establish responsibility for any violation, there needs to be a jurisdictional link between a duty-bearer and a particular individual. While certain obligations may apply “at all times”, this does not equate to actors being duty-bearers with respect to all people, everywhere. That is, the obligation on a party to a

conflict to treat persons humanely requires their treatment to be within that party's power. This jurisdictional requirement presents a limit on the extent of the obligation with respect to preventing inhumane treatment by others.

I will omit the next two paragraphs and just come to the first of the four bases of potential jurisdiction that Sir Kenneth highlighted.

"*Common Article 3 in so far as it may be read as prohibiting the transfer of detainees where they may be in danger of being tortured*"

As set out in earlier submissions, the Crown accepts it has *non-refoulement* obligations to persons detained by New Zealand forces and whose movement is within New Zealand's control to compel. A transfer implies this level of control. For the reasons set out in detail in submissions following Module 2, the Crown agencies take the view that no such transfer was possible in partnered operations where any detention was carried out by Afghan forces under the authority of the Afghan Government, consistent with the mandate provided to international forces under the relevant resolutions of the UNSC.

Then I turn to 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.

Sir Kenneth draws attention to Common Article 1 of the 1949 Convention, which requires the State parties in all circumstances not only to respect the Conventions but also to ensure respect for them. As discussed over the course of Module 2, New Zealand forces were engaged in a mentoring relationship with Afghan law enforcement personnel/officials designed to promote a greater

understanding of and adherence to human rights and international obligations within Afghanistan. Through this mentoring relationship, New Zealand was directly engaged in seeking to ensure respect for, *inter alia*, IHL and IHRL. Furthermore, New Zealand was part of a wider effort by the international community, under the auspices of the mandate provided by the UNSC, to develop the capacity of the Afghan security forces and criminal justice system in order to strengthen compliance with the rule of law and human rights standards. Accordingly, New Zealand, as part of the overall international contribution in Afghanistan can therefore be considered to have fulfilled relevant obligations under Common Article 1.

SIR GEOFFREY: Do you think, Mr Rishworth, that mentoring relationships could in some circumstances have such a significant New Zealand element in them that they became - that element was so significant that it drew New Zealand into an obligation?

MR RISHWORTH: Well, I suppose in principle that is conceivable, but I would not accept that the circumstances, as I understand them in this case, would approach that, some distance from it.

SIR GEOFFREY: We had quite a debate about this last time.

MR RISHWORTH: I know, Sir. I think it's salient in that respect, that Sir Kenneth sees the most compelling argument for the point of view that we're discussing here, of which the Crown is expressing disagreement, is in fact the Article 16 and aid and assistance.

And so, because I'll be coming to that in some detail, that would embrace my, sort of, rejection of that

proposition, that we are in that territory just in a mentoring relationship.

But, as I said at the start, and as the previous submission said, there's always the possibility of a sham arrangement, in which something is made to look like somebody else is doing it when you're really doing it yourself.

SIR GEOFFREY: It might not have to be a sham to reach a threshold where you might want to consider this issue because it might be that there are so many New Zealand elements involved in different features of the operation that but for the New Zealand involvement, there would be no operation.

MR RISHWORTH: Yes. I mean, again one can speculate about the facts and in the abstract that may well be so and so the question is, is this a case like that? Against the background of what an international coalition is and what it was designed to do, the countries of the world who are in that coalition are there with the mandate of the United Nations to do the very thing that they're seeking to do. New Zealand, as you know, is a small force they're amongst many others, it can't do everything, it does some things here, many other countries are doing things there.

While in principle either the sham situation or the situation, Sir Geoffrey, that you describe if not a sham but there's so much of it that it really counts as New Zealand I think the submissions will be on the facts that that just isn't the facts in this case but it's something that I can't take further in this forum.

So, that was all under paragraph 84 on page 24, I think.

At paragraph 85, this is still talking about Common Article 1 in terms of the obligations to secure respect for the Conventions and common Article 3.

Sir Kenneth also points to the Arrangement of 12 August 2009, concerning the transfer of persons between NZDF and the Afghan authorities, as a possible model for 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".

Sir Kenneth himself acknowledged that this arrangement "may not extend to partnering or close support situations." Crown agencies affirm this view and note that this arrangement only applied to detentions effected by New Zealand forces and not those carried out by the Afghan National Security Forces with New Zealand support. Neither the terms of the arrangement, the context within which it was developed, nor the clear intention of the participants at the time it was concluded anticipated that the arrangement would regulate transfer in partnered operations where detention was carried out by Afghan forces with New Zealand support (consistent with the mandate provided to New Zealand forces). Rather, the arrangement was designed to apply with respect to individuals detained directly by New Zealand.

SIR GEOFFREY: So, the protections of the torture Convention are relaxed when Afghans are doing the detaining, even if New Zealand helps them, but they're not relaxed if New Zealand does the detaining?

MR RISHWORTH: Well, no, the Convention speaks with one message consistently to everybody, and it is not to breach it.

SIR GEOFFREY: And, therefore, New Zealand might want to say to Afghanistan 'let's not take people to this facility because people get tortured there'.

MR RISHWORTH: Well, that's probably best dealt with under the question of whether it is aid or assisting because your question assumes a sort of level of knowledge about something which is addressed under that heading of 'does that constitute aiding or assisting?' I think my point would be that we've got that concept which is yet to come. A degree of knowledge which takes you there would be something we've got to talk about but if it's not that, then there's the non-refoulment obligation whether it's detention.

But beyond that, if there isn't that, then we have a situation where the whole mission of the coalition forces in being there is to assist and aid to improve the justice system. Sure, Sir Geoffrey, your question was, well if they know this, but my point is if they know that then we're heading down a different path that we haven't had to come.

SIR GEOFFREY: If it's a pre-emptory norm of international law as it's clear that it is, that you have to avoid, that should speak to all nations at all times, shouldn't it?

MR RISHWORTH: Well yes but it's a question of what - it does in the sense that it becomes a matter *erga omnes* and therefore that speaks to the procedure by which people can commence cases about it and universal jurisdiction and so forth. But

beyond that - and if there's a knowledge that this is going to happen and it reaches a level I am about to describe, then we're into possibly describing aiding and abetting assistance. But if it's not that, and it doesn't reach the level of being that the judgment in aid that a transfer of a person that you are detaining would be to a real risk of torture, then of course the *non-refoulement* obligation attaches to that.

But if it's not that, if it's something less than that, then the submission is that what the New Zealand Defence Forces are doing to promote respect for the principle against torture, is being there as part of this international coalition to raise the level of compliance generally and to restore Afghanistan to a -

SIR GEOFFREY: Well yes but, you know, October 2011, there was a large report done by the United Nations that said significant numbers of Afghan institutions there was systematic torture being undertaken, including the one to which one of the people were sent there. I mean, how much do you have to know, to know?

MR RISHWORTH: Well, that's what I'm coming to, Sir, and that's what the Inquiry will be needing to consider but the submission - can I just move on?

SIR GEOFFREY: Yes.

SIR TERENCE: Just before we go there, could I try to put this in an alternative way?

In a situation where the New Zealand forces capture somebody and hand that person over to the Afghan authorities, it's accepted that New Zealand has certain obligations and that's what the discussions with the Afghan Government were designed to deal with and

New Zealand have the ability to monitor the way that the detainee was kept and so on.

But my understanding is that that detainee enters the Afghan system and may well end up being prosecuted as an insurgent or something like that under Afghan domestic law.

Now, on the Crown theory about the partnering operation, on one view of it all that happens is that the person who is captured, by whomever, enters the Afghan system in a slightly earlier point. So, let's accept for the sake of argument the detention is carried out by the Afghan authorities, but New Zealand provides a security cordon and does the processing and all the rest of it, delivers the person to the facility. The Crown argument is that, well, we cannot interfere in Afghan internal processes. And the question I have is, why could New Zealand not have made the same sort of arrangement as it made when it did the detaining in that second type of case? I mean, how is it, at the moment I don't quite understand, how is it that the principles fundamentally change?

If you have a concern when you capture somebody that you're handing him or her over to an environment where he or she may be tortured, and you accept obligations to do things to ensure that that doesn't happen or try to ensure, how does it change when you are basically doing the same thing, in terms of in an operational sense, except somebody else is carrying out the detention?

Why can't the same arrangements be made? We want to be able to monitor this detainee. In what sense are you interfering with Afghan internal processes?

MR RISHWORTH: So that, the proposition or the question is the *non-refoulement* obligation ought to be parallel on the detainee?

SIR TERENCE: Effectively, yes, that's exactly the point.

SIR GEOFFREY: That's exactly it.

SIR TERENCE: And my question is, I just do not understand why we're told that's jurisdictionally impossible; why?

I mean, New Zealand is taking on a responsibility to interfere in the Afghan system in respect of people it captured. Why is it different where it is heavily supporting a detention by an Afghan authority?

MR RISHWORTH: I understand the question. It may be most efficient for again submissions following the hearing to address that in a comprehensive way. I think it would include, for example, the proposition that the capabilities of a small force that's there to become a monitoring agency. It's one thing to acquit yourself of a *non-refoulement* obligation of persons who do the same but to be there to support the Afghan authorities and to premise Your Honour's questions, there's some degree of knowledge which is somehow different from that which engages Article 16 and complicity, and that that degree of knowledge, if it exists, generates this, not just a *non-refoulement* obligation, which is not sending a person somewhere, but on the scenario that the Inquiry is describing, it would be an obligation of monitoring and enquiry.

I suppose, amongst the answer that might be given is, well, that is part of what's happening in the ISAF

arrangement. That's why the forces are there, that's what the mandate is, to put the forces of the world there to improve the system. And to visit upon the individual coalition partners this obligation to become the monitors and to have prison visiting capacity and so on, as to expand the nature of an international mandate in a way that might make them unworkable and unattractive.

So, I imagine that the answer will take us into that sort of area, but it's a complex and multifaceted sort of answer, which is why it would be one that would be better in writing.

SIR TERENCE: I am happy for that. The Crown, as you've mentioned, after the last hearing put in a substantial submission, a very helpful submission, on this whole topic, but fundamental to that was this jurisdictional issue.

MR RISHWORTH: Yes.

SIR TERENCE: We can't interfere with the Afghan process and, in a sense, that is of course right. But the fact is, when the capture is made directly there are obligations, New Zealand attempted to live up to them and accept certain flow-on obligations. The question is simply, well, why doesn't the same apply in this situation? And the answer, to my way of thinking, has to be something other than a jurisdictional one. That's all I'm signalling.

MR RISHWORTH: Yes, Sir. Well, yes, the previous submissions were, as you say, directed to that jurisdictional question and I understand your question, so I'll respond to that in writing.

SIR TERENCE: Thank you.

MR RISHWORTH: That takes me to Article 3 of the Torture Convention.

New Zealand's position with respect to the Convention Against Torture and related non-refoulement obligations has also been addressed in detail in the Crown's submissions following Module 2. As set out in these submissions, the Crown Agencies accept that *non-refoulement* obligations apply where New Zealand detains and transfers a person.

Sir Kenneth uses the term "handover" by one State to the territorial State. The Crown agencies submit that handover, in the same manner as "transfer", implies a degree of control sufficient to compel movement of a person. For the reasons already given, the Crown agencies submit that, given the mandate of foreign forces in Afghanistan and the particular factual circumstances of partnered operations, this degree of control by New Zealand was not a feature of partnered operations.

I turn then to aiding or assisting another State in the commission of an unlawful act because this is what Sir Kenneth posited as the most direct route to the question that, as he saw it, the facts might, if they were decided in a certain way, generate.

Sir Kenneth suggests that, in establishing aiding and assisting, customary international law does not require that the aid or assistance be given with a view to facilitating the commission of the wrongful act. That is, he considers that there is no requirement for a shared intention. Rather, "knowledge of the wrongdoing is enough". No additional comment was made with respect to the level of knowledge, on the part of the provider of aid or assistance, that may be required.

If I may foreshadow in the discussion that comes, therein lies what might be disagreement with Sir Kenneth but I'm not sure that ultimately it is. I think there's

a substantial amount of common ground. It really is the fact that the matter has only been before the ICJ in cases about genocide where, on the view that Sir Kenneth took, we have somebody being a supplier of poisonous gas for the purposes of genocide being supplied in the knowledge that it was going to a person who was going to use it for genocide. And the point was being made: you don't need any extra finding of an intent on the part of a supplier to perpetrate the genocide. It was enough that the intent was to supply the gas to somebody that you knew was going to perpetrate the genocide.

The Crown Agencies' reflection on that, is that that really describes one end of a very broad spectrum of possibilities in the circumstances of life and conflicts, and the knowledge that is found to exist there is very, very close to intent. And, as the commentators say, as discussed in the submission, that knowledge can be the flipside of intent.

If the knowledge is that something will happen with virtual certainty and that you then engage in that act knowing that it will happen with virtual certainty, it's not impossible to say that that's an intention, that's sufficient for the purposes of Article 16. So, that's essentially the proposition that's set out in the paragraphs that follow.

I don't regard that as really a disagreement. It's just that it's focusing more closely on what knowledge means in particular circumstances because everything that Sir Kenneth says, obviously what he says about what the ICJ did and didn't decide, is exactly as he says. It wasn't a question that was reached.

I set out at paragraph 93 the Article that we're talking about, Article 16:

"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) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State".

And here, the international wrongful act alleged to have occurred is the torture of Qari Miraj by Afghan authorities; and the suggested basis for a complaint against New Zealand is that it aided or assisted that alleged wrongful act by transfer or transportation of Qari Miraj to the Afghan authorities with knowledge of the pending torture.

So, the Crown agencies' response to that:

First, they observe that, irrespective of whether a secondary actor needs to share the intent of a primary actor in order to establish complicity, there first needs to have been a primary wrongful act or violation, the perpetration of which was assisted. There can be no complicity in an act that has not been shown to have occurred.

I just add that, of course, in the genocide case, it was a finding of fact of course there had been a genocide, and the question is complicity in that.

Over the page to 96. Second, and in any event, Article 16 requires "knowledge of the circumstances of the internationally wrongful act". This, as the ICJ explains in the *Bosnian Genocide* case, means "there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way". "In other words" said the ICJ, "an accomplice must have given support

[there, in perpetrating the genocide] with *full knowledge of the facts*."

The Crown agencies' Module 2 submissions already address the salient facts here, namely that: There is no evidence to suggest that New Zealand had knowledge that the ANSF intended to torture Qari Miraj, or that it acquiesced or connived in any torture; no evidence suggested individuals detained by ANSF were routinely tortured at the time; the finding of the English High Court in *Maya Evans* related to a detention facility other than the one to which Qari Miraj was transferred; and the New Zealand Government had received information indicating that, post the *Evans* case, practices had improved. It cannot in the circumstances be said that the transfer/transportation was made by New Zealand *in the knowledge* of a pending act of torture.

SIR TERENCE: Just on that proposition that no evidence of the time suggested individuals detained by the ANSF would be routinely tortured. I think the UNAMA study that came out later in 2011, that Sir Geoffrey referred to, was a study carried out between about mid-2010 and the early part of 2011, and it looked at what had happened in various facilities around that period. They certainly do conclude that there was evidence of systematic torture at facility 90 which is where Qari Miraj was taken to.

So, this raises the question, I guess, of, again, what does "knowledge" mean? Does it mean what you actually know or what you could with reasonable diligence have found out if you put your mind to it? So, it goes back to that sort of earlier -

MR RISHWORTH: Yes, Sir. My submission would be that it is what you actually know. To the extent that there's discussion in the literature of sort of relaxation from that, it's the case of wilful blindness that is a conscious decision not to inquire.

But negligence, no. And I say that because that mirrors what in domestic law of most nations is required for criminal aiding and abetting; that there must be a knowledge of the act and negligence and taking steps to -

SIR TERENCE: Picking up Sir Kenneth's point earlier this morning, we're really talking about the responsibility of the State, not whether somebody is going to be criminally liable.

So, would you argue that the same principles apply to the State's responsibility as apply when determining criminal liability?

MR RISHWORTH: Yes, I do, Sir. And the reason for that is, if one looks at the spectrum of possibilities with which we're dealing here, starting with right at the end of the spectrum as being the perpetrator of the genocide or the torture, then you've got the co-parties' joint enterprise, then you've got the aiding and abetting; and I say that there needs to be knowledge and a wilful blindness might be a part of that.

You come back some distance to what's involved, what is at stake is the *non-refoulement* obligation which is not the virtual certainty of a future act from torture, bearing in mind we're always talking about things in the future.

SIR TERENCE: Yes.

MR RISHWORTH: It is the virtual certainty there would be torture which we're talking about, and a knowledge if that is such, is a very high proposition.

And so, now to more directly answer your question as to whether although it's State responsibility, does that - does the fact it's a State rather than individual responsibility amount to a reason why that requirement should be relaxed? I submit that there's nothing in the literature or the commentary which would suggest that it is and that's for good reason, that it's a strong moral combination in the nature of criminal law, although not literally itself criminal law.

And to attribute that on a standard less than knowledge, would be a very serious proposition.

And so, the seriousness of it goes right through to the standard by which the facts are proved and also affects that question of: would you say that negligence or failure to make inquiries is sufficient to constitute knowledge when there is not in fact knowledge?

That would be my answer.

SIR TERENCE: Okay, thank you.

MR RISHWORTH: I come to the third of three points which are on page 27 at paragraph 98.

The ILC Commentary on Article 16 is clear that for a finding of liability in aiding or assisting there needs to be an *intention* to facilitate a wrongful act. It says - this is now reading from the ILC commentary. The first was knowledge of the circumstances.

"The second requirement [the first had been *knowledge* of the circumstances making the assisted State's conduct unlawful] is that the aid or assistance

must be given with a view to facilitating the commission of the wrongful act and must actually do so."

In this case, it would be passing over Qari Miraj with a view to facilitating the torture which was a virtual certainty.

"This limits the application of Article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under Article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State".

That is the statement of the view that Sir Kenneth is disagreeing with.

In the Crown agencies submission, the difference between that proposition, what Sir Kenneth says, can be sort of bridged by looking at what is meant by the concept of knowledge. So, I turn to that. Paragraph 100.

Subsequently the question whether an intent (on the part of the provider State) is required has been a matter of controversy amongst commentators. This is because a need for intention is not explicit in Article 16, even if it is in the ILC commentary and in the discussions leading to the adoption of the text. There is considerable consensus around the proposition that intent is indeed a necessary part of Article 16. At the same time, there is also consensus that the nature and quality of an assisting State's *knowledge* say, where some of its supplied resources are being used by a receiving State for an internationally wrongful act, this knowledge must *at least* be such as will allow the inference that the

State intended to facilitate that wrongful act. All will depend on factual circumstances. What is significant, though, is acceptance that an intention nonetheless be demonstrated in some positive way through the degree of knowledge.

And so, that's why I say at one end of the spectrum is the supply of genocide-capable gas to persons who are known to have the intent to carry out genocide. It's very at one end of the spectrum.

So, I quote from some commentators, academic commentators, para 101 in the next few paragraphs. Commentator Erika de Wet notes (after first observing that the principle of good faith in international law implies that normally an assisting State can act in the belief its assistance will be used lawfully):

"Commentators nevertheless support the view that the knowledge requirement would be met by virtual certainty that a particular wrongful act will occur in the ordinary course of events."

If you give lots of financial resources to another State, you're assuming they're going to use them in ways that don't violate human rights of their citizens.

That is very close, I think, to what Sir Kenneth found in the facts on the genocide case.

Then, when discussing the related question of intention, she says “there is support in scholarship for interpreting intent as the flipside of knowledge.” As she puts it:

"In line with this reasoning, actual knowledge of the fact that the recipient State will act illegally in the ordinary course of events will amount to intent. This would further imply that knowledge in the form of

virtual certainty or wilful blindness would simultaneously establish intent".

Then, when discussing the related question of intention, she says "there is support in scholarship for interpreting intent as the flipside of knowledge." As she puts it:

"In line with this reasoning, actual knowledge of the fact that the recipient State will act illegally in the ordinary course of events will amount to intent."

Looking at prediction of a future event, you'll never have absolute actual knowledge, so you're always talking about virtual certainty. That's how she completes her sentence, Harriet Moynihan there.

On the question of the need for "intention", Moynihan says that "the better view [is that] intent is a necessary part of Article 16, in addition to knowledge". The question then becomes, she says, what counts as intent. By analogy to Article 30(2) of the Rome Statute dealing with "intent", she suggests that an assisting State does not have to share the same intention as the principal State, but that if it has "knowledge or virtual certainty that the recipient State will use the assistance unlawfully" that is "capable of satisfying the intent element under Article 16, whatever its desire or purpose."

I then discuss the *Bosnian genocide* case but I might have said enough about that already and I'm conscious that I only have 7 minutes and there's the IHL discussion to come. Would you like me to move to that?

SIR GEOFFREY: Yes.

SIR TERENCE: Yes. I was wondering, some of this will come up tomorrow too, won't it?

MR RISHWORTH: IHL?

SIR TERENCE: Yes.

MR RISHWORTH: Yes.

SIR TERENCE: Anyway, I think probably you should.

MR RISHWORTH: It certainly comes up in the sense that it's Professor Akande talking about it. In terms of the Crown agencies' comment on it, this is it.

SIR TERENCE: So, go to that and we can give you a little more time, so just pace it.

MR RISHWORTH: Yes, Sir. That takes me to page 31, paragraph 115, interaction of IHL and IHRL in Afghanistan.

This is discussed by Professor Akande in relation to his discussion of the JPEL.

The Crown agencies agree with Professor Akande that the protection offered to individuals against a State by human rights conventions do not cease in cases of armed conflict. They agree that, as Professor Akande says, in his paragraph 56, human rights treaties are potentially applicable in armed conflicts. Accordingly, Crown agencies also agree that the two bodies of law can be complementary and not mutually exclusive, when both apply to the same scenario.

As Professor Akande points out, however, States' obligations under human rights conventions are generally expressed by those treaties in terms that limit their application to individuals within the State's territory or jurisdiction. It is those persons to whom the relevant human rights obligations are owed and not to the world at large. (The example given is ICCPR, article 2(1) of which obliges a State party to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant".)

The footnote says Professor Akande's emphasis, but emphasis has slipped away from the paragraph. There should be a line under the quotation, "all individuals within its territory and subject to its jurisdiction". That is what Professor Akande had emphasised.

A preliminary question, then, when considering the relationship between IHL and IHRL, is to ask whether IHRL applies at all in a given situation. This turns upon the meaning and application of the phrase “within its territory and subject to its jurisdiction” and cognate phrases in other human rights instruments.

The issue of jurisdiction under both the Convention Against Torture (CAT) and the ICCPR including discussion of the relevant authorities, is dealt with in the submissions filed by the Crown following Module 2.

The next heading is, 'Extra-territorial jurisdiction by application of lethal force'. Perhaps there could be a question mark after that because that's what's being discussed.

Crown agencies agree with Professor Akande that these authorities do not go as far as to suggest that in any situation where a State has the ability to take a person's life there is, by dint of that fact alone, a degree of “control” sufficient to say that the person is under the jurisdiction of the State. Were that approach to be applied in armed conflicts it would be manifestly unworkable and unintended, being wholly inconsistent with IHL.

In paragraph 63 of General Comment 36 (2018) the Human Rights Committee may be thought to go that far when it says that a State party has an obligation to ensure the right to life of “persons located outside any territory effectively controlled by the State, whose

right to life is impacted by its military or other activities in a direct and reasonably foreseeable manner."

That sentence cannot be, and is not, taken literally as imposing IHRL constraints in armed conflicts going beyond those arising out of ECHR and ICCPR case law.

In particular, a literal reading of the sentence is contrary to the position on jurisdiction of the ECHR, as established in the jurisprudence of the European Court of Human Rights, reviewed in the decision of the Court of Appeal of England and Wales in *Al Sadoon & Ors v Secretary of State for Defence and Anor*, where the Court concluded as follows (at [69]):

"In these circumstances, I am unable to agree with the judge that the effect of *Al-Skeini* is to establish a principle of extra-territorial jurisdiction to the effect that whenever and wherever a State which is a contracting party to the Convention uses physical force it must do so in a way that does not violate Convention rights."

I'll skip to the last sentence in the interest of time:

"In other words, I believe that the intention of the Strasbourg Court was to require that there be an element of control of the individual prior to the use of lethal force".

The footnote reference, back to the Human Rights Committee's general comment, the footnote reference to the salient part of paragraph 63 refers back to paragraph 22 of the General Comment, so it's an internal reference that the Human Rights Committee is making. That in turn speaks of activities taking place within a State's territory or jurisdiction but having effect outside it. That same footnote refers also to the

Committee's concluding observations on the US back in 2014 under the ICCPR in which the allusion appears to be to paragraph 9 of those observations, speaking of "targeted killings using unmanned aerial vehicles (or drones)". The Committee expressed concern about the need for "precautionary measures taken to avoid civilian casualties in practice".

The following paragraph of the new General Comment, paragraph 64, is more specifically addressed to situations of armed conflict. It says that rules of IHL may be relevant to the interpretation and application of Article 6 of ICCPR and that both spheres of law are complementary not mutually exclusive. The Committee says:

"Use of lethal force consistent with [IHL] and other applicable international law norms is, in general, not arbitrary. By contrast practices inconsistent with [IHL], entailing a risk to the lives of civilians and other persons protected by [IHL], including the targeting of civilians … indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant".

Crown agencies submit that these comments must be read as meaning that IHL and IHRL relate in this way *when both apply*. If IHRL is not applicable because it is not engaged on the facts, then the question of interaction with IHL does not arise at all in relation to that matter.

My next paragraph is just observing in the hearing last year there was discussion about General Comment 63 and whether it was pushing the law further. I don't think I need to repeat that now. The point simply being made is that the Crown doesn't accept that and would wish

to have the opportunity to respond with a fuller argument if that was salient to the point.

SIR TERENCE: All right.

MR RISHWORTH: But that's what I say at paragraph 128 on page 35.

I am up to paragraph 129. Crown agencies recognise that it is still necessary to deal with the interaction of IHL and IHRL in those cases where both apply.

As Professor Akande explains, the relationship between IHL and IHRL has been discussed by the ICJ in terms suggesting that when both apply IHL is *lex specialis*, such that a deprivation of a life contrary to IHL will be arbitrary under IHRL. In this way "both principles or concepts are given the same meaning".

On the ICJ's conception, as Professor Akande explains, "where there is no violation of IHL there is no violation of human rights".

The ICJ's conception is, in Crown agencies' view, consistent with the structure of IHRL (which articulates human rights as high level principles in the general expectation that they will be recognised and implemented in the fabric of domestic law). IHL, as a discrete part of international law, can be regarded as consistent with those high-level principles - explaining, for example, the principles of distinction, precaution and proportionality which give effect to high-level humanitarian principles in the context of armed conflict.

Professor Akande's view is that the ICJ's explanation of the inter-relationship is not consistent with general international law (which must accommodate the real possibility that States undertake obligations that cannot be reconciled as consistent with each other).

Crown agencies do not consider it necessary in the circumstances of this Inquiry to resolve these matters in the abstract since so much depends on the application of principles to facts.

That said, Crown agencies understand and appreciate the points made by Professor Akande including those from his paragraph 72 onwards which relate to this point in particular. He there refers to discussions in literature that have addressed the "relationship between the use of force under the conduct of hostilities paradigm and the law enforcement paradigm."

That is to say, the conduct of hostilities paradigm would be more like IHL, and the law enforcement paradigm would be more like IHRL.

But he considers this does not illuminate the problems (in understanding the relations between IHL and IHRL), as each term may just be another way of referring, respectively, to IHL and IHRL but without saying, for example, "what brings a matter within the conduct of hostilities paradigm."

I completely agree with that proposition too.

Professor Akande next poses the question whether it is really correct to say that, with respect to arbitrary deprivation of life, "what is lawful under IHL is always lawful under IHRL". He points to human rights cases arising out of non-international armed conflicts where courts have applied IHRL without regard to IHL (albeit Professor Akande noting that in most cases IHL is not pleaded). These are typically IHRL cases.

Crown agencies observe that these will be cases where a preliminary point has been that IHRL *does* apply (typically it will be the ECHR) and so a court or body will have addressed the question of jurisdiction and

hence application of ECHR or equivalent. So Crown agencies certainly agree there are cases in which for this reason both IHRL and IHL may well be relevant.

But that would be a case where there is jurisdiction or effective power and control, as that phrase is discussed in the ECHR and ICPR.

Professor Akande's final observation is, in my submission, illuminating and very helpful:

"It is within human rights law, that a distinction may begin to be drawn between acts carried out in the context of active hostilities where there is sustained and concerted fighting and/or the State lacks effective territorial control (on the one hand) and security operations where there are no active hostilities (on the other hand)". That is the closing of Professor Akande's report.

The footnote reference accompanying that suggestion is to Murray, Akande et al. *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford, 2016, chapter 4 which is a very interesting read. That chapter concerns the relationship between IHL and IHRL, first reviewing the ICJ and other case law on their relationship, and then offering an approach to how the "overall legal framework" is to be "applied in specific situations".

That framework is developed in detail in chapter 4 and applied in subsequent chapters. It builds upon the two concepts of "active hostilities" and "security operations", offered by the authors not as terms of art but as tools of analysis. It is said that the characterization of a matter as "active hostilities" or "security operations" will determine whether (respectively) IHL or IHRL is the starting point (or "primary framework") as they call it), for analysing

legal regulation of the matter. But the other framework may then be deployed in the context of the primary framework, having regard to the nature of the conflict and the issues arising.

The Crown agencies understand and appreciate the potential value in the tools of analysis suggested in chapter 4 of the *Practitioners' Guide*.

The Crown agencies consider, however, that the essential starting point must be the extent to which IHRL applies at all. As noted already, this ultimately turns on findings of fact and the meaning of the key phrase in Article 2(1) of ICCPR and equivalents in cognate instruments (in other words on the issue of jurisdiction). In the case of Operation Burnham, the Crown agencies submit that the ICCPR did not apply, as, even applying the most forward-leaning conception of jurisdiction from the authorities (concerning the extra-territorial application of either ICCPR or ECHR through use of lethal force), the occupants of the villages in question could not be said to be within New Zealand's jurisdiction.

But when both IHL and IHRL do apply, the framework contemplated by the *Practitioners' Guide* is indeed illuminating.

If it be assumed for argument's sake that, on one basis or another, the events on the night of Operation Burnham gave rise to jurisdiction so as to make IHRL applicable, the issue would be how that body of state obligation related to IHL. It is then helpful to apply the "framework" approach suggested in Chapter 4 of the *Practitioners' Guide*. Salient points would be these:

a. Operation Burnham was an operation taking New

Zealand forces into an area not under their control. You will see there is a 'not' omitted from the text.

Nor, at any time, were *persons* in that area under their control We here set to one side the point made above that Crown Agencies consider this means that IHRL did not apply, as we are proceeding on the assumption that it might nonetheless apply in order to assess its relationship with IHL, so to carry on applying a framework.

b. The operation was undertaken within the framework of a non-international armed conflict in which there were "active hostilities". It was not a "security operation" within an area under the control of the New Zealand state or ISAF.

Using the tools of analysis in the *Practitioners' Guide*, the primary framework is IHL.

As put by the authors in denoting the types of non-international armed conflict, there is a spectrum within which an encounter will fall. At the lower end is the type of conflict "just above the threshold of applicability of Common Article 3 of the Geneva Conventions" where most activity is "a form of law enforcement whether undertaken by armed forces or the police" seeking a restoration of law and order. The authors continue:

"At the other end of the spectrum are situations where normal life is completely disrupted and public authorities are unable to function, at least in relation to certain areas of the territory, military operations undertaken in such circumstances are directed to defeating the enemy and resemble traditional military operations. Indeed, the level of disruption may be far more severe than in international armed conflict".

The *Practitioners' Guide* further says:

"The 'active hostilities' framework is applied on the basis of either (a) the sustained and concerted nature of the fighting, or (b) a State's lack of effective territorial control".

The Crown agencies' primary point is that, in the circumstances in which Operation Burnham occurred, IHRL obligations of New Zealand did not apply. But even if IHRL did apply, such that its interaction with IHL had to be determined, then, on the basis that the "active hostilities" framework applied, (Chapter 4 of Professor Akande's book) the "primary framework" is IHL. In the result, this would be a case in which acting consistently with IHL is acting consistently with IHRL.

SIR TERENCE: Perhaps if you could just do the conclusion now at 151 and so on.

MR RISHWORTH: Yes. For all these reasons the Crown agencies submit that questions about the interaction of IHL and IHRL relating to Operation Burnham fall to be resolved as follows:

a. IHL governed the interaction of ISAF with forces hostile to the Afghan Government;

b. The IHRL obligations of New Zealand were not triggered in relation to the events subject to this Inquiry because at no relevant time did New Zealand have jurisdiction by dint of control over persons neither persons engaged during Operation Burnham, the subsequent return to Tirgiran Valley, nor Qari Miraj, nor the other individuals targeted in operations following their listing on the JPEL.

That is the presentation, thank you, Sir.

SIR TERENCE: Thank you very much, Mr Rishworth, that was very helpful.

We'll take a 5 minute break, just to let people stretch their legs and so on, and then we will have Mr Humphrey.

Hearing adjourned from 3.25 p.m. until 3.30 p.m.

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PRESENTATION OF COUNSEL FOR JON STEPHENSON

BY MR HUMPHREY

MR HUMPHREY: Good afternoon, members of the Inquiry, core participants and members of the public.

Perhaps anticipating some of the questions that might follow and given the discussion that we've already had, if it would please the Inquiry I am happy to start from the beginning of my submissions but it might be helpful if I were to offer my perspective on a couple of the issues that came up in earlier discussion.

SIR TERENCE: Thank you.

MR HUMPHREY: The two issues that I propose to address presently are the issues of complicity and primary responsibility, the question put by Sir Terence to my learned friend, Mr Rishworth.

On the issue of complicity, in my submission it's important, and this point was made by Sir Kenneth and by members of the Inquiry through questioning, where we start from. What's the question? And the question is, what is the existence and scope of the customary international rule for the purposes of State responsibility? And what does that require in terms of being complicit in the internationally wrongful acts of third States?

What we're not considering is the standard as may be required under the ICC Roman statute or the ICTY statute or any other international criminal provision. The effect of the interpretation of the rule is that it will apply or the standard that is set forth for knowledge, for example, will apply for every potential

internationally wrongful act, such as the nature of the rule.

And so, in my submission, it would be an error to focus on the international criminal standard to the exclusion of all others. And it is instead necessary to ask the same question that one asks when one is trying to work out what any customary international law rule is, which is what is the extent of State practice? And is it supported by *opinio juris*?

In that regard, the starting point of the ILC Draft Articles is useful. One point which perhaps hasn't been mentioned, is that the standard under those articles, leaving aside the commentary, is knowledge, not of the offence but of the circumstances. And, in my submission, those two are not necessarily the same thing.

The Crown agencies have submitted that there is a scholarly consensus on that element, that mental element, as requiring an intention to assist. And I respectfully disagree with that proposition. Among other imminent scholars, we heard from Sir Kenneth Keith this morning, Miles Jackson, one of the authors of one of the leading texts takes a different view. And I haven't addressed this issue in terms of that framework, State practice *opinio juris* in my written submissions, but given the flow of the discussion today I propose to do so in my reply, but I just wanted to frame the issue in those terms.

The second question posed by Sir Terence earlier to Mr Rishworth, 'how can the position be different'? You have a *non-refouler* non-obligation when you do the detaining and transfer, but all of a sudden nothing when you are merely providing assistance.

I make two submissions. The first submission is to disagree in terms of the substance. Is to say no, as a matter of IHL, International Human Rights Law, Domestic Human Rights Law, those substantive obligations do apply. I do refer in my submissions, which I will present later, to the *Jaloud* case and another recent case of the Danish High Court which would support that proposition.

I would also emphasise that we've been speaking a lot about detention, transfer and *non-refouler*, but there are other obligations too that mean that the analysis is not just an all-or-nothing approach. Sir Kenneth mentioned earlier the obligation to ensure respect for the Geneva Convention. When does that apply? That doesn't just apply at the point that you assist an Afghan force to detain someone. It applies at all times, subject to the caveats that have been identified.

And also, the duty to prevent torture. That doesn't just apply at the moment that you are accompanying a force. That applies when you are, in my submission, planning operations in which you're going to have a significant role.

And so, it isn't just an all-or-nothing Inquiry.

Anyway, those were my submissions on those two specific issues but to turn to the synopsis that I have prepared.

I will perhaps omit the first two paragraphs and say that while Mr Stephenson is grateful for the opportunity to appear and present here, he considers his role in the Module to be limited. He is a core participant primarily because of his knowledge of facts relevant to the Inquiry, and his access to information and witnesses, rather than as a commentator on the legal issues in a general sense.

And so, for this reason, he considers that he and his counsel can be of most assistance by cross-examining NZDF witnesses at the upcoming hearing in September and making submissions on both matters of fact and law at the proposed October hearing.

And so, in light of this, the following submissions will be submitted to generally applicable legal principles and rights, and reserves to make more comprehensive submissions later.

And so with that said, these submissions address four things. First, why are we here? What is the relevance of the applicable law to the Inquiry? And what is the Inquiry's jurisdiction to consider it? This is something that hasn't occupied much of our time today so far and so I may move through this more briefly.

The general legal framework.

The relationships between different bodies of applicable law, mostly human rights law and IHL.

And general principles of IHL.

Turning to the relevance. The applicable law is relevant in three ways:

The main purpose of this Inquiry is to examine the allegations of impropriety or wrongdoing against NZDF personnel in connection with Operation Burnham and the law provides a robust framework against which these allegations can be examined.

Second, there is an express reference in the Terms of Reference.

Thirdly, the Inquiry also has jurisdiction to make recommendations that further steps be taken to determine liability.

I just want to develop the second point there just slightly, and that is to say that following hearing

number 2, the Crown agencies submitted that the Inquiry's jurisdiction to report on compliance with the law was limited in relation to Qari Miraj. The agencies submitted that all the Inquiry has jurisdiction to do is examine whether the NZDF acted in accordance with Crown legal advice and government policy and not to challenge that advice or policy itself.

Mr Stephenson disagrees with that view for the reasons we've previously set out in written submissions.

But should a similar argument be advanced in relation to Operation Burnham and IHL, in my submission the Inquiry also has jurisdiction to report on all applicable law in relation to this operation too. I set out the reasons for that in the written submission. I don't propose to go through them this afternoon because they involve a technical reading of the Terms of Reference and that's probably not necessarily of great interest to members, but they are there.

In terms of the applicable legal framework, my second point of focus, again, as I've set out in my written submissions, there are three basic bodies of law: New Zealand domestic law, Afghan law and public international law. Again, in the written submission I start out by summarising the relevant New Zealand domestic law but really, the only point I want to emphasise today is in relation to public law and the application of the Bill of Rights.

That begins at paragraph 22 of my synopsis and I will start reading from there.

In their reply submissions following hearing 2, the Crown agencies addressed the extraterritorial application of the Bill of Rights Act. They submitted that the Inquiry should not consider this issue as it's currently

before the High Court. They also submitted that if the Inquiry was minded to disagree with that, they should take a narrow approach and decline to apply the European Court of Human Rights' approach to the European Convention. The ECHR has applied the Convention to actions in places where States exercise effective control in the territory or governmental - exercise governmental functions or take actions in respect of people over whom States exercise sufficient control to guarantee rights.

I caveat that last "or actions in respect of people over whom States exercise sufficient control to guarantee rights". This was the point that Mr Rishworth has just finished addressing the Inquiry on. And I would accept, in terms of where the ECHR is at in relation to the application of the personal model of jurisdiction, as opposed to the territorial model. It has applied in cases such as *Al-Skeini* and *Jaloud* in Netherlands, a model which says the Convention can apply extraterritorially in two ways; either where a State exercises effective control over territory; or where it exercises personal jurisdiction which itself can occur in two ways. Either first, the state exercises some kind of governmental function. Or secondly, where it exercises control over a person in very specific circumstances.

Now, the legal issue here for the Inquiry to grapple with, and the point that was raised by Mr Rishworth, is the ability to, for example, kill someone, does that fall under that second part of the personal jurisdiction model applied by the ECHR?

And in my understanding of the authorities, the ECHR hasn't so far applied the Convention in that way, although in the *Jaloud* and *Netherlands* case it

effectively did so. It didn't say it was doing so but in substance it did so.

In *Jaloud* that involved, and I will talk about *Jaloud* more later in the submissions, but in *Jaloud* that involved a checkpoint that had been setup in Iraq by the Netherlands but operated by Iraqi forces. And some Dutch soldiers turned up and one of the cars refused to stop, they shot them, killed them. So technically, it would have been open to the European Court, if it had wanted to do so, to say by application of the force the shooting of the victim, that the jurisdiction in terms of the personal model of jurisdiction of the Convention would have applied. It didn't do that. It said instead, the Netherlands had assumed responsibility in the area and so was exercising governmental functions. And so, they found it applied but not in that narrow sense.

But my submission would be that's effectively what they did and it wouldn't be a radical departure from that, to hold that that's possible.

Mr Rishworth also said or submitted in the written submission that that would be a grossly - that would pose serious problems for the application of the law, it would make it unworkable if you applied the right to life in that scenario. My response to that would be, well, the right to life is not the right to life in all circumstances. It is the right not to be deprived of life if we're talking in terms of section 8 of our Bill of Rights, which is the focus, except in accordance with law and unless that wouldn't be inconsistent with fundamental justice.

If you kill someone but that's lawful under IHL, then arguably, as I go on to submit, that satisfies that element of the test. There might still be some aspect

where IHRL goes further or domestic human rights goes further because you might say 'even though it was lawful under IHL, it was still not inconsistent or it was still inconsistent with fundamental justice.' for example if you kill someone, kill a combatant under IHL, but that would be not necessary in the circumstances, another point I go on to address. That overlap is actually very narrow.

Again, just to sum up on that point, that's the scope of the jurisprudence of the ECHR as it is. And my submission would be it would be open for members of the Inquiry to interpret the Bill of Rights along those lines.

I would add, resuming at 24 of my written submissions, that the issue is no longer before the High Court.

And the point made at 25 of my submissions, there is no principled basis for New Zealand authority not to follow the ECHR. The purposes of the New Zealand Bill of Rights Act include giving effect to New Zealand's commitment under the ICCPR and the jurisdictional clause of the ICCPR is similar to the European Convention.

Moving to paragraph 26. This is where I got a bit ahead of myself before. I apologise but this is where I introduce two recent cases which support the extraterritorial application of human rights law to situations such as existed in Afghanistan in our circumstances.

So, I mention *Jaloud* and I explain in paragraph 26 what the Court did there was to take a broad approach to the personal jurisdiction model but focusing on the governmental functions that the Netherlands exercised in Iraq.

I summarise the facts, I won't go over them again, but I'll come back to the significance for that case for New Zealand shortly.

And then at 28, I introduce the *Green Desert* Case. I confess I can't read Danish and I've only been able to find this case in Danish. My colleague Mr Neilson, who is Swedish, can read Danish but has not yet been able to give me some advice on that, so I do confess my understanding of this case is secondary through reading a blog which I understand Professor Akande is involved with, but in my submission this case is very instructive for the kinds of problems that we have here.

In that case, the Danish High Court held the Danish forces were liable for the detention, transfer and subsequent mistreatment of detainees in Iraq in November 2004 following a joint operation with both Iraq and British forces.

Iraq forces had arrested about 30 Iraqis who were then transferred to detention facilities managed again by Iraq. Those detained were subject to torture and electrical shocks and torture involving the beating of the feet, both while they were being transported but also during their detention. Danish forces had not directly assisted with their arrests but had followed the Iraq security forces and assisted with their evacuation. The Danish Court held that Danish personnel ought to have known that there was a real risk that the Iraq forces would torture or mistreat the detainees, and that their involvement breached various provisions of Danish constitutional law, read alongside Article 3 of the European Convention.

Now, I've included a comment from Danish commentators explaining the significance of that case.

And I won't read that out for the interests of time but the main point there is that the Danish Court really appeared to have been concerned that the Danish forces had assumed that the partnering nature of the operations put the operations beyond Danish responsibility. And those seem like very similar concerns to what we have in the context of this Inquiry.

So, turning to that context then, against that backdrop, several factors support the application of the Bill of Rights Act to the actions of the NZDF in this Inquiry.

First, they were present in Afghanistan with the consent of, and under an agreement with, the Government of Afghanistan. If we turn back to what the ECHR held in *Jaloud*, and again I think this comes from *Al-Skeini*, where "in accordance with custom, Treaty or other agreement authorities of the contracting State carry out executive functions on the territory of the other state, the contracting State may be responsible for breaches of the Convention, thereby incurred as long as the acts are attributable in the international law sense".

In my submission, that's what we have here. NZDF personnel took part in numerous deliberate detention and other operations alongside CRU personal. In the case of Qari Miraj, NZDF personnel assisted the NDS. These were executive functions.

I should add too, in *Jaloud* the Netherlands, one of the factors which led the European Court to say the Netherlands should be responsible, is that among other things it had the power to make the ROE more restrictive. They were joint ROE with the British.

Their ability to influence and change those ROE suggested to or proved for the European Court that there

was still full command with the Dutch forces over the forces and therefore the Convention should apply.

Again, we have that situation here.

New Zealand Defence Force personnel played an active role in planning the various operations.

NZDF personnel played a leading role in the operations.

When Qari Miraj was captured and detained, he was placed in the NZDF vehicle with NZDF personnel and transported to an NDS facility. During this time, he was firmly restrained, in accordance with that aspect of the European Courts jurisprudence, unable to escape and NZDF personnel were responsible for keeping him restrained. NZDF entered the NDS facility with Qari Miraj and processed him.

So, those are my submissions in relation to the application of New Zealand domestic law. I briefly address civil law in the written submission but that can be skipped over.

Likewise, I've addressed the possible application of Afghan Law. The sole point I want to make there is, I am not an expert in Afghan law and the Inquiry may consider it may be assisted by engaging an expert but there aren't any submissions that I can usefully add beyond that.

The next major areas of law, New Zealand law or Afghan law, is public international law. The NZDF were required to act consistently with New Zealand's obligations. These included the law of IHL applicable in non-international armed conflicts and IHRL, as well as the customary law of State responsibility. I have addressed these points at the top of my submission but that's the limited extent to which I address the

complicity issue in the written submission, those authorities there.

Turning to the third main area of submissions, the relationships between bodies of different applicable law. I have brought in New Zealand domestic law, I suppose I have to address how one reconciles it with International Humanitarian Law.

Again, this assumes the point was fairly made by Mr Rishworth, these issues are only relevant to the extent that human rights law, either whether it be the Bill the Rights Act or International Human Rights Law, applies extraterritorially, otherwise there's no overlap, so there's no point in considering the question, well beyond academic interests.

The potential for conflict between relevant norms of Domestic Human Rights Law and the NZ Bill of Rights Act and IHL, in my submission, is reasonably low, as these laws are generally co-extensive.

I have set out some of the main Bill of Rights Act rights that could potentially be engaged by the NZDF operations. I don't propose to read through all of that but that analysis is there for the assistance of the Inquiry if it's helpful.

I reiterate the point about the significance of applying the right to life in particular. Yes, there may be some overlap, some conflict of norms here, in that section 8 of the New Zealand Bill of Rights might impose wider obligations but I haven't addressed that in great detail. I would add that there is limited jurisprudence on that particular point in New Zealand domestic law. That is not a point that has been established, for example, at an appellate level but, in my submission, it could be.

Turning to the important point at paragraph 40. If a conflict arose, so assume a domestic court was faced with a claim, NZDF were bound by the Bill of Rights applied extraterritorially; a detention, for example, engaged sections 22, 23 of the Bill of Rights and the issue was, was the detainee, assuming it applied and so on, was the detainee afforded the minimum standard of treatment that the Bill of Rights Act standards requires? The Crown response is, that's not appropriate. IHL applies. IHL doesn't really regulate detention in non-international armed conflicts. Therefore, there might be a gap, but you've just got to apply IHL because it is a non-international armed conflict. How does the Court resolve that? Well, it's trite law that to a domestic court, domestic and international law exist on different planes. Treaty law is not a part of domestic law unless and until it's incorporated in an Act of Parliament, while customary law is only part of domestic law to the extent it has been overridden by an Act of Parliament. Where possible though, statutes must be interpreted consistently with New Zealand international obligations. However, this cannot lead to a situation where the Court contradicts or avoids applying the terms of the domestic legislation.

In interpreting rights which have the potential to provide greater protection than comparable IHL, a Court would have to address this conflict by applying ordinary orthodox principles of statutory interpretation.

The main point is this; upholding the wider human rights norm would not put a notice in breach of its international obligations. However, it could create practical difficulties for the NZDF and undermine its ability to accomplish its mission, potentially,

hypothetically in the abstract, which could be taken into account.

I give the reference there to the *Serdar Mohammed* case where that is discussed.

I guess, I would add there, I haven't mentioned it in the written submission but there's a lot of *jurisprudence* in the European Court, in particular the case of *Husam* in the UK, where that Court had to work out how it interpreted Article 5 of the European Convention consistently or not with international, the law applicable to international armed conflicts.

A crash course in Article 5 of the European Convention prohibits all detentions unless it's in certain specific circumstances of which security in an armed conflict is not one.

So, the European Court had to work out how do we interpret and apply this European Convention when there might have been permission under the law of international armed conflict to detain but we don't have that in the European Convention. They apply this very broad model. I will emphasise what they didn't apply was the rule of *lex specialis*. They expressly said we are not going to use this confusing concept of *lex specialis* to resolve this conflict. We are just going to apply ordinary principles of Treaty interpretation to get to the right answer.

They took quite a liberal answer. They effectively said you should read into the European Convention the rules and international armed conflicts which authorise and permit detention so it's not a breach.

Now, in my submission, a domestic court couldn't do that same sort of thing here. It would be constrained by the principles of Treaty interpretation. It would be

constrained by the rule that principles of consistent interpretation are about ensuring New Zealand isn't put in breach of an international obligation, not that there might be greater protection under human rights law.

Moving then to "International Human Rights Law and IHL". The position is similar. As with domestic norms, many of the norms are coextensive. Again here, I have referred to an article by Milanovic which, in my respectful submission, is very illuminating. Milanovic reduces the issue to this: you have to resolve a conflict between legal norms by applying a rule of law. You can't just invoke a general principle of law, like *lex posterior*, unless it meets the standard for recognition of a rule of law.

And Milanovic says what possible rules of law could a Court use or authority use to interpret where there is a conflict which one prevails?

He says, well, *jus cogens*. Article 1 and 3 of the UN Charter which says anything which is inconsistent in the Treaty with something in the UN Charter, the UN Charter prevails.

Specific causes in treaties which say which norm has priority or not but not some general principle necessarily of *lex specialis*.

What is the outcome of that? The outcome might mean you have inconsistent obligations. You just have a wider rule in human rights law than you do in IHL. That's not necessarily a bad thing, that's just the law.

As Milanovic notes, many of these rules giving priority or not to certain norms have limited application to IHL and IHRL. For example again, as I said, there's no specific clauses in relevant treaties.

While Section 103 of the UN Charter can generally be invoked to give priority to Security Council resolutions, the law on that point is the Security Council resolution has to be really, really clear. The European Court decided in the *Al Jedda* case that when a Court or authority interpreting human rights law is looking at the Security Council resolution, it has to interpret that resolution as far as it can to be consistent with human rights law.

And so, in that case, *Al Jedda*, the ECHR held because the Security Council resolution didn't expressly require that a certain course of conduct be taken in that case detention there was no conflict of norms involved.

Paragraph 45 just summarises the submission already made, that *lex specialis* doesn't have a foundation in general international law.

So, turning to the fourth and final area in which I propose to make some general submissions, IHL.

I can skip through the next few paragraphs reasonably quickly. What law applies? Well, we've been asked to assume that the - well, the Terms of Reference say there was an armed conflict in Afghanistan of a non-international character. This implies there was a conflict of sufficient intensity between the Afghanistan Government and armed groups who were sufficiently well-organised as to engage at least Common Article 3 and possibly Additional Protocol II; AP II imposes a slightly higher requirement on the armed groups to apply which is well-established.

At paragraph 48 I explain that my position is that not only did such an armed conflict exist, it reached the standard for application of both common Article 3 and

AP II and I set out the organised various armed groups that took part in it.

I should clarify in relation to 48(b), I am not meaning to suggest all of those groups necessarily met the standard of organisation and ability to comply with the Protocol of AP II but the Taliban in my submission did, and also involved ISAF and New Zealand.

In terms of which rules of IHL are most important to the Inquiry, in the submissions that follow I've identified firstly, the duty to ensure respect with the Geneva Conventions addressed by Sir Kenneth Keith earlier.

I would add only one point in relation to that, which is that what Sir Kenneth's opinion perhaps did not go into precise detail about was what this duty in Common Article 1 of the Geneva Conventions, such as it was, might have required his duty to ensure respect in relation to Common Article 3 of the Conventions; common Article 3 being the Article that applies in non-international armed conflicts.

He suggests that the agreement for the transfer of detainees was an example of something which New Zealand did which could be in compliance with that but, in my submission, entering into such agreements is the bare minimum that would be required. The duty is ongoing and contextual.

As the ICRC note in their commentary to this Article, I am loath to read it out but in my submission, it is important:

"The High Contracting Parties also have positive obligations under Common Article 1, which means they must take proactive steps to bring violations of the Conventions to an end and to bring an erring party to a

conflict back to an attitude of respect for the Conventions..." and it goes on.

Whether that commentary is an accurate description of the scope of the rule of customary international rule, is not clear. It is a relatively recent comment but, in my submission, it is and I can address the Inquiry further on that if required.

Other than that general duty to ensure respect, there is a whole long list of customary rules of IHL that applies to the conflict. I have set them out in paragraph 55, I don't propose to go through them, mainly because, as has been said by the Crown Agencies, a lot of the issues and the application of these rules really relate to the facts, and without the facts it's probably not very helpful to engage in hypothetical discussions.

But I have identified a small handful of issues and I will close with these solely to put forward Mr Stephenson's position on them because they are important.

The first is the status of members of armed groups who are parties to non-international armed conflicts. There is a related issue as to when civilians will be directly participating in hostilities.

Now, I've attempted to summarise Professor Akande's view in paragraph 57. I apologise, Professor, if I have mischaracterised your arguments in these paragraphs but the essence of his views are that there is limited guidance in Common Article 3 and in AP II of the status that members of groups who are defined as parties to that conflict have. And it doesn't set out also how one is to determine who a member of those groups is.

The better view is that anyone who is a member of a party to a conflict loses their protection against direct

attack and absent any clear Treaty rule, membership of that group should be enough to qualify for loss of protection. And what does membership mean? This continuous combat function test has been proposed by the ICRC, although there is some discussion. Professor Akande's opinion is that that's probably not exhaustive.

Finally, on direct participation in hostilities this should turn on an assessment of specific acts and the ICRC's guidance is useful.

Mr Stephenson acknowledges these are issues on which the relevant Treaty rules, and existence and scope of any customary rule(s), are not necessarily clear but while the ICRC has put forward one interpretation in its Interpretive Guidance, this does not necessarily reflect customary international law. Different scholars have taken different views.

Mr Stephenson inclines to Professor Akande's conclusion on the status of members of organised groups in NIACs for the reasons he gives.

On membership, in my submission the Inquiry should carefully consider all evidence which bears upon the relationship of the person in question to the military or fighting wing of such a group. While, as Professor Akande points out, imposing a continuous combat function test as proposed by the ICRC arguably results in asymmetry between the rules applying to State forces and non-State groups, this is arguably appropriate on the basis that members of State forces are not in the same position as people who may assist fighting members of organised groups from time to time. Military cooks have an employment relationship with the State. Farmers by day provide more ad hoc or remote assistance.

Regarding direct participation in hostilities, it should be recalled that the rule arguably applies only to putative civilians only which in NIACs, and this assumes one takes the view that anyone who is a member of an armed group automatically loses their protection against direct attack; civilians in that case excludes that category of persons. So, we're dealing with a smaller category. Civilians are ordinarily absolutely protected and, as Professor Akande notes, the text of AP I and II refers to direct participation and hostilities. These factors together point toward a narrower test for direct participation, along the lines of that suggested by the ICRC.

So, if we exclude all members of organised armed groups, if we start from the proposition that civilians have absolute protection and we refer to the Treaty text, that emphasises direct participation in hostilities, that inclines to a narrower test.

How are we going for time?

SIR TERENCE: You're going fine, thanks.

MR HUMPHREY: That's as far as I've taken the submissions on direct participation in hostilities, mindful of the differing views on that issue.

Another very interesting issue framed by Professor Akande is whether international law requires all uses of force to be required by military necessity, such that killing or wounding of a combatant, someone who can normally be targeted, may be unlawful if the target could have been subdued by wounding or capture instead. Professor Akande concludes that such a rule has not yet emerged.

Now, it is acknowledged as inevitable that the propose of this type of rule the Red Cross put forward in

its guidance has been forcibly criticised, and I cite Rogers who wrote one of the leading texts in this area, a former military lawyer, he really in quite trenchant terms says this:

"Recommendation [the ICRC put forward] deals with a matter that the experts were not asked to decide, it was raised late in the expert process, was strongly objected to by a substantial number of the experts present, was not fully discussed and so should not, in my opinion, have been included in the document".

So, you can't get much more trenchant criticism of it than that.

I would respectfully nudge the Inquiry away from perhaps an inquiry that focuses solely on the ICRC's approach and instead ask whether the rule has sufficient foundation in state practice and *opinio juris*.

In that regard, I found the article by Professor Ryan Goodman very illuminating. He argues that there is in fact State practice. States actually, quite often, include in their military manuals or Rules of Engagement, rules which require least restrictive uses of force in circumstances. And that the onus should really fall on the other side to prove that State practice falls the other way.

I haven't gone into detail in the written submissions on this very interesting issue in a lot of detail but, in a nutshell, what Ryan Goodman, Professor Goodman, argues is in Additional Protocol I which applies in international armed conflicts with another caveat, that prohibits means and methods of warfare which are likely to cause, I might not get the exact wording of the Protocol right but which have the effect of causing unnecessary suffering. Sort of reasons from that, that

that indicates a general rule that killings have to be necessary, justified by reference to a necessity.

That has been the subject of - in his article, he goes through at great length and great detail the travaux that led to the Additional Protocol 1 and discusses State practice and explains in his view the State practice has in fact reached the level that that can be said to be evidence at least of a rule under Additional Protocol 1 and arguably also of customary law.

So, in my submission, perhaps a more robust starting point than the ICRC's analysis.

It's also important to bear in mind that whether or not a restrictive rule based on military necessity existed, all the parties to armed conflict have to respect the rule prohibiting the targeting of combatants, again people who would normally not have any protection against direct attack who have become *hors de combat*.

If I can interpolate here, the definitions of hors de combat in the relevant Treaty law includes, and I should perhaps check again that I have this right, but there are three grounds. Among them, people who by reason of their wounding or sickness, have surrendered and others. The key article that Professor Goodman focuses on in his commentary is this: when you fall into the power of an enemy, you become *hors de combat* and you can't be targeted. And there are various other obligations that arise then too.

And so, Professor Goodman's argument is, well, what does that mean? When do you fall into the power of an enemy? How do you - that rule might actually be a lot more restrictive potentially than it's been understood to be in the past.

In his response to Goodman on this excessive force issue or necessity issue, that's acknowledged to some extent by Professor Schmitt who says this is something we do need to take account of, the *hors de combat* rules might perform some of the same functions that this general rule we've previously thought of it as all-or-nothing, is there a rule in international law or not that prohibits killing based on necessity? When instead we should be thinking perhaps a bit more latterly about that.

The final specific rule that I address in the written submission is the duty to collect and provide treatment for the wounded and sick. I note there, Common Article 3 provides the wounded and sick should be collected. Article 8 of AP II sets out the same similar sort of standard or sets out the wording that the ICRC have held is reflective of custom.

In my submission, this obligation is squarely engaged by the allegations in relation to Operation Burnham. And one point in particular can be emphasised, duty to take all possible measures to search for and collect the wounded and sick is not an all-or-nothing duty. In determining whether or not NZDF personnel complied with it, the Inquiry needs to consider all the evidence about what actions the NZDF could feasibly have taken.

That concludes my written submissions and presentation. I just conclude by noting that in terms of how many of these issues are factually dependent, as you know, Mr Stephenson will be giving evidence later in a private session about some of the factual aspects of the law that we've covered today.

SIR TERENCE: Thank you, Mr Humphrey. We won't go into questions now because of time but it would be helpful, I would find it helpful anyway, if you were to, in your further submissions, just develop that argument around the Common Article 1, and you gave the commentary from the ICRC in 2016 and the development of that, if you could see if you could do, I would find that helpful, thank you.

MR HUMPHREY: Yes.

SIR TERENCE: Thank you very much.

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PRESENTATION BY NICKY HAGER

MR HAGER: Kia ora, thank you very much for the opportunity to speak today. I will not inflict amateur legal analysis on people who know far more than I do on the subject, especially coming after Sam's fine presentation, but I hope to add some things to the discussion.

I am presenting today, like the other speakers, on the international legal framework relevant to the issues being considered by the Inquiry. Professor Ken Keith's paper authoritatively covered the key issues:

- the duties to avoid civilian casualties and damage to civilian objects (the laws of distinction, proportion and precaution);
- the requirements to render aid to the injured; and
- the obligation to protect detained people.

This is largely the same list of potential breaches of international and domestic law, albeit more precisely stated, that we included in the book *Hit & Run*. Specifically, we listed:

"failing to distinguish between combatants and non-combatants and the disproportionate use of force, especially the killing and wounding of civilians and attacking or bombarding dwellings that were undefended and not military objectives; destroying the property of an adversary where that destruction was not imperatively demanded by the

necessities of the conflict; failing to search and care for the wounded; and the cruel treatment and torture of a prisoner."

To these should be added the obligation to investigate credible allegations of each of these breaches, a very important issue for this Inquiry.

I will discuss each of them in turn, with reference to Professor Keith's paper and some relevant declassified documents published on the Inquiry website. I will not be disputing any of the paper. I agree entirely with Professor Keith's analysis and I am grateful to him for taking an interest in this Inquiry. I will merely develop some points and comment on contrary positions presented by some other parties to the Inquiry.

I want to thank the Inquiry also for the process of declassifying key documents. These documents inform a lot of what I will say today.

Also, I note Professor Keith's point that "The customary law continues to evolve....". I hope this Inquiry will hopefully contribute to the evolution.

Professor Keith bases some of his paper on the rules set out in the ICRC Customary Law Study and notes that: "Each of the rules ... are cited in the recent NZDF Manual and are not questioned".

He goes relatively quickly through the first rules and then spends most of his time on the subject of protection of those in detention. I will do the same.

First of all, the protection of civilians. International law states that parties must distinguish between civilians and combatants; and

between civilian objects and military objectives. They must not make indiscriminate attacks, as stated in Rule 14:

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

Also, there is the obligation to take "all feasible precautions which must be taken to avoid, and in any event minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects".

Since these are not in dispute, the questions facing this Inquiry concern how those laws relate to the facts. The rules can be framed as a series of factual questions which need to be answered to determine whether the international laws on protection of civilians have been breached and, if so, the extent of the breach.

I have provided a list of questions and answers in an appendix to this presentation which I won't read today, we are not doing the factual side today. This list supports the view that international law has been breached but my main point now is that these factual issues are relatively straight forward. It should be possible for the Inquiry to reach clear positions on the international law issues.

Collecting and caring for the wounded has been a clear obligation in treaty for the last 155 years. Military forces are supposed to look for

and help all wounded people, friend or foe.

As with the protection of civilians above, these rules can be framed in a series of factual questions which need to be answered to determine whether the international laws on protection of civilians have been breached. I have again provided a list of questions and answers in an appendix to this presentation. This shows it should be possible for the Inquiry to reach clear positions on the international law issues on this important issue of NZDF neglecting to find and assist the wounded.

I want to move on to the obligation to investigate civilian casualty incidents and other potential international law breaches.

In addition to breaching the international obligations for protection of civilians and care for the wounded, there is a separate and important issue about failing to investigate those primary breaches.

The obligation to investigate civilian casualties and other potential international law breaches is not covered explicitly by Ken Keith's paper. However, it is implicit in the other obligations he discusses because investigating is an essential part of fulfilling those other obligations. I will discuss this now.

My position is that NZDF should have launched its own investigations following the events under investigation in this Inquiry, but it failed to do so.

There is a large body of writing about civilian casualty reporting and investigation. For instance, an article called “Protection of Civilians: A NATO Perspective” discusses NATO's efforts in Afghanistan to “instil a culture of investigation and mitigation of

civilian casualty incidents and redressing civilian harm".

The obligation on NZDF to investigate allegations of civilian casualties can be seen in one of the documents declassified as part of this Inquiry. Declassified document 06/14 comes from "Task Force 81", the NZSAS deployment in Afghanistan from 2009-2012 and is headed "Legal Checklist and Procedures". The legal checklist specifies a series of pre-operation and post-operation steps the NZSAS was required to follow to ensure its activities were lawful. The first item on the post-operation legal checklist was "CIVCAS", the abbreviation for civilian casualties. It says:

"Check compliance with Directive and initiate investigation".

The Directive refers to the Petraeus Directive, where the US military Commander in Afghanistan, General David Petraeus, wrote about the need to "reduce the loss of innocent civilian life to an absolute minimum" and ordered:

"Prior to the use of fires, the commander approving the strike must determine that no civilians are present. If unable to check the risk of civilian presence, fires are prohibited".

So, when the NZSAS legal check list said "check[ing] compliance with Directive", it meant checking whether civilians were present during weapon fire and whether there had been civilian casualties. If so, the legal check list instructed, NZSAS should (quote) "initiate investigation".

This document shows that the NZDF's own legal instructions required it to begin an investigation whenever there were allegations or suspicions of civilian

casualties. When it did not, this amounted to a serious breach of its obligations.

This document is important because NZDF has repeatedly claimed that the obligation to investigate civilian casualties was fulfilled by a two-day Initial Assessment Team investigation into Operation Burnham conducted by ISAF staff in the first days after the operation. However, NZDF, as a participant in and indeed the leader of the operation, had its own obligations to investigate its part in any civilian casualties.

NZDF has also claimed that the Initial Assessment Team investigation concluded that all was well, and no further action was required. We now know, thanks to new information on Operation Burnham released under the US Freedom of Information Act, that the Initial Assessment Team did not conclude this at all. It concluded the opposite: that further investigation was required.

The US military then conducted a much more thorough investigation into the actions of US military personnel who took part in the operation; the investigation that described groups of women and children running and trying to hide as the helicopter gunship fired into their village and that NZDF kept secret.

However, the US military was not responsible for investigating the actions of the NZDF personnel. That was NZDF's responsibility, as in the legal check list. Despite the strong evidence of civilian casualties, it did not investigate. This is confirmed by declassified document 06/07, dated 31 May 2017, which says:

"NZDF advises: the only inquiries into the conduct of NZDF members during the operation were those carried out: One, in the NZDF debrief immediately following it; two, and by the IAT [Initial Assessment Team] in its

immediate aftermath..."

Note that the NZDF debrief immediately following Operation Burnham was clearly insubstantial since the NZDF-assisted ISAF media release the next day said there had been no civilian casualties.

My submission is that the failure to investigate was a separate and clear breach of NZDF's international law obligations.

There may also be a breach of New Zealand law. Declassified document 06/07 includes 24 March 2017 Crown Law advice that discusses possible offences under the Armed Forces Discipline Act and the obligation of NZDF commanders to investigate.

Paragraph 19 of the document states:

"New Zealand will be best placed to resist any investigation by the ICC [International Criminal Court] prosecutor if it conducts its own, genuine investigation into the allegations".

This did not happen. NZDF argued against there being any investigation at all, notably to the then government.

Paragraph 15 spells out the specific obligations on NZDF commanders when allegations arose of civilian casualties and the mistreatment of a prisoner. It says:

"15. In the context of these allegations we must consider NZDF commanding officers are <u>required</u>" - with the word “required” underlined - "to take one of the following three actions."

That is number one option. Number two option is:

"15.1 Satisfy themselves on the information now available that it cannot be said that the allegations are ‘not well-founded’. The allegations must thereafter be either:

15.1.1 the subject of charges under the AFDA [Armed Forces Discipline Act], and a military investigation carried out.

15.1.2 referred to the appropriate civil authority for investigation.

15.2 Satisfy themselves on the information now available (including the IAT [Initial Assessment Team] report in relation to the operation) that the allegations are not "well-founded".

15.3 Initiate a preliminary inquiry to enable them to determine whether the allegations are "not well-founded".

In other words, NZDF considered itself to have an investigatory obligation arising under New Zealand legislation, namely the Armed Forces Discipline Act.

I submit that NZDF commanding officers breached their legal obligations when they claimed the allegations were not well-founded and so took no action to investigate them. Did the NZDF lawyers stand up to this? Civilian casualties are, after all, the concern from which a lot of International Humanitarian Law first arose. It is very important, as a message to future commanders, that the Inquiry finds fault with the failure to investigate.

Now I move on to protection of those in detention which is the main subject today on which I'm talking on.

The issues discussed so far concern the Inquiry Terms of Reference parts 6.1, 6.2, 7.1, 7.5 and 7.7. I now move on to legal - not legal issues but legal-related issues concerning parts 6.3 and 7.8, concerning the protection of those in detention.

As Professor Keith spelt out clearly, the prohibition on torture and other mistreatment of

prisoners is a peremptory norm. Quote: “There can be no derogations from the prohibition”. He took us through a range of pieces of international law and concluded that the most relevant one in “partnering and close support situations” as was the case with the NZSAS in the arrest of the insurgent Qari Miraj in January 2011 is Article 16 of United Nations-prepared law, which is about aiding or assisting another State in the commission of an unlawful act.

As he told us, Article 16 reads, we've already heard this but I'm going to say it again:

"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."

By these rules, NZDF is undoubtedly in breach of very serious obligations. However, legal advice written by the Director General of Defence Legal Services (declassified document 06/10), in September 2010, just a few months before the torture of Qari Miraj, cited the same Article 16 and concluded that NZDF had no responsibility for prisoners arrested during partnered operations. It was presumably this advice that led NZDF to continue to help taking prisoners to the notorious NDS secret police interrogation centre in Kabul.

The Director General of Defence Legal Services' 10 September 2010
Minute was written in response to the High Court of England and Wales Judgment (the *Evans* Judgment) that the UK moratorium of handing prisoners across to the NDS in

Kabul was correct and should be maintained owing to the Kabul NDS's well documented record of torture and abuse of prisoners. He wrote:

"The fact that these are the same facilities that the UK High Court considered should not be used by UK Forces has caused you" - presumably the Chief of Defence Force Jerry Mateparae - "to seek legal advice about the consequences of the *Evans* decision for NZDF operations".

He advised, on the subject of NZDF aiding or abetting torture, that State complicity relied on two factors, which we have been hearing about today. First, the aiding State must have knowledge of the circumstances that made the conduct of the partner State unlawful. For this factor, he wrote that "In the present case, for the reasons set out in the Evans decision, it can be assumed that New Zealand is constructively 'on notice' that the NDS used torture". He's saying, yes, knowledge is satisfied. However, he argued in the next sentence - I think completely unsoundly - that this did not mean that NZDF had knowledge that the NDS would continue to use torture. He cited selective evidence of the Kabul NDS standards "improving substantially" and said "Clearly this is [a] major risk reduction factor in terms of NZDF operations and provides comfort that if NDS have used torture in the past, we are not forced to the conclusion that they will continue to do so".

The other factor determining complicity, the Director General of Defence Legal Services argued, was that a state was only responsible if it intended - we have heard this issue - by its aid or assistance, to facilitate the occurrence of the wrongful conduct, i.e. torture. He says: "an intention to facilitate the crime is necessary".

This sounds improbable and weak, this will be debated, and I am pleased that Professor Keith has strongly disagreed with the position in his paper. An aiding or assisting party, quote: "need not share the intention," he says, and if you read the rest of that quote you will know what he's talking about.

This means that NZDF was operating under faulty legal advice and, as I argue shortly, self-justifying legal advice when it assisted the capture and handing over to the NDS of Qari Miraj.

Professor Keith concluded his paper saying that "the law of aiding or assisting or complicity is very fact-dependent". He went on:

"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, … or is complicit in torture under customary international law."

Back in 2010 and 2011, when the handling of Afghan prisoners was controversial internationally and in New Zealand, controversial in New Zealand as well, NZDF and MFAT constructed a careful justification for NZSAS detention operations. The official line was set down in declassified document 06/08, which was advice prepared by MFAT for the Minister of Foreign Affairs after the same UK High Court judgment. It went as follows:

The, quote, "concept of operations" was again that, quote, "the Afghan authorities will arrest and detain persons of interest subsequent to an arrest warrant issued by the Afghan Attorney General". The New Zealand

troops would just be "in the vicinity" to give assistance.

That meant that, it wrote, "New Zealand does not have any legal obligation with respect to Afghan nationals arrested by Afghan authorities".

This argument consists, in practice, of one fiction supporting another fiction. The fiction of the NZSAS only being in the vicinity supports the fiction of NZDF having no legal responsibility.

This hearing is not the place to go through the factual detail of NZSAS partnered detention operations at that time, which I am going to do in a separate hearing as well, but New Zealand troops were far more involved than this expedient formula suggests. The relatively inexperienced soldiers they were mentoring - the "partnered" Afghan troops - were being sent forward at the moment of arrest so that they could be claimed to be the "detaining authority". It was a legal nicety, designed to try to wash away New Zealand's obligations.

Indeed, the NZSAS troops were specifically instructed to ensure they went along with the fiction. For instance, the Task Force 81 legal checklist, the one I have already mentioned, quoted earlier instructs the troopers, under a heading "Scheme of Manoeuvre", to quote: "[e]nsure we are not detention authority". The MFAT document, declassified document 06/08 again, likewise said the "risk" of legal challenge to detention activities in New Zealand courts, the equivalent of the UK High Court case, the risk, quote: "can be minimised (but not eliminated) by, so far as possible, continuing to ensure that Afghan authorities are responsible for arrests/detentions, rather than the New Zealand forces". I just want to read that again, the "risk" of legal

challenge to detention activities in New Zealand courts, the equivalent of the UK High Court case, the risk, quote, "can be minimised (but not eliminated) by, so far as possible, continuing to ensure that Afghan authorities are responsible for arrests/detentions, rather than the New Zealand forces".

Note the phrase "continuing to ensure". The word "ensure" is an active verb, meaning that the NZSAS was creating the convenient situation, not responding to a situation imposed by others.

The word "ensure" is used in other documents as well. However, the idea of international law is not that nations try to sidestep their responsibilities in this way, and especially not where peremptory norms are at stake.

The MFAT document expressed this side-step intention when it noted that "the arrest by Afghan forces is the best scenario for mitigating detainee issues". You can hear what that's saying.

It then muddied the legal obligations with political/diplomatic concerns, when it advised that "[m]aintaining the viability of the Arrangement on detainees is essential for the continued deployment of the NZSAS".

In very MFAT fashion, the document continued:

"There may be a perception that New Zealand has a moral/political obligation with respect to Afghan nationals arrested by Afghan authorities, for example when the NZSAS have supported the Afghan CRU on operations."

I then say "the Minister of Foreign Affairs, presumably Murray McCully," because this was a document addressed to the Minister of Foreign Affairs,' but in

fact what it should be saying is, please correct this: the Minister of Defence, in fact Wayne Mapp who is sitting here and kindly corrected it for me. - And then it minimises this perceived obligation was not convinced by the advice provided by MFAT. The MFAT document had stated "... New Zealand's legal obligations on detainees are clear i.e. they extend only to individuals detained by New Zealand forces....". However, the Minister wrote in the margin: "I do not agree with this. This is a developing area and is not 'clear'".

Overall, there is a striking difference between the independent expert advice given by Professor Keith and the official advice from the NZDF and MFAT, where non-legal concerns seem to have contaminated the legal obligations. The point of this international law is not for countries to try to find clever ways to minimise and sidestep their obligations, it is to stop people being tortured.

Declassified document 06/05 records that when former Defence Minister Wayne Mapp (again) and Chief of Defence Force Jerry Mateparae visited the NZSAS in Kabul in August 2010, just before Operation Burnham, an internal NZSAS note for the person briefing them said:

"You should be prep[ared] to discuss the detainee issue if it was to arise, but be careful the Min[ister] has a PhD in law so sees things in a different light to us."

The NZDF and MFAT lawyers and other public servants should be insisting on New Zealand staff conforming with the laws, not devising arguments to justify ignoring the laws. Likewise, there is not one word in the MFAT advice about the importance of Human Rights Law and New Zealand doing the right thing. I hope the Inquiry will take note

of this point.

Looking at the 2010 legal advice from NZDF and MFAT is not an academic discussion, it is directly relevant to why the events in January 2011 occurred. NZSAS troops helped - helped a great deal - to capture and hand a prisoner over to exactly the place that the UK Court had found to have a repeated record of torture, enabling the actual torture that followed; and then took no action when they learned about the torture and instead tried to hide it and evade responsibility.

My final topic is the obligation to investigate reports of torture. If NZDF had had its way, no-one outside a small group of defence staff might ever have known about the torture of Qari Miraj. Secrecy would have protected them from accountability. It was only because of the personal actions of a whistle blower (one of the sources of the book *Hit & Run*) that the rest of us ever learned that a man named Qari Miraj was tortured after being handed over to the Afghan secret police.

An important issue for this Inquiry is, therefore, the legal obligation on NZDF to report and investigate reports of torture - an obligation that it appears to have ignored.

NZDF was reminded of this obligation only two months before the detention of Qari Miraj, in a 2 November 2010 letter from Crown Law to the Director-General, Defence Legal Services (declassified document 03/02) which states:

"The Convention Against Torture has been held by the United Nations Committee Against Torture to impose duties of investigation and pursuit of remedial measures where a State party becomes aware of torture committed by another State party in the course of joint operations..."

It appears from the facts presented in *Hit & Run* that NZDF failed in this legal duty; i.e. that it did not investigate and instead just kept its knowledge quiet. To the extent that New Zealand forces were actively involved in handing over a prisoner to likely torture, and then received intelligence reporting that torture had occurred, New Zealand's duty to investigate was even greater than that only from "becom[ing] aware of torture".

Following the publication of *Hit & Run*, Crown Law considered the options for an official investigation into the allegations in the book, including concerning Qari Miraj. As part of this (in declassified document 06/07), it records that "no preliminary inquiry has been undertaken in relation to the allegations of mistreatment of Qari Miraj". This seems to be saying that for six years after the torture, NZDF had not conducted an investigation.

My submission is that, just like the failure to investigate the allegations of civilian casualties, the failure to investigate the allegations of torture amount to a breach of the NZDF's legal obligations.

The September 2010 legal advice quoted above from the Director General of Defence Legal Services (declassified document 06/10) also discussed the idea that maybe NZDF should do detention centre inspections to "ascertain that the human rights of persons detained in partnered activities are respected". As part of this he wrote:

"If, in the course of such an inspection, credible evidence of torture were to be uncovered NZDF must be in a position to act decisively in response. A failure to do so could be interpreted as tacit approval and a much

more complete indication of complicity than our current situation."

Six days later the Chief of Defence Force, Jerry Mateparae, made the same point in a report to the Minister of Defence. He wrote, in document 03/01:

"If credible evidence of torture were to be uncovered in such inspections, I consider we would be under a moral and legal duty to act decisively in response. A failure to do so could be interpreted as tacit approval and a much more complete indication of complicity than our current situation".

That sounds very responsible, but it seems that when credible evidence of torture was uncovered, just a few months later, they did not act decisively in response. We know for sure that NZDF's own intelligence sources informed them that Qari Miraj had been tortured. They also received a report from the NDS secret police on what he said during interrogation. However, it seems NZDF did nothing and kept it quiet.

The failure to do so can be interpreted, in Jerry Mateparae's words, as tacit approval and an indication of complicity.

One of the important questions for the Inquiry is who would have heard the reports of torture, why they were not distributed more widely and with greater concern, and who is responsible for the lack of reporting and investigation - and, as elsewhere, who is responsible for the evasions and denials after the allegations were published in the book? For instance, did NZDF tell the Prime Minister and Minister of Defence about Qari Miraj's torture? I suspect not.

Another document signed by Jerry Mateparae, the cover letter to the Minister of Defence in declassified

document 03/02, notes that the Solicitor-General had advised that NZDF, quote: "should restrict or withdraw cooperation in the event that a risk of torture arises". Mateparae wrote: "I propose to direct NZDF force elements in Afghanistan accordingly".

Other important questions for the Inquiry to find answers to are whether Mateparae did instruct his staff to restrict or withdraw cooperation if reports of torture appeared, and whether, when NZDF learned shortly afterwards that Qari Miraj had been tortured, they continued to help capture and hand over people to the NDS or other unsafe detention centres.

If they did, they would have continued to be in breach of their international obligations.

Thank you.

SIR TERENCE: Thank you, Mr Hager.

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CLOSING REMARKS

SIR TERENCE: That brings to an end the proceedings for today. Could I again thank Sir Kenneth Keith for his presentation and also thank all those who made submissions for their submissions. We will reconvene tomorrow here at 10.00, thank you.

Hearing adjourned at 4.48 p.m.