Under the Inquiries Act 2013

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

SUBMISSION ON APPLICABLE INTERNATIONAL LAW

1. I am Kevin James Riordan, ONZM.[1] I am currently Judge Advocate General of the Armed Forces and Chief Judge of the Court Martial of New Zealand. I am also an independent expert on international humanitarian law ("IHL" – also known as the law of armed conflict) and it is in this latter capacity that I write this submission.

2. In my former role as Director-General of Defence Legal Services, I was the principal legal adviser to the New Zealand Defence Force (NZDF) at the time of Operation Burnham and all other relevant times. In this submission I do not address the legal advice I provided to the NZDF, as that advice remains subject to legal professional privilege. The right to waive that privilege resides with the Attorney-General.[2] This submission seeks, rather, to bring to the attention of the Inquiry some sources and commonly accepted understandings of international law which, in my view, are relevant to its terms of reference.

3. I have read the opinion of Rt Hon Sir Kenneth Keith, ONZ KBE QC on the international law relevant to operations in Afghanistan in 2010 and to the question of state and individual responsibility for internationally wrongful behaviour ("the opinion"). Sir Kenneth, as a former Judge of the international Court of Justice and an Emeritus Professor of Law is an acknowledged New Zealand expert in international law of unparalleled prestige.

4. I am mindful that Sir Kenneth's opinion is a summary of a very large - in fact vast - body of law and that all summaries must necessarily emphasise some matters at the expense of others. The purpose of this submission is not to dispute the major points made in that opinion, but rather to point out some further sources, authorities and principles which were of direct relevance to the decisions made by New Zealand and the conduct of the NZDF in its operations in Afghanistan in 2010. These matters are, in my submission, important to the Inquiry's understanding of the legality and propriety of New Zealand's action. In doing so I follow the order of Sir Kenneth's opinion. I also

[1] BA LLB (VUW) and LLM (Cornell). I have over 35 years' experience in legal practice. I served as head of legal for the New Zealand Defence Force for over a decade, reaching the rank of brigadier, before moving to the independent bar in 2013. I have served in the Middle East, Bosnia Herzegovina, Afghanistan, the Pacific and South East Asia. I was a member of New Zealand's delegation to the Rome Conference of the International Criminal Court, subsequent conferences on the elements of crimes, and the 2010 Review Conference in Kampala. I am an honorary lecturer at Victoria University of Wellington as well as a faculty member of the United Nations Regional Course in International Law. I have written number of manuals and other publications on the law of armed conflict. I was a member of the Public Advisory Committee on Disarmament and Arms Control 2015-2019 and I am a member of the International Humanitarian Law Committee.

[2] I have confirmed this position with the Solicitor-General. As I understand it privilege has been waived in respect of two items of advice.

address some matters which I did not, with hindsight, sufficiently explain in my verbal presentation on Rules of Engagement on 22 May 2019.

Introductory material

5. I do not propose to make any submissions on the matters covered in pages 1-3 of Sir Kenneth's opinion which deal mostly with the history of IHL.

6. Pages 4-6 of that opinion deal with a range of matters including the sources of IHL, and the legal basis of ISAF operations – particular those involving detention. In discussing the authority for detention of Afghan nationals and others by members of the International Assistance and Security Forces (ISAF), Sir Kenneth observes:

> What is the source of that authority? So far as the actions of the Afghan authorities are concerned they presumably may depend on their national law. But the States participating in ISAF? In the absence of any agreement with the Afghan government, three sources have been suggested…"

7. I draw to the Inquiry's attention that in addition to the "all necessary measures" authority provided by the relevant United Nations Security Council Resolutions;[3] agreements and arrangements were in place between the Government of the Islamic Republic of Afghanistan and ISAF,[4] and between the Afghan Government and New Zealand / NZDF. These recognise that ISAF forces, including New Zealand forces, have authority to, amongst other things, detain people.

8. The case of *Al-Waheed* v *Ministry of Defence*[5] to which the opinion refers, concerns detentions carried out by UK Forces in Afghanistan (and Iraq). As the opinion notes, the authority of the Security Council Resolutions to authorise detention, identified in that judgment, is patently correct. The issue was rendered very much more complex for the UK than it was for New Zealand because detentions in Afghanistan were conducted under the UK Government's independent detention policies, not under the direct authority and policies of ISAF.[6] I draw the Inquiry's attention to ISAF Standard Operating Procedures for Detention (SOP 362) which were accepted as applicable to the NZDF. The direct line of authority from the UN Security Council to the New Zealand Force renders inapplicable almost all of the issues contested in *Al-Waheed*.

9. I also draw the Inquiry's attention to United Nations Security Council Resolution 1943 (2010) which unanimously determined that the Afghan authorities were ultimately responsible for maintaining order in the country and recognised the assistance provided by ISAF in this regard. Importantly, the Resolution states, at [4], that the Security Council:

> …encourages ISAF and other partners to sustain their efforts, as resources permit, to train, mentor and empower the Afghan national security forces**,** in order to accelerate progress towards the goal of

[3] UNSC Res 1368 (2001) [3] authorises " … Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate". See also UNSC Res 1510 (2003), UNSC Res 1623(2005), UNSC Res 1746 (2007), UNSC Res 1817 (2003) and UNSC Res 1890 (2009).

[4] Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, at [2]: "The Interim Administration understands and agrees that the ISAF Commander will have the authority, without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission".

[5] *Al-Waheed* v *Ministry of Defence* [2017] UKSC 2.

[6] Per Lord Sumption at [31] "This issue arises from differences between the detention policy applied generally by ISAF and that operated by United Kingdom forces … in their own areas of operation".

> self-sufficient, accountable and ethnically balanced Afghan security forces providing security and ensuring the rule of law throughout the country,…

10. Partnering operations such as those conducted by the NZDF were, therefore, expressly called-for by the Security Council, not simply a by-product of the wider ISAF mandate. I also draw the Inquiry's attention to the Report of the UN Assistance Mission in Afghanistan and the UN Office of the High Commissioner for Human Rights, dated October 2011 which recommends that troop contributing nations:[7]

> Build the capacity of the NDS [National Directorate of Security] and ANP [Afghan National Police] facilities and personnel including through mentoring and training on the legal and human rights of detainees and detention practices in line with international human rights standards.

11. If the UN had considered that further cooperation by troop contributing nations of ISAF with Afghan Authorities was no longer lawful or proper because of the actions of those authorities – it would have said so.[8] I also note the training obligations of Article 10 of the UN Convention Against Torture which are consistent with performing a training or mentoring role that encourages compliance with the prohibition on torture.[9]

International Humanitarian Law / International Human Rights Law

12. The opinion addresses, at page 5, the relationship between IHL and the similarly-named International Human Rights Law. It is correct that these two bodies of law significantly overlap, and this is particularly so in respect of the prohibition on torture. I also draw to the inquiry's attention, however, that in some other respects these two bodies of law produce quite different results. This is particularly so when a force is concurrently assisting a policing function (in which case international human rights law takes a primary role); but may also be called upon to perform a more fundamentally military "direct action" role (which is primarily governed by IHL). This can have significant effects on issues such as the use of force, and in particular the right to life.[10] The expression "proportionality" also has a very different meaning under IHL from that which it typically bears under human rights law.[11] Similarly, the use of riot-control agents and expanding bullets is

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[7] UN Assistance Mission in Afghanistan / UN Office of the High Commissioner for Human Rights, "Treatment of Conflict-Related Detainees in Afghan Custody" (October 2011) at 52. This report identifies evidence of widespread torture by Afghan authorities. It recommends that troop contributing nations suspend transfers of detainees to those facilities where credible allegations of torture had been made, pending full assessment.

[8] See, eg Letter dated 12 October 2009 by the UN Legal Counsel concerning the support given by the UN Organization Mission in the Democratic Republic of the Congo to the Armed Forces of the Democratic Republic of the Congo, at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf

[9] Convention Against Torture art 10 1. "Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment". Although this obligation applies primarily to the state party's own personnel, it need not be so limited in practice.

[10] The question of what amounts to an "arbitrary deprivation of life" in armed conflict must be judged by the *lex-specialis* – i.e. IHL. See International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of July 8, 1996, ICJ Rep (1996) 226, [25]. Also see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion 9 July 2004, ICJ Rep (2004) 136, [106] and *Case Concerning Armed Activities in the Territory of the Congo (DRC v. Uganda)*, 19 December 19 2005, [216].

[11] See Michael Newton and Larry May *Proportionality in International Law* (Oxford University Press, Oxford, 2014) Ch 6. Proportionality in IHL only takes into account death and injury to protected civilians. It does not concern itself with the number deaths amongst combatants, or persons taking a direct part in hostilities. Gary

expressly prohibited in a war-fighting paradigm, but is implicitly permitted (and, in practice, commonplace) in a policing role. This is an important and increasingly studied area of law which may require further detailed submissions, which I can provide should the Inquiry so require.

International and non-international armed conflict

13. Pages 6 – 8 of the opinion deal with the law as it applies to non-international armed conflict, and in particular the history of the demarcation between such conflicts and international armed conflicts. It is rightly observed that the law relating to the two types of conflict has drawn closer over recent years, and this is particularly so in respect of the humane treatment of the victims of war. After all, "[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife".[12] Some issues, however, are still treated differently as between the two types of conflict, and as explained below, some of these demarcations are of particular importance to the situation in Afghanistan in 2010.

14. At pages 6 – 11 the opinion addresses some of the substantive rules of IHL. I will, like Sir Kenneth, use the International Committee of the Red Cross's Customary International Law Study ("CIHL Study") as the most convenient encapsulation of the law. That study is not, of course, a legal authority in itself and it is sometimes necessary to examine the customary law and treaty law which are said to support the rules asserted in that book.

Distinction

15. The opinion notes that the CIHL study rule 1 states:

> ***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.***

16. The correctness of this rule is indisputable. It is applicable in its entirety to international armed conflict and applies (subject to some necessary qualifications explained below) to non-international armed conflicts. It contains three distinct propositions:

- Combatants must be distinguished from civilians
- Attacks against combatant are permitted
- Attacks against civilians are prohibited.

17. In applying Rule 1 to non-international armed conflict the CIHL commentary concentrates on the third element - "attacks against civilians are prohibited" and applies the second element - "attacks against combatants are permitted" only by broad incorporation of the rules applicable to international armed conflict.[13] This is because in all but the rarest cases (not applicable in Afghanistan) insurgent groups in a non-international armed conflict do not qualify as combatants. As the ICRC itself advises "… in non-international armed conflicts there is no such thing as combatant status".[14]

Solis *The Law of Armed Conflict: International Humanitarian Law In War* (Cambridge University Press, Cambridge, 2010) 280.

[12] *Prosecutor v Tadić (Jurisdiction Appeal) ICTY* Appeals Chamber, 2 October 1995 at [119].

[13] The CIHL Study mischaracterises for example, the interim New Zealand Law of Armed Conflict Manual DM112 at [205] (misidentified as [203]) which in fact only refers to "legitimate military objectives" not "combatants".

[14] https://www.icrc.org/en/doc/assets/files/other/law10_final.pdf at 5.

18. To understand the application of the distinction rule in the context of operations in Afghanistan in 2010, it is necessary to also examine the next five rules in the CIHL study. In particular, distinction between civilians and combatants requires an understanding of the legal nature of a "combatant". Rules 3 and 4 set this out clearly:

> **Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.**
>
> **Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.**

The commentary to both these rules is equally clear. Although the term "combatants" is sometimes (rarely) applied generically to non-state fighters, this description "does not imply a right to combatant status". [15] The word "combatant" does not appear in Geneva Convention common art 3, nor in Geneva Additional Protocol II. This position is almost universally accepted and is seldom controversial.[16]

19. Applying the law of distinction in an international armed conflict is, therefore, generally straightforward. Enemy combatants wear uniforms and/or distinctive emblems (and can face adverse legal consequences if they fail to do so).[17] They must distinguish themselves from the civilian population, at the very least, while carrying out attacks.[18] They have ranks and serial numbers, and they undergo a process of formal assimilation into the armed forces. They are subject to a command structure and to the orders of a central authority which can enforce IHL.[19] They may, subject to the rules of IHL, be attacked at any time, whether they pose an immediate threat or not.

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[15] Combatants enjoy immunity from prosecution for all acts of violence they perform in accordance with international law. Insurgents in a non-international armed conflict do not. Baragwanath J's obiter in *Attorney-General* (*Minister of Immigration)* v *Tamil X and Refugee Status Appeals Authority* 107/2009 at [43]-[70] seems wrong on this point and was not adopted by the Supreme Court. See *Attorney-General (Minister of Immigration) v Tamil X and Refugee Status Appeals Authority* SC 107/2009 [2010]. The term "combatant adversary" is used in Rome Statute Art 8(2)(e)(ix) but not in a sense granting special status. Members of government forces fighting in internal conflicts are, however, often regarded as having combatant immunity, at least as a matter of domestic law.

[16] See, for example, Medecins sans Frontieres: *The Practical Guide to Humanitarian Law*: "The combatant under the definition of the Third Geneva Convention is entitled to prisoner-of-war status and cannot be prosecuted for participation in hostilities. Nevertheless, this status corresponds to privileges granted by States to their national armies. This status has not been implemented in non-international armed conflicts, where, by definition, governmental armed forces fight non-state armed groups, rebels, or dissidents. These non-state armed groups have the status of a party to the conflict, which compels them to comply with the provisions of international humanitarian law applicable to non-international armed conflicts, but they are not entitled to combatant status"..< https://guide-humanitarian-law.org/content/article/3/combatants/>

[17] Geneva Additional Protocol I art 44(4). Agincourt provides a useful example. Knights in those days were conveniently adorned with heraldic emblems and fought under national colours. A knight could never be mistaken for a farmer, or vice versa. Yet even so, one regrets to note, the wilful massacre of civilians was far from uncommon in medieval warfare, and Henry V (despite his nobler instincts) ordered the slaughter of over 1000 French prisoners and wounded as they lay helplessly trapped in their own armour. See M H Keen *The Law of War in the Later Middle Ages* (Routledge, Toronto, 1965) 190.

[18] Geneva Additional Protocol I art 44(3). The "while carrying out attacks" provision only applies, in New Zealand's view, to persons seeking self-determination or in struggles against racist regimes or foreign occupation.

[19] See Geneva Additional Protocol I arts 43-44. The rules of distinction described in the early chapters of A P V Rogers *Law on the Battlefield* are addressed to exactly this type of warfare, namely "the law of war as it applies

20. The principle of distinction remains of vital importance in non-international armed conflict, such as the case of the insurgency in Afghanistan. The relevant sources demonstrate, however, that applying that rule is an altogether more complex matter. I explain this matter in some detail because, in retrospect, I do not think that in my oral presentation of 22 May 2019, I answered Sir Geoffrey Palmer's question about rules of engagement in the course of "asymmetric warfare" in sufficient depth.[20]

21. Rule 5 of the CIHL Study states:

> **Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.**

Again, this rule has been completely accepted by New Zealand. If a person is not a member of the armed forces, he or she is a civilian. The law requires, furthermore, that, "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[21] Members of the Taliban, el Haqqani Network, and other insurgent groups are not members of the armed forces. Therefore, by default, their underlying legal status is that of civilians. Some sources seek to apply the term "fighter" to such people – but this has no legal basis. New Zealand has never subscribed to the troublesome theory that there is a third and intermediate class of person called an "unlawful combatant". I am aware of no legal instrument, outside of US domestic law, that supports that proposition.

22. Rule 6 of the CIHL Study enunciates what is, for the purposes of understanding the legal obligations of the NZDF in Afghanistan in 2010, the most important rule of all. It states:

> **Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.**

The rule of distinction as applicable in Afghanistan was not, therefore, one that required ISAF forces to distinguish between **combatants** and **civilians**, it was one that required them to distinguish between **civilians who take a direct part in hostilities**, and **civilians who do not**. That rule of distinction is applied as follows:

- Civilians who take a direct part in hostilities are liable to attack under international law for so long as they do so.
- Civilians who do not take a direct part in hostilities are immune from attack.

23. I am aware of no official position by any state, or recognised international organisation (including the UN and ICRC) which runs contrary to this position. There exists today not a single armed conflict anywhere in which combatants are fighting combatants. There was no such conflict in existence in 2010, and certainly not in Afghanistan.[22] All warfare then, as now, comprised conflicts

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to decisions made on the battlefield in conventional, international armed conflicts". The war in Afghanistan is, however, not a conventional international armed conflict.

[20] Conflict is described as "asymmetric" whenever there is a significant imbalance in military capabilities of opposing forces. Inevitably, to survive, the weaker force must seek to exploit vulnerabilities in the stronger force's security. In recent years this has been primarily achieved through breaches of IHL such as attacks on "soft targets" – a euphemism for civilians and civilian objects. They may hope to goad the stronger forces into committing war crimes in reply, due to frustration at their inability to counter such attacks through traditional military strategy.

[21] Geneva Additional Protocol I, art. 50(1).

[22] Stockholm International Peace Research Institute Year Book 2011 Appendix 2A. Patterns of major armed conflicts, 2001–10.

between governmental armed forces fighting against armed groups of civilians directly participating in hostilities, or amongst such groups of civilians fighting each other. The term "insurgent" and its variants, have no legal basis and do not confer any legal status. [23] The ICRC's *Basic rules of international humanitarian law in armed conflicts* 1978, although generally still useful, is somewhat out of date in this regard since it refers to " an enemy who surrenders" and "parties to the armed conflict and their armed forces" "combatants", etc which is not the language, or reality, of modern operations.[24] It is for this reason that the *basic rules* card is not used by the NZDF, which instead drew up a Code of Conduct card of its own design. This card expresses the distinction principle as: "Fight only opposing forces and persons taking a direct part in hostilities".

24. The vital issue of distinction in the conduct of operations in Afghanistan in 2010 (and now) is: - "what constitutes direct participation in hostilities?" There may be no single issue of greater importance, or complexity, in the law governing modern armed conflict, and few more vigorously debated. It may be surprising, therefore, that the international community has never provided a definitive answer to this question. [25] In 2009, after six years of concentrated effort, the ICRC launched its *Interpretative Guidance on Direct Participation in Conflict*. [26] The result was, to say the least, controversial.[27] The guidance was just over a year old at the time of Operation Burnham. Legal advisers throughout the world tacitly accepted bits of the guidance with which they agreed, and discarded the rest. No armed force, to the best of my knowledge, officially adopted it in its entirety. NZDF did not.

25. A critical, and most controversial, part of the Direct Participation Guidance is this:[28]

> [W]here individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group.

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[23] The UN Assistance Mission in Afghanistan uses the term "anti-government elements" which encompasses "individuals and armed groups of diverse backgrounds, motivations and command structures, including those characterised as the Taliban, the Haqqani network, Hezb-e-Islami and others". It is now known that "Islamic State" operates in parts of Afghanistan, but this was not the case in 2010. Whatever was left of el Qaida was also thought to be present in Afghanistan in 2010.

[24] This has been supplied to the Inquiry.

[25] See the unhelpful position taken in *Prosecutor* v *Tadic*,. Judgment, (7 May 1997): at [616] [I]t is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time".

[26] See Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL (ICRC, Geneva, 2009).

[27] Melzer's work was subject to much criticism on its release - some of which, in my view, was justified, some of which was not. For a range of views see W. Hays Parks, "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect" 42 NYUJ Int'l L. & Pol. 769(2010). Michael N. Schmitt "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis"(2010) 1 Harvard National Security Journal, 5. For a response see Nils Melzer, "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities, 42 NYUJ Int'l & Pol. Many experts withdrew before the final document was published and many who remained were disappointed not to be allowed to append dissenting views.

[28] See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* (ICRC, Geneva, 2009). pp. 71-72

26. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions notes: [29]

> The ICRC test may rightly be criticized because of its lack of an authoritative basis in treaty law, but it has the advantage that the question of who is a legitimate target is answered by reference to the performance of activity that directly causes harm to belligerents and/or civilians. This provides some objective basis for determining who may be targeted.

27. The distinctions, nuances and bitter arguments on this point thrive most actively, however, in the world of academic blogs and law journal articles - debates which are of very little use to armed forces required to make split-second decisions in combat situations. That is where rules of engagement, and sophisticated targeting processes, come in to play.

28. That the Taliban's core cadre directly participated in hostilities in 2010 seems undisputed in international literature. Such participation involved planning, directing and executing campaigns of armed violence against ISAF, the Government of Afghanistan and its forces, journalists perceived as insufficiently friendly to Taliban interests, school teachers and children (particularly schoolgirls), women's rights activists, ethnic and religious minorities and members of the civilian population in general. [30] While some also had other employment (for example drug-trafficking) their participation in the insurgency during the "fighting season" was on a more or less full-time basis – thereby depriving them of immunity from attack. More problematic is whether any given individual fighting for the Taliban is:

- a member of an "organised armed group" fulfilling a "continuous combat function", or
- a civilian taking a direct part in hostilities only for the time being, or
- a person who may have taken a direct part in hostilities at some stage, but is not doing so now.

29. The Taliban have frequently made use of local Pashtun tribal fighters whose actual allegiance to the movement's (often-incoherent) ideology is unknowable. They also use conscription, particularly for suicide bombers. Taliban fighters did not wear uniform in 2010 (or now) nor did they, or any other insurgent group, have an easily recognisable rank structure.[31] A person does not have to be a member of the Taliban to actively assist them – and in so doing the person may (in some circumstances) lose immunity from attack.

30. Distinction in a scenario such as this is highly circumstantial and is driven by intelligence. That a particular individual is taking a direct part in hostilities may be determined by a number of criteria which are applied in combination. Whether a person is armed, and if so with what weapon, is a factor, but is not determinative. A person may be unarmed at the moment of the attack, and yet

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[29] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions A/68/382 13 September 2013 at [70].

[30] See, eg, Amnesty International: *Afghanistan: Human rights must be guaranteed during reconciliation talks with the Taleban* 8 March 2010, Index number: ASA 11/003/2010. "The Taleban and related insurgent groups in Afghanistan have shown little regard for human rights and the laws of war, deliberately targeting civilians, aid workers, and facilities like schools (particularly girls' schools). According to UN figures, the Taliban and other insurgent groups were responsible for two thirds of the more than 2,400 civilian casualties in Afghanistan last year, the bloodiest year yet since the fall of the Taleban. See also Amnesty International: "Afghanistan: Harrowing accounts emerge of the Taliban's reign of terror in Kunduz" (October 2015) "Taliban fighters were using a "hit list" to track down their targets. It allegedly includes the names and photos of activists, journalists and civil servants based in Kunduz".

[31] Many Taliban wear black turbans or white turbans, but many do not. This is not uniform, and many people who do not belong to the group also wear black or white turbans.

still be taking a direct part in hostilities – for example a commander ordering an attack by cell-phone.[32] A person who is armed, conversely, might not be taking a direct part in hostilities. I will not, in this format, further address the process by which such a determination is made.

31. Whatever worthwhile debates the ICRC guidance may give rise to, the actual conduct of states (an element of customary international law) could not be clearer. Attacks by governmental armed forces and their allies, on insurgent groups, are taking place around the globe on a daily basis. The legality of doing so, provided IHL is complied with, is almost universally accepted by the international community. New Zealand's Government currently and unambiguously supports such use of force in the global campaign against "*Islamic State*".[33]

Military objectives

32. The opinion then moves to rule 7 of the CIHL Study which states:

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

33. Again, this rule is completely uncontroversial and is applicable to both international and non-international armed conflict. To apply the rule in the context of operations in Afghanistan in 2010, however, it is necessary to understand what constitutes a military objective. This is because the distinction between the two forms of property set out in rule 7 is not immutable – in fact quite the contrary. To understand Rule 7 it is necessary to examine Rules 8, 9 and 10. These state:

> **Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.**
>
> **Rule 9. Civilian objects are all objects that are not military objectives.**
>
> **Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives.**

34. Rule 10, when read in the context of rules 8 and 9, makes it clear that a civilian object, such as a dwelling house, is ordinarily (and by default) deemed to be not a military objective, and therefore immune from attack.[34] That, however, is not the end of the story. Such a building will become a military objective, if it is used by the opposing force to contribute to "military action" e.g.

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[32] It would be inconsistent with IHL principles if a soldier who accidentally drops his or her rifle during an attack remains a lawful target, but an insurgent who does the same thing, is not. See *Blaskic Appeal Judgement*, ICTY [114]: "If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of the crimes, does not accord him civilian status."

[33] This country is currently an active participant in the "Global Coalition to Defeat ISIS / Daesh" which "remains committed to conducting the fight against ISIS in full respect of international law". See Statement by Ministers of the Global Coalition To Defeat ISIS/DAESH 6 February 2019. <https://tr.usembassy.gov/statement-by-ministers-of-the-global-coalition-to-defeat-isis-daesh/..> . That fight includes conventional armed attack against members of ISIS forces in the field (for example Mosul in Iraq) on that basis that those people have forfeited civilian immunity by taking a direct part in hostilities

[34] Geneva Additional Protocol I art 52(1). Article 52(3) provides that in cases of doubt objects such as a place of worship, dwelling house or school shall be presumed not to be making an effective contribution to military action.

if they fire from it, store munitions there, or use it as a command centre. In that case it can be attacked if its destruction, capture or neutralization offers a definite military advantage.[35]

35. If insurgents were inoculated from attack by simply entering a civilian building the entire basis of the distinction principle would collapse. Civilian buildings would become the cover of choice for insurgents very quickly, thereby endangering not only the civilian inhabitants, but also respect for the law of armed conflict itself.

36. Conversely, however, the mere fact that insurgents have entered a civilian building does not justify its deliberate destruction by virtue of that action alone. Attack is only lawful if it is demanded by military necessity. In some cases, it will be better to wait for the insurgents to leave the building before taking military action against them. A force may attempt to capture the insurgents rather than attack the building. This is particularly so when those forces are operating under rules of engagement that require them to apply "minimum force". IHL might allow a building to be destroyed – but the rules of engagement might require greater restraint. In the fluid and confusing environment of combat operations, however, a force may not always have the freedom to exercise a wide range of options. The risk of own-force casualties is a legitimate consideration.

37. There are, of course other layers of protection for buildings and other objects that have cultural or religious value, and for hospitals, schools, protected zones etc.[36] These are not specifically addressed in the opinion, but are implicit in the law of distinction and as such are well known to the personnel of the NZDF. In these cases, still greater care must be taken in the choice of the means and methods of warfare. Even these enhanced protections, however, are not absolute. The actions of the opposing force may render buildings enjoying special protection liable to attack as military objectives if the military necessity to attack them is great enough.[37]

Indiscriminate attacks

38. The opinion states:

> The two rules [Rules 1 and 7] are to be read with the prohibition in Rule 11 on indiscriminate attacks also applicable in IACs and NIACs (for the definition of indiscriminate attacks see Rule 12 and also Rule 13 on bombardment).

39. Rules 11, 12 and 13 are as follows.:

> **Rule 11. Indiscriminate attacks are prohibited**
>
> **Rule 12. Indiscriminate attacks are those:**
>
> **(a) which are not directed at a specific military objective;**
>
> **(b) which employ a method or means of combat which cannot be directed at a specific military objective; or**

[35] Geneva Additional Protocol I art 52(2).
[36] See e.g. Geneva Additional Protocol I, art 53(1); and Additional Protocol II, art 16. See also Rome Statute, art 8(2)(b)(ix) and 8(2)(e)(iv); and Customary IHL Study Volume vol 1, rule 38. Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 215. See Cultural Property (Protection in Armed Conflict) Act 2012, sch 1. Protocol for the Protection of Cultural Property in the event of Armed Conflict 249 UNTS 358 For Hospitals etc see Geneva Convention I, art 19; and Additional Protocol I, art 12.
[37] See, e.g. Convention for the Protection of Cultural Property in the Event of Armed Conflict art 11.

(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.

40. These rules are largely self-explanatory and engage no specific qualifications arising from the nature of the conflict in Afghanistan in 2010.[38] In the interests of completeness, I would add, however, that the rules in question relate to the inherent characteristics of a means of warfare and the intended consequence of a particular use of force.[39] A usually reliable weapon which malfunctions on a particular occasion, does not constitute an indiscriminate attack. Nor does this rule apply to accidental targeting, unless the means or method of warfare in question is so unreliable that it can be regarded as inherently indiscriminate.[40] Nor, finally, do these rules criminalise mistakes and human error. A commander who, in good faith, thinks that an object is a legitimate military objective is not held to be in breach of IHL if it later transpires that the information upon which he or she relied was in fact wrong. This is known as the "Rendulic rule", which holds that a commander's liability is based on the information reasonably available at the time of his or her decision.[41]

Proportionality

41. The Rendulic rule is also applicable to the principle of proportionality referred to at pages 9 – 10 of the opinion. The content of Rule 14 is accepted as correct. It states:

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

42. The corollary of this rule is that attacks which may cause incidental civilian casualties or damage are not unlawful if justified by, and proportionate to, military necessity.[42] Although such losses are always tragic and much to be regretted, that is the law.[43] It may seem surprising that no

[38] Geneva Additional Protocol I Art 51(4).

[39] Geneva Additional Protocol I Art 51(4) "…. are of a nature to strike military objectives and civilians and civilian objects without distinction.

[40] See *Prosecutor* v *Gotovina* ICTY (Appeals Judgment). This controversial decision was approved by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*), Judgment, ICJ. Reports 2015, [472].

[41] *Trial of Willem List and Other* (the Hostages Case) LRTWC at 1297.

[42] The fact that this rule admits the possibility of lawful incidental injury and incidental civilian damage does not in any way justify violations such as deliberately attacking civilians who are not taking a direct part in hostilities.

[43] See Geneva Additional Protocol Art 51(5)(b) which treats disproportionate attacks as an example of indiscriminate attacks. However, the two types of attack are usually treated as being different, albeit related, subjects. See Rome Statute, art 8(2)(b)(iv). See also Elements of Crimes under art 9. The attack must be such that it would cause incidental death or injury to civilians of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated. 'Concrete and direct overall military advantage' refers to a military advantage that is foreseeable at the relevant time.

binding and exact formula for making such a proportionality calculation has ever been pre-set by the international community. That calculation has always been left to the judgement of commanders on the spot. In this regard, the concept is "easy to phrase but difficult to implement". [44] An excessively permissive view of the rule will result in needless civilian deaths. An unduly restrictive calculation will inevitably lead not only to own-force casualties but may also cause loss of civilian lives greatly exceeding any that might be lost as an unintended result of the operation itself. If incidental casualties were categorically impermissible it would be impossible to interdict suicide bombers driving through city streets, rescue hostages, defeat insurgent attacks within built-up areas, or forcibly halt genocidal attacks - since all of these things incur a real risk of civilian casualties even if all feasible precautions are taken.[45] Once again, this rule does not deal with casualties that arise through accident or weapon malfunction. The rule applies to attacks which are actually expected – but not intended - to inflict such losses. This rule is essential to IHL, without which all other rules established to protect the civilian population would become unworkable.

43. These duties are not all one way. The party under attack also has obligations not to expose the protected civilian population to attack by the way it conducts its operations.[46] Needless to say, the Taliban pay little practical heed to such requirements, and their failure to do so does not diminish the legal obligations of ISAF forces.

44. This all creates, therefore, much greater problems in asymmetric warfare than in conventional warfare - particularly in non-international armed conflict. Insurgent forces will often live and operate amongst the civilian population, sometimes of necessity and sometimes for the very purpose of inducing breaches of the proportionality rule. I reiterate, however, that just because the law provides that a force may cause incidental civilian casualties and damage does not mean that it must. An attack may be perfectly lawful under IHL, and yet may not be approved by the force's rules of engagement. This is particularly so when the force is operating under rules of engagement that require the use of minimum force.

45. I do not have any comment on the remaining rules of IHL identified in Sir Kenneth's opinion, other than to observe that they are all accepted and well-known.

Aiding and assisting under international law

46. Pages 11-17 of the opinion deal with protection of persons in detention and identifies the major authorities which protect detainees from torture and other ill-treatment. That this is the law is not open to doubt. Torture is absolutely prohibited as a "super-strong" rule of international law and is also, it should be noted, criminalised under New Zealand law. Those provisions apply extra-territorially to member of the NZDF.[47]

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[44] *Public Committee against Torture* v *the State of Israel* (2006) Israel Supreme Court HCJ 769/02 judgment of Rivlin P at [6].

[45] For example, for the Dutch Battalion at Srebrenica to stop the Army of Republika Srpska (VRS) attack on the Moslem population it would have been necessary to use anti-armour weapons, close air support and indirect fire, such as artillery. Given the close proximity of VRS forces to their intended victims, such means of combat would have almost inevitably lead to unintended casualties amongst the protected population – although nowhere near as many as inaction produced.

[46] Geneva Additional Protocol I art 58(b) requires that parties to a conflict avoid locating military objectives within or near densely populated areas. See also art 51 (7) which prohibits the use of human shields.

[47] See Crimes of Torture Act 1989, s 3, Geneva Conventions Act 1958, s 3, International Crimes and International Criminal Court Act 2000, ss 9 - 11 and Armed Forces Discipline Act 1971 s 74(1).

47. Pages 11-16 of the opinion traverse a range of matters relating to the *non-refoulment* obligation where a real risk of torture exists. That obligation is fully accepted and is reflected, amongst other places, in ISAF Standard Operating Procedures 362 Annex D at [3]. It is also well explained in the *Copenhagen Principles* to which New Zealand contributed, as follows:

> A State or international organisation will only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.

48. The opinion also offers the possibility of an expanded interpretation of this obligation - and that of Art 1 of the Geneva Conventions of 1949. It postulates, but without conclusion, a possible extension of the legal obligations which obtain in respect of prisoners taken by New Zealand forces, to prisoners taken by the Afghan Security Forces that New Zealand is partnering. The opinion does not address any concrete consequences of such a conclusion or refer to any example where this possible interpretation has been found to be the case.

49. The opinion also states:

> That purpose [non-refoulment] also appears in the requirement in Article 5(4) of AP II that if persons deprived of their liberty in a NIAC are to be released necessary measures must be taken to ensure their safety; that is, they should not be released if their safety cannot be ensured (see ICRC commentary para 4596).

To the extent that this provision is cited as simply another example of the duty of humane treatment of person in detention, I agree. It should be noted, however, that arrest by Afghan authorities of a person subject to Afghan law, while those authorities are being partnered by New Zealand forces, does not constitute a "release" of that person from New Zealand detention in either law or fact. As has been noted above, the circumstances of the arrest, and release, of persons detained in Afghanistan are prescribed in in ISAF Standard Operating Procedures 362. A force has no legal capacity to "not release" a person over whom it has no legal authority or physical custody.

50. The inquiry will be aware that the issue of applying the non-refoulment obligation to persons detained by the Afghan CRU was the subject of an authoritative and detailed Crown Law opinion written by Mr Ben Keith and Ms Cheryl Gwyn in 2010. That opinion was signed by the Solicitor-General, Dr David Collins, QC and from a constitutional viewpoint represents the official New Zealand Government legal position on the matters on which it treats.[48] I will not needlessly revisit the matters it covers, but suggest some other issues this question throws up.

51. The importance of Art 1 of the Geneva Conventions of 1949 is undisputed. It states:

> The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

[48] *Du Claire* v *Palmer* [2012] NZHC 934 at [113]. Providing binding direction to Government departments is a fundamental of the law officer function. As far as I am aware, no part of that opinion has since been rescinded.

There is, however, a discernible gap between some of the aspirational hopes attached to that article, and the demonstrated practice of states in its application.[49] I would be happy to expand on this submission if required. In terms of how the obligations would apply in practice in a situation like Afghanistan in 2010, however, the head of the ICRC's Legal Division has the following useful advice:[50]

> …it has often been repeated that Common Article 1, as well as the general principles of humanitarian law to which it gives expression, prohibits third States from encouraging the parties to a conflict to violate IHL. As pointed out by Meron, the well-grounded principles of good faith and pacta sunt servanda impose upon States party to the Geneva Conventions not only a duty to abide by their own obligations, but also a duty not to encourage other parties to violate theirs. Furthermore, according to the general regime of State responsibility, third States are under the obligation not to knowingly aid or assist in the commission of IHL violations. …To give but one example, such negative duties could arise in multinational operations. High Contracting Parties would be prevented from carrying out joint operations with other States if there was an expectation that these States would act in violation of the Geneva Conventions or other relevant norms of IHL, **unless they took active measures to ensure respect therewith**. **Such measures to ensure respect could include joint planning, training or mentoring programmes.**

52. The opinion also addresses the issue of state responsibility for complicity in acts of international wrongdoing. This advice draws heavily on Sir Kenneth's separate declaration in support of his dissenting vote on finding in the ICJ *Bosnian Genocide* case,[51] which in turn, draws on the separate and partially dissenting judgment of Judge Shahabuddeen in the *Krstić* Appeal Decision. The issues of state responsibility and individual criminal responsibility have, therefore, been somewhat intertwined, although they do engage some rather distinct elements. While I greatly respect both of those opinions, I think it necessary to add some matters of importance to the Inquiry's considerations.

53. The opinion, referring to the ICTY *Krstić* Appeal decision, states:

> "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."

It is now generally accepted that a secondary party to an international crime such as genocide does not need to "share" the specific intent of the principal perpetrator. I suggest, however, that further qualifications need to be added to the statement that "knowledge of the wrongdoing is enough" because it could be read to suggest that the secondary party need not intend to facilitate the principal crime in any way at all – which is not the position under either international law or domestic law.

54. It is useful to start with New Zealand law, particularly as national practice is a valid source for determining the content of international law. It would be strange indeed if the law protected ordinary people in peacetime New Zealand from over-criminalisation of secondary liability, but did not do so for members of the Armed Forces operating in a war zone, in direct fulfillment of a UN Security Council Resolution, at the risk of their own lives. One would expect to see a clear legal

[49] The current ICRC Commentary on Art 1, while a valuable source, has no legal status. It was published in 2016, six years after the events in question.
[50] Knut Dormann and Jose Serralvo "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations" International Review of the Red Cross 727
[51] *Bosnia and Herzegovina* v *Serbia and Montenegro* (2007) ICJ Rep 2

enunciation of any such position. To the contrary there is good argument for suggesting a margin of appreciation should actually apply in the opposite direction.

55. Section 66(1)(b) of the Crimes Act 1961 states:

> "Every one is a party to and guilty of an offence who
>
> … (b) does or omits an act **for the purpose of** aiding any person to commit the offence"

56. Simester and Brookbank explain this as follows:[52]

> The *mens rea* element for secondary participation (by assisting or encouraging) is intention; S [the secondary party] must intend to participate in the crime committed by P [the principal]. …
>
> The essence of aiding and abetting is intentional help or encouragement. This means that not only must S intend his or her actions, but he or she must act with the intent thereby to aid, abet, incite, counsel or procure P's conduct…

57. Mere knowledge a crime may occur is, "insufficient".[53] The Supreme Court has more recently held that aiding and abetting requires that:

> "the secondary party **intentionally helped or encouraged the principal offender** with knowledge of the essential matters constituting the offence, including the principal's *mens rea*".[54]

58. International criminal law on aiding and abetting follows a more confusing path, but arrives (eventually) at very nearly the same point. The *Krstić* trial concerned genocide – a crime having a specific intent requirement.[55] The issue was whether a person who assists a group, knowing that it intends to commit international crimes, must share the intent to "destroy, in whole or in part a national, ethnical, racial or religious group as such".[56] Judge Shahabuddeen's opinion addresses that "special intent" but does not suggest that mere knowledge of another person's criminal intent is generally enough to secure a conviction. He states:[57]

> This does not mean that the act of the aider and abettor does not have to be shown to be intentional. Intent must always be proved, but the intent of the perpetrator of genocide is not the same as the intent of the aider and abettor. The perpetrator's intent is to commit genocide. The intent of the aider and abettor is not to commit genocide; **his intent is to provide the means by which the perpetrator, if he wishes, can realise his own intent to commit genocide.**

I agree. The secondary party must intend to facilitate a crime (even if not that exact crime). If that view is accepted, no further discussion is necessary.

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[52] AP Simester and WJ Brookbanks Principles of Criminal Law (5th ed, Thomson Reuters, Wellington, 2019) at [6.4.4].
[53] Citing *R v Sammuels* [1985 1 NZLR 350 (CA)].
[54] *Mahana Makarini Edmonds* v *R* [2011] NZSC 159, [22].
[55] The other two crimes with special intent being persecution (as a crime against humanity) and terrorism.
[56] Radislav Krstić knew of the genocidal intent of members of the Republika Spska "Main Staff". He was also aware that they had insufficient resources to carry out the executions and that, without the use of his Drina Corps resources, they could not implement that genocidal plan. Although Krstić was not a supporter of that plan, by allowing Drina Corps resources to be used he knowingly and intentionally made a substantial contribution to the murder of Bosnian Muslim prisoners. The Appeal Chamber confuses "desire" with "intent". Krstić may not have desired that his troops assist in a genocide, but in ordering them to assist the Main Staff – his intent was to facilitate a genocidal plan by the principal offenders.
[57] *Prosecutor* v *Radislav Krstić* ICTY Appeals Judgment at [66]:

59. Unfortunately, the loose language of the Krstić majority sowed seeds of confusion where none needed to exist. In deciding what does not constitute the *mens rea* of aiding the majority never states definitively what actually is required. To produce their ruling, the majority surveys national law. That survey was (not unreasonably) accepted as accurate in Judge Shahabuddeen's dissenting *obiter dicta.* And from there it migrated into the ICJ *Bosnian Genocide* case.[58] The survey is, however, inaccurate and misrepresents the material on which it relies. A knowledge-only basis of guilt was not the law in Germany,[59] Canada,[60] Australia[61] or Switzerland.[62] All of those states, like New Zealand, required that a secondary accused must have intended to facilitate the crime. Even the law of France and England is not quite as simple as the majority suggest. Why the Chamber followed this path when Krstić could properly have been convicted on the basis of his actual intent is a mystery.[63] That there is, in reality, no such common approach amongst states was laid finally bare by the Appeal Chamber in Sainović: "… in light of the variation among national jurisdictions with respect to aiding and abetting liability, the Appeals Chamber considers that no clear common principle in this respect can be gleaned from the major legal systems of the world."[64]

60. Even if the position that under English Law "aiders and abettors need only be aware that they are aiding the principal perpetrator in the commission of its offence by their contribution" was true in 2004, it was not at the time of the events before this Inquiry. Section 44 of the Serious Crime Act 2007 (UK) provides that:

> (1) A person commits an offence if—
>
> (a) he does an act capable of encouraging or assisting the commission of an offence; and
>
> (b) he intends to encourage or assist its commission.

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[58] For the ICJ policy of accepting ICTY appeal judgments without closer examination, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia*), Judgment, ICJ. Rep 2015, [107].

[59] German Criminal Code 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I s 27 Aiding (1) "Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider." See also Code of Crimes Against International Law (Völkerstrafgesetzbuch) s 2 which applies the Criminal Code to international crimes.

[60] Criminal Code (RSC, 1985, c. C-46) 21 (1) Every one is a party to an offence who … (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it. The Chamber selectively misquotes the finding in *Dunlop and Sylvester v R* (1979) 2 S.C.R. 881, and ignores the later, and more relevant, case of *R* v *Hibbert* [1995] 2 SCR 973, 1995 at [38] – [39]: " Parliament's use of the term "purpose" in s. 21(1)(b) is essentially synonymous with "intention" and does not incorporate the notion of "desire" into the mental state for party liability".

[61] Criminal Code Act 1995, s 11.2(3) For the person to be guilty, the person must have intended that: (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed. The actual ruling of *Giorgianni* v R (1985) 156 Clr 473 at [17] is as follows: "My view of the law may be summed up very shortly. No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender … neither negligence nor recklessness is sufficient."

[62] Swiss Criminal Code 1937. Art. 25 5. Participation / Complicity "Any person who wilfully assists another to commit a felony or a misdemeanour is liable to a reduced penalty".

[63] Few people in the West doubted that Krstic,(having been acquitted as a principal in a joint criminal enterprise) should be punished on some basis. Why the Chamber misquoted the law is harder to understand.

[64] *Prosecutor* v *Sainović* ICTY Appeals Chamber at [1644].

(2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.

61. Furthermore, s 50 of that Act provides a "reasonable act" defence:

(1) A person is not guilty of an offence under this Part if he proves—

(a) that he knew certain circumstances existed; and

(b) that it was reasonable for him to act as he did in those circumstances.

One might consider whether the provision of mentoring, in accordance with a UN Security Council Resolution, with the intent to enhance the professionality of a local security force could constitute "reasonable conduct" by this test.

ICTY's confused jurisprudence

62. *Krstić* is but part of a wide-ranging jurisprudence on aiding and abetting, developed by the ICTY and other *ad hoc* tribunals during their lifespan. While no judgment disputed that a subjective element must be proved to convict a secondary party, the exact nature of that mental element was described in a range of ways. The Tribunals often confused intent with either motive, or desire, each of which are quite different things. Several judgments identify intent from the knowledge and awareness of the secondary party that his or her conduct assisted or facilitated the commission of the crime by the principal offender.[65] Other judgments required that the secondary party be aware of the essential elements of the crime committed by the principal offender – including that person's state of mind. Later Tribunals insisted that there be some form of "volitional" element, i.e. an acceptance of the final result.[66] Later still this incoherence reaped its logical reward, producing the "aiding and abetting rupture" - one of the most significant and divisive episodes of legal fragmentation in the Tribunals' history.[67] A last-gasp attempt to unify the position was made

[65] *Prosecutor v Tadic* ICTY Appeals Chamber at [192] found "The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime… and this support has a substantial effect upon the perpetration of the crime… the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal". See also *Prosecutor* v *Furundzija* ICTY Trial Chamber (1998).

[66] In *Prosecutor* v *Oric* ICTY Trial Chamber (2006) [279] the trial chamber stated: "the aider and abettor must have double intent, namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator. The intention must contain a cognitive of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that, in consequence of his actions, the commission is more likely than not." See also Prosecutor v Halilovic ICTY Trial Chamber (2006) at [286] "recent judgments also demand some form of acceptance of the final result".

[67] In *Prosecutor* v *Perisic*, ICTY Appeals Chamber. Th majority (four judges to one) found that the aid must be "specifically directed" to the crime. Perisic was acquitted and released. Twelve months later the Appeal Chamber in *Prosecutor v Sainovic* came to the exact opposite conclusion - again with one dissent. *Mladic* at first instance has followed *Sainovic* – as it must. How the Appeals Chamber will deal with the issue is yet to be demonstrated. Whichever way one looks at it, however, an almost even split exists amongst top international jurists on whether specific direction is required to prove accessorial liability. Most scholars think *Sainovic* is right, but some well-known experts think that Perisic is the correct position. An accurate reflection of this jurisprudence must concede that the exact nature of the mental and material elements of aiding and abetting in the ICTY produced sharply divided views, discontent, and bitter personal attacks amongst judges at the highest level of the court.

(ironically) in the very twilight of tribunals which no longer exist, and the likes of which we may never see again.[68]

63. Having studied this material in depth, I can identify no case where a person was properly found guilty before an international criminal tribunal for aiding and abetting where that person has not, in some significant way, deliberately facilitated the principal's capacity to commit the principal crime. Even if not sharing that person's particular intent, the secondary party has always been shown to have "bought into" the crime. This is also true of the "*Zyklon B*" case, relating to the supply of deadly gas to Nazi Death Camps - although that case is often cited in support of the opposite conclusion.[69] Furthermore, liability for aiding and abetting in international criminal law is not inchoate: the accused cannot be held responsible for aiding and abetting if a crime or underlying offence is never actually carried out with his or her assistance, encouragement, or moral support'. [70]

The Rome Statute

64. More reliable, contemporary and (one hopes) enduring guidance on aiding and abetting is to be found in the Rome Statute of the International Criminal Court – a Court which, unlike the *ad hoc* tribunals, actually has last-resort jurisdiction over members of the NZDF in respect of their conduct in Afghanistan in 2010.[71] One hundred and twenty states, including New Zealand, negotiated the terms of the Statute and all but seven voted approval. It now has 122 state parties, and a further 31 signatories.

65. The relevant provision is Rome Statute art 25(3)(c).[72] This establishes criminal liability if the perpetrator:

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[68] *Prosecutor v Sainovic*: ICTY Appeals Chamber (2014): " it must be shown that the aider and abettor knew that his acts or omissions assisted the commission of the specific crime by the principal, and that the aider and abettor was aware of the essential elements of the crime which was ultimately committed, including the intent of the principal perpetrator … it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed – if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."

[69] *Trial of Bruno Tesch and ors* (1946) LRTWC. Tesch's motive for providing Zyklon B, one can surmise, was self-preservation and financial gain. He did not desire, he claimed, the extermination of ethnic and religious minorities. But his clear intent was to facilitate such killing. The judge advocate, while referring only to knowledge in his summing up, did not think that "on points of law … the Court needed any direction." Prosecution evidence, included the following: "Dr Tesch, when asked for his views [on killing Jews] had proposed to use the same method, involving the release of prussic acid gas in an enclosed space, as was used in the extermination of vermin. He undertook to train the S.S. men in this new method of killing human beings". He was consequently convicted and hanged. (One of the members of that court was Lt Col Sir Geoffrey Palmer, Bart., Coldstream Guards).

[70] *Prosecutor* v *Milutinović* ICTY Trial Chamber-at [92]. *Prosecutor* v *Laurent Semanza*, ICTR (2003), at [378].

[71] The Pre-trial Chamber of the ICC has determined, however, that investigation of the situation in Afghanistan is not in the interests of justice and has declined the Prosecutor's *proprio motu* application to do so.

[72] I was present during Rome Conference debates. The "Zutphen draft statute" mooted criminal liability on the basis of aiding and abetting with "[intent][knowledge] to facilitate the commission of such a crime". The language adopted, however, went down a different path. The prevailing view was that criminal liability for aiding and abetting should, only arise when the perpetrator intended that the crime take place and purposefully set out to facilitate it. The phrase "for the purpose of facilitating" comes from § 2.06(3)(a) of the Model Penal Code. The commentary to that code states "the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent".

> **for the purpose of facilitating the commission of such a crime**, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

66. This is read as consistent with, although prevailing over, art 30 of the Rome Statute which requires that unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.[73]

67. Professor Roger Clark, a lead negotiator for Samoa before and at Rome, writes:[74]

> Article 25 sometimes uses terms like "purpose" and "with the aim of" that may need to be read in the light of article 30. Speaking generally, one who does not personally "do" the deed**, must know of it and intend to associate himself with it .**...

68. Olasola and Roja elaborate further:[75]

> … Article 25(3)(c) of the ICC statute expressly requires the "purpose of facilitating the commission of such a crime" by the perpetrator. Accordingly, an aider and abettor under the ICC Statute **must have a purposeful will to bring about the crime** (direct intent / dolus directus in the first degree), **or at least the will to assist in the commission of the crime.** As a result, mere awareness that assistance in a crime will be the necessary outcome of one's conduct (oblique or indirect intent / dolus dirtus) does not suffice for responsibility to arise as an aider and abettor under Article 25(3)(c) of the ICC Statute. Any lower mental element, such as conditional intent /dolus entualis or negligence, is not sufficient either.

69. Some scholars hoped the ICC would, in practice, ignore the clear language of the Rome Statute and instead "anchor to the floating debris" of the ad hoc tribunals' disjointed decisions.[76] Such hopes were dashed by the decision in *Bemba Gombo* (*Witness Tampering*). The trial chamber found, in effect, that the Statute says what it means, and means what it says:[77]

> … Article 25(3)(c) of the Statute expressly sets forth a specific 'purpose' requirement according to which the assistant must act ('for the purpose of facilitating the commission of such crime'). This wording introduces a higher subjective mental element and means that the accessory must have lent his or her assistance with the aim of facilitating the offence. It is not sufficient that the accessory merely knows that his or her conduct will assist the principal perpetrator in the commission of the offence.

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[73] The "purpose" standard of art 25(3)(c) has been applied by the ICC as prevailing over art 30. Under art 30, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly. A person has "intent" where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events

[74] Professor Clark adds: " There was considerable debate throughout the process about the conjunctive "and" between intent and knowledge [in art 30]. Some delegations, the French in particular, insisted that both were necessary. Others of us, especially from common law jurisdictions, believed that the appropriate mental element for each separate material element had to be considered on its own merits...". The "both were necessary" camp prevailed.

[75] Hector Olasolo "Forms of Accessorial Liability under Article 25(3)(b) and (c)" in Carsten Stahn (ed) The Law and Practice of the International Criminal Court (Oxford University Press, USA, 2015) at 579. ", it is important to note that the distinction under the ICC Statute between aiding and abetting and perpetration stems from the express reliance by the ICC case law on the "control over the crime" theory to distinguish between principals and accessories.

[76] Elies van Sliedregt & Alex Popova "Interpreting "for the purpose of facilitating" in Article 25(3)(c)?" Comparative Criminal Law, International Criminal Justice, 22 December, 2014

[77] *Prosecutor v Jean-Pierre Bemba Gombo, and others* ICC Trial Chamber (19 October 2016) at [97].

70. The Rome Statute has force of law in New Zealand. Its test of aiding and abetting was expressly incorporated into New Zealand law in the International Crimes and International Criminal Court Act 2000, and applies with any necessary modifications to any trial for an offence against sections 9 (genocide), 10 (crimes against humanity) or 11 (war crimes).[78] In the event of inconsistency with the provisions of New Zealand law and the "principles of criminal law applicable to the offence under New Zealand law" - the provisions of the Rome Statute prevail.[79]

71. The Supreme Court has made clear the Rome Statute's significance:[80]

> … the Rome Statute … is a recent international instrument which directly addresses the principles that govern liability for international crimes including those of particular relevance to this case. It is appropriate to refer to it for authoritative assistance on what is a "crime against humanity".
>
> That approach fully reflects the principle that those who contribute significantly to the commission of an international crime with the stipulated intention, although not direct perpetrators of it, are personally responsible for the crime. This principle is now expressed in arts 25 and 30 of the Rome Statute and was earlier well established in customary international law. Its application recognises the importance of domestic courts endeavouring to develop and maintain a common approach to the meaning of the language of an international instrument which is given effect as domestic law in numerous jurisdictions of state parties.

72. The appropriate enunciation of international criminal law relating to aiding and abetting in 2010 was, I submit, as expressed in Rome Statute art 25(3)(c).

International Law Commission commentary

73. The preponderant international view on the issue of state responsibility for aiding and assisting is that "intent to facilitate" is also an element of such responsibility - just as it is for individual criminal responsibility. The international Law Commission Articles on State Responsibility art 16 is the primary authority. It reads as follows:

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

74. That Art 16 represents customary international law is now beyond dispute.[81] Art 16 is accompanied by a commentary which states:

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[78] International Crimes and International Criminal Court Act 2000 s 12 (1)(a)(iv). Section 12(1)(a)(viii) incorporates art 30 (which relates to the mental element of crimes) into New Zealand law.
[79] International Crimes and International Criminal Court Act 2000, ss 12(1)(b))) and 12(3)).
[80] *Attorney-General (Minister of Immigration) v Tamil X and Refugee Status Appeals Authority* SC 107/2009 [2010] at [47]. The term "complicity" was associated with the concept of a joint criminal enterprise covered by article 25(3)(d) rather than aiding and abetting under 25(3)(c). However, in determining a general concept of complicity in crime against humanity or war crimes, the person must have "voluntarily … contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose".
[81] Although the UN General Assembly "took note" of the Draft Articles in Resolution A/RES/56/83 of 12 December 2001, the articles have not been codified in a treaty. Its status as a reflection of customary law, was however, confirmed in the *Bosnian Genocide* case at [217].

'Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act.

'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.'

75. Sir Kenneth states:

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

While Sir Kenneth's opinion on this issue is entitled to great respect, I submit that the Inquiry should also consider the other, widely accepted and respected, positions on that question.

76. Although there is some academic argument that the position in the commentaries should be ignored,[82] the greater weight of opinion considers that it must be read alongside the article:[83]

> As Article 16 reflects a rule of customary international law, and the product of the ILC's drafting over many years, the negotiating history on the mental element of Article 16 is important. The statements of governments during the many years of negotiation of the draft Articles suggest that most states were more inclined towards an element of intent rather than knowledge alone.

77. Nolte and Aust observe:[84]

> While much speaks in favour of the existence of a rule of customary international law that prohibits the provision of 'aid or assistance' to the commission of an internationally wrongful act by another State, such a rule should be interpreted narrowly in order not to discourage the typically beneficial forms of inter-State cooperation. Any provision on complicity and its interpretation should take into account the stability and the smooth running of the international system as a whole. Thomas Franck has highlighted that determining and defining a legal rule is crucial for its legitimacy and that indeterminate standards are likely to facilitate non-compliance with international law. Hence, it should be established that the assisting State had not only knowledge of the circumstances of the internationally wrongful act but that it also provided its assistance 'with a view to' facilitate the

[82] Critics commonly conclude that they would prefer that no such element exist, not that its existence lacks legal basis. See eg. Alexandra Boivin "Complicity and beyond: International law and the transfer of small arms and light weapons" 84 IRRC June 2002 401. Boivin describes the ILC commentary as "surprising" and observes that it did not exist in earlier drafts (it did). She quotes the Report by Special Rapporteur James Crawford, Fifty-Third Session, UN Doc. A/CN.4/517/Add. 1, 3 April 2000 to suggest that certain states had asked that the "intent" requirement be removed. In fact, the report states "It is suggested to delete the phrase "**knowledge of the circumstances**" (Denmark, on behalf of the Nordic countries)." See also Bernhard Graefrath "Complicity In The Law Of International Responsibility" Revue Belge De Droit International 1996/2 which examines both sides of the "intention dilemma" but finds: " Intention therefore, becomes an essential, constituent element in complicity… Mostly that wording is interpreted to mean that the assistance must be given with the intention to support the commission of the wrongful act".

[83] Harriet Moynihan "Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism" – Chatham House (November 2016). Having identified the scholarship on both points of view, Moynihan concludes "On the whole, the better view appears to be that intent is a necessary part of Article 16, in addition to knowledge".

[84] Georg Nolte and Helmut Philipp Aust "Equivocal Helpers—Complicit States, Mixed Messages and International Law" 58 ICLQ (January 2009) 1–30.

commission of this act and that the act to which assistance is given consists of a violation of a sufficiently precise and clearly established rule within international law.

78. Marco Sassòli states:[85]

> The ILC clarifies that a State assisting another State normally does not have to assume the risk that such aid is used to commit internationally unlawful acts and that to be unlawful the aid must be given with a view to facilitating the commission of the violation and must actually do so.

79. Furthermore, the majority in the *Bosnian Genocide* case (eleven Judges) stated:[86]

> '… 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 complicit 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', para 421

Professor (now Judge) James Crawford takes this statement 'at the least', to indicate that something more than mere knowledge is required, 'namely the need for actual intent that aid and assistance be given to the illegal act'.[87] Although placing such emphasis on these few words may seem to be a rather "fine" point, it is hard to imagine why they were inserted into the majority decision if not for that reason.

80. More convincingly, four years after the *Bosnian Genocide* case, the ILC returned to the issue of intent in its Draft Articles on the Responsibility of International Organisations (DARIO).[88] Article 14 provides that responsibility of an aiding or assisting organisation arises where (a) the organisation does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organisation.[89] The ILC commentary to DARIO refers to, and reproduces verbatim, the intent requirement of Commentary to the Articles on State Responsibility .[90] If the ILC had mis-stepped on the character of customary law in its commentary in the Articles on State Responsibility, it seems unlikely that it would do so again, in the same language, in respect of international organisations.

81. This is consistent with the high threshold for state responsibility for the actions of others. In *Nicaragua* v *United States* the ICJ found that the US, by producing in 1983 a manual entitled *'Operaciones sicológicas en guerra de guerrillas'*, and disseminating it to Contra forces, had encouraged the commission of acts contrary to IHL; but did not find a basis for concluding that any such acts which may have been actually committed are imputable to the US.[91] The *Bosnia Genocide*

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[85] Marco Sassòli "State responsibility for violations of international humanitarian law" 84 IRRC June 2002 401 at 413. Professor Sassòli further opines that a state would be in breach of its international obligations if it supplied weapons to a state that "systematically commits violations of international humanitarian law with certain weapons". There is, however, no cited authority for that proposition. The law has developed in that respect, at least, with the adoption of the Arms Trade Treaty. See *R (Campaign Against Arms Trade*) v *Secretary of State for International Trade* [2019] EWCA Civ 1020

[86] *Bosnian Genocide* case (ICJ 2007) at [421].

[87] See J Crawford *State Responsibility: The General Part*, (Cambridge University Press, Cambridge, 2013). 407.

[88] Report of the International Law Commission 63rd session (26 April-3 June and 4 July-12 August 2011) at 104.

[89] Draft Articles on the Responsibility of International Organisations Art 14,

[90] See M Möldner "Responsibility of International Organizations" – 16 Max Planck Year Book of United Nations Law, (2012) 312. The Max Planck entry comments that the wording of the article, to the extent that it suggests knowledge alone is enough, is "misleading".

[91] *Nicaragua v United States of America* (Merits), Judgment, ICJ. Rep 1986 115 : "…United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still

case applied effectively the same test for state responsibility (despite being strenuously urged by Bosnia Herzegovina not to do so). This means that the ICJ has consistently reached the same conclusion as to the high threshold of control for state responsibility to be attributed.[92]

82. Having looked at this issue in some depth, cases in which international responsibility has been authentically attributed to a state arise only where its aid and assistance to another state or organisation was demonstrably intended to facilitate the wrongful acts in question (see for example *El-Masri v Macedonia*[93] and *Al Nashiri v Poland*[94]). I have not found a case where acts which were intended to be lawful, let alone mandated by the UN Security Council, have engaged such liability.

83. I would be happy to provide further submissions, in writing or orally, on any of the matters set out in this submission should the Inquiry so wish.

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24 July 2019

insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

[92] *Bosnian Genocide Case at* [401] : "The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis".

[93] *El-Masri* v *Former Yugoslav Republic of Macedonia* 39630/09, Judgment (13 December 2010)(GC) at [180] to [223]." In such circumstances, the Court considers that it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant faced a real risk of a flagrant violation of his rights under Article 5." The "such circumstances" were that Macedonian Police had tortured El Masri themselves and then handed him over the CIA, who mistreated El Masri in Macedonia, probably in the presence of Macedonian Police. The Chamber found that Macedonia actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer.

[94] *Al Nashiri* v *Poland* Judgment (24 July 2014) [442] "Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and that, by enabling the CIA to use its airspace and the airport, by its complicity in disguising the movements of rendition aircraft and by its provision of logistics and services, including the special security arrangements, the special procedure for landings, the transportation of the CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the CIA's secret detention, Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory."