UNDER	THE INQUIRIES ACT 2013
IN THE MATTER OF	A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS

CROWN AGENCIES' PRESENTATION ON APPLICABLE INTERNATIONAL LEGAL FRAMEWORKS

26 July 2019

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Introduction

1. The Crown Agencies have been invited to provide a presentation on the international law applicable to the matters that arise under the Inquiry's Terms of Reference. In particular, the Inquiry has identified the following issues:

    a. The applicable sources of law, including International Humanitarian Law (**IHL**), International Human Rights Law (**IHRL**), customary international law and the United Nations Charter;

    b. The impact of relevant United Nations Security Council (**UNSC**) resolutions;

    c. The application of the relevant provisions of the 1949 Geneva Conventions and the Additional Protocols to the Convention to the situation in Afghanistan at the relevant times;

    d. The law relating to the following aspects of IHL:

        i. Distinction;

        ii. Proportionality;

        iii. Precaution; and

        iv. The humane treatment of persons who are not taking a direct part in hostilities.

2. In part, these submissions respond to the papers provided by Rt Hon Sir Kenneth Keith ONZ KBE QC 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.

Factual context

3. In order to consider the legal frameworks that applied to the relevant operations under examination by the Inquiry, 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.[1]

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 insurgent group involved in the armed conflict, and had been involved in armed attacks against Afghan Government and / or ISAF forces. As will be discussed below, this is relevant to consideration of whether their capture was a legitimate military objective, providing concrete military advantage, in the context of the armed conflict.

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.[2] 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

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1 In *Prosecutor v Tadić* (decision on the defence motion for interlocutory appeal on jurisdiction) IT-94-1 2 Oct 1995 at [70], the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (**ICTY**) held that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there".

2 See https://www.stuff.co.nz/national/113621206/insurgent-leaders-admit-they-were-in-afghanistan-village-raided-during-nz-sass-operation-burnham; NZDF Unclassified Unreferenced Narrative of Events At Issue.

providing air support for the operation caused rounds to impact a building.[3]

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.

Sources of international law relevant to ISAF operations in Afghanistan

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

5. It may assist to consider the applicable international legal frameworks from two perspectives:

a. First, the international legal framework which *authorised* the use of force by New Zealand forces in Afghanistan; and

b. Second, the international legal framework which *regulated* the use of force by New Zealand forces in the relevant operations.

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

Authorisation of the use of force

ISAF Forces

7. ISAF was initially created in accordance with the Bonn Agreement[4] of December 2001 and its tasks detailed in a Military Technical Agreement of January 2002 between ISAF and the Afghan Transitional Authority.[5]

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3 NZDF Unclassified Unreferenced Narrative of Events At Issue; AR 15-6 Investigation Report, CIVCAS, Tigiran Village, 22 August 2010. While the latter report found that civilian casualties were possible, they could not be confirmed (see page 8). No further action in respect of potential civilian casualties was recommended.

8. As Sir Kenneth sets out in his paper, the use of force by ISAF was authorised under chapter VII of the United Nations Charter, by way of the resolutions of the UNSC. Eighteen resolutions of the UNSC relate to ISAF.[6]

9. UNSC Resolution 1386 (2001), "authorised, as envisaged in Annex 1 to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment", and "authorised the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate." This mandate was subsequently extended for a further six months pursuant to Resolution 1313 (2002) and again by Resolution 1444 (2002). The mandate was subsequently modified by Resolution 1510 (2003) to authorise ISAF to support the Afghan Transitional Authority and its successors in the maintenance of security in areas of Afghanistan outside of Kabul and its environs. This mandate was then continually extended by the UNSC until the end of 2014.

10. In general, resolutions adopted by the UNSC under Chapter VII of the UN Charter are considered to be binding on States, under Article 25 of the Charter.[7] Due to their binding effect, such resolutions may authorise and empower coalition forces and relevant States to act and fulfil their mandate appropriately, and provide international legal authority and justification to do so.

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4 Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 5 December 2001.

5 Military Technical Agreement between the International Security Assistance Force and the Interim Authority of Afghanistan.

6 Annex B of MFAT's paper for Public Module 1 contains a list of UNSC Resolutions on Afghanistan from 2001 to present.

7 *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion [1971] ICJ Rep 16; *Serdar Mohammed and Anor v Ministry of Defence* [2107] UKSC 2 (***Serdar Mohammed***) per Lord Sumption at [21] to [28]; *Hassan v United Kingdom* (2014) 38 BHRC 358.

11. The Crown Agencies agree with Sir Kenneth that the authorization of ISAF member states to "take all necessary measures" to fulfil its mandate authorised those states to use force as necessary to fulfil this mandate.[8]

12. Accordingly, the use of force by New Zealand forces in Afghanistan, as necessary to fulfil the mandate of ISAF, was lawful. There does not appear to be any dispute that the use of force by ISAF to defeat the armed insurgency against the Government of Afghanistan during the period 2010 to 2014 was lawful at international law.

13. It is also relevant to note that ISAF operated with the consent of the Government of Afghanistan, pursuant to a military technical agreement between the Government of Afghanistan and ISAF, and various military technical agreements between the Government of Afghanistan and the Governments of troop contributing nations.

14. As submitted by the Crown agencies in respect of module 2, the nature of the mandate provided to ISAF member states (including New Zealand) is also relevant to issues before the Inquiry, in particular in relation to issues pertaining to partnered operations. The following aspects of the mandate provided by the relevant UNSC Resolutions are important to note:[9]

    a. Beginning with Resolution 1386 (2001), and continuing throughout the relevant period, the UNSC recognised that the responsibility for providing security and law and order throughout Afghanistan resided with the Afghans themselves. Furthermore, beginning with Resolution 1413 (2002), the UNSC affirmed a strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan. Accordingly, the mandate of ISAF was always to *assist* the relevant Afghan authorities in the maintenance of security.

    b. In Resolution 1797 (2006), the UNSC stressed the importance of security sector reform including further strengthening the Afghan

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8 See *Serdar Mohammed* per Lord Sumption at [26].

9 See UNSC Resolutions 1386 (2001), 1413 (2002), 1444 (2002), 1510 (2003), 1563 (2004), 1623 (2005), 1707 (2006), 1776 (2007) and 1833 (2008)

National Army and Police. Subsequently, in Resolution 1776 (2007), the UNSC encouraged "ISAF and other partners to sustain their efforts, as resources permit, to train, mentor and empower the Afghan national security forces, in particular the Afghan National Police." This was further developed in Resolution 1833 (2008), where the UNSC stressed the importance of increasing the functionality, professionalism and accountability of the Afghan security sector and encouraged "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 self-sufficient and ethnically balanced Afghan security forces providing security and ensuring the rule of law throughout the country."

c. In Resolution 1890 (2009), the UNSC acknowledged the progress made in security sector reform, and welcomed support provided by international partners in this regard. It continued to stress the importance of increasing the functionality, professionalism and accountability of the Afghan security sector and encourage ISAF and other partners to sustain their efforts to train, mentor and empower the Afghan national security forces, in order to accelerate progress towards the goal of self-sufficient, accountable and ethnically balanced Afghan security forces providing security and ensuring the rule of law throughout the country.

d. In Resolution 1917 (2010), the UNSC noted the ongoing efforts of the Afghan authorities to enhance the capabilities of the Afghan National Police, called for further efforts towards that goal, and stressed the importance of international assistance through financial support and provision of trainers and mentors.

e. In Resolution 2011 (2011),[10] the UNSC again acknowledged the progress made and the challenges remaining in security sector

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[10] The Crown Agencies note that this resolution was issued following the release of the UNAMA Report on Treatment of Detainees in Custody, October 2011, which itself recommended that troop contributing nations

> reform and governance, welcomed the support and assistance extended to the Afghan National Police by the international partners in this regard stressing the need for Afghanistan to further strengthen the Afghan National Army and the Afghan National Police urging, inter alia, continued professional training measures to ensure Afghan capability to assume, in a sustainable manner, increasing responsibilities and leadership of security operations and maintaining public order, law enforcement, the security of Afghanistan's borders and the preservation of the constitutional rights of Afghan citizens as well. The UNSC also stressed in this context the importance of further progress by the Afghan Government in ending impunity and strengthening judicial institutions, in the reconstruction and reform of the prison sector, and the rule of law and respect for human rights within Afghanistan.

Insurgents

15. Unlike ISAF, the organised armed groups against whom the NZDF were operating at the relevant times 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 ISAF forces.

16. 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.[11]

17. Accordingly, the domestic law of Afghanistan is relevant because actions of insurgents by way of direct participation in hostilities (**DPH**) would be

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"Build the capacity of the NDS and ANP 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 ICRC *The relevance of IHL in the context of terrorism* 01-01-2011 FAQ.

unlawful under that law, rendering such persons subject to arrest and prosecution by Afghan authorities under Afghan criminal law.

18. 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).

Regulation of the use of force - the relevant principles of IHL

19. 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.

20. 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.[12]

21. 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. Recognition of non-international armed conflicts came later, by way of common Article 3 to the Geneva Conventions of 1949 and subsequent protocols. Crown agencies agree common Article 3 applies in the present context.

22. In any event, the Crown Agencies agree that the relevant principles are incorporated in customary international law, applying both to international and

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[12] This is evident from the wording of Common Article 3, which is addressed to 'each Party to the conflict', and has also been confirmed by various resolutions and decisions of international bodies, as well as the ICRC. See generally ICRC *Casebook: How Does Law Protect in War, Non-international armed conflict*" at part VIII (available at https://casebook.icrc.org/glossary/non-international-armed-conflict) and cited cases and commentary, particularly the decisions of the International Criminal Tribunal for Rwanda (**ICTR**) in *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998 See also *The Prosecutor v. Thomas Lubanga Dyilo* (Decision on Confirmation of Charges) ICC601/04601/06, Pre-Trial Chamber, 29 January 2007.

non-international armed conflict. The Crown Agencies also agree the International Committee of the Red Cross's (**ICRC**) *Customary International Humanitarian Law Volume 1: Rules*[13] (**ICRC CIHL Rules**) are a convenient resource. The Crown Agencies consider that the Inquiry may be assisted by further discussion of some aspects of the relevant principles.

Distinction

23. 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 Additional Protocol I (**API**) and Article 13(3) of Additional Protocol II (**APII**) each say civilians may not be targeted "unless and for such time as they take a direct part in hostilities".[14]

24. 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 armed conflicts. The ICRC CIHL Rules numbered 1 through 7 deal with the principle of distinction and are designed to be read together.

25. Rule 1 provides as follows:

> 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.

26. Rule 1 is qualified, by Rule 6, which provides:[15]

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

27. 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

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13 ICRC *Customary International Humanitarian Law Volume 1: Rules,* Cambridge, 2005

14 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (**AP I**) 8 June 1977, 1125 UNTS 3. The same language is in Article 13(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (**AP II**).

15 This rule is reflected in Article 13(3) of AP II.

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.

28. 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.[16] 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.

29. 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 for lawful combat activities.

30. 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.[17]

31. On New Zealand's approach, members of organised armed groups are civilians. However, membership of an organised group may provide evidence

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16 See introductory note to Chapter 33 of the ICRC CIHL Rules.

17 New Zealand Defence Force *Manual of Armed Forces Law*, 2nd ed, Vol 4 (Law of Armed Conflict) (**NZDF LOAC Manual**), Chapter 6, Section 5, at [6.5.3].

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, and therefore lose protection from attack for so long as they remain a member. The NZDF LOAC Manual states as follows:

> **Member of an organised armed group** means any person whose integration into an armed group is of such a level that he or she can be regarded as making a direct contribution to the combat effectiveness of that group.
>
> Members of an organised armed group may, in some circumstances, be regarded as being involved in continuous direct participation in hostilities. The fact that a person is acting under effective command and control, and is subject to some form of discipline, is a strong indication that the person is taking a direct part in hostilities, even if the person is not actually fighting at that particular point in time.

32. On this approach, membership of an organised armed group is *evidence* 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.

33. However, as noted by Professor Akande, his preferred analysis of the status of members of organised armed groups, and the approach adopted by New Zealand forces in Afghanistan, while conceptually different, in practice lead to practically equivalent results: that a member of an organised armed group that is engaged in continuous hostilities may be targeted for attack. It is this conclusion that formed the basis for Rule H of the Rules of Engagement for Operation Wātea (**ROE**), 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.

34. Evidence of membership of an organized 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 organized armed group. This will be discussed further.

35. The concept of DPH, and New Zealand's interpretation of this concept, is discussed in detail in the NZDF LOAC Manual,[18] and will be further discussed by Brigadier Ferris in the context of targeting through the JPEL process tomorrow. Accordingly, in the interests of time, it is not further discussed in this presentation.

The principle of distinction concerns intentional targeting

36. 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).

37. Similarly, the rule is concerned with prohibiting intentional targeting of civilians or civilian objects.[19] 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.

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18 NZDF LOAC Manual, Chapter 6, Section 5.

19 In this context "intent" to attack may include recklessness. See *Prosecutor v Stanislav Galić (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-98-29-T,5 December 2003* (***Galić Trial Judgment***) at [54].

Situations of doubt as to the character of a person

38. In the event of doubt as to whether a person to be attacked is a civilian or combatant (or a civilian directly participating in hostilities), he or she shall be assumed to be a civilian.[20]

39. 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 AP I, 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.[21]

40. 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."[22] 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.

41. 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."

42. 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

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20 See the commentary under Rules 6 and 10 of the ICRC CIHL Rules.

21 See T. Gill and D. Fleck, ed. *The Handbook of the International Law of Military Operations*, 2nd ed (Oxford University Press, Oxford, 2007) at 16.02 and the commentary under Rules 6 and 10 of the ICRC CIHL Rules. The fact that soldiers may use force in self-defence (both as a unit and individually) is also relevant here.

22 See the commentary under Rules 6 and 10 of the ICRC CIHL Rules.

the factors which may be considered in deciding whether he or she is a civilian".[23]

43. 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."[24]

44. The above discussion is reflected in the NZDF Manual on the Law of Armed Conflict, as follows:[25]

> **Cases of doubt.** If there is any doubt whether or not a person is a civilian, members of the NZDF are to treat that person as being entitled to civilian protection until they are sure that he or she is not.
>
> In giving effect to this order, members of the NZDF are not to act recklessly as to their own safety. In assessing whether there is doubt as to the true status of a person, members of the NZDF are to take into account intelligence or information as to the way the opposing force conducts operations, the way that the person is behaving, the clothes that the person is wearing, in some cases his or her gender and age,[26] the extent to which he or she is equipped for combat action, and the way he or she reacts to the presence of the New Zealand force.

The obligation for combatants to distinguish themselves

45. 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.[27]

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23 See *Galić Trial Judgment* at [50]. See also *Prosecutor v Halilović* IT-01-48-T, Trial Chamber, 16 November 2005 (***Halilović trial judgment***) at [34]: "The Trial Chamber finds that it is the specific situation of the victim at the moment the crime was committed that must be taken into account in determining his or her protection under Common Article 3. The Trial Chamber considers that relevant factors in this respect include the activity, whether or not the victim was carrying weapons, clothing, age and gender of the victims at the time of the crime."

24 *Galić Trial Judgment* at [55] [Emphasis added]. Cited and affirmed in *Halilović Trial Judgment* at [36].

25 NZDF LOAC Manual at [8.4.6] – [8.4.6].

26 This is not to say that all military-aged men should be treated as combatants or that combatants will be exclusively male and of a certain age. It is less likely, however, that the very young and the very old will be direct participants in combat, and the issue of gender may be relevant in some societies where combat is a predominantly male activity. In no case should presumptions for or against civilian status be made on these criteria alone.

27 This is codified, in respect of international armed conflict in Geneva Protocol I art 44(3): "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish

46. In international armed conflicts, combatants who fail to distinguish themselves do not qualify for prisoner-of-war status,[28] and combatants who deliberately feign civilian or non-combatant status may be guilty of perfidy.[29] These rules are strictly only applicable in international armed conflicts, as there are no "combatants" in non-international armed conflicts.[30]

47. 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,[31] which indicates that it is unlawful for a party to a non-international armed conflict (including a member of an organized armed group) to feign civilian status in order to attack an adversary.[32] 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."[33]

Proportionality in attack

48. The principle of proportionality is codified in the context of international armed conflicts in Article 51 of AP I. 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.[34] 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

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themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.". See also ICRC CIHL Rule 106 and *Galić Trial Judgment* at [50].

28 See ICRC CIHL Rule 106.

29 AP I, Art 37(1)(d).

30 This is a further reason for the approach taken by NZDF to the status of members of organised armed groups, who often fail to distinguish themselves from the civilian population, particularly in an insurgency occurring within a non-international armed conflict, such as Afghanistan.

31 Rome Statue of the International Criminal Court, Art 8(2)(e)(ix).

32 See also the commentary under ICRC CIHL Rule 65 concerning perfidy.

33 *ICRC Casebook: How Does Law Protect in War - Non-international armed conflict*, at part VII, (available at https://casebook.icrc.org/law/non-international-armed-conflict).

34 See commentary below ICRC CIHL Rule 14.

> combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

49. 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.[35]

50. 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 Wātea.

51. 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.

52. 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.

53. 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?[36] It is relevant to note, as well, that New Zealand (along with Australia and Canada) considers that the term "military advantage" includes the security of attacking forces.

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35 *Gill and Fleck* op.cit. at 16.06.

36 See *Galić Trial Judgment* at [58].

Precaution in attack

54. 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 minimize, incidental injury to civilians or collateral damage to civilian objects.[37]

55. 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.[38] 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'.[39]

56. 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 Wātea after its amendment in December 2009.[40]

57. 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.[41] This will obviously be influenced by the factual context of the attack, and the role of the individual planning or

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37 See ICRC CIHL Rule 15.

38 ICRC CIHL Rules commentary at 54.

39 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* , para 2208.

40 "Positive confirmation by [redacted] that a target is directly participating in hostilities is required."

41 See for example *Karlsruhe*, German Federal Court of Justice, Judgement of the 3rd Civil Panel of 6.10.2016, III ZR 140/15, part of which is reproduced, in translated form, on the ICRC website, available at (https://casebook.icrc.org/case-study/afghanistan-bombing-civilian-truck). This case involved an aerial attack on fuel tankers captured by the Taliban from ISAF forces, ordered by a German Officer, which resulted in a large number of civilian casualties. The officer concerned was, however, found to have taken all feasible precautions to avoid civilian casualties before ordering the attack.

executing the attack.[42] 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.

58. 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 (discussed above), in determining what steps are feasible in verifying that a person is directly participating in hostilities, a commander is also entitled to consider their 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.

59. 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 minimize 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.

Precautions against the effects of attacks

60. Parties to a conflict who are subject to attack shall, to the extent feasible, endeavor 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

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42 *Gill and Fleck* op.cit. at [16.07.4].

that are necessary to protect civilians and civilian objects under their control against the dangers resulting from military operations.[43]

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

62. 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.[44]

63. A violation of the prohibition on human shielding does not release a party to conflict from its legal obligation with respect to civilians.[45]

Obligation to collect and care for wounded

64. The law of non-international armed conflict includes treaty rules designed to offer protection to the wounded, sick, and shipwrecked without distinction. The individuals covered by these rules are those whose wounds or sickness have placed them 'hors de combat'. The potential obligation to collect and care for any wounded or sick (regardless of status) is provided for in Common Article 3(2) of the Geneva Conventions.[46]

65. Along with treaty rules, the obligation is also considered to be a matter of customary international humanitarian law,[47] as discussed in Sir Kenneth Keith's paper.

66. The ICRC has noted that the legal status of being wounded or sick is based upon a person's medical condition *and* conduct. The obligation will not apply to an individual who may be wounded but continues to take part in hostilities.

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43 See ICRC CIHL Rules 22 to 24.

44 See ICRC CIHL Rule 97.

45 This is specifically noted (in the context of international armed conflict) in Article 51(8) of AP I.

46 The obligation is also found in Article 16 of the Fourth Geneva Convention as well as Article 10 of AP I and Article 7 of AP II.

47 See Commentary to ICRC CIHL Rules 109 and 110:

> Rule 109: Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.
>
> Rule 110: The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones.

A person must therefore need medical attention and also be refraining from directly participating in hostilities in order to benefit from protection.[48]

67. The specific obligation to collect and care for the wounded or sick must be read as dependent on knowledge that there are in fact wounded or sick to collect and care for.[49] The first Geneva Convention refers to 'wilfully' leaving persons without medical care, inferring that there must be knowledge of persons who are wounded or sick.[50]

68. The obligation to take all possible measures collect and care for the wounded and sick without delay is one of means. When the obligation is triggered, it remains an obligation of best efforts in the circumstances that apply. The steps to be taken are those that are possible and practical.[51] This qualification recognises that returning to a battle site to collect and care for the wounded, if their existence is learned about later, may yet be ruled out for operational reasons.

69. In addition to taking all possible precautions to avoid civilian casualties (both in the planning and during the course of an operation), the obligation to collect and care for any wounded or sick is a salient consideration in the planning phase of an operation. Brigadier Ferris will address this point tomorrow in relation to Operation Burnham, including by reference to previously classified material that the Crown has agreed to declassify for the purpose of the Inquiry.

Command Responsibility in multinational operations

70. The Inquiry may consider he 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.

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48 The ICRC states at [1348] that "it is clear in such situations that persons who, for example, are rendered unconscious by wounds, or who are otherwise incapacitated, may not be attacked since they abstain from any acts of hostility. On the other hand, persons who continue to fight, even if they are severely wounded, will not qualify as wounded or sick in the legal sense".

49 The Commentary to ICRC CIHL Rules 109 and 110 does not in terms speak to a knowledge requirement, but that is plainly implicit.

50 Refer by analogy to Art 12 GC1, which refers to a person being "wilfully left without medical care".

51 ICRC – IHL database. See, e.g., Rule 110 which sets out that the care and attention required is only what is "practicable". Further, Art. 10 (2) AP I provides that the wounded, sick, and shipwrecked shall receive the required medical care 'to the fullest extent practicable and with the least possible delay' and subject to no

71. Under treaty law and customary international law, commanders can, under certain circumstances, be responsible for war crimes committed by their subordinates.[52] While they are phrased slightly differently in different cases, there is general consensus around the essential elements for the proof of command responsibility.[53] 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:[54]

> (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."

72. The NZDF has provided a description of the command relationship between the coalition forces in the relevant operation in a recent memorandum.[55]

73. 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. The commander's relationship with those who committed the acts would have

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distinction other than on medical grounds. Art. 8 AP II provides that 'whenever circumstances permit … all possible measures shall be taken' inter alia to search and collect the wounded, sick, and shipwrecked.

52 See ICRC CIHL Rule 153. Treaty law provisions related to command responsibility are also contained in Arts 86 and 87 of API and Art 28 of the ICC Statute.

53 *Prosecutor v Zejnil Delalić* ICTY Case no. IT-96-21, Trial Judgment, 16 November 1998, Appeals Judgment, 20 February 2001. Trial judgment at [346].

54 *Prosecutor v Jean-Pieerre Bemba Gombo*, PTC II, Decision on the Confirmation of Charges, 15 June 2009 at [407].

55 Memorandum of counsel for the NZDF, 19 July 2019.

needed to be such that the commander was in a position to give orders, with the expectation that they be obeyed. The commander would need to have failed to take measures available to him or her to prevent the acts, and a causal link between that failure and the occurrence of the unlawful acts would be required.. The scope of this duty to take all necessary and reasonable measures is intrinsically connected to the extent of a commander's material ability to intervene.[56]

74. While issues of fact are for the Inquiry to determine, the Crown Agencies do not anticipate these elements will be met.

Protection of those in detention

75. Part 6 of Sir Kenneth's opinion directly addresses the law relating to the protection of those in detention, with reference to paragraphs 7.3 and 7.8 of the Inquiry's Terms of Reference concerning the transfer and/or transportation of Qari Miraj.

76. 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.

77. In response to Sir Kenneth's comments on detention, the Crown agencies respectfully direct the Inquiry to those earlier submissions.

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.

Prohibition on torture

79. 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.

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56 *Prosecutor v Jean-Pieerre Bemba Gombo* Appeal Judgment, ICC-02/-5-01/08 A, 8 June 2018 at [1667],. [169].

80. 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.

81. The Crown Agencies take the opportunity here to respond to a submission made by counsel for Mr Stephenson in reply to the Crown agencies' Module 2 submission. Mr Humphrey says that the Crown agencies had described the existence of a duty to prevent torture as "not settled" and a "developing area of international law", propositions with which he disagreed.

82. The Crown Agencies' submission at that point was explicitly addressing the question whether state responsibility can arise through omission, and observed that (in relation to assistance given to another state) the extent of a "due diligence" obligation) to prevent torture is not settled at international law. It maintains that submission, which is borne out (inter alia) by the submission below as to the meaning and application of the principles relating to aiding and assisting.

Common Article 3 insofar as it may be read as prohibiting the transfer of detainees where they may be in danger of being tortured.

83. 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.[57]

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[57] See paragraph 29 of the Memorandum of Counsel for the Crown dated 13 June 2019.

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.

84. 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 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.

85. 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".

86. Sir Kenneth himself acknowledged that this arrangement: "may not extend to partnering or close support situations."[58] 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

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[58] At p. 14.

forces). Rather, the arrangement was designed to apply with respect to individuals detained directly by New Zealand.

87. In accordance with the submissions of Crown Agencies during and after Module 2, if New Zealand did not carry out the detention, it could not be "principally responsible" and had no power to compel the movement of the detainee in a manner that would give rise to non-refoulement obligations.

Article 3 of the Torture Convention

88. 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 transfer a person.[59]

89. In his discussion, 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 set out in the submissions for module 2, 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 troops over persons detained by the Afghan authorities was not a feature of partnered operations.

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

90. The Crown Agencies refer the Inquiry to their submissions on aiding or assisting under Article 16 of the Articles on State Responsibility (**ASR**) made over the course of module 2.

91. 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

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[59] As discussed in submissions following Module 2, the Crown agencies accept the obligation imposed by Article 3 may apply to actions taken extraterritorially by NZDF in certain circumstances.

wrongdoing is enough". No additional comment is made with respect to the level of knowledge, on the part of the provider of aid or assistance, that may be required.

92. In the following paragraphs the Crown agencies submit that this position cannot be considered a definitive statement of the law, as it differs from that set out in the ILC commentary[60] and by the rapporteur. That said, they agree with Sir Kenneth that "the application of the law of aiding or assisting or complicity is very fact dependent". They submit that, even taking the view advanced by Sir Kenneth that "knowledge of the wrongdoing is enough", the facts before the Inquiry do not support any finding that New Zealand forces had such knowledge. That conclusion is sufficient for resolution of the matter,

93. Article 16 ASR is first set out for convenience:

> 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:
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> (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.

94. In this case the "internationally wrongful act" alleged to have occurred is torture of Qari Miraj by Afghan authorities; the suggested basis for complaint against New Zealand is that it aided or assisted that alleged wrongful act by transfer/transportation of Qari Miraj to Afghan authorities with knowledge of the pending torture. To this the Crown Agencies respond as follows.

95. 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.

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[60] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" (2001), Commentary on Article 16 at paragraph (5) on p 66

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.*"[61]

97. 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 at the time suggested individuals detained by ANSF were routinely tortured; 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-*Maya Evans*, 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.

98. Third, 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:[62]

> 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. 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.

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[61] Bosnian Genocide Case, para [432] (emphasis added).

[62] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries,* p. 66. (NB. The first requirement alluded to was that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful.)

99. This reflected the views expressed throughout the lengthy period of preparations and drafting of Article 16, notably by the United States and the United Kingdom.

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.[63] 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 – 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.

101. 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):[64]

> Commentators[65] 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.

102. 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:

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63 Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism,* Chatham House, Royal Institute of International Affairs, (November 2016), para 64.

64 See Erika de Wet, "Complicity in violations of human rights and humanitarian governments through direct military assistance on request" (2018) 67 ICLQ 287 at 306-307.

65 The ccommentators to which de Wet and Moynihan allude are James Crawford (*State Responsibility: the General Part* (Cambridge University Press, 2013) pp 406-408) Miles Jackson (*Complicity in International Law* (Oxford University Press, 2015), p 161) Vaughan Lowe ("Responsibility for the Conduct of Other States" (2002) 101 Journal of International Law and Diplomacy and (2002)l; 101 Kokusaiho Gaiko Zassi 11) (this source has not been sighted by counsel) and Vladyslav Lanavoy (*Complicity and its Limits in the Law of International Responsibility* (Hart Publishing, 2016)).

> 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 willful blindness would simultaneously establish intent.

103. Coming to a broadly similar conclusion, Harriet Moynihan first says:[66]

> It is clear that actual knowledge of the circumstances of the principal wrongful act will meet the knowledge element in Article 16. Commentators[65] also generally accept that the knowledge element can be met by virtual certainty, on the part of the assisting State, of the eventual possibility of unlawful use of its assistance.

104. 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".[67] 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."[68]

105. De Wet similarly suggests that:[69]

> The fact that the assisting State did not desire a particular outcome (in the form of an internationally wrongful act) would not be decisive for establishing intent, but rather whether it knew that its assistance would be used for illegal purposes.

106. Against this background, the *Bosnian Genocide* case is relevant. There the ICJ held that conduct could only be treated as aid or assistance to genocide if the organ or person had, "at the least", acted knowingly in the sense that it (or the person) was aware of the specific intent of the principal wrongdoer.[70] Here, it is relevant that genocide requires a specific intent (*dolus specialis*).[71] On the facts

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66 "Aiding and Assisting: the mental element under article 16 of the International Law Commission's Articles on State Responsibility" (2018) 67 ICLQ 455 at 460.

67 Above, note 63, p 466.

68 Above, note 75, p 468. In New Zealand the International Crimes and International Criminal Court Act 2000 applies (inter alia) article 30 of the Rome Statute for the purposes of proceedings for the offences it sets out in ss 9 to 11.

69 Above n 64, p 307.

70 Para [421].

71 That is, the act must be committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: Convention of the Prevention and Punishment of the Crime of Genocide, Art II.

of that case the ICJ found a lack of any such knowledge on the part of Serbia.[72] The resources it had supplied were *not* specifically addressed to facilitating genocide, and the decision of Bosnian Serb leaders to perpetrate genocide with some of those resources was taken only shortly before the genocide was carried out.

107. As Sir Kenneth points out, the ICJ did not ultimately rule on whether the "assisting" State must share the intention of the principal perpetrator. Its factual conclusion was at the prior point – that the assisting State was *not* aware of the specific intention of the Bosnian Serb leaders. This removed any need to answer the legal question whether the genocidal intent, were it known at all, had to be shared.

108. Sir Kenneth held differently on those facts, finding that the respondents to the case must have known of the genocide intended by the principal perpetrator and that, with that knowledge, provided aid and assistance to the perpetrator. The respondents did not need to share the perpetrator's intent; their intent was to provide the means by which the perpetrator realized his own intent. In so holding, Sir Kenneth cited the observation of Judge Shahabuddeen in his dissenting opinion in *Krstić*[73] that the drafter of the Genocide Convention could not have failed to criminalize the actions of commercial suppliers of poisonous gas who knew of the purchaser's genocidal intentions.

109. As an analogy, the supply of genocide-capable poisonous gas must of course be seen as a factual scenario occupying one extreme on the spectrum of factual possibilities. Ranged at the other end of the spectrum are cases involving the supply of financial aid or military or other assistance that cannot similarly be said to lead, as a virtual certainty, to any internationally wrongful act.

110. As commentator Erika de Wet observes, with reference to R *(Campaign Against Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1754, the "determination of virtual certainty (and by extension intent) in complex

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72 Para [422].

73 ICTY *Prosecutor v Krstić* Appeals Chamber IT-98-33, 1 July 2003.

military situations where the factual situation is likely to be disputed is highly challenging."[74]

111. For that reason the analogy to supplying poisonous gas has to be used with appropriate caution; it has a simplicity about it that may not be present in many cases. As Sir Kenneth acknowledges, each case must be decided on the facts. In the *Bosnian Genocide* case members of the ICJ assessed the facts differently.

112. With regard to Article 16, Miles Jackson observes in his monograph *Complicity in International Law*: "In practice, the standard of knowing participation means awareness with something approaching practical certainty as to the circumstances of the principal wrongful act."[75]

113. As to Operation Yamaha, there can be no finding of a "practical certainty" that torture was going to occur.

114. On this basis the question about the salience of "intent" when applying Article 16 (and the customary international law it embodies) does not arise. It is enough to conclude that New Zealand did not have knowledge of any (pending) internationally wrongful act let alone with anything approaching "practical certainty". And, in these circumstances, it cannot be said that there was any intention to facilitate an internationally wrongful act. That is the intention that, on the best view of Article 16, is required.

Interaction of IHL and IHRL in Afghanistan

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

116. 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

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[74] Above, note 72, p 307.

[75] M. Jackson *State Complicity in International Law* (Oxford University Press, 2015) at 161.

complementary and not mutually exclusive, when both apply to the same scenario.

117. 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, art 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".)[76]

118. 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.

119. The issue of jurisdiction under both the Convention Against Torture (**CAT**) and the ICCPR including discussion of the relevant authorities,[77] is dealt with in the submissions filed by the Crown following module 2.

Extra-territorial jurisdiction by application of lethal force

120. 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.[78] Were that approach to be applied in armed conflicts it would be manifestly unworkable and unintended, being wholly inconsistent with IHL.

121. 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

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76 Professor Akande's emphasis.

77 Including authorities concerning the extraterritorial application of the European Convention on Human Rights.

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

122. 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.

123. 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,[79] 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*,[80] 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 under Article 1 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. (C.f. obiter dicta in *Serdar Mohammed v Ministry of Defence* [2015] EWCA Civ 843; [2016] 2 WLR 247 at [93] and [95], where this point was not argued.) The concept of physical power and control over a person will necessarily cover a range of situations involving different degrees of power and control. However, for the reasons set out above, I consider that in laying down this basis of extra-territorial jurisdiction the Grand Chamber required a greater degree of power and control than that represented by the use of lethal or potentially lethal force alone. 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.

124. The footnote reference to the salient part of paragraph 63 refers back to paragraph 22 of the General Comment. That in turn speaks of activities taking place within a state's territory or jurisdiction but having effect outside it. The same footnote refers also to the Committee's Concluding Observations on the United States 2014 report under ICCPR in which, although no pinpoint reference is given, the allusion appears to be to paragraph 9 speaking of "targeted killings using unmanned aerial vehicles (drones)" – the Committee

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78 At paragraph [63] discussing *Al Skeini v United Kingdom*, Grand Chamber, Application 55721/07, 7 July 2011.

79 Particularly: *Bankovic & Others v Belgium & Ors* (App No. 52207/99) (2001) 44 EHRR SE5; Al-*Skeini v United Kingdom* (2011) 53 EHRR 18; *Hassan v United Kingdom* [2014] ECHR 9936 and *Jaloud v The Netherlands* (2015) 60 EHRR 29.

80 *Al Sadoon & Ors v Secretary of State for Defence and Anor* [2017] 2 All ER 453; [2016] WLR(D) 491. See particularly the Court's discussion of the relevant jurisprudence of the European Court of Human Rights in part II of the judgment (paras [9] to [73]).

there expressing concern about the need for "precautionary measures taken to avoid civilian casualties in practice".[81]

125. 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.

126. 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.

127. The Crown Agencies' submissions for the hearing on 23 November 2018 (on possible investigative obligations) observed that:

a. the statement in paragraph [63] appears inconsistent with Art 2(1) of the ICCPR and General Comment 31 at [10];

b. the Committee's views may be persuasive but are not binding on states;

c. the Committee's statement in new paragraph 63 is not drawn from any other treaties, prior court or tribunal decisions and is not representative of state practice; and

d. a number of states including some of New Zealand's key partners have expressed disagreement with it.

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81 CCPR/C/USA/CO/4 23 April 2014).

128. The Crown Agencies advised that should the Inquiry wish to consider the question further they would wish to provide more detailed submissions on whether the statement accurately reflects current international law.

129. Crown Agencies recognize that it is still necessary to deal with the interaction of IHL and IHRL in those cases where both apply.

130. 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".

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

132. 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.

133. 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).

134. 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.

135. 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." 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."

136. 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 noting that in most cases IHL is not pleaded).

137. 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. But Crown Agencies certainly agree there are cases in which for this reason both IHRL and IHL may well be relevant.

138. Professor Akande's final observation is:

> 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).

139. 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. 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".[82]

140. 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") for analyzing legal regulation of the matter.

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82 Para 4.01.

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.

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

142. 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.

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

144. 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 under their control. 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.]

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.

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

146. 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:[83]

> 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.

147. 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.

148. . 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, the "primary framework" is IHL. In the result, this would be a case in which acting consistently with IHL is acting consistently with IHRL.

149. Even if it were otherwise, and the mission were conceived as a "security operation" (such that, according to the framework of chapter 4 of the *Practitioners' Guide*, IHRL was thereby applicable as the primary framework), the analysis offered by the *Practitioner's Guide* (quite understandably) recognises that circumstances may change the framework. That would be the case if, say, a specific security operation is met by hostile activity judged to place lives of personnel in danger.

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83 Paragraph 4.43.

150. The Crown Agencies submit that it is very difficult to discuss these propositions in the abstract, divorced from the facts of an individual cases calling for a decision on the precise mode by which IHL and IHRL interact. More particularly, the Crown agencies say that the facts in relation to matters in this Inquiry do not generate any need for difficult decisions about IHL/IHRL. It is enough to say that, by its own terms, IHRL applies only when by dint of the relevant clauses of human rights treaties a state owes the relevant human rights obligations on the basis of territorial sovereignty or (beyond that) jurisdiction over relevant persons. In relation to the facts relevant to this inquiry there was neither. The events were governed by IHL.

151. 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.

Conclusions

152. The Crown Agencies hope that this presentation assists the Inquiry in considering the relevant legal frameworks that apply to the events in issue in this Inquiry.

153. The application of the relevant legal frameworks discussed in this presentation is inherently fact dependent. Accordingly, the Crown Agencies request the opportunity to provide further legal submissions based on the Inquiry's preliminary findings in due course.

26 July 2019

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