in the matter of the Inquiry into Operation Burnham and Related Matters

REPLY SUBMISSIONS OF COUNSEL FOR JON STEPHENSON

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LeeSalmonLong

Barristers and Solicitors

LEVEL 16 VERO CENTRE 48 SHORTLAND STREET

PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND

TELEPHONE 64 9 912 7100 FACSIMILE 64 9 912 7109

EMAIL: davey.salmon@lsl.co.nz SOLICITOR ON RECORD: DAVEY SALMON

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MAY IT PLEASE THE INQUIRY

1. These submissions reply to the presentations made by the Crown Agencies and NZDF on issues relating to detention at Public Hearing 2 on 23 May 2019.

2. They also respond to a request by the Inquiry for further submissions of the significance of the characterisation of the prohibition of torture as a peremptory norm of general international law or *jus cogens* (**peremptory norm**).

REPLY TO CROWN AGENCY AND NZDF PRESENTATIONS ON DETENTION

3. The following points in reply address:

   (a) The scope of legal obligations relevant to the Inquiry.

   (b) The application and content of the duty to prevent torture.

   (c) The extraterritorial application of the CAT and ICCPR.

   (d) Assurances received and the recent Court of Appeal decision in *Kim v Minister of Justice*.

Scope of legal obligations relevant to the Inquiry

4. The Crown Agencies' submissions did not address relevant principles of international criminal law or New Zealand domestic law relating to detention: Dr Ridings' submissions at [1].

5. It is respectfully submitted that these matters are within the Inquiry's Terms of Reference (**TOR**). The TOR expressly authorise the Inquiry to report on:

   (a) Compliance with IHL in connection with Operation Burnham, which directly overlaps with international criminal law;

   (b) Whether the transfer and/or transportation of Qari Miraj was proper, having regard to the *Evans* decision "among other matters".

6. *Evans* was a judicial review case involving a challenge to the *practice* of the UK government transferring detainees in Afghanistan and whether this was inconsistent with the government's *policy*, which prohibited the transfer of detainees where there was a real risk of torture or serious mistreatment. In interpreting and applying the policy, the Court had regard to the standards that would have been applicable under the Human Rights Act 1998 (UK) and article 3 of the European Convention on Human Rights: see [237]-[239].

7. The reference in the TOR to whether the transfer and/or transportation of Qari Miraj was proper having regard to the *Evans* decision and "other matters" also authorises the Inquiry to report on whether New Zealand complied with the duty to prevent torture (addressed below). In addition to following from a natural and purposive interpretation of these words in the TOR, it is also appropriate that the Inquiry consider these obligations, given the NZDF and other Crown Agencies ought to have been aware of their application at the time. New Zealand ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) on 10 December 1989.

The duty to prevent torture

8. The Crown Agencies described the question of the existence of a duty to prevent torture as "not settled" and a "developing area of international law": Dr Ridings submissions at [28]-[29]. Counsel for Mr Stephenson respectfully disagree.

CAT

9. The CAT imposes a duty on states parties to prevent torture in article 2(1), which provides:

> Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

10. This duty is also a rule of customary law and has the status of peremptory norm: *Prosecutor v Furundzija* IT-95-17-1 (TC) at [148] and [153], UN Special Rapporteur on Torture Interim Report A/73/207 at [5].

11. This duty applies to a state "*in any territory under its jurisdiction*". "*Any territory*" has been interpreted to mean "*all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control*" and includes such places as embassies, military bases, detention facilities: Committee Against Torture General Comment No 2 at [16].

12. This is consistent with the drafting history of the article, as explained in the UN Special Rapporteur on Torture's Interim Report A/70/303 at [29]:

> The Convention's drafting history reveals a preoccupation with balancing the practicability of implementing its provisions rather than an intent to limit the ability to hold States responsible for extraterritorial acts of torture or ill-treatment or to dilute the strength of its applicability. From the original phrasing of the 1978 draft by Sweden, four provisions — articles 11, (5) (1) (a), 5 (2) and 7 (1) — were in fact broadened during drafting from initial reference to "territory" to "any territory under its jurisdiction", with the initial reference to territory alone being rejected as too restrictive. In article 2 (1), the addition of "territory" to the initial reference to "jurisdiction" was intended to avoid the Convention's applicability being triggered by the nationality principle alone. There is also support for the argument that the same formulation was adopted in articles 12, 13 and 16 to ensure textual consistency. That the drafting history reveals changes from references to both "jurisdiction" and "territory" alone to "any territory under its jurisdiction" can be understood to reflect practical concerns rather than a wish to limit the Convention's extraterritorial applicability. A literal reading of the Convention's jurisdictional clauses clearly contradicts its object and purpose and gives rise to impermissible loopholes in its protections

13. In terms of the substance of the duty, the Committee Against Torture General Comment No 2 provides at [18]:

> Where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.

14. Obligations under article 2(1) are not limited to preventing acts of torture by state agents or private actors, but can include acts of torture by other states: UN Special Rapporteur on Torture's Interim Report A/70/303 at [34].

15. The extent of a state's positive duties under article 2(1) in areas under its effective control will necessarily be proportionate to its capacity to influence third parties within those areas: UN Special Rapporteur on Torture's Interim Report A/70/303 at [28].

ICCPR and NZBORA

16. The duty to prevent torture is also inherent in article 7 of the ICCPR: UN HRC General Comment No 20 at [8].

17. While there has been no case law on the duty to prevent torture under s 9 of the NZBORA, the texts of article 7 of the ICCPR and s 9 of the NZBORA are materially the same. The purposes of the NZBORA (to affirm, protect and promote human rights and fundamental freedoms in New Zealand an affirming New Zealand's commitment to the ICCPR) would be served by interpreting the two instruments harmoniously.

Other sources of public international law

18. The Crown Agencies referred to the *Genocide Case* as illustrating the application of a duty to take reasonable steps or carry out "due diligence" to prevent genocide by other states, while noting that the ICJ expressly disclaimed it was doing anything other than applying article 1 of the Genocide Convention and was not purporting to develop a general rule of international law: Dr Ridings' submissions at [28], *Genocide Case* at [429]-[430].

19. The significance of the *Genocide Case* was the recognition of a duty to take steps to prevent genocide which was not subject to any jurisdictional limitation. In this regard it is acknowledged there are small differences between article 1 of the Genocide Convention (which is entirely silent as to jurisdiction) and article 2(1) of the CAT (which applies in "any territory under [states'] jurisdiction" but which has been interpreted to apply extraterritorially to areas where states exercise effective control).

20. It is nonetheless submitted that the *Genocide Case* provides a useful blueprint for how an international court or tribunal might apply article 2(1) extraterritorially. In particular the observations of the Court at paragraph [430] regarding the scope of states' positive obligations being proportionate

to their "*capacity to influence effectively the action of persons likely to commit, or already committing, genocide [here torture]*" is instructive.

21. The ICJ has also held that states have a legal duty not to recognise an illegal situation arising from breaches of duties under international law which are owed *erga omnes* (to all states): *Wall Advisory Opinion* at [155], [159], [163(3)(D)] (although note the separate opinions of Judge Higgins and Judge Kooijmans, who disagreed that the basis for this duty was the characterisation of the related obligations as obligations *erga omnes*). It is submitted this duty is separate from, but complementary to, the duty to take positive steps to prevent torture under the CAT and related instruments.

Extraterritorial application of the CAT and ICCPR generally

22. The Crown Agencies submitted the extraterritorial application of both international and domestic human rights instruments was not settled and controversial, and that there is no consensus between international and domestic courts and Treaty bodies on one test: Dr Ridings submissions at [2], [12] and [19].

23. The Crown Agencies further submitted that while the UN Committee Against Torture and UN Human Rights Committee had interpreted the prohibitions of torture in the CAT and ICCPR as applying extraterritorially, the ECHR and Canadian domestic courts had taken more restrictive approaches: Dr Ridings Submissions at [12] and [19].

24. In reply, it is submitted it is not the *principles* governing the extraterritorial application of the CAT and ICCPR that are so controversial, but the *application* of these principles to particular fact situations, which will necessarily require a careful consideration of all relevant evidence.

25. Under the CAT, certain obligations are expressed as applying "in any territory under [a state's] jurisdiction" only. However, as addressed above in the context of article 2(1), these limitations have been interpreted broadly and the underlying obligations have been held to apply in all areas under the effective control of a state as well as to all people over whom the state exercises effective control: Committee Against Torture General Comment No 2 at [7], [16]; Special Rapporteur Interim Report A/70/303 at [28]. The UN Special Rapporteur report referred to also notes at [28]:

> While recognizing that States' obligations to fulfil certain positive obligations are practicable only in certain situations, States' negative obligations under the Convention are not per se spatially limited or territorially defined, nor are its obligations to cooperate to end torture and other ill -treatment.

26. The ICCPR has also been held to apply in all areas where a state exercises its jurisdiction outside of its territory. This interpretation is consistent with the *travaux preparatoires* of the instrument and the jurisprudence of the UN Human Rights Committee*: Wall Advisory Opinion* at [109]. It has also been reinforced by leading commentators: Joseph and Castan (eds) *The International Covenant on Civil and Political Rights* (3 ed, Oxford University Press, Oxford) at [4.12] and Andrew Butler and Petra Butler (eds) *The New Zealand Bill of Rights Act: A Commentary* (2 ed, LexisNexis NZ Ltd, Wellington, 2015) at [5.16.3].

27. The interpretations by domestic courts of domestic constitutional or human rights legislation is not directly relevant to the interpretation of the CAT or ICCPR, which should be conducted autonomously in accordance with the rules governing treaty interpretation set out in the VCLT. Nonetheless, in making submissions on the position under the European Convention and Canadian Charter of Rights and Freedoms, the Crown Agencies omitted to acknowledge that:

(a) The main authority put forward in support of the position under the European Convention is no longer good law. The Court's decision in *Bankovic v Belgium* (2007) 44 EHRR SE5 has been displaced by its decision in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (GC), in which the Court held the European Convention applies extraterritorially where a state by consent or acquiescence exercises some public powers normally exercised by a foreign government on that state's territory; or where a state exercises control or authority over individuals; or where a state exercises effective control over an area: [133]-[140].

(b) The Solicitor-General doubted the correctness of the Canadian Federal Court of Appeal's decision in *Amnesty International* decision in his contemporaneous 2010 opinion: **Solicitor-General Opinion** at [12].

Assurances and arrangements

Summary of presentations

28. In his presentation, Mr Fisher mentioned that:

(a) In 2006, New Zealand had obtained verbal assurances from "*a range of Afghan senior officials regarding humane treatment [of detainees] in accordance with international humanitarian and human rights law*" (**2006 assurances**); [15].

(b) On 12 August 2009, New Zealand signed an arrangement with the Government of Afghanistan on the treatment of detainees (**ATD**) which included as a "key element" that Afghan authorities would maintain and safeguard persons transferred to them by the NZDF in accordance with applicable domestic and international law: [16].

29. It appears that only limited details of the 2006 assurances have been made publically available: see eg. **20 Dot point brief for CDF Detainees in Afghanistan – AN, NZ transfer arrangement** (**Dot point brief**) at bullet 2; **33 Cable Re Afghanistan New Zealand Military Arrangement** at talking point no 4.

30. The ATD was recently disclosed by the Inquiry. Some of the other recently disclosed documents provide background: see eg. **11 NTM NZDF Operations – Afghanistan** at [10]-[12]; **32 Arrangements between Afghanistan MFA and NZDF concerning the transfer of persons between the NZDF and Afghan Authorities** (**5 August 2009 Cable**).

31. Mr Fisher also referred to other activities which, it can be inferred, the Crown Agencies consider to be relevant to the question of whether the

assurances that were given and the ATD could reasonably have been relied upon. These other activities included:

(a) New Zealand's mentoring and training relationship "*emphasising*" human rights obligations: [9]

(b) New Zealand "*engaging with*" the Afghan government to ensure people detained by New Zealand and transferred to Afghan custody were treated humanely and in accordance with international obligations: [10]

(c) "*Senior visitors*" to Afghanistan "*[raising] New Zealand's concerns*" with "*historic*" abuses and seeking assurances of human treatment of detainees apprehended by the NDS": [25]

(d) Minister Mapp "*reiterating*" these concerns in August 2010 and receiving briefs on "*improvements within Afghan prisons*": [26]

(e) New Zealand's participation in a detainee working group: [27]

Legal principles

32. It is trite law that states and officials cannot rely on assurances or arrangements as immunising them from state responsibility under international law or liability under domestic law. Assurances must meet the real risk of a breach of fundamental rights on the extradition or transfer of a person, or the risk of acts of torture being committed by third parties (for the purpose of the duty to prevent).

33. Since Hearing No 2, the Court of Appeal has given judgment in *Kim v Minister of Justice* [2019] NZCA 209 (***Kim***). This judgment addresses the circumstances in which a government should seek assurances, and when it will and will not be safe to rely on them.

34. *Kim* was an extradition case. The People's Republic of China (**PRC**) had requested that Mr Kim be extradited to the PRC to face one charge of murder. The extradition proceedings were at the stage where the Minister of Justice (**Minister**) had to consider whether to confirm Mr Kim would be extradited. Mr Kim opposed his extradition on the basis there was a real risk that his human rights would be breached in the PRC. The relevant rights included the prohibition of torture and extrajudicial killing, the right to a fair trial and the right to life or application of the death penalty.

35. The Minister sought assurances on these matters: see [25]-[26]. Based on those assurances and other matters, she decided to confirm the extradition. After the Minister's decision was overturned on judicial review, she reconsidered the decision based on updated briefings: see [39], [104]-[113]. Mr Kim again sought judicial review, this time unsuccessfully at first instance. He appealed. The main grounds of appeal of relevance to the Inquiry were Mr Kim's arguments that:

(a) New Zealand was not entitled to rely on assurances given by the PRC at all (Ground 1); and

(b) The Minister should not have accepted that the assurances adequately dealt with the risks of torture, extrajudicial killing or the application of the death penalty (Grounds 3-5).

36. Winkelmann J (as she then was) gave the judgment of the Court allowing Mr Kim's appeal. In terms of the applicable law, the Court held that:

(a) The discretion to confirm extradition under s 30 of the Extradition Act 1999 needed to be exercised consistently with the *non-refoulement* principle as drawn from domestic and international human rights instruments: [20], [265].

(b) The appropriate standard of review of decisions relating to fundamental human rights, such as decisions to confirm extradition, was heightened scrutiny, which includes asking whether materially relevant information which the decision-maker knew or ought to have known existed at the time of the decision, had been taken into account: [45]-[46].

(c) There is widespread international concern about the practice of obtaining assurances: [62]-[64]

(d) Before making decisions to extradite, state officials should ask a preliminary question, namely whether the general human rights situation in the state of concern is such that assurances should be sought. As the Court noted at [73]:

> The fact that serious breaches of human rights occur regularly in a state may be evidence that the importance of human rights is not understood or valued, or alternatively that the rule of law is not sufficient in the requesting state to secure the defendant the benefit of [the] assurances.

(e) There is no rule that a state may be automatically prohibited from relying on assurances in certain contexts; however, whether or not particular assurances can be relied upon will require an evaluative assessment of all the facts, subject to review on the heightened scrutiny standard: [70].

(f) The nature and extent of the risk the assurances must meet are critical to assessing the adequacy of the assurances received: [126]

(g) A state may prohibit torture, prevent the use of information obtained by torture and be undergoing a "cultural shift" away from the use of torture; however, torture may nonetheless remain widespread, and any systems in place to prevent it may be inadequate to support the provision of meaningful assurances: [128].

(h) The consensus from international bodies is that there are very real difficulties in monitoring individual cases to detect torture and even regular visits by skilled monitors may not provide adequate protection: [132]

37. Applying these principles, the Court of Appeal held that on her second decision, the Minister had:

(a) Failed to address and answer the preliminary question about whether the general human rights situation in the PRC was such that assurances should be sought and relied upon properly;

(b) Wrongfully relied on factors as reducing Mr Kim's risk of torture which were not supported by evidence; and

(c) Failed to address how the assurances would assist, given torture is already prohibited in the PRC but persists, is concealed, and can be hard to detect; limited safeguards are in place and there are substantial disincentives for not reporting torture; but

(d) Had been justified in holding the assurances were acceptable in relation to the death penalty. There was cogent evidence that assurances given to other states in this regard had been complied with.

Application

38. It is not possible to make detailed submissions on the adequacy of the 2006 assurances or the ATD at this stage, given that little detail is known about their content (in relation to the assurances) or the circumstances in which they came to be made and agreed. However, some high level comments can be offered.

39. First, both the 2006 assurances and ATD are non-binding.

40. Second, it appears that neither the 2006 assurances nor the ATD were sought or prepared following an assessment of the general human rights situation in Afghanistan and in particular, whether in the light of that, assurances relating to the non-commission of acts of torture and mistreatment *specifically* were required. The 5 August 2009 Cable suggests the ATD was an "alternative" proposed by a person or entity whose name is classified to address concerns about the application of the death penalty: see paras [2]-[3]. All the ATD does is affirm in general terms that persons transferred from the NZDF to Afghan Authorities will be treated "in accordance with the international obligations of both parties". There is no suggestion that any specific risks of torture or mistreatment were considered.

41. Third, there was evidence available to the NZDF at the time the ATD was entered into, which increased with time, of the systemic practice of torture at NDS facilities including the facility in Kabul: see previous submissions at [29(a)]. This evidence either was, or ought to have been, known to the NZDF and/or other Crown Agencies: refer paragraph [36(b)] above. It was arguably incumbent on New Zealand to seek specific assurances relating to torture and mistreatment by the NDS to safeguard detainees transferred to Afghan forces, including the large number of detainees that were arrested by the CRU on partnered operations with the NZSAS. Between 17 August 2010 and 31 August 2011 the number of these detentions increased from 22 to 58 at an average rate of approximately three per month: compare **34 Cable re Afghanistan, Detainees – UK High Court**

Ruling and Implications for New Zealand at [2] with **11 NTM NZDF Operations – Afghanistan** at [7].

THE PROHIBITION OF TORTURE AS A PEREMPTORY NORM

Peremptory norms generally

42. There is no one agreed definition of a peremptory norm. Article 53 of the Vienna Convention of the Law of Treaties (**VCLT**) defines a peremptory norm as:

> A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

43. The ICJ has noted the description "peremptory" refers to the legal character of the norm rather than the content of that norm: *Nuclear Weapons Advisory Opinion* at [83] and *Jurisdictional Immunities* at [92]-[97].

44. The International Law Commission's Commentary on its Draft Articles on the Law of Treaties shows that the terms "no derogation" in article 53 were intended to refer to treaty arrangements between states which contradicted peremptory norms: Commentary on draft article 50, addressed in James Crawford (ed) *Brownlie's Public International Law* (8 ed, Oxford University Press, Oxford 2012) at pp 594-595.

45. To that end the VCLT provides that where a treaty conflicts with a peremptory norm at the time the treaty is concluded, the treaty is void, and if a new peremptory norm emerges over time, any existing treaty which is in conflict with that norm becomes void and terminates: articles 53, 64.

46. There is limited authority addressing conflicts between peremptory norms and other rules of customary international law. In the *Jurisdictional Immunities* case, the ICJ held that states may invoke immunity under customary international law from civil claims seeking compensation for alleged breaches of peremptory norms. No conflict of rules arose justifying resort to the peremptory character of the peremptory norms engaged, the ICJ held, because the law of state immunity was procedural while the peremptory norms were substantive in character, and the invocation of immunity did not affect the illegality of the underlying conduct (assuming there had been a breach of the underlying norm(s)): [92]-[95]. The ICJ added for clarification:

> To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition.

47. There are specific rules of state responsibility for peremptory norms. States cannot invoke other circumstances as precluding the wrongfulness of a breach: ILC Draft Articles on State Responsibility, art 26.

48. States have duties to co-operate to bring to an end by lawful means "*serious breaches*" of such norms: ILC Draft Articles, art 41(1). A

serious breach is one which "*involves a gross or systematic failure by the responsible state to fulfil the obligation*": art 40(2).

49. Additionally, states are prevented from recognising as lawful situations created by serious breaches of peremptory norms, and are prohibited from rendering aid or assistance in maintaining the situation: ILC Draft Articles, art 41(2).

The prohibition of torture as a peremptory norm

50. International and New Zealand domestic courts have recognised that the prohibition of torture is a peremptory norm: *Questions Relating to the Obligation to Prosecute or Extradite* at [99], *Prosecutor v Furundzija* IT-95-17/1-T, 10 December 1998 (TC) at [145] and *Fang v Jiang* [2007] NZAR 420 (HC) at [27].

51. The peremptory status of the prohibition could be implicated by the Inquiry's work in at least two ways.

52. First, it could be necessary to resort to the status to resolve a conflict of rules of international law. One potential example could be in the interpretation and application of the duty to take positive steps to prevent torture under article 2(1) of the CAT. As submitted above, this duty applies extraterritorially. In applying this duty, the Inquiry would need to consider the conduct of New Zealand forces both within its territorial jurisdiction and in all areas in Afghanistan where New Zealand exercised effective control, to determine whether the obligation was complied with. In this context, UN Security Council Resolution 1386 and the scope of its authorisations could be invoked as justifying the particular course of conduct followed. The peremptory status of the prohibition of torture could be invoked in addition to the discretionary nature of the permissions and authorisations in the Resolutions as a basis for breaking any deadlock.

53. Second, the peremptory status could provide an additional basis for state responsibility. The systematic practice of torture, as recorded in the 2011 UNAMA report, arguably amounted to a "*serious breach*" by Afghanistan of the prohibition. In this context, it is at least arguable that by assisting the CRU to arrest persons which it knew were being transferred to the NDS, or more specifically by the actions in assisting the NDS directly to detain Qari Miraj, including assisting with at least 36 detentions in the year following *Evans* judgment, New Zealand could incur state responsibility in accordance with art 41(2) of the ILC Draft articles.

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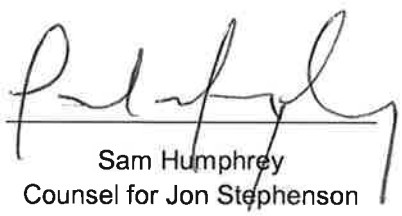

Sam Humphrey
Counsel for Jon Stephenson