

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO
OPERATION BURNHAM AND
RELATED MATTERS

MEMORANDUM OF COUNSEL FOR THE CROWN AGENCIES

13 June 2019

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MAY IT PLEASE THE INQUIRY:

1. These submissions are filed at the invitation of the Inquiry on behalf of the Crown Agencies participating in the Inquiry. They address a number of detention-related issues arising from the public hearing for module 2, held on 22 and 23 May 2019.
2. To the extent these submissions concern issues of law, they represent the Crown view of the law.

Background – Module 2

3. Paragraphs 6.3 and 7.8 of the Inquiry’s terms of reference empower the Inquiry to examine the circumstances of the transfer and/or transportation of Qari Miraj to the Afghanistan National Directorate of Security in January 2011. The facts relating to this event, as set out in *Hit & Run*, are contested and will need to be considered by the Inquiry in private. However, in order to facilitate public understanding of the issues in the Inquiry,¹ the Inquiry considered that the legal framework relating to, and New Zealand’s policy on, detention in Afghanistan could properly be considered in public.
4. In Minute 12, the Inquiry noted that the purpose of module 2 was to examine the rules governing the detaining of people in Afghanistan by New Zealand forces and to look at the safeguards used to ensure they were not tortured when delivered into the custody of others. In that minute, the Inquiry directed the Crown Agencies to provide a presentation on a number of issues relating to detention during the Afghanistan conflict.
5. Given the direction to provide a “presentation”, and as the Inquiry had not previously raised concerns with the Crown’s legal position as set out in the advice from the Solicitor-General dated 2 November 2010 (**Solicitor-General’s Advice**), Crown Agencies did not provide full legal submissions on the range of issues that are considered in that advice. However, based on questioning from the Inquiry, and submissions provided on behalf of Mr Stephenson, it is apparent the Inquiry would be assisted by further legal submissions from the Crown on the legal basis for the New Zealand Government’s policy in respect of persons detained by the Afghan National

¹ Ruling No 1 of the Inquiry at [82] and [84].

Security Forces (ANSP) during law enforcement operations conducted with New Zealand support. Accordingly, these submissions set out in more detail the Crown's position on the relevant legal issues.

6. Before doing so, however, we set out the Crown Agencies' understanding of how these issues relate to the Inquiry's Terms of Reference (ToR).

Scope of the ToR

7. The matter of public importance the Inquiry is directed to examine is "the allegations of wrongdoing by New Zealand Defence Force (NZDF) forces in connection with Operation Burnham and related matters [including the detention of Qari Miraj]." The background section of the ToR makes it clear that the relevant allegations are those contained in the book *Hit & Run*.
8. The relevant allegations concerning the detention of Qari Miraj, upon which the ToR are based, are contained in Chapter 6 of *Hit & Run*. A key allegation is that having detained Qari Miraj, the NZDF transferred him to the Afghan authorities without putting in place measures to mitigate the risk of torture. Relevantly, the chapter includes the following passage:²

"Under international law concerning prisoners of war, it is very important to be clear about what country's troops detain a person, because the detaining authority has ongoing responsibility to ensure the prisoner is treated properly. The Qari Miraj capture operation was a New Zealand one..."

9. Against this background, the Inquiry is directed by its ToR to:
 - 9.1 Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations;
 - 9.2 Examine the circumstances of Qari Miraj's transfer and / or transportation to the Afghanistan National Directorate of Security (NDS) in Kabul in January 2011; and
 - 9.3 Inquire into and report on whether NZDF's transfer and/or transportation of suspected insurgent Qari Miraj to the NDS was

² At p.83.

proper, given (amongst other matters) the June 2010 decision in *R (oao Maya Evans) v Secretary of State for Defence (Maya Evans)*.³

10. It is submitted that these paragraphs of the ToR require the Inquiry to do three things: i) establish the facts relating to the operation involving Qari Miraj in January 2011; ii) in doing so, determine whether NZDF ‘transferred’ and/or ‘transported’ Qari Miraj to the NDS; and iii) determine whether that transfer and/or transportation was proper, having regard to the *Maya Evans* decision.
11. Having regard to these three tasks, the Crown Agencies submit that: i) the distinction between a ‘transfer’ and a ‘transportation’ is legally significant as the former implies obligations of non-refoulement whereas the latter may not; ii) the word ‘proper’ was deliberately chosen in the ToR in preference to ‘lawful’, as determining whether the events were lawful would require the Inquiry to enter a prohibited realm of determining civil liability;⁴ and iii) the *Maya Evans* judgment addressed a situation where the United Kingdom (UK) was the detaining authority contemplating a transfer of detainees to the Afghan authorities, but it did not express any view about a situation where the UK, as part of a partnered operation with Afghan authorities, provided assistance in transporting a person detained by the Afghan authorities under Afghan law.
12. Taking each of these points in turn: first, it is clear from the passage quoted at para [8] above that the allegation in *Hit & Run* is that NZDF was the detaining authority responsible for Qari Miraj and that NZDF ‘transferred’ (and not merely assisted in transporting) Qari Miraj to the NDS. The NZDF denies that allegation. The Crown Agencies accept that this is a dispute the Inquiry will need to determine.
13. Secondly, having determined that dispute, the Inquiry will also need to determine whether what happened was ‘proper’. The Crown Agencies submit that the conduct of the NZDF would be ‘proper’ if it accorded with Government policy, and if that policy accorded with appropriate legal advice as to the Crown’s international legal obligations. As the Inquiry members will know, Crown Agencies, including the NZDF, are bound to accept advice given by the Solicitor-General, based on the Solicitor-General’s constitutional

³ *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445.

⁴ Which it is not empowered to do under s 11 of the Inquiries Act 2013.

responsibility for determining the Crown's view of what the law is.⁵ Accordingly, it is submitted that it would be "proper" for the Government to rely on the Solicitor-General's advice when formulating its policy, and it would be "proper" for the NZDF to have followed such a policy. We submit that it forms no part of the Inquiry's mandate to determine whether the Solicitor-General's advice was correct in law.⁶ Provided it was produced in good faith and was not manifestly wrong, reliance on it would be 'proper'.

14. The relevant parts of the Solicitor-General's Advice can be summarised as follows:

14.1 The Solicitor-General drew a distinction between the obligations that would arise where: i) NZDF members detained a person themselves so that the person was in New Zealand's jurisdiction and control; and ii) a person was detained by Afghan authorities, in circumstances where NZDF members were providing support and assistance. The Solicitor-General noted that a duty of non-refoulement, and potentially applicable related obligations such as a duty of protection to prisoners taken in armed conflict, only applied in the former and not the latter situation.

14.2 However, the Solicitor-General recognised that, in providing assistance to the ANSF in law enforcement operations, there was a risk that NZDF forces could become complicit – at international law – in any subsequent torture or mistreatment of the detainees by the ANSF. In order to avoid the potential for complicity, the policy required the relevant agencies to:

14.2.1 Maintain agreements with Afghan authorities that human rights protections would be observed;

14.2.2 Continue to obtain credible assurances from the Afghan officials and personnel that such protections were met in practice; and

⁵ See *Accent Management limited v Commissioner of Inland Revenue* [2013] 3 NZLR 374 at [51].

⁶ For completeness, we note that paragraph 7.1 of the Terms of Reference is squarely focussed on the conduct of NZDF forces in *Operation Burnham* and accordingly has no bearing on the Inquiry's task to determine whether the transportation / transfer of Qari Miraj was proper, contrary to the submissions for Mr Stephenson.

- 14.2.3 If New Zealand, or New Zealand personnel, were to become aware that prisoners taken by Afghan forces in operations partnered by New Zealand personnel were tortured, to withdraw cooperation from the ANSF, or any part of it, until that risk could be addressed.
15. The Solicitor-General's Advice reflects a significant and respectable body of international legal opinion and should be the basis upon which the Inquiry determines whether the events at question were 'proper'. The Crown Agencies do not share Mr Stephenson's view that the Inquiry's role is to extend international norms or to resolve controversial and currently undecided issues of international or domestic law.
16. We submit that the Solicitor-General was right to draw a clear-cut distinction between cases where i) New Zealand has jurisdiction and control over a detained person and subsequently transfers that person to the jurisdiction and control of the ANSF; and ii) New Zealand never has jurisdiction and control over a detained person. We accept, however, that while the distinction is clear-cut in terms of its legal consequences, there is a spectrum of factual situations such that it may be difficult, in some cases, to identify clearly which paradigm applies. For example, while partnered operations would ordinarily not give rise to non-refoulement obligations, that may not be the case for "sham" partnering arrangements, where the Afghan "partner" is deployed solely for the purpose of allowing the foreign State to carry out an arrest and detention, while avoiding its international obligations.
17. That interpretation of the ToR does not deprive the Inquiry of important lines of inquiry. The Crown Agencies accept that there are legitimate questions as to whether the particular operation involving Qari Miraj did, in fact, comply with the Government's policy. In particular, the Crown Agencies acknowledge that the Inquiry may wish to consider the following issues:
- 17.1 First, whether, due to the particular circumstances of the operation involving Qari Miraj, he was *in-fact* detained by the NZSAS, such that the obligations, and the Government's policies that applied to persons detained by the NZDF applied to Qari Miraj, including the obligation of non-refoulement. As discussed, this is the allegation from *Hit &*

Run around which the ToR is framed. This also appears to be the issue which the Chairperson identified in his comments and questions at the conclusion of the Crown Agencies' presentation on detention issues in module 2.⁷

- 17.2 Secondly, whether, as at January 2011, information available to the New Zealand Government indicated that prisoners taken in partnered operations were at a real risk of torture, such that, on the basis of the advice from the Solicitor-General, the Government should have restricted its cooperation with the ANSF (or any particular agency).
18. These particular issues will be dealt with in these submissions at a high level. They can then be addressed in more detail, in light of the facts, once the Inquiry has made its preliminary findings of fact.

Legal context

19. In order to fully understand the legal basis for New Zealand's policies in respect of detention in the Afghanistan conflict, it is important to understand the different legal bases for detention by New Zealand forces and by the Afghan authorities. It is also important to consider the international legal context for New Zealand forces partnering with the ANSF, as defined by the Security Council resolutions mandating the involvement of New Zealand forces in Afghanistan.

Legal basis for detention by New Zealand forces in Afghanistan

20. A question has been raised by counsel for Mr Stephenson as to whether there is authority for a foreign force to detain a person in non-international armed conflict (NIAC).⁸
21. As this question is not within the scope of the Inquiry's ToR, we do not intend to address this issue in great detail. However, this submission does highlight the difference in the legal authority for New Zealand forces to detain an alleged insurgent, and the legal authority for the Afghan authorities to do so.
22. The legal authority for New Zealand forces to detain people in the course of the armed conflict in Afghanistan was based in international law, specifically

⁷ See transcript of hearing, 23 May 2019, at pp.34 – 35 and 41.

⁸ Synopsis of Submissions of Counsel for Jon Stephenson for Hearing 2, 22 May 2019 at [11-17].

International Humanitarian Law (IHL) and the relevant resolutions of the United Nations Security Council (UNSC).

23. Implicit authority for detention in IHL is found in Common Article 3 to the 1949 Geneva Conventions, which expressly provides for protections that must be afforded to persons taking no active part in hostilities, including members of the armed forces who are out of action due to “sickness, wounds, *detention*, or any other cause” (Emphasis added).
24. Further, Article 5.1 of Additional Protocol II to the Geneva Conventions sets out rules with regard to certain NIAC in relation to “persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”. The inclusion of the word “detained” implies that detention is permitted in NIAC.
25. The International Committee of the Red Cross (ICRC), among others, concludes that international humanitarian law provides an implicit authorisation for detention of persons in NIAC.⁹
26. Further support for the lawfulness of detention by New Zealand forces in the Afghanistan conflict is also found in UNSC resolutions relating to Afghanistan, the consent of the Afghan Government, and the ISAF policies on detention. In particular, as the UK Supreme Court has held, the relevant resolutions of the UNSC which “authorised member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate”,¹⁰ authorised detention of members of the opposing armed forces when this was required for imperative reasons of security.¹¹

Legal basis for detention by Afghan authorities

27. While the legal authority for New Zealand forces to detain people in the course of the armed conflict in Afghanistan was based in international law, the legal authority for the Afghan authorities to detain people in the course of

⁹ “Internment in Armed Conflict: Basic Rules and Challenges”, International Committee of the Red Cross (ICRC) Opinion Paper, November 2014; See also S. Aughey and A. Sari *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence* 91 Int’l L. Stud. 60 (2015).

¹⁰ Security Council Resolution 1386 (2001). The mandate was subsequently extended by Resolution 1510 (2003) to the provision of security assistance for reconstruction and humanitarian efforts throughout Afghanistan.

¹¹ *Serdar Mohammed & Others v. Secretary of State for Defence* [2015] EWCA Civ 843 per Lord Sumption at [28].

administering the criminal law was based on Afghan domestic law. There is no dispute that the NDS had legal authority to detain Afghan citizens in Afghanistan under Afghan law.

Legal basis for assistance by New Zealand forces to Afghan National Security Forces in executing arrest warrants

28. The Chairperson, in his comments and questions at the conclusion of the Crown Agencies' presentation for module 2, noted the difficulty in drawing a line between detentions undertaken by foreign forces, under the authorisation granted by international law, and the role played by foreign forces in supporting detentions undertaken by Afghan authorities exercising criminal jurisdiction. In the Crown Agencies' submission, in determining where that line is drawn, regard has to be had to the mandate given to international forces under international law, as defined by the resolutions of the UNSC.
29. Successive UNSC Resolutions reiterated the Council's strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan, and encouraged the international community to support and develop the capacity of the Afghan Government to fulfil its sovereign obligation to provide for the security of its citizens.
- 29.1 UNSC resolutions from 2001 recognised that "*responsibility for providing security and law and order throughout the country resides with the Afghans themselves*".¹² This language was strengthened in successive UNSC resolutions and ensuing ISAF policies to encourage ISAF members "*to train, mentor and empower the Afghan National Security Forces, in particular the Afghan National Police*".¹³
- 29.2 In 2009, the UNSC welcomed "*the increasing leadership role played by the Afghan Authorities in security responsibilities throughout the country*,"¹⁴ while continuing in 2010 to stress ISAF's role "*in assisting the Afghan Government to improve the security situation and build its own security capabilities*".¹⁵

¹² See, for example, UNSCR 1386 (2001).

¹³ UNSCR 1776 (2007).

¹⁴ UNSCR 1890 (2009).

¹⁵ UNSCR 1890.

- 29.3 In 2011 the UNSC further recognised “*the need for Afghanistan together with international donors to further strengthen the Afghan National Army and Afghan National Police*” and urged “*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.*”¹⁶
30. As such, although ISAF members had legal authority to conduct operations in Afghanistan and to detain as part of the NIAC hostilities, as time went on the clear preference of both the Afghan Government and the international community became for insurgents to be dealt with, wherever possible, through the Afghan criminal justice system.¹⁷ This was essential to the sustainability of the improvements in security and law and order. ISAF could not remain deployed in Afghanistan indefinitely, so the international community recognised a need to develop the capacity of Afghan institutions to provide security and law and order for themselves. To enable this, the concept of partnering with Afghan agencies to develop their capacity to provide security and law and order was a core element of the mandate provided by the UNSC.
31. Partnered operations supported the enforcement of Afghan laws by Afghan authorities. Arrests were conducted by Afghan authorities in accordance with Afghan arrest warrants, executed in accordance with domestic law. The detention of persons on criminal charges took place within the Afghan law enforcement structures and procedures. Assessment of detention practices by the ICRC was undertaken through consultation with the Government of Afghanistan, not the partnering force.
32. The development of ISAF partnering operations was a direct response to the need to build capacity and skills within the Afghan law enforcement and prison system. New Zealand’s contribution to this was its role in partnering with and mentoring the Crisis Response Unit (CRU) and, on occasion, partnering with

¹⁶ UNSCR 2011.

¹⁷ International forces did retain the lawful authority to detain under IHL. Accordingly, an operation within the law enforcement paradigm could transition into an operation under the conduct of hostilities paradigm if, e.g. the person presented a threat to New Zealand or persons we were mandated to protect. This escalation would move the operation into the active hostilities phase, primarily governed by IHL, and New Zealand would have authority to act pursuant to that. There is no suggestion this occurred during Operation Yamaha however.

other agencies within the ANSF. Other international forces within ISAF, and international organisations under the umbrella of the United Nations Mission in Afghanistan (UNAMA), were responsible for building the capacity of other institutions within the criminal justice system. This included monitoring places of detention and working with the relevant agencies to improve compliance with human rights standards.

33. It should also not be overlooked that the international intervention in Afghanistan, which formed the framework in which partnering operations were conducted, was ultimately directed towards increasing the fulfilment of human rights in Afghanistan, by strengthening the rule of law and increasing security.

Legal issues arising in partnering operations

34. In this section of the submissions we respond to issues of law raised by the Inquiry, and in the submissions of counsel for Mr Stephenson, without prejudice to the submission that the Inquiry does not have jurisdiction to determine whether the legal advice underpinning New Zealand's detention policy concerning partnered operations was correct.
35. As an indication of the issues to be considered:
- 35.1 First, we consider the circumstances in which New Zealand's non-refoulement obligations are engaged when acting abroad and explain why they were not engaged by the arrest and detention of Qari Miraj.
- 35.2 Secondly, we consider whether there was a duty to prevent torture, and if so, whether New Zealand failed to meet this duty in the arrest and detention of Qari Miraj.
- 35.3 Thirdly, we consider the requirement in international law to avoid complicity in internationally wrongful acts, including torture, and explain why New Zealand was not complicit in any alleged torture of Qari Miraj by Afghan authorities.
- 35.4 Fourthly, we consider whether the *jus cogens* nature of the prohibition on torture, and its *erga omnes* character changes the analysis in 35.1 and 35.3 above;

35.5 Finally, we consider the extra-territorial application of the New Zealand Bill of Rights Act.

Non-refoulement obligations in international law

36. The allegations referred to in paragraphs 6.3 and 7.8 of the ToR allege that New Zealand may have transferred Qari Miraj to the NDS in breach of its obligations under international law. In particular, New Zealand has legal obligations not to ‘refoule’ any person to another State where there are substantial grounds for believing the person faces a real risk of torture. Refoulement includes any form of return, expulsion or extradition of a person from the jurisdiction of one State to the jurisdiction of another.

37. New Zealand’s relevant non-refoulement obligations in respect of torture derive from:

37.1 Article 3 of the United Nations Convention Against Torture (**CAT**), which provides that “no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”; and

37.2 Article 7 of the International Covenant on Civil and Political Rights (**ICCPR**), which provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

38. As is common with international law instruments, the CAT and the ICCPR contain clauses defining their geographic application.

Extraterritorial application of the CAT

39. The CAT does not have a single jurisdictional clause and different obligations are treated differently for jurisdictional purposes. For example:

39.1 The obligation to criminalise “all” acts of torture is unlimited in geographic scope and applies wherever they may occur (Articles 5 and 6);

39.2 By contrast, Articles 2, 5, 11, 12, 13 and 16 require a State Party to take certain actions limited to "any territory under its jurisdiction".

40. The Article 3 non-refoulement obligation has no express geographic limitation. Some States, drawing on the origin of the principle in refugee law, have argued that the obligation necessarily imports an understanding of a transfer of a person from the territory of one State to the territory of another State. The Crown Agencies do not support this construction of the CAT. Instead, the Crown Agencies accept that the non-refoulement obligation is engaged when a detainee subject to New Zealand's jurisdiction is transferred to the jurisdiction of another State even where that transfer takes place exclusively within the territory of the other State. That more generous construction of Article 3 of the CAT is consistent with the *jus cogens* nature of the prohibition on torture.
41. Importantly, as will be discussed further below, whether the wording in Art 2 of CAT obligating a State party to take measures to *prevent* torture might reasonably be interpreted to apply beyond its plain reading of 'in any territory under its jurisdiction', is unsettled, but unlikely. The UN Committee Against Torture has indicated that the content of that duty is not static since "*the Committee's understanding of and recommendations in respect of effective measures are in a process of continual evolution*".¹⁸

Extraterritorial application of the ICCPR

42. The extraterritorial application of the ICCPR is considerably less clear-cut. Article 2(1) of the ICCPR provides that State parties to the Covenant "undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".
43. This has been interpreted to mean that New Zealand will have obligations to secure certain rights to individuals outside of its territory in exceptional circumstances where they are subject to its jurisdiction.¹⁹ The issue of jurisdiction is essential, however.
44. The Crown Agencies submit that the circumstances in which a person outside of a State's territory is within its jurisdiction remains unsettled in international

¹⁸ UN Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties at [4]. Despite some suggestions to the contrary in academic literature, there is no State practice to accept a wider interpretation of Art 2.

¹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 at [1107-111].

law. International courts have recognised two bases for establishing the application of the ICCPR to actions of a State outside its own territory:

44.1 First it may apply to the conduct of a State in areas where it enjoys effective control, such as where the State is an occupying power,²⁰ (so called ‘territorial’ extraterritorial jurisdiction).

44.2 More controversially, it may apply to conduct in respect of individuals who are outside a State’s territory but subject to its jurisdiction, such as where a State abducts one of its citizens from another country (so-called ‘personal’ extraterritorial jurisdiction).²¹

45. There is a lack of clarity in international law on how these principles apply to different fact scenarios. However, for the purposes of paragraphs 6.3 and 7.8 of the Inquiry’s ToR, it is sufficient to note that if a detainee “subject to New Zealand’s jurisdiction” were transferred to the jurisdiction of another State, New Zealand’s non-refoulement obligations under Article 7 of the ICCPR would be engaged.

46. As with the CAT, therefore, the most relevant question in the context of the ToR is not whether the ICCPR applies extraterritorially (it may do in exceptional circumstances), but whether Qari Miraj was ever subject to New Zealand’s jurisdiction before his detention by the Afghan authorities.

When is a person subject to the extraterritorial jurisdiction of a State?

47. As New Zealand did not have effective control of any area or facility where Qari Miraj was arrested or detained in January 2011, the only basis on which it might be argued that he was subject to New Zealand’s jurisdiction is by applying the principle of personal jurisdiction.

48. The principle of personal jurisdiction is controversial and has primarily been employed by the European Court of Human Rights (ECtHR) in interpreting the European Convention on Human Rights (**European Convention**). Article 1 obligates a State party to apply the European Convention to all persons

²⁰ International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168 at [219]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 at [1107-111]. And by analogy, see European Court of Human Rights, *Loizidou v Turkey* [1995] ECtHR, Application no. 15318/89.

²¹ HCR, *Lopez v Uruguay*, CCPR/C/13/D/52/1979, 29 July 1981, [12.1-12.3].

within that State party's jurisdiction. The ECtHR has emphasised that jurisdiction under Article 1 is exercised extraterritorially only in exceptional cases, the vast majority of which are when the contracting State exercises effective control of an area outside its territorial boundaries. Nonetheless, the Court has occasionally found the European Convention to apply extraterritorially where a contracting State or agents of a contracting State exercise *state agent authority or control* over other persons.²²

48.1 In *Öcalan v Turkey*²³, the alleged victim was held to have been within the jurisdiction of Turkey from the moment he was transferred from Kenyan authorities to Turkish authorities in a Kenyan airport and for the duration of the journey by Turkish aircraft back to Turkey where he was held in detention. It was common ground in *Öcalan* that, directly after being handed over to the Turkish security forces on a Turkish registered aircraft, who arrested him, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.²⁴

48.2 In a series of cases, the ECtHR has considered that persons held in detention facilities in Iraq that were controlled exclusively by the UK were within the authority and control and therefore the jurisdiction of the United Kingdom throughout the internment: see *Al-Saadoon and Mufdhi v. the United Kingdom*²⁵; *Al-Jedda v. the United Kingdom*²⁶ and *Hassan v. the United Kingdom*.²⁷ That approach aligns with the UN Committee Against Torture's interpretation of the scope of the prohibition against torture as including "situations where a State Party

²² *Pad and Others v. Turkey* ECHR, decision on admissibility, 28 June 2007.

²³ *Öcalan v. Turkey*, ECHR, Grand Chamber judgment, 12 May 2005 at [91].

²⁴ Ibid. See [90]-[91].

²⁵ *Al-Saadoon and Mufdhi v. the United Kingdom*, ECHR, no. 61498/08, Fourth Section – decision on admissibility, 30 June 2009 at [84-89].

²⁶ *Al-Jedda v United Kingdom Grand Chamber* – judgment, 7 July 2011.

²⁷ *Hassan v. the United Kingdom*, Grand Chamber – judgment, 16 September 2014.

exercises, directly or indirectly, de facto or de jure control over persons in detention.’²⁸

48.3 In *Al-Skeini and Others v. the United Kingdom*, the alleged victims were individuals killed by UK troops during the course of, or related to, security operations carried out by British forces in Basrah, Iraq. The ECtHR accepted that although the UK was an occupying power in Basrah, it did not have effective control of the area. Nonetheless, the Court found that the relevant individuals were within the UK’s jurisdiction because, following the removal from power of the Ba’ath regime and until the accession of the Interim Government, the UK assumed the exercise of public powers normally to be exercised by the Iraqi Government. In particular, the UK had assumed authority and responsibility for the maintenance of security in the relevant part of Iraq. It therefore exercised authority and control over individuals killed in the course of the security operations carried out by its troops.²⁹

48.4 In *Jaloud v. The Netherlands*, the Court concluded that the Netherlands exercised its jurisdiction over an individual shot dead at a checkpoint manned by personnel under the command and supervision of a Dutch officer in Iraq. The Court reached this conclusion having noted that i) the Netherlands assumed ‘responsibility’ for providing security in its area of operations to the exclusion of other States; ii) its troops had not been at the disposal of any power, whether Iraq or the UK, at the time; and iii) it had set up a checkpoint for the purpose of asserting authority and control over persons passing through it.³⁰

49. These European cases, predicated as they are on the broad jurisdictional basis in the European Convention, identify a wider concept of personal jurisdiction than that contemplated in the ICCPR or the CAT. Accordingly, the ECtHR case law is not directly applicable to the concept of jurisdiction for the purposes of the CAT or ICCPR. It is also important to note that the approach

²⁸ As noted in the Solicitor-General’s Advice, the concept of non-refoulement would apply to “any *detainee* under the ‘effective control, de facto or de jure’ of a State’s personnel, wherever they happen to be and even if those personnel are at the time under the operational command of another State” [at 36].

²⁹ *Al Skeini v United Kingdom* 7 July 2011, Grand Chamber – judgment.

³⁰ *Jaloud v Netherlands* ECHR, No. 47708/08 Grand Chamber – judgment, 20 November 2014, at [152].

taken to jurisdiction under the European Convention by the ECtHR is not universally accepted. For example, Lloyd Jones LJ has recently suggested in the UK Court of Appeal that the generous approach to jurisdiction represented by the *Al-Skeini* judgment, and followed subsequently, may come to be considered a false step in the development of the law.³¹

50. Even so, the cases illustrate that whether a particular situation falls under the “jurisdiction” of a State is dependent on the particular facts. They reinforce the fact that the mere use of force or the short-lived application of some control by a State or agent of a State acting outside its territory is not sufficient to bring an individual within the jurisdiction of that State.³² Something more is needed to create a jurisdictional link: see *Banković*³³ at [75] and *Medvedyev*³⁴ at [64]. In *Öcalan*, that was the fact that the transfer of the individual to Turkish authorities on a Turkish registered aircraft was the start of a single period of detention, most of which occurred in Turkish territory. In *Al Sadoon, Al Jedda, and Hassan*, it was the exclusive control of a detention facility by UK troops; in *Al Skeini*, it was the exercise of public powers as an occupying force; in *Jaloud*, it was the exclusive assumption of responsibility for providing security in the area and the setting up of a checkpoint for the purpose of asserting authority and control.

Comparison with cases where jurisdiction has been established

51. While the Inquiry will need to establish the facts relating to what happened to Qari Miraj in January 2011 based on all of the evidence it receives, including classified material and evidence from witnesses, for the purpose of these submissions the Crown Agencies submit that the following facts can be assumed:

51.1 Qari Miraj had been a person of interest to New Zealand, Afghanistan and ISAF partners from well before the time that he was

³¹ R (*Al-Saadoon*) v *Secretary of State* (CA) [2017] 2 All ER at [33].

³² In that respect, there is little support for the approach adopted by the Human Rights Committee in its recent General Comment 36 with respect to the right to life, where it noted that the jurisdiction of State parties included “persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.” The draft of the General Comment was subject to criticism by a significant number of States and does not reflect an established view of international law.

³³ *Banković v Belgium* [2001] ECHR 890.

³⁴ *Medvedyev and Ors v France* [2010] ECHR 384.

implicated in the attack on the New Zealand Provincial Reconstruction Team that resulted in the death of LT Tim O'Donnell. He had been implicated in a number of other violent attacks over several years on Afghan and foreign individuals, including civilians.

- 51.2 The operation to apprehend Qari Miraj was planned and approved in accordance with ISAF standard procedures. The ANSF were involved in the planning, preparation and execution of the operation as well as the post-operation assessment.
 - 51.3 NZ provided a security cordon to enable the Afghan authorities to arrest and detain Qari Miraj pursuant to an Afghan arrest warrant.
 - 51.4 NZ further assisted the Afghan authorities by transporting Qari Miraj in a convoy including both NZDF and Afghan authorities to an Afghan detention facility. At the detention facility, members of the NZDF were involved in the processing of Qari Miraj.
 - 51.5 The Afghan authorities conducted information gathering at the site and, as part of key leadership engagement, information was prepared for the local community that explained the Afghan Government had conducted the operation with ISAF support, and the purpose of the operation.
52. The operation involving Qari Miraj can be distinguished on the facts from cases where personal jurisdiction has been held to have applied:
- 52.1 Unlike the *Öcalan* case, Qari Miraj was never held in New Zealand territory.
 - 52.2 Unlike the cases of *Al Saadoon*, *Al Jedda*, and *Hassan*, Qari Miraj is not alleged to have been held in a detention facility controlled exclusively (or even in part) by New Zealand. Indeed, he is not alleged ever to have been under the exclusive control of New Zealand at all. The allegation is that he was transported in an NZDF vehicle, and was processed by NZDF personnel following his arrest. However, at all times he remained subject to arrest and detention by the ANSF,

under Afghan domestic law. Accordingly, NZDF could not exercise unilateral authority and control over him without breaching the sovereignty of Afghanistan.

52.3 Unlike the situation pertaining in *Al Skeini*, New Zealand was not an occupying power in Afghanistan and was not exercising public powers. Instead, New Zealand forces in Afghanistan were operating with the consent of the Afghan Government, which remained at all times responsible for exercising governmental functions. As discussed, New Zealand was mandated to support the Afghan Government to exercise sovereign power within its own territory. The importance of this distinction is highlighted by the UK Supreme Court's discussion, in *Smith v Ministry of Defence*,³⁵ of the legal significance of the end of occupation in Iraq. In that case, the court suggested that the jurisdiction the UK had been found to have exercised in Basrah in *Al Skeini* had ceased once the occupation came to an end and authority passed to the interim Iraqi Government (although British troops remained in the country).³⁶

52.4 Unlike in *Jaloud*, New Zealand had not assumed exclusive responsibility for security in the relevant area and was not acting to the exclusion of other States. Instead, to the contrary, pursuant to the mandate described above, the NZDF worked in partnership with Afghan forces and under agreements with (even if not entirely at the disposal of) the Afghan Government specifically to support the Afghan Government to fulfil its responsibility to maintain law and order within its own territory. Given the mandate of New Zealand forces, they could not operate to the exclusion of the Afghan authorities. This is a critical distinction with the situation in *Jaloud* where, while the checkpoint was nominally manned by Iraqi Civil Defence Corps (ICDC) personnel, the ICDC was supervised by and subordinate to officers from the Coalition forces.

³⁵ *Smith v Ministry of Defence* [2013] UKSC 41.

³⁶ *Ibid* at [41].

53. The Crown Agencies accept that other factual situations not contemplated by the recent ECtHR cases might also give rise to extraterritorial jurisdiction sufficient to engage the non-refoulement obligations of Art 3 CAT and Art 7 ICCPR. However, the Crown Agencies submit that the factual situation applicable to Qari Miraj's detention set out above did not, because:

53.1 Qari Miraj was arrested in a partnered operation where NZDF members provided support and assistance to the ANSF.

53.2 That is, ANSF members were not invited on an NZDF operation simply to allow the NZDF to avoid its obligations under international law. The operation to arrest Qari Miraj was part of an established partnering arrangement between the NZDF and ANSF that was consistent with the objectives set out in the UN Security Council Resolutions at paragraph [29] above. Qari Miraj was – independently – of interest to both NZDF and the ANSF. As a result, by arresting Qari Miraj, ANSF was not “doing the bidding” of NZDF; it was instead carrying out an arrest of a person ANSF suspected of carrying out multiple previous attacks.

53.3 Qari Miraj was arrested by ANSF members, under the legal authority of an Afghan arrest warrant. The arrest and detention was not authorised by UN Security Council Resolutions for imperative reasons of security, but by the domestic law of Afghanistan.

53.4 As a result, NZDF had no lawful authority to apply any control over Qari Miraj, other than as a partner in a law enforcement operation carried out under Afghan law.

53.5 To the extent that NZDF had physical control over Qari Miraj,³⁷ it was short-lived and solely for the purposes of assisting the ANSF in detaining him. At all times, Qari Miraj remained subject to the

³⁷ To be clear, this submission does not address the allegation that Qari Miraj was mistreated while in an NZDF vehicle, which is denied. However, it is important to note that it is not necessary to hold that Qari Miraj was under the personal jurisdiction of New Zealand in order for any such mistreatment to have been unlawful. Mistreatment of an individual by NZDF members would be unlawful in domestic law, irrespective of whether the individual was within the jurisdiction of New Zealand for the purposes of the CAT and the ICCPR.

overriding jurisdiction and control of the Afghan authorities, pursuant to Afghan criminal law.

54. Even applying the forward-leaning case law on jurisdiction of the ECtHR, the facts set out above do not provide the “something more” that is required to establish a jurisdictional link to New Zealand. That is, while NZDF members may have had short-lived physical control over an individual, that short-lived physical control was not enough to establish jurisdiction in the absence of, for example: the exercise of public powers by New Zealand as an occupying force; the exclusive assumption of responsibility for security in the area; or a subsequent transfer to New Zealand or a New Zealand facility.
55. The ECtHR cases demonstrate that the circumstances in which jurisdiction arise are reflective of the practical control and authority that it is possible for a government to exercise. In the circumstances of New Zealand’s involvement in Afghanistan, given its mandate, the level of control and authority that it was possible for New Zealand to exercise was insufficient to give rise to jurisdiction.
56. As a result, the Crown Agencies submit that Qari Miraj was never in New Zealand’s jurisdiction and cannot therefore be described as having been “transferred” from the jurisdiction of New Zealand to the jurisdiction of Afghanistan. Consequently, New Zealand’s non-refoulement obligations were not engaged in respect of him.

Relevance of extent of New Zealand support

57. In his first question following the Crown Agencies’ presentation in Public Module 2, the Chairperson asked whether the extent of involvement of a foreign force in a partnered operation could give rise to a situation where the foreign force was not providing support to the Afghan authorities to effect an arrest, but were effecting it themselves. In other words, whether the level of involvement of foreign forces could result in a shift from a partnering operation, to one where the foreign force was conducting the arrest and detention, such that the person came under its jurisdiction.

58. The Crown Agencies submit that the level of involvement of a foreign force in a partnered operation may be relevant to, but is unlikely to be determinative of, whether an operation is truly a “partnering” operation.
59. At one extreme, we accept that where the ANSF had not contributed in a meaningful way to the planning or execution of the operation, and only participated in the operation in order to allow the foreign force to achieve its own objectives without triggering international obligations, this can properly be described as a foreign operation with the ANSF used as mere agents. But that is not the arrangement that applied in the arrest and detention of Qari Miraj.
60. We submit that the level of involvement of the foreign force is one of a number of factors to be considered in determining whether the partnership paradigm applies. Other relevant factors include (among others):
- 60.1.1 The mandate of the foreign force. The mandate in this case provided that “responsibility for providing security and law and order throughout the country resides with the Afghans themselves”, and the role of international forces was to build the capacity of the Afghan authorities “to assume in a sustainable manner, increasing responsibilities and leadership of security operations and maintaining public order”. Accordingly, even if foreign forces played a considerable role in a given law enforcement operation, it was always on the underlying basis that the operation was the responsibility of the Afghan authorities, given their overall responsibility for providing security and law and order.
 - 60.1.2 The legal basis of the arrest and detention. In this case, the legal basis was the domestic criminal law of Afghanistan and the arrest was carried out under an Afghan arrest warrant.
 - 60.1.3 The extent to which the target was of interest to the ANSF and the extent to which the operation furthered domestic law enforcement objectives. In this case, Qari Miraj was of interest to the ANSF independently of any NZDF interest in

him and his arrest and detention clearly furthered domestic law enforcement interests.

60.1.4 The involvement of the ANSF in different phases of the operation. In this case, the ANSF was involved – to differing extents - in all phases of the operation, including planning, arrest, transportation, and detention.

61. The level of involvement of the foreign force may also fluctuate between operations, depending on the complexity, risk and degree of intelligence required. In Afghanistan, where an operation involved significant security and safety risks, given the higher capacity of international forces to deal with these risks, this would necessitate a greater involvement by foreign forces in order to mitigate the risk of casualties, both to Afghan forces, and the partnered foreign forces. Similarly, the need to maintain information security also meant that, for some operations, intelligence was not always able to be shared with Afghan authorities. This accordingly required foreign forces to play a greater role in intelligence gathering and the initial planning of operations. The greater degree of involvement in these situations would not necessarily indicate that an operation was not properly to be understood as a genuine partnered operation under Afghan law and pursuant to Afghan responsibility for law and order.

The extent of a duty to prevent torture

62. Mr Stephenson has raised the issue of whether New Zealand may have failed “to take positive steps to prevent” torture. It is not clear that this issue is tied to paragraphs 6.3 and 7.8 of the ToR and the arrest and detention of Qari Miraj or whether it is made more generally. To the extent that it is made more generally, it is outside the scope of the ToR.
63. In any case, the duty relied on appears to be drawn from Article 2 of the CAT, which provides that “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*”.³⁸ The International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* opined that “States are obliged not only to prohibit and punish torture, but also to forestall its occurrence” and

³⁸ Synopsis of Submissions of Counsel for Jon Stephenson, 22 May 2019, at [41.b].

“to put in place all those measures that may pre-empt the perpetration of torture”.³⁹ In this context, the ICTY opined that States “must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring”.⁴⁰ Significantly, that case dealt with acts of torture committed within the territory of a culpable State. The case does not support a broader reading that there is a primary obligation on a State to take action to prevent torture committed by persons not attributable to that State in areas outside its jurisdiction.

64. Such an interpretation would take the primary obligation beyond current international law. Significantly, while it is clear the prohibition on torture is *jus cogens*, it is not widely accepted that the duty to prevent torture falls within this concept.
65. The ICJ in the *Bosnian Genocide* case considered the duty to prevent genocide, but did not purport to establish general jurisprudence with respect to the duty to prevent, including the duty to prevent torture.⁴¹
66. Applying the ICJ’s reasoning from the *Bosnian Genocide* case, in respect of genocide, to torture would not accord with current international law. Even applying that reasoning, however, any duty to prevent would be limited by what is reasonable in the circumstances and having regard to a State’s capacity to influence. For example, the Court considered that the duty to prevent genocide is “to employ all means reasonably available to them, so as to prevent genocide so far as possible” and “to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide”.⁴² Furthermore, the State’s capacity to influence “must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law”.⁴³ An assessment of whether any duty to prevent applied would need to consider what was reasonable in the circumstances, taking into account the sovereign jurisdiction of another State.

³⁹ *Prosecutor v Furundzija* 10 December 1998 at [148].

⁴⁰ *Ibid.*, at [149].

⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 at [429].

⁴² *Ibid.*, at [430].

⁴³ *Ibid.*

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67. Even assuming, *quod non*, that there is a primary duty at international law for a State to prevent torture in areas outside a territory under that State's jurisdiction, any such duty is limited by what is permissible at international law and what is within the capacity of that State. Where, in Afghanistan, the responsibility for security, law and order, is in the hands of the Afghan Government, it would not be permissible for the NZSAS to interfere in the lawful domestic arrest warrant processes of Afghanistan. Neither in such circumstances would it be reasonable, nor within their capacity, for New Zealand forces to take action in contradiction of the sovereignty of the Afghan Government.
68. What New Zealand could do, and did do, was to support the overall international effort at a systemic level to develop the capacity of the Afghan criminal justice system, to progressively strengthen the rule of law and improve compliance with human rights norms, in accordance with the mandate provided by the UNSC.

The obligation not to aid or assist an internationally wrongful act

69. For the reasons set out above, the Crown Agencies submit that New Zealand's non-refoulement obligations were not ordinarily engaged in partnered operations, and were not engaged in the specific case of Qari Miraj. Further, we submit that the NZDF was not under a primary duty at international law to prevent the Afghan authorities from torturing people within Afghan jurisdiction or control. However, that is not the end of matter. New Zealand remained under:
- 69.1 a domestic law obligation not to mistreat any detainee irrespective of whether the detainee was in its jurisdiction for the purposes of international law;⁴⁴
- 69.2 an international law obligation to extradite or prosecute any NZDF member responsible for torture;⁴⁵

⁴⁴ Armed Forces Discipline Act 1971.

⁴⁵ CAT Article 5(2).

- 69.3 an international law obligation not to aid or assist an internationally wrongful act, including torture.
70. The relevant allegation from *Hit & Run* is that New Zealand was responsible for torture of Qari Miraj by Afghan authorities. If that responsibility does not arise from the principle of non-refoulement, and does not arise from a breach of a purported obligation to prevent torture, then one must address the question of whether New Zealand may be held responsible for aiding or assisting his alleged torture.
71. Article 16 of the International Law Commission's (ILC) Articles on State Responsibility deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. The State primarily responsible is the acting State, and the assisting State has a secondary and supporting role. The scope of responsibility for aiding and assisting is limited. In particular the aiding State must act knowingly, ie with knowledge of the intent of the perpetrator.⁴⁶ Counsel for Mr Stephenson's contention that the knowledge element in Article 16 generally affirms a "potentially wide ranging" principle,⁴⁷ is not consistent with the view of the ICJ or leading commentators.⁴⁸
72. It is submitted that in order to report on paragraphs 6.3 and 7.8 of the ToR, the Inquiry might reasonably approach this issue on three bases:
- 72.1 Did New Zealand have knowledge, when taking part in the operation to arrest Qari Miraj, that the ANSF intended to torture him? The Crown Agencies submit that there is no evidence to support that proposition.
- 72.2 Did New Zealand acquiesce in torture by Afghan authorities such that it was liable for acts of torture committed "with the acquiescence

⁴⁶ Articles on State Responsibility, Commentary to Article 16 at [3-4]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ICJ Reports 2007, p. 43 at [421].

⁴⁷ Synopsis of Submissions of Counsel, 22 May 2019 at [32(b)].

⁴⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 at [432]; Helmut Philipp Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, 2011 at p. 32.

or connivance of its authorities”⁴⁹ There is no evidence that New Zealand acquiesced in any alleged torture of Qari Miraj. In stark contrast to the *El Masri* case, any alleged torture was not carried out in the presence of New Zealand authorities, or in circumstances subject to New Zealand jurisdiction.

72.3 Did New Zealand have knowledge, at the time of the operation to arrest Qari Miraj, that individuals detained in their partnering arrangements with the ANSF were routinely tortured such that constructive knowledge of an intention to torture could be imputed? Once again, the Crown Agencies submit that there is no evidence to support that proposition.

72.4 In this context, it is relevant that the *Maya Evans* decision did not establish that torture was so widespread in Afghanistan as to render it unlawful to transfer detainees to *all* ANSF detention facilities. Instead, it found that while UK transfers to some ANSF facilities could continue, it would be unlawful to transfer detainees to one specific facility in Kabul. Qari Miraj was not transferred to that facility. It is also relevant that the New Zealand Government received information after the *Maya Evans* decision was released (and before the Qari Miraj operation) indicating that NDS practices had improved.⁵⁰

72.5 When New Zealand became aware of a more widespread risk of torture shortly before the October 2011 UNAMA Report on Treatment Detainees in Afghan Custody was released (well after the operation which the Inquiry is concerned with under the ToR) it implemented steps to address this issue. The Inquiry has received classified information on this point.

Does the peremptory nature of the prohibition on torture, or its ega omnes character, change the analysis above?

73. The prohibition against torture is acknowledged to be a peremptory norm of international law, also known as *jus cogens*, a norm from which no derogation is

⁴⁹ *El-Masri v The Former Yugoslav Republic of Macedonia*, Grand Chamber - Judgment, 13 December 2012 at [205-211].

⁵⁰ See transcript of the hearing for module 2, day 2, at pages 21, 55 – 56.

permitted.⁵¹ It may appear to be formulated in absolute terms, seemingly allowing no room for restriction or limited application.⁵²

74. However, the fact that the prohibition against torture is acknowledged to be a *jus cogens* norm does not change the nature of the obligation. This was explained by the ECtHR in *Al-Adsani v United Kingdom*, which recalled *Prosecutor v Furundzija* and went on to note that “the State’s obligation [to prohibit torture and cruel, inhuman and degrading treatment] applies only in relation to ill-treatment allegedly committed *within its jurisdiction*”.⁵³ It is also implicit in the unanimous decision of the International Court of Justice in *Questions Relating to the Obligation to Prosecute or Extradite* to require Senegal to prosecute or extradite an alleged torturer, who was present in the territory of Senegal.⁵⁴
75. The jurisdictional element to the prohibition against torture is present in the texts of the relevant human rights treaties. Article 2, paragraph 1 of the CAT provides: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. Article 7 of the ICCPR provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Article 2, paragraph 1 of the ICCPR states in part: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant”.
76. An extra-territorial application of the prohibition against torture comes about through the non-refoulement obligation. This is directly reflected in Article 3 of the CAT, which does not contain the same express territorial limitation as is present in Articles 2 and 16 relating to prevention. If the prohibition against torture were to be given full extraterritorial effect, there would be no need for a prohibition on States transferring persons to another State where there are substantial grounds for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or

⁵¹ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012 at [99].

⁵² *Prosecutor v Furundzija*, ICTY Case No. IT-95-17/1-T, Judgment, 10 December, 1998 at [144-154].

⁵³ *Al-Adsani v United Kingdom* ECHR, Judgment, 21 November 2001 [38] [emphasis added].

⁵⁴ *Questions Relating to the Obligation to Prosecute or Extradite* ICJ, Judgment of 20 July 2012, ICJ Reports 2012 at [122].

punishment in the receiving State.⁵⁵ Non-refoulement only has meaning if there is a transfer of a person from one State's jurisdiction to another State's jurisdiction.

Legal Consequence of Jus Cogens

77. The nature and legal consequences of *jus cogens* are not settled at international law.⁵⁶ Three potential legal consequences of *jus cogens* can be identified:
78. First, in relation to criminal liability, the ICTY in *Prosecutor v Furundzija* considered that one of the consequences of the identification of the prohibition against torture as a *jus cogens* is that States are entitled to investigate, prosecute and punish, or extradite individuals accused of torture who are present in their territory.⁵⁷ This is what is known as "universal jurisdiction". Universal jurisdiction applies to the exercise of criminal jurisdiction over individuals and whether or not universal jurisdiction can or should be exercised over acts of torture committed in another State, is a matter for domestic criminal law. As the ToR of this Inquiry do not cover the potential exercise of universal jurisdiction, this legal consequence of *jus cogens* will not be considered further.
79. Second, a *jus cogens* norm may also be an obligation *erga omnes*, and hence every member of the international community has a legal interest in the protection of such a norm.⁵⁸ The ICTY in *Prosecutor v Furundzija* confirmed that the prohibition of torture imposes upon States obligations *erga omnes* – obligations which are owed towards "all other members of the international community, each of which then has a correlative right"⁵⁹. The effect of a breach of the prohibition against torture (as an *erga omnes* obligation) "simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every

⁵⁵ *Soering v the United Kingdom*, ECtHR, Judgment of 7 July 1989 [86, 91].

⁵⁶ This led the International Law Commission in 2015 to include the topic "*Jus cogens*" in its programme of work, noting that the precise nature of the norms which qualify as *jus cogens* and the consequences of *jus cogens* in international law remain unclear - Report of the International Law Commission, 66th Session, Supplement No. 10, A/69/10, Annex [274-286].

⁵⁷ *Prosecutor v Furundzija* ICTY Case No. IT-95-17/1-T, Judgment, 10 December, 1998 at [156].

⁵⁸ *Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports 1970, p. 32 at [33].

⁵⁹ *Prosecutor v Furundzija* ICTY Case No. IT-95-17/1-T, Judgment, 10 December, 1998 at [151].

member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”.⁶⁰

80. The *erga omnes* nature of an obligation may therefore be relevant where a State seeks to assert a legal interest in protecting a peremptory norm, for example in dispute settlement proceedings. This is primarily a procedural right of standing to enforce an obligation, and does not impact the substantive nature of the obligation itself. Significantly, while an obligation *erga omnes* confers on all States a *right* of enforcement, it does not impose on them a *duty* to police or enforce the observance of the right.
81. Third, the character of an obligation as a peremptory norm, or *jus cogens*, may have implications for State responsibility. Chapter III of the ILC Articles on State Responsibility addresses breaches of obligations under peremptory norms of international law which are in themselves serious, having regard to their scale or character. Article 40 defines the scope of the Chapter and Article 41 addresses the legal consequences of breaches coming within the scope of the Chapter.⁶¹
82. The scope of the ILC Chapter is defined in Article 40 to include two criteria. The first is that the obligation must be a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature.⁶² The ILC considered it necessary to limit the scope of this Chapter to the more serious or systematic breaches; breaches carried out in an organised and deliberate way; and violations of a flagrant nature.⁶³ That the threshold for a breach to come within this Chapter is a high one is indicated by the ILC view that such serious breaches are likely to be addressed by the competent international organisations, including the Security Council and the General Assembly.⁶⁴

⁶⁰ *Prosecutor v Furundzija* ICTY Case No. IT-95-17/1-T, Judgment, 10 December, 1998 at [151]. The ICTY went further to note that international treaty bodies responsible for monitoring compliance with provisions on torture should enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, calling upon that State to fulfil its international obligations.

⁶¹ *Articles on State Responsibility*, Commentary on Chapter III at [1].

⁶² *Articles on State Responsibility*, Commentary on Article 40 at [1].

⁶³ *Ibid* at [7-8].

⁶⁴ *Ibid* at [9].

83. Article 41 deals with the particular consequences of breaches of the kind and gravity referred to in Article 40. According to Article 41(1) States are under a positive duty to cooperate in order to bring to an end serious breaches within the meaning of Article 40. While the form which this cooperation can take is not prescribed, the ILC suggested, by way of example, that cooperation could be organised under the framework of a competent international organisation, in particular the United Nations.⁶⁵
84. Article 41(2) provides that no State shall render aid or assistance in maintaining a situation created by a serious breach within the meaning of Article 40. Article 41(2) is to be read in connection with Article 16 of the Articles on State Responsibility which presupposes that the State has “knowledge of the circumstances of the internationally wrongful act”, but the obligation in Article 41(2) goes beyond Article 16 as it deals with conduct “after the fact” which assists the responsible State in maintaining a situation created by a serious breach of a peremptory norm.⁶⁶
85. The ILC regarded Article 41(1) as a progressive development of international law.⁶⁷ The ICJ in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall* went further to opine that States are under an obligation not to recognise an illegal situation (resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem) and not to render aid or assistance in maintaining the situation created by such construction.⁶⁸
86. In the UK House of Lords, Lord Bingham of Cornhill considered that in light of Article 41 and the ICJ Advisory Opinion, States must “cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law”.⁶⁹ However, a leading commentator on complicity has concluded that the law is not settled in this

⁶⁵ *Articles on State Responsibility*, Commentary on Article 41 at [2].

⁶⁶ *Ibid*, at [11].

⁶⁷ *Articles on State Responsibility*, Commentary on Article 41, at [3].

⁶⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 at [159].

⁶⁹ *Amnesty International v Secretary of State for the Home Department* [2006] 1 All ER 575, at [34].

area.⁷⁰ Other commentators agree that it is disputed whether Article 41(2) has acquired the status of customary international law.⁷¹

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87. The *jus cogens* nature of the prohibition on torture does not alter the analysis or conclusions set out in these submissions in relation to the Inquiry's ToR for the following reasons.

87.1 Even if Article 41 of the Articles on State Responsibility had acquired the status of customary international law, any duty on individual States to make efforts to bring a situation created by the breach of a peremptory norm to an end is subject to the constraints of international law and the actions themselves must be lawful.⁷² This was an important constraint on the actions available to ISAF. Recognition and acceptance of State sovereignty was a key element in the mandate for ISAF operations in Afghanistan. It was also a key element in New Zealand's partnering operations with ANSF.

87.2 The *jus cogens* nature of the prohibition against torture does not alter the nature of the obligation nor its basic jurisdictional element. Even under the most forward leaning interpretations, New Zealand did not have jurisdiction over Qari Miraj during his transfer or transportation in January 2011. The *jus cogens* nature of the prohibition on torture does not change that.

87.3 It is the prohibition on torture and not the duty to prevent torture that has attained the status of *jus cogens*. As a result, there is no need to revise the analysis above that there is no primary duty on New Zealand to prevent the torture by another State of individuals within the jurisdiction of another State.

⁷⁰ Helmut Philipp Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, 2011, p. 47.

⁷¹ Erika de Wet, "Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request", ICLQ, Vol 67, April 2018 at 302-303; Harriet Moynihan in *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, Chatham House, November 2016, p. 22.

⁷² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 at [159]; *Amnesty International v Secretary of State for the Home Department* [2006] 1 All ER 575, per Lord Bingham of Cornhill at [34].

87.4 As to the question of complicity, there is no evidence that New Zealand knew that its partnering operations in general – or this specific partnering operation – were likely to lead to a serious breach of the prohibition against torture by the Afghan authorities.

87.5 Even assuming that there was a positive duty to bring about an end to serious breaches of a *jus cogens* norm, New Zealand, in conjunction with ISAF and operating under successive UNSC mandates, cooperated under the United Nations framework to assist Afghanistan to improve its human rights record and adherence to the rule of law, including through mentoring of a unit of the ANSF.

Does the erga omnes character of the obligation to prohibit torture change the analysis above?

88. The *erga omnes* character of the obligation relating to a *jus cogens* norm also does not alter the above analysis.

89. The conduct of States must be judged against what is reasonable. The UK Queens Bench in *R on the Application of Campaign Against Arms Trade v The Secretary of State for International Trade* considered whether, in light of allegations of serious violations of IHL by the Saudi Arabia Coalition in the conflict in Yemen, it was reasonable for the UK Government to conclude that there was no clear risk that UK arms exported to Saudi Arabia might be used in the commission of a serious violation of IHL in Yemen.⁷³ Following a wide-ranging review of the evidence, including the extensive efforts that the UK had taken to inform itself of the situation in Yemen and alleged violations of international humanitarian law, and engagement with Saudi Arabia over concerns of adherence to IHL, the Court rejected the challenge to the UK Government decision.

90. When allegations of torture in Afghanistan came to light, ISAF took action to address the situation through increased mentoring of the Afghan law enforcement apparatus. It is notable that following reports of torture in Afghanistan, Amnesty International concluded that “ISAF States, led by NATO and working closely with the Afghan Government, the UN, EU, AIHRC and ICRC, should explore a range of remedial measures to reform the

⁷³ *Application of Campaign Against Arms Trade v The Secretary of State for International Trade* ([2017] EWHC 1726 (QB)).

Afghan detention system - as an integral part of continuing security and justice sector reform efforts”.⁷⁴

91. The October 2011 UNAMA Report on Treatment Detainees in Afghan Custody identified a significant scale of torture and arbitrary detention in certain Afghan detention facilities and recommended that troop contributing countries suspend transfer of detainees to those NDS and ANP units and facilities where credible allegations or reports of torture and ill-treatment had been made, and review policies on transferring detainees to ANP and NDS custody to ensure adequate safeguards were in place to stop torture. It also recommended building the capacity of 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.⁷⁵ More mentoring and partnering was therefore encouraged as a means of addressing the prevalence of torture.

Response to further submissions by Mr Stephenson

Extraterritoriality of the New Zealand Bill of Rights Act 1990

92. Counsel for Mr Stephenson submits that the NZBORA “applies extraterritorially, including to areas where New Zealand has effective control, which can include areas where New Zealand forces patrol in Afghanistan and is not limited to major military bases or installations”, citing *Al-Skeini* in support of this position.⁷⁶
93. In response to these issues, the Crown Agencies submit that the question of extra-territorial application of the NZBORA is not a matter the Inquiry is required to determine. The legal question has not been tested in New Zealand and is currently before the High Court. Applying NZBORA extra-territorially would also fall outside the Inquiry’s remit to the extent that it has a bearing on individual liability.⁷⁷
94. Moreover, given that the Crown Agencies accept that New Zealand was bound, when acting through its agents in Afghanistan, i) not to refole an

⁷⁴ Amnesty International, *Afghanistan: Detainees transferred to torture: ISAF complicity?* 2007 at p. 35.

⁷⁵ UNAMA, *Report on Treatment of Conflict Related Detainees in Afghan Custody*, October 2011.

⁷⁶ Synopsis of Submissions of Counsel for Jon Stephenson for Hearing 2, 22 May 2019 at [37].

⁷⁷ Inquiries Act, s 11; ToR at [13].

individual and ii) not to aid and assist an internationally wrongful act, it is unnecessary to determine whether NZBORA also applied in order to determine whether the transport of Qari Miraj was “proper”, as required by paragraphs 6.3 and 7.8 of the ToR.

95. However, if the Inquiry were to consider the substantive question, the Crown Agencies submit that New Zealand is not bound to follow the jurisprudence of the ECtHR and that there are good reasons to depart from it on this point in favour of the narrower approach adopted in other jurisdictions.
96. Further, even if the jurisprudence of the ECtHR (including the decision in *Al-Skeini*) was to be adopted and applied wholesale in New Zealand, the Crown Agencies submit that the operation concerning Qari Miraj can nonetheless be distinguished on the facts and that the requisite jurisdictional threshold is not met in this case (as discussed above).

Unsettled question of law currently before the High Court

97. There is no New Zealand authority directly addressing the extraterritoriality of the NZBORA, but the question is currently before the High Court in the matter of *K and G & K v The Government Inquiry into Operation Burnham and related matters & the Attorney General*.⁷⁸ The substantive hearing of the judicial review is set down for 22 to 24 July 2019. The Inquiry may consider it appropriate for this issue to be determined in that forum.
98. Extra-territorial jurisdiction of NZBORA has been touched on in two cases, which lean in different directions. In *R v Matthews*, the High Court found the New Zealand officer who conducted an interview of a suspect arrested in Australia was not legally obliged to comply with s 23 of NZBORA.⁷⁹ Tipping J held that the word “enactment” in s 23(1) referred to New Zealand enactments, which were not engaged since the arrest was carried out by Australian police under Australian law.⁸⁰ Tipping J also determined there was

⁷⁸ Judicial review proceedings were brought with respect to Rulings made by the Inquiry into Operation Burnham and related matters limiting the applicants’ rights of participation by directing evidence to be heard in private and by dealing with classified material in a protective way.

⁷⁹ *R v Matthews* (HC) (1994) 11 CRNZ 564 (p. 567).

⁸⁰ This stands in contrast to the submission by Counsel for Mr. Stephenson at [43] that the words “any enactment” under s 23 NZBORA “should be interpreted so as to apply to persons detained under the authority of a Security Council Resolution.”

nothing in the NZBORA which demonstrated a general intention for it to have extraterritorial effect.

99. By contrast, in *Young v Attorney-General*, the Court of Appeal commented in obiter that there is “no reason in principle why the NZBORA should not be interpreted to apply to acts that would otherwise fall within the ambit of s 3 by reason only that they occur offshore”.⁸¹ The Court of Appeal nonetheless acknowledged that the implications of NZBORA for acts performed abroad “have yet to be authoritatively explored”.⁸² The law remains unsettled, and the Inquiry may consider that it appropriate to leave determination of this issue to the courts.

Departure from the jurisprudence of the European Court of Human Rights

100. Even if the Inquiry were to consider the substantive legal question, there are compelling reasons that weigh against the extra-territorial application of NZBORA in these circumstances.
101. The ECtHR has taken a particular approach to the extraterritorial application of the European Convention. However courts in other comparable jurisdictions, including the UK and Canada, have reached a different view. The extra-territorial application of domestic and regional rights instruments remains contested and unsettled internationally, as has been highlighted in the discussion of personal versus territorial jurisdiction set out above.
102. The Crown Agencies submit that the structure, purpose and scope of NZBORA provides for a narrower approach to extraterritorial application than that adopted by the ECtHR on the basis of the European Convention.

The problem of “dividing and tailoring” rights

103. Counsel for Mr Stephenson further submits that “the executive branch could also incur liability for breaches of ss 22-23 of the NZBORA for breach of the procedural requirements governing detention, at least where they are the detaining authority, and potentially where they are not.”

⁸¹ *Young v Attorney-General* [2018] NZCA 307 at [40]. The Court also acknowledged competing arguments over whether a narrow or wide approach should be adopted and referred to academic commentary about securing rights only when the New Zealand Government was acting in this capacity.

⁸² *Young v Attorney-General* [2018] NZCA 307 at [39].

104. This submission highlights the difficulty in finding that New Zealand authorities had an obligation to secure the rights of people arrested by Afghan authorities during partnered operations, under either the ICCPR or NZBORA: in other words that they were within New Zealand's jurisdiction. In particular, it raises the difficult question of "dividing and tailoring" rights.⁸³
105. Section 23(1) to (4) of NZBORA reflects Arts 9(2) to (4) of the ICCPR, and in essence provides for the rights of those arrested under domestic law. Section 23(1), for example, relate to "everyone who is arrested or who is detained *under any enactment*". Sections 23(2) to (4) all apply to those arrested or detained *for an offence*. Similarly, the language of Arts 9(2) to (4) of the ICCPR also suggests they are directed to detention conducted under domestic law.
106. Where a person is arrested by Afghan authorities, pursuant to the Afghan criminal law, it is the Afghan authorities who are obliged secure the rights described in Arts 9(2) to (4) of the ICCPR. It is difficult to see how New Zealand could secure these rights, let alone the other rights due to a person arrested and charged with an offence.⁸⁴ In essence this would require New Zealand to take control of the Afghan criminal justice system, which is practically unfeasible, and would be outside the scope of what is permissible for New Zealand at international law as a breach of Afghanistan sovereignty and contrary to both the UNSC Resolutions described above and the agreement New Zealand had with Afghanistan.
107. Given the particular mandate provided to international forces in Afghanistan, the agreements under which New Zealand forces operated in Afghanistan, and the need to respect the sovereignty of the Afghan Government, the extent to which New Zealand forces could secure the procedural rights of people arrested by Afghan authorities in partnered operations was limited. The inability for New Zealand forces to secure the procedural rights contained in ss 23(1) to (4) of NZBORA, or Arts 9(2) to (4) of the ICCPR, to a person detained by Afghan authorities tells against finding that such a person was within New Zealand's jurisdiction for the purposes of the ICCPR or NZBORA.

⁸³ See *Bankovic* at [75].

⁸⁴ For example ss 24 and 25 of NZBORA and Arts 10 and 14 of ICCPR.

Conclusion

108. In conclusion, the Crown Agencies submit as follows:

108.1 First, it is a matter for the Inquiry to establish the facts of the operation related to Qari Miraj in January 2011.

108.2 However, on the facts as currently known, Qari Miraj cannot be described as having been “transferred” from the jurisdiction of New Zealand to the jurisdiction of Afghanistan. Consequently, New Zealand’s non-refoulement obligations were not engaged.

108.2.1 The fact that Qari Miraj was in the physical control of NZDF for a short period is not sufficient to establish that he was in New Zealand’s jurisdiction.

108.2.2 The operation to arrest and detain Qari Miraj was a genuine partnered operation. It was carried out under Afghan law pursuant to the responsibility of the Afghan authorities for law enforcement. The fact that NZDF provided considerable support to the Afghan authorities, and also had an interest in the target of the operation, is not determinative of the question as to whether New Zealand was in control of the operation sufficient to establish jurisdiction over the person arrested and detained.

108.2.3 Given the mandate of ISAF to support Afghan authorities in providing security and law and order, and given that Qari Miraj had been arrested pursuant to an Afghan arrest warrant, he did not come within New Zealand’s jurisdiction and remained subject to the control and jurisdiction of the Afghan authorities.

108.3 There is no positive duty at international law requiring one State to prevent another from committing torture in the territory of that other State. Even if there is such a duty, it is limited by what is permissible at international law and what is within the capacity of a State. Given the mandate of foreign forces in Afghanistan, there was little New

Zealand could do to control the actions of the Afghan Government exercising its own sovereignty. What New Zealand could do, and did do, was to play a part in the international effort to develop the capacity of the Afghan criminal justice system, to strengthen the rule of law and increase compliance with human rights standards.

- 108.4 There is insufficient evidence to find that New Zealand acquiesced in torture, or that it had knowledge, at the time of the operation to arrest Qari Miraj, that individuals detained in partnering arrangements with the ANSF were routinely tortured, so that it could be said to have knowingly aided the Afghan authorities to commit torture.
- 108.5 The *jus cogens* nature of the prohibition on torture, and its *erga omnes* character does not change the analysis in 108.3 and 108.4.
- 108.6 Finally, it is submitted that NZBORA does not apply extraterritorially. Even if it did, however, it can only require New Zealand authorities to secure the rights of people within New Zealand's jurisdiction. Qari Miraj was never within New Zealand's jurisdiction.
109. The Inquiry's final determination on many of the issues discussed in these submissions will depend on its eventual findings of fact. The Crown Agencies request the opportunity to provide further legal submissions based on the Inquiry's preliminary findings in due course.

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