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

16 August 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 issues arising from the public hearing for module 3, held on 29 and 30 July 2019.

Jurisdiction is the basis of legal obligation in International Human Rights Law

2. In the submissions in response to issues arising out of module 2, the Crown Agencies noted the fundamental importance of jurisdiction when determining the applicability of the relevant human rights instruments,[1] and when assessing whether any non-refoulement obligation could apply. In particular, the Crown Agencies noted:

   2.1 That the application of the International Covenant on Civil and Political Rights (**ICCPR**) is dependent on jurisdiction: Art 2 requires states to "ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognised in [the] covenant" [emphasis added];

   2.2 that any non-refoulement obligation, whether derived from the ICCPR or the Convention Against Torture (**CAT**), is premised on the transfer of an individual from the jurisdiction of one State to the jurisdiction of another State.

3. The Crown Agencies' submissions following module 2 address the issue of jurisdiction in detail. The submissions below are not intended to repeat those submissions, but instead address two issues that arose in module 3:

   3.1 First, they respond to Professor Akande's discussion on the issue of whether jurisdiction can be established by a State's ability to apply force alone, as is suggested by the United Nations Human Rights Committee (**UNHRC**) in General Comment 36 on Article 6 of the ICCPR (**General Comment 36**).[2]

   3.2 Secondly, they address the Chairperson's question regarding the distinction between the obligations arising in respect of people

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1 International Covenant on Civil and Political Rights (**ICCPR**), United Nations Convention Against Torture (**CAT**), New Zealand Bill of Rights Act 1990 (**BORA**).

2 United Nations Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36.

detained by the NZDF and people detained by Afghan authorities with the assistance of the NZDF.[3]

Jurisdiction in International Human Rights Law is not established by the application of force alone

4. In his presentation at the hearing for module 3, Professor Akande elaborated on his written opinion on the question of whether the fact that a State has the ability to take an individual's life means it has sufficient control to establish jurisdiction and thereby trigger its obligations under the ICCPR, as suggested in General Comment 36.[4] In particular, Professor Akande expanded on his discussion of the decision of the European Court of Human Rights in *Al Skeini v United Kingdom*,[5] and concluded that, although the ratio of that case does not support the impact-based approach to jurisdiction proposed in General Comment 36, the logic espoused by the Court in the decision might support such an approach.[6]

5. The Crown Agencies respectfully disagree with Professor Akande's analysis on this point.

6. In *Al-Skeini*, the applicants' argument on jurisdiction was that, due to the fact that the British armed forces had responsibility for public order in Iraq, there was a particular relationship of authority and control between the soldiers and civilians killed. Accordingly, the applicants submitted that "to find that the individuals fell within the authority of the United Kingdom armed forces would not require the acceptance of the impact-based analysis which was rejected by the Court in *Bankovic*,[7] but would instead rest on a particular relationship of authority and control".[8] It was this reasoning that was accepted by the Court in deciding that the United Kingdom had jurisdiction on the basis that it exercised some of the public powers normally exercised by a sovereign

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3 Transcript of hearing for module 3, day 1 at p. 73 to 74.

4 For completeness, the Crown Agencies also again note that the relevant paragraphs of General Comment 36 have not enjoyed support from States (see footnote 32 of the Crown Agencies' presentation for module 3).

5 *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.

6 Transcript of hearing for module 3, day 2, from p. 173.

7 *Bankovic & Others v Belgium & Ors* (App No. 52207/99) (2001) 44 EHRR SE5.

8 *Al Skeini* at [124].

government, and assumed authority and responsibility for the maintenance of security in South-East Iraq.[9]

7. Accordingly, it is wrong to conclude that the Court intended to adopt the impact-based approach to jurisdiction that it had specifically rejected in *Bankovic*, and which is proposed in General Comment 36. In fact, it is submitted the Court *specifically did not* adopt that approach.

8. In support of his analysis that the Court's logic suggests support for an impact-based approach to jurisdiction, Professor Akande points to the part of the judgment where the Court noted that its jurisprudence had established that "in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction".[10] However, in discussing this jurisprudence, the Court cited only cases where the relevant states had exercised personal authority and control over the relevant individuals by detaining them, or exercised control over the place they were detained (e.g. a prison, ship or aircraft).

9. One commentator has summarised the *Al-Skeini* decision as follows:[11]

> The Court applied a *personal* model of jurisdiction to the killing of all six applicants, but it did so only *exceptionally*, because the UK exercised public powers in Iraq. But, *a contrario*, had the UK not exercised such public powers, the personal model of jurisdiction would not have applied. In other words, *Bankovic* is, according to the Court, still perfectly correct in its result. While the ability to kill is 'authority and control' over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft.

10. This was also essentially the conclusion reached by the Court of Appeal of England and Wales in *Al-Saadoon*, as noted in the presentation filed prior to module 3.[12] With respect, the Crown Agencies submit that the Court of Appeal's conclusion should be preferred over Professor Akande's analysis on this issue.

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9 At [149].

10 At [136].

11 M.Milanovic "*Al-Skeini* and *Al-Jedda* in Strasbourg" EJIL (2012), Vol. 23 No. 1, 121–139.

12 *Al Saadoon & Ors v Secretary of State for Defence and Anor* [2017] 2 All ER 453; [2016] WLR(D) 491 at [73]. See Crown Agencies' presentation for Module 3 at [123].

Refoulement requires that the person was subject to the jurisdiction of the transferring State

11. The fundamental difference between the obligations of the Crown in respect of people detained by the NZDF, pursuant to authority under the United Nations Security Council (**UNSC**) mandate, and people detained by the Afghan authorities in operations involving the NZDF, pursuant to Afghan criminal law, is that non-refoulement obligations applied to the former, but not the latter.

12. As was also noted in the submissions following module 2, the Crown Agencies accept that the non-refoulement obligation under Art 3 of the CAT and derived from Arts 6 and 7 of the ICCPR 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. This is supported by the United Nations High Commission for Refugees (**UNHCR**) position that the principle of non-refoulement "applies wherever a State *exercises* jurisdiction, including at the frontier, on the high seas or on the territory of another State" and that the decisive criterion is whether the person comes within the effective control and authority of the State.[13]

13. However, non-refoulement obligations are *only* engaged once a person has come within the jurisdiction of the "transferring" State. To respond to the Chairperson's question at the module 3 hearing,[14] the distinction between detentions conducted by New Zealand forces and detentions conducted by Afghan forces in partnered operations is not that in the latter case a person would come within Afghanistan's jurisdiction earlier, but rather that they would always be in Afghanistan's jurisdiction and would not come within New Zealand's jurisdiction at all (as discussed in the submissions filed following module 2). While there can be reasonable debate over whether this makes any moral or ethical difference, it clearly has *legal* significance: non-refoulement obligations do not apply.

14. However, as discussed below, the Crown Agencies accept New Zealand had other international legal obligations in respect of partnered operations.

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13 *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCR, January 2007.

14 Transcript of hearing for module 3, day 1, at p.74.

The New Zealand State did not aid or assist the Afghan State to commit torture

15. As was noted in the Solicitor-General's advice to the NZDF, dated 2 November 2010 (**Solicitor-General's Opinion**), while New Zealand's non-refoulement obligations were not engaged in respect of detainees taken by Afghan authorities in New Zealand partnered operations, New Zealand was subject to an obligation to ensure that assistance provided to Afghan authorities did not amount to aiding or assisting any internationally wrongful act. Accordingly, the Crown Agencies agree with Sir Kenneth that the international law relating to State complicity may be the most relevant to partnering operations.[15]

16. Although paragraph 7.8 of the terms of reference highlights the judgment in *Maya Evans* as a significant factor in assessing whether the "transfer or transportation" of Qari Miraj in January 2011 was "proper", it is worth noting that that judgment does not address the question of complicity in internationally wrongful acts:

    16.1 the *Maya Evans* case concerned the lawfulness of the application of the United Kingdom's detainee transfer policy. That policy was concerned with ensuring that individuals detained by the United Kingdom were not transferred to the Afghan authorities when there was a "real risk of torture". That legal test ("real risk of torture") is the test applicable under Article 3 ECHR to the issue of non-refoulement.

    16.2 the United Kingdom's detainee transfer policy did not address the question of the United Kingdom's complicity in torture when individuals arrested by the Afghan authorities in partnered operations were subsequently tortured. As a result, *Maya Evans* is silent on this question. As will be discussed, the test for State complicity in international law is different from the test for a breach of the non-refoulement principle.

17. While it is established in customary international law, reflected in Art 16 of the International Law Commission's (**ILC**) Articles on State Responsibility, that a

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15 Expert Opinion of Sir Kenneth Keith at p.16; Transcript of hearing for module 3, day 1, at p.35.

State can bear responsibility for assisting another State to commit an internationally wrongful act, the threshold to establish such responsibility is contested. The Crown is in the process of developing a firm position on this issue.[16]

18. The ILC's commentary to Art 16 of the Articles of State Responsibility indicates that, to constitute complicity, aid or assistance must be given "with a view to facilitating the commission of the wrongful act, and must actually do so" and that "this limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct." It further states that "the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act".

19. In the *Bosnian Genocide* case, the International Court of Justice (**ICJ**) confirmed these principles in noting that complicity for an internationally wrongful act required: i) a positive action to furnish aid or assistance to the perpetrator of the wrongful act; and ii) the provision of support in full knowledge of the facts relating to the wrongful act.[17]

20. There are, then, three elements of complicity: i) a positive act; ii) a sufficient causal connection between the positive act and the internationally wrongful act;[18] and iii) a mental element.

21. The mental element of complicity is vital. The law cannot intend that a State assisting another State to conduct a lawful activity is liable for subsequent unlawful activity conducted by the assisted State, unless there is some intention, or at least full knowledge, that the assistance given will facilitate that unlawful activity. Such a result would not accord with the philosophical basis

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16 Independently of this Inquiry, the Ministry of Foreign Affairs and Trade is currently considering this issue as part of a broader suite of advice to government on the question of complicity for internationally wrongful acts in international law.

17 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, International Court of Justice (ICJ), 11 July 1996, at [432].

18 While not directly applicable, the approach to complicity in International Criminal Law may be relevant by analogy in interpreting state responsibility for assistance. The leading decision of the International Criminal Tribunal for the former Yugoslavia regarding complicity in torture indicates that, to constitute aid and assistance under international criminal law, the assistance rendered must have a "substantial effect" on the commission of the crime (*Prosecutor v Furundzija* (Trial Judgement), IT-95-17/1-T, 10 December 1998 at [234]). This has also been indirectly endorsed by the ICC (*Prosecutor v. Lubanga* ICC-01/04-01/06, 14 March 2012).It would make sense for the same, or a similar, standard to apply in respect of State responsibility.

of the legal doctrine of complicity,[19] and would have an undesirable chilling effect on inter-State cooperation.[20]

22. The importance of the mental element is highlighted by the *Bosnian Genocide* case where, despite finding that the crimes committed in Srebrenica were committed with resources provided as part of a general policy of aid and assistance by the Federal Republic of Yugoslavia (**FRY**) towards the Republika Srpska, the ICJ held that complicity could not be made out because it could not be proved that the FRY supplied aid to the perpetrators of the genocide "in full awareness that the aid supplied would be used to commit genocide".[21]

23. There is some debate as to the mental element requirement for a State to be liable via complicity, for an internationally wrongful act under Art 16 of the Articles of State Responsibility, as was discussed in detail in the presentations for module 3. The Crown notes that the considerable weight of international legal opinion supports the view that an element of intention is required. The ILC's commentary ("with a view to facilitating the commission of the wrongful act") supports that view. A number of academic commentators also support that view.[22] This approach is also consistent with that proposed by both the United States and United Kingdom during the drafting of the Articles of State Responsibility,[23] which appears to have influenced the ILC's commentary to Art 16 discussed above.[24]

24. Although the ICJ, in its articulation of the requirements for complicity in the *Bosnian Genocide* case, did not need to determine whether an intention to assist is required in addition to knowledge of the essential facts, its framing of the issue (a positive act to furnish aid and assistance in full knowledge of the facts

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19 See J.Crawford *State Responsibility: the General Part* (Cambridge University Press, 2013) at 404, quoting commentary by another of the International Law Commissioners, Roberto Ago, during the drafting of Art 16 that "the very 'idea' of complicity in the internationally wrongful act of another presupposes an intent to collaborate". Although not directly relevant, this is also reflected in the simple formulation in our own law that "the essence of aiding and abetting is intentional help".

20 For a helpful discussion of this point, see H. Aust *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011) at 238 – 241.

21 At [421]-[422].

22 As discussed in the Crown Agencies' presentation for module 3 at [98] to [112].

23 International Law Commission, 'State Responsibility – Comments and Observations Received from Governments" (2001) UN Doc A/CN.4/515 at p.52. It is interesting that the position of the UK and USA reflects the standard approach in common law that aid and assistance requires both knowledge of the essential facts of the unlawful act and an intention to assist. This is also the position in our own criminal law.

24 It is also relevant that the ILC subsequently adopted a test of intention for aiding and assisting in international criminal law. See Art 25(3)(c) of the Rome Statute.

of the relating to the wrongful act) is consistent with an intention requirement. Full knowledge that a positive action would inevitably assist the commission of an internationally wrongful act could, we submit, permit intention to be imputed.[25]

25. In any event, as will be discussed below, the knowledge element is not fulfilled in the current case and so, as in the *Bosnian Genocide* case, there is no need to determine whether an element of intent is required.

26. What is clear from the *Bosnian Genocide* case, and generally accepted in the literature, is that to establish complicity there must be proof of actual knowledge of the circumstances of the internationally wrongful act.[26]

27. A threshold of constructive knowledge is not consistent with the ICJ's formulation[27] and is unlikely to be sufficient. This is supported by the fact that the ILC did not accept a proposal from the Netherlands that the wording of the knowledge element of Art 16 be changed to read: "the state does so when it knows o*r should have known* the circumstances of the internationally wrongful act."[28]

28. Similarly, recklessness, in the sense of knowledge of a "real risk" that the aided state will commit an unlawful act, is also insufficient. A leading commentator has noted as follows:[29]

> In practice, the standard of knowing participation means awareness with something approaching practical circumstances of the principal wrongful act. Dilution from that standard – the slide into reckless assistance – starts to become inconsistent with the essential derivative nature of complicity and may indeed undermine valuable international cooperation.

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25 While knowledge and intent are distinct elements in law, proof of a sufficient degree of knowledge may provide an inference of intention: see for example, in the domestic law context, *R v Jogee* [2016] UKSC 8; *Ruddock v* R [2016] UKPC 7. See also Crawford, op.cit, at 408: "Additionally, as the first reading commentary may be taken as indicating, if aid is given with certain or near certain knowledge as to the outcome, intent may be imputed."

26 Again, see Crown Agencies' presentation for module 3 at [98] to [112].

27 See also [432], where the Court specifically distinguished complicity from a duty to prevent on the basis that complicity requires that support be given "in full knowledge of the facts", whereas a standard of constructive knowledge ("aware, or should normally have been aware") and recklessness ("of a serious danger") is sufficient to establish a breach of a duty to prevent.

28 International Law Commission, 'State Responsibility – Comments and Observations Received from Governments" op.cit. at p.52. See also M. Jackson *State Complicity in International Law* (Oxford University Press, 2015). at p161. Again, incidentally, this is consistent with the approach to knowledge in cases of complicity in our own law: *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679, 8 NZBLC 101, 774 (HC) at [231].

29 Jackson op. cit at pp.161 – 2.

29. While the Crown Agencies acknowledge that some academics have argued that wilful blindness may be sufficient, there is no State practice to support this and the weight of international legal opinion, including the *Bosnian Genocide* case, currently supports the view that *actual* knowledge of the circumstance of the internationally wrongful act is required.

30. As the above discussion demonstrates, the test applicable to non-refoulement ("real risk") is not the same as that for complicity. It appears that Sir Kenneth agrees with this position.[30] In the Crown's submission, merging these two legal frameworks by applying a test for complicity that is met simply by providing aid or assistance to another State with the knowledge that there was a "real risk" the other State might commit an internationally wrongful act would require a significant departure from current international law. Its practical consequences would be felt across the full suite of areas of international cooperation and would have a substantial chilling effect on that cooperation.

Applying the Art 16 test to the circumstances relevant to paragraph 7.8 of the terms of reference

31. Even proceeding on the hypothetical basis that Qari Miraj were, in fact, tortured by the Afghan authorities, New Zealand's participation in a partnered operation to arrest him would not amount to aid and assistance in his torture.[31]

32. The Crown Agencies accept that first element of the test for complicity is made out: New Zealand's agents took a positive action to assist the Afghan authorities. However, it was assistance in the arrest and transportation of Qari Miraj. It is not alleged that New Zealand State agents directly aided or assisted the Afghan authorities to commit torture. As such, the second element of the test for complicity (a sufficient causal connection between the positive act and the internationally wrongful act) is less clear-cut. The question is whether

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30 Transcript of the hearing for module 3, day 1, at page 35. A leading commentator on State complicity, Miles Jackson, also appears to agree that this is the current state of the law (although he argues for an extension of the law): M. Jackson "Freeing *Soering*: The ECHR, State Complicity in Torture and Jurisdiction" EJIL (2016), Vol. 27 No. 3, 817–830. See also Aust op. cit. at 239: "A requirement of intent is also the only possible conceptual means to distinguish the situation of complicity in the sense of Article 16 ASR from the typical situation of non-refoulement."

31 The Crown Agencies note that the Inquiry's Terms of Reference do not direct it to determine whether the New Zealand State was in fact complicit in torture conducted by Afghan authorities. First, the Inquiry has no jurisdiction to make determinations about the actions of forces or officials other than NZDF forces or New Zealand officials. A finding of complicity would first require a determination that Afghan officials tortured a particular person detained with the assistance of the NZDF. Secondly, the Inquiry, in common with all inquiries under the Inquiries Act, has no power to determine the civil, criminal, or disciplinary liability of any person. This includes the civil liability of the New Zealand State at international law.

providing aid and assistance to the Afghan authorities to conduct a lawful arrest could have a substantial effect on the commission of any subsequent torture. That is a matter for the Inquiry to determine.

33. In any case, it is clear that the third element of the test for complicity is not made out. New Zealand's agents had no *intention* to assist in the torture of Qari Miraj, nor did they have *actual knowledge* that his detention by the Afghan authorities would lead to his torture. To the extent that the Inquiry considers constructive knowledge or wilful blindness to be appropriate standards to establish complicity (which is not accepted), New Zealand was neither *wilfully blind* to the fact that Qari Miraj would be tortured in detention, nor should it have known that he would be tortured.

34. As set out in the Solicitor-General's Opinion, the Crown Agencies accept that, had the Government known that there was a systemic practice amongst the relevant Afghan authorities of torturing detainees, then it would have been required to restrict or withdraw its cooperation, as necessary, until that risk was addressed, in order to avoid the risk of complicity.[32]

35. As paragraph 7.8 of the terms of reference highlight the *Maya Evans* judgment as significant to an assessment of whether the transfer of Qari Miraj was "proper", it is worth noting that that judgment did not support a prohibition on transfers of prisoners to all detention facilities in Afghanistan. While serious concerns were raised about ill-treatment of detainees, the Court did not conclude that there was a real risk of torture (let alone knowledge or wilful blindness that torture would occur) in all Afghan facilities.

36. In light of the *Maya Evans* judgment, the Government took a number of steps to inform itself of the overall conduct of Afghan authorities. In particular, the Government took the following steps:

    36.1 During a visit to Afghanistan in August 2010, Dr Mapp reiterated New Zealand's concerns on the treatment of detainees and sought assurances of the humane treatment of detainees apprehended by the Afghan National Security Forces (**ANSF**), especially when operating

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32 Noting that, on the ICJ's formulation of the test for complicity, the practice of torture in detention would have to be so widespread and systemic as to make torture a near certainty.

with the support of the NZSAS. Dr Mapp also received updates on the progress of improved surveillance of NDS facilities. He was briefed on improvements within Afghan prisons, particularly where international assistance had helped the NDS improve its investigative, forensic and evidence based methodology and support to modernise detention facilities in Kabul.

36.2 New Zealand joined with a number of international partners in a detainee working group to assist the Afghan Government to upgrade detention facilities, systems and practices, including within the NDS.

36.3 New Zealand informally liaised with Afghan authorities and other ISAF troop contributing nations to discuss detainee issues.

37. Moreover, New Zealand was aware that the International Committee of the Red Cross (**ICRC**), the Afghan Independent Human Rights Commission (**AIHRC**), and the United Nations Assistance Mission in Afghanistan (**UNAMA**) carried out monitoring of Afghan detention centres, together with like-minded troop contributing nations[33] who transferred detainees (i.e. detainees captured by ISAF) directly to the Afghan authorities, including the NDS. Given these nations were also conscious of their non-refoulement obligations, it was reasonable to assume that any information indicating that the relevant Afghan authorities routinely committed torture would have been identified by those nations, and this information shared with New Zealand, through ISAF, and particularly through the detainee working group.

38. In addition, in parallel with partnered law enforcement operations, New Zealand was involved in other activities specifically intended to reduce risks of torture, and other human rights breaches in Afghan facilities, for example providing training to the Crisis Response Unit on the professional and humane conduct of their duties. New Zealand was also cooperating with other nations and contributing, within its means, to a wider international effort to address human rights issues in Afghanistan at a systemic level, including by providing funding to UNAMA and the AIHRC. The Crown Agencies submit that this

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33 Nations New Zealand would consider share our commitment to human rights.

evidences the fact that New Zealand's assistance to the Afghan authorities was not provided "with a view to facilitating torture". Instead the opposite is true.

39. The Crown Agencies submit that its conduct post-*Maya Evans* does not support a contention that, when participating in the operation to arrest Qari Miraj: i) it had knowledge that Qari Miraj *would be tortured* in detention; or ii) it was wilfully blind to the fact that Qari Miraj would be tortured in detention. Moreover, there is no evidence at all to suggest an intent to assist the Afghan authorities in torture.

40. As a result, the Crown Agencies reject any suggestion that it is arguable in law that New Zealand aided or assisted an internationally wrongful act by Afghanistan.

41. However, the Crown Agencies accept, given the subsequent findings of UNAMA in its report of October 2011 on Treatment of Conflict-Related Detainees in Afghan Custody (**UNAMA Report**), that the Government might reflect critically on its policy position post-*Maya Evans*. That is, while the legal position set a baseline for New Zealand's conduct, it did not set a ceiling on the protections New Zealand might have sought as a matter of *policy*. Subject to resourcing considerations and the consent of the Afghan authorities, it might have been open to New Zealand to explore the possibility of detainee monitoring as a component of any partnering arrangement.

42. The reasoning behind the decision not to pursue this policy at the time includes that set out in the Solicitor-General's Opinion at [68] to [72]. Monitoring of detention facilities would have required the consent of the Afghan authorities (which may not have been forthcoming for those arrested in partnered operations). It would also have required either a larger deployment with more resources, or a reduction in capacity to undertake the tasks for which NZDF was deployed and specialised to undertake. However, in hindsight, the Crown Agencies accept that it may have allowed New Zealand to identify and respond to the practices identified in the UNAMA Report earlier.

43. To address directly the Chairperson's question from the module 3 hearing as to the reason why New Zealand could not have pursued a monitoring regime for detainees arrested by Afghan authorities in partnered operations:[34]

43.1 As a matter of *policy*, and subject to resourcing considerations and the consent of the Afghan authorities, it may have been open to New Zealand to pursue such a regime. Although the decision not to pursue such a policy may be reflected on critically in hindsight, there were legitimate reasons for not doing so at the time.

43.2 As a matter of *international law*, it is not accepted that there was any obligation to do so.

44. It is also important to note that when New Zealand did become aware of a widespread risk of torture shortly before the UNAMA Report was released, steps were taken, in accordance with ISAF policies, to address this issue.

The Government complied with Article 1 of the Geneva Conventions

45. It is not contentious that under Common Article 1 of the 1949 Geneva Conventions a State has positive and negative obligations in respect of its own troops and their actions. However, the Crown Agencies note that the existence of any positive obligations from Common Article 1 for a State in respect of the troops and actions of another State has been the subject of much academic debate, which has not been settled by any competent court or tribunal, or through a consistent approach in state practice.

46. The Crown Agencies accept that Common Article 1 imposes an obligation not to provide aid, assistance or encouragement to another State's commission of a breach of International Humanitarian Law (IHL).[35] However, the extent to which it imposes a positive obligation, and the nature of any such obligation, is very much open for debate.[36] This is a developing area of international law, upon which the Crown has not yet formed a comprehensive view.

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34 Transcript of hearing for module 3, day 1 at p 74.

35 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14 at [220].

36 For example, see the differing views of commentators in the following commentary: ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd edition, 2016; C. Focarelli "Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?" EJIL (2010), Vol. 21 No. 1, 125–171; K. Dormann and J. Serralvo "Common

47. Even if Common Article 1 did impose a positive obligation for a State in respect of the troops and actions of another State, the New Zealand State met this obligation through its various efforts to promote compliance by the Afghan authorities with IHL and IHRL, as discussed in the Crown Agencies' presentation for module 3.[37]

The distinction between "security operations" and "active hostilities" paradigms

48. There has been some suggestion that Operation Burnham be seen as domestic "law enforcement" (of Afghan arrest warrants by Afghan authorities) rather than a situation of "armed hostilities". This may be an allusion to the framework suggested by the authors of the *Practitioners Guide to Human Rights Law in Armed Conflict*[38] as helpful for determining the interaction of IHL and IHRL in cases where both apply.[39]

49. The Crown Agencies say in response:

49.1 The situation in Afghanistan at the relevant time constituted a non-international armed conflict. Accordingly, IHL applied throughout Afghan territory.[40]

49.2 As submitted at the hearing, the interaction of IHL and IHRL falls for resolution only when both apply. New Zealand's IHRL obligations did *not* apply to the main aspects of the Operation Burnham mission, which was undertaken in an area over which New Zealand exercised no jurisdiction, and in circumstances where New Zealand did not exercise state agent authority and control over any person.

49.3 Even if IHRL did apply, given the facts on the ground, the operative framework within which to consider Operation Burnham (using the

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Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations" IRRC (2014) 96 (895/896), 707-736.

37 At [84].

38 Wilmshurst, Hampson, Garraway, Lubell, Akade (eds), Oxford 2016.

39 As the authors explain (at 4.34), "[t]he term 'security operations' denotes activities which are largely of the nature of law enforcement but, since they are carried out within armed conflict, including situations of occupation, the term "law enforcement" was not thought appropriate.

40 *Prosecutor v Tadic* (decision on the defence motion for interlocutory appeal on jurisdiction) IT-94-1 2 Oct 1995 at [70].

tools of analysis suggested by the authors) was plainly one of "active hostilities" throughout.

49.4 But even if that were not the case, and the operation were cast as a "security operation", the following observations of the authors are germane:[41]

> Under the 'security operations' framework, in circumstances connected to a non-international armed conflict or other significant disturbances, the standard of scrutiny applied to the State's actions will be determined with a certain degree of flexibility, in order to ensure that an unrealistic burden is not placed on the State or its agents, including in a manner that could be detrimental to the protection of life.

50. The overall result – even if it be assumed, contrary to the Crown Agencies submission, that IHRL applied to New Zealand in relation to events in Tirgiran Valley along with IHL – is in accord with the ICJ's articulation of the relationship between the two bodies of law: a loss of life in circumstances permitted by IHL is not arbitrary under IHRL.

51. For completeness, Crown Agencies observe that Operation Yamaha was, in contrast, a security operation conducted by Afghan authorities. As such IHRL applied to the Afghan authorities, alongside IHL.

The principle of distinction is concerned with attacks intentionally directed against civilians

52. As noted in the presentation for module 3, the Crown Agencies generally agree with the characterisation of the relevant principles of IHL described by Sir Kenneth Keith and Professor Akande in their papers. However, there is one issue that arose during the hearing that the Crown Agencies consider requires response.

53. In answer to questioning by the Inquiry, Professor Akande stated that a State can be legally liable for a breach of the principle of distinction where civilians or civilian objects are unintentionally targeted by its forces in the course of armed conflict.[42] Professor Akande distinguished individual international criminal liability for directing attacks against civilians or civilian objects, which

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41 *Practitioners' Guide*, paragraph 5.12.

42 The Crown Agencies interpreted the exchange in question as relating to *direct* attacks. Accordingly, the Crown Agencies do not understand Professor Akande to have suggested that the State can be liable for a breach of distinction where civilian casualties have occurred as an incidental result of an attack on a military objective.

clearly requires intention,[43] from State responsibility for the same conduct, which he stated could be established on the basis of strict liability. With respect, the Crown Agencies disagree with this approach.

54. Leading commentators have posited that it is the intent to attack civilians that is the *sine qua non* of the principle of distinction, not the fact that civilians are actually harmed. It is on this basis that the prohibition on attacking civilians applies even if the intended attack proves unsuccessful.[44]

55. Further, the principle of distinction must be considered alongside other principles of IHL, notably the obligation to take precaution to avoid civilian casualties in attack. In effect, the principle of distinction prohibits intentional targeting of civilians and civilian objects, whereas the obligation to take precaution and verify targets aims to prevent the accidental targeting of civilians and civilian objects under the apprehension they are military objectives. Neither the principle of precaution nor distinction impose strict liability for attacks on civilians or civilian objects. Accordingly, as the Crown Agencies noted in the presentation for module 3, an unintentional attack on a civilian or civilian object, for example based on a genuine mistake as to their status, will not be a breach of the principle of distinction.

56. A State may be liable for breaches of IHL by its agents.[45] However, the principle of distinction is concerned with intentional targeting of civilians, and, accordingly, accidental targeting, based on a mistake as to status, is not a breach of IHL. Accordingly, as there is no underlying breach of IHL, there is no basis upon which *either* an individual or the State could be liable.[46]

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43 Rome Statute of the International Criminal Court (**ICC Statute**), Arts 8(2)(b)(i) and (ii) and (8)(2)(e)(i) and (ii).

44 T. Gill and D. Fleck, ed. *The Handbook of the International Law of Military Operations*, 2nd ed (Oxford University Press, Oxford, 2007) at [16.02.07].

45 See ICRC CIHL Rules, Rule 149 and the commentary that follows. See also M. Sassoli "State responsibility for violations of international humanitarian law" IRRC Vol 84 No 846 (June 2002) at p.401.

46 See also B.Bonafe *The Relationship Between State and Individual Responsibility for International Crimes* (Leiden, Martinus Nijhoff, 2009) at p.245, where the author notes as follows "First, positing the unity of state and individual responsibility for international crimes at the level of primary norms is essential to determine the actual content of the relationship between these two regimes, as revealed by the analysis of international practice. A crucial element of this relationship is the correspondence of the conduct amounting to an international crime and giving rise to both state and individual responsibility. Therefore, conduct triggering a dual responsibility under international law cannot be qualified differently (i.e., as lawful or unlawful) according to whether that conduct is assessed from the perspective of state versus individual responsibility."

Obligation to gather information to verify target and assess proportionality

57. At the hearing for module 3, in the context of a discussion on the principle of proportionality in attack, the Chairperson asked a question as to whether a military planner is under an obligation to attempt to gather information in order to assess the expected harm to civilians (on the one hand) and anticipated military advantage (on the other hand) resulting from an attack.[47]

58. The planner of an attack must do everything feasible to confirm that targets are military objectives and to assess the proportionality of a planned attack. The intent of this requirement is to provide sufficient information to permit an attack to be conducted with reasonable certainty that the target is a military objective (i.e. to comply with the principle of distinction) and that the attack will comply with the principle of proportionality. As noted in the presentation for module 3, the obligation to take all "feasible" precautions has been interpreted by many States (including New Zealand) as being all those precautions which are practicable or practically possible, taking into account all circumstances at the time, including humanitarian and military considerations. Feasible measures include timely collection, analysis and dissemination of intelligence. The Crown Agencies note that what is "feasible" will depend on the circumstances of the case and is ultimately a matter of common sense and good faith.[48]

Command responsibility requires knowledge

59. In the presentation for module 3, the Crown Agencies set out the test for command responsibility for war crimes committed by subordinates, by reference to the elements established in the ICC decision in *Bemba*.[49] One of those elements is that the commander must have known, or should have known, that their subordinates were committing or about to commit a war crime.

60. At the hearing, the Chairperson questioned whether, if it is assumed that coalition air assets breached IHL (an assumption which we understood to be

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47 Transcript of hearing for module 3, day 1, at p.59. Brigadier Ferris also provided an answer to this question during her presentation – see Transcript of hearing for module 3, day 2, at p.192.

48 See *Gill and Fleck* at [16.07.03]. See also commentary to ICRC CIHL Rule 15.

49 At [71].

hypothetical given the absence of evidence to support that conclusion),[50] the Ground Force Commander could be responsible for such a breach, if, when clearing the aircraft to engage, he did not ask whether the target had been positively identified or inquire about the possibility of collateral damage. In other words could the Ground Force Commander be responsible for a breach of IHL by a pilot of a non-New Zealand air asset if he failed to confirm with the pilot that the engagement would comply with IHL before giving clearance? Is a failure to inquire sufficient to establish knowledge that a breach of IHL will occur, as required for command responsibility?

61. In the absence of any information to the contrary, the Ground Force Commander would be entitled to assume that the pilot operating in a coalition of allies would comply with IHL (and their Rules of Engagement) in any attack. In the absence of any information to indicate that the pilot would breach IHL, there can be no factual finding that the Ground Force Commander "knew or should have known" that this would occur. Accordingly, a failure to inquire is insufficient to establish the knowledge required for command responsibility.

62. In any event, based on the command relationship as described in the memorandum of counsel for the NZDF dated 19 July 2019, "clearance" to engage did not constitute an order to engage. Neither would a refusal of clearance have constituted an *order* not to engage. Accordingly, the Ground Force Commander did not have sufficient command or control over the coalition pilots for their actions to be attributable to him on the basis of command responsibility.

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50 And in relation to which there has been, and can be, no finding as the Inquiry has no jurisdiction to make determinations about the actions of forces or officials other than NZDF forces or New Zealand officials.

63. Accordingly, on the hypothetical assumption that a coalition pilot breached IHL, the Ground Force Commander could not be liable on the basis of command responsibility even if the requisite knowledge element was met.

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