under the Inquiries Act 2013

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

SYNOPSIS OF SUBMISSIONS OF COUNSEL FOR JON STEPHENSON FOR HEARING 2

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MAY IT PLEASE THE INQUIRY

INTRODUCTION

1. This synopsis has been prepared in response to the Inquiry's invitation to non Crown core participants to make submissions on legal issues relating to the rules of engagement (**ROE)** and law and policy governing detention relevant to the Inquiry's work.

2. The Inquiry invited parties to focus on those issues that were most important to them. This synopsis accordingly focuses on principles relating to detention.

3. The synopsis is intended as a roadmap setting out relevant principles in general terms. It does not purport to be an exhaustive statement of the applicable law.

4. Finally, while this synopsis includes some reference to the declassified documents recently disclosed by the Inquiry, it has not possible in the time available to make comprehensive submissions in relation to them. To the extent these documents raise issues of law, they will be addressed in more detail supplementary submissions. Counsel respectfully request an additional 7 days' time for filing these submissions in order to fully consider the potential legal implications of these documents.

DETENTION

Terms of Reference

5. It is submitted the Inquiry has jurisdiction under its terms of reference (**TOR**) to consider issues of compliance with relevant rules of international and domestic law relating to detention. In particular, the scope of inquiry includes inquiring into and reporting on:

   (a) The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law: TOR at [7.1]

   (b) Whether NZDF's transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security (**NDS**) in Kabul in January 2011 was proper, given (amongst other matters) the June 2010 decision in *R (on the application of. Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (***Evans***): TOR at [7.7].

6. While the Inquiry has no power to determine the civil, criminal, or disciplinary liability of any person, it may, however, make findings of fault

or recommendations that further steps be taken to determine liability: TOR at [13].

Different types of detention

7. As a matter of background fact, it is relevant that detentions involving SAS could occur in two ways:

   (a) SAS detains.

   (b) SAS accompanies Afghan forces who detain.

8. It appears from the declassified NZDF and Crown Law advice that the Crown saw this distinction as legally significant, and in particular determined that the scope of individual and state liability and liability under the New Zealand Bill of Rights Act 1990 (**NZBORA**) to be significantly diminished where SAS was not the detaining authority: **[01 – Note to Minister 414 Detainee Arrangements – Afghanistan]** and **[02 – Note to Minister 484 Detainee Arrangements – Afghanistan] (*Solicitor-General Opinion*).**

9. It is respectfully submitted that this distinction is not as clear cut as may be suggested by the Crown advice. The reality is that SAS often had significant input and provided significant assistance on joint or partnering missions which resulted in the capture of detainees, even on the NZDF's own account: **NZDF Unreferenced Account pp 4-5**.

10. In considering whether relevant legal principles are engaged, the Inquiry should have regard to the full extent of SAS involvement in joint or partnering missions with Afghan CRU or other forces, including the extent to which SAS identified the objectives, planned and carried out the operations. In this context it is also necessary to inquire into what was known about what would happen to detainees captured on those operations. The NZDF were aware a large number of SAS operations resulted in arrests: **11NTM NZDF Operations – Afghanistan at [7].**

Authority to detain in NIAC

11. One issue which would arise if the SAS were the de jure or de facto detaining authority would be the lawful basis for any such detention.

12. It appears the SAS did not have authority under the law of Afghanistan to arrest and detain: Solicitor-General Opinion at [14].

13. It is submitted there was no clear basis under international humanitarian law (**IHL**) for the detention of persons by the SAS.

   (a) The situation was a non-international armed conflict (**NIAC**).

   (b) There is no clear basis for detention in Common Article 3 to the Geneva Conventions or AP II.

   (c) There is also no clear rule of customary international law authorising detentions: *Serdar Mohammed v Ministry of Defence*

[2017] UKSC 2 at [256]-[273] per Lord Reed (*obiter*) (***Serdar Mohammed***).

14. The clearest potential legal basis for detention was under Security Council Resolution 1386, which was issued under Chapter VII of the UN Charter and "*authorised all member states participating in the [ISAF] to take all necessary measures to fulfil its mandate*": paragraph [3].

15. While it may be safe to assume this wording authorised detention, the conditions on which it did so are far from clear. The UK Supreme Court recently interpreted the Resolution as authorising detention on terms analogous to art 78 of the Fourth Geneva Convention ie. where "*necessary for imperative reasons of security*": *Serdar Mohammed* at [17] per Lord Sumption.

16. Despite a positive basis to detain under the Resolution, and ISAF and New Zealand policies implementing the Resolution, another issue which could arise is whether the Resolution and relevant policies were sufficiently clear and precise so as not to have infringed the prohibition against arbitrary detention applicable international and domestic human rights law:

    (a) ICCPR and NZBORA both prohibit arbitrary detention (art 9, s 22)

    (b) Both apply extraterritorially in areas and to persons in areas where New Zealand exercises effective control, which is not limited to major military bases or installations but can include areas patrolled by New Zealand forces:

        (i) ICCPR: art 2(1), General Comment 31 at [31].

        (ii) NZBORA: *Young v Attorney-General* [2018] NZCA 307 at [40] (*obiter*), long title (b) and s 3; *Al Skeini v U.K.* (2011) 53 EHRR 18 (GC).

    (c) Both apply notwithstanding the existence of parallel international legal obligations in the form of the Security Council Resolution: *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226 at [25].

17. This issue will be addressed in more detail in supplementary submissions, however it is noted that if a conflict of norms were to arise, that conflict would need to be resolved. As to the different methodologies that could be brought to bear, see Stubbs "Human Rights Obligations as a Collateral Limit on the Powers of the Security Council" in *Imagining Law* (2016, UoA Press) at 65-67. For different outcomes in the ECHR context see *Serdar Mohammed* per Lord Sumption (in the majority, giving preference to Security Council Resolution 1386) and Lord Reed (dissenting, upholding a violation of art 5 of the ECHR).

18. Similar issues of consistency between Security Council authorisations and international and domestic human rights obligations could arise in the context of rights relating to conditions of detention, considered below.

Prohibitions against torture, mistreatment of detainees and conditions of detention

Individual criminal responsibility

19. New Zealand is a state party to the Rome Statute. The Statute criminalises genocide, crimes against humanity, war crimes and aggression.

20. Crimes against humanity must be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". War crimes must be committed "when committed as part of a plan or policy or as part of a large-scale commission of such crimes".

21. Crimes against humanity include:

    (a) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law: Art 7(1)(e).

    (b) Torture: Art 7(1)(f).

    (c) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health: Art 7(1)(k).

22. War crimes include:

    (a) In NIACs, serious violations of common article 3 to the Geneva Conventions, including:

        (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture: Art 8(2)(c)(i).

        (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment: Art 8(2)(c)(ii).

23. The elements of these offences are set out in the Elements of Crimes to the Statute. Note that the definition of "torture" for crimes against humanity is slightly modified from the definition in CAT; and there is no specific definition of torture as a war crime.

24. The Statute defines different modes of responsibility for these crimes. They include aiding and abetting, and joint criminal enterprise (**JCE**) liability: art 25(3)(c) and (d).

25. Aiding and abetting requires the accused:

    (a) Aids, abets or otherwise assists in its commission or its attempted commission of an offence in the Statute. In this respect:

        (i) The assistance must be significant: *Mbarushimana*, Confirmation of Charges Decision, ICC-01/04-01/10-465-Red, 16 December 2011.

        (ii) Omissions can qualify as assistance where there is a legal duty to act. In this regard it is significant that New Zealand

has a positive duty under international and it is submitted domestic human rights law to prevent torture and ill-treatment in all areas under its effective control: Convention Against Torture (**CAT**), arts 2 and 16.

(b) Has the purpose of facilitating the commission of a crime. This is a higher *mens rea* standard than knowledge that the conduct would assist in the commission of the crimes in question. However, as the ICTY Trial Chamber noted *obiter* in *Prosecutor v Popovic* IT-05-88-T (TC) at [1500]: "in the vast majority of cases, the acts of the accused, with the requisite knowledge that it assists a crime, will allow for no other reasonable inference than that the accused intended to assist the commission of an offence."

26. JCE requires the accused:

(a) Contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.

(b) The contribution is intentional.

(c) The contribution is either

(i) made with the aim of furthering the criminal activity or criminal purpose of the group including the commission of a crime within the jurisdiction of the Court, or

(ii) made in the knowledge of the intention of the group to commit the crime.

27. New Zealand has enacted these crimes as offences under domestic law: Crimes of Torture Act 1987 ss 3-4, International Crimes and International Criminal Court Act 2000.

28. The question of potential individual criminal responsibility for torture committed in NDS facilities appears to have been considered in legal advice from the Director-General of Legal Services **C10004560 – WLN dated 2/9/10 [classified]** – cf. **01- NTM 414 Detainee Arrangements – Afghanistan** (16 September 2010) at [2]. The NTM summarising the advice noted that a small number of persons detained by CRU on partnered operations were transferred to the NDS in Kabul. The Solicitor-General's opinion also briefly considered the issue at [20]-[27].

29. In this regard it is significant that:

(a) There were a large number of reports of torture at NDS facilities at the relevant time, including the NDS facility in Kabul: *Evans* at [49]-[84], [227]-[235]; Solicitor-General Opinion at [6]-[10]; United Nations Assistance Mission in Afghanistan (**UNAMA**) Report, October 2011.

(b) NZDF admits that a small number of persons detained by the CRU on partnered operations were transferred to the NDS facility in Kabul: **01- NTM 414 Detainee Arrangements – Afghanistan at** [1].

(c) SAS had a substantial involvement in partnered operations.

State responsibility

30. New Zealand may also incur state responsibility for breaches of international obligations relating to treatment of detainees either by SAS or Afghan forces. Relevant obligations include:

(a) The prohibition of torture as a rule of customary international law: *Prosecutor v Karadzic* IT-95-5/18-T, 24 March 2016 (TC) at [505] and under art 7 of the ICCPR.

(b) Obligations to prevent torture in all areas under its jurisdiction, as well as acts of inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity: CAT, arts 2 and 16.

(c) Obligations to treat detainees in NIAC humanely and to provide certain minimum conditions: Common Article 3 to the Geneva Conventions, AP II art 5.

(d) Procedural protections for detainees: ICCPR, art 9.

31. States commit internationally wrongful acts where conduct which is attributable to them constitutes a breach of an international obligation: *International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts* UN A/56/83, 3 August 2001, art 2 (***ILC Draft Articles***).

32. States may be complicit in the internationally wrongful acts of other states. In this regard art 16(a) of the ILC Draft Articles may be taken as reflecting customary international law: *Bosnia and Herzegovina v Serbia and Montenegro* [2007] ICJ 2 (***Genocide Case***) (*obiter*). A state can be complicit in the internationally wrongful act of another state where:

(a) The state aids or assists the commission of the act. The Draft Articles state that a "substantial contribution" to the act is required. It is submitted an omission may be sufficient where there is a duty under public international law to act: Lanovoy "Complicity" in Oxford Public International Law at C(1)(15).

(b) With knowledge of the circumstances of the act. There is limited authority on the scope of this mental element. Crawford has described art 16(a) as generally affirming a "potentially wide-ranging" principle: Brownlie's Principles of Public International Law (8 ed, 2012) at 555.

(c) The act would be wrongful if it had been done by the state.

33. It is submitted that the processes of SAS detaining persons in Afghanistan, and SAS accompanying CRU and other Afghan forces on operations which result in detentions, could engage a number of the obligations set out above.

34. In some instances there could hypothetically be grounds for primary responsibility (such as in relation to the duty to prevent torture, or the duties under the ICCPR in relation to detention). In other cases it is more likely that if any basis for liability existed, it would be for complicity in the internationally wrongful acts of other states (Afghanistan) (eg. torture).

NZBORA

35. Acts of the executive branch of the government of New Zealand are also subject to the NZBORA: s 3.

36. The NZBORA affirms rights of "every one":

(a) Not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment: s 9.

(b) Not to be detained arbitrarily: s 22.

(c) To certain conditions in detention: s 23.

37. 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: *Al Skeini v U.K.* (2011) 53 EHRR 18 (GC).

38. The Supreme Court has held that non-refoulement obligations are implicit in s 9 NZBORA: *Attorney-General v Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289 at [79]. Government officials are not permitted to extradite or deport a person to a third state where there are substantial grounds to believe they will be in danger of torture.

39. It is submitted that s 9 also incorporates a principle that New Zealand is required to take positive steps to prevent torture in all areas under the jurisdiction of the statute, and that acquiescing in a breach by a third state may engage liability.

40. In a series of recent cases, the ECHR has found states liable for violations of Convention rights committed by third states of persons on the defendant state's own territory "*with the acquiescence or connivance of its authorities*": *El Masri v. Macedonia* App No 39630/09, 13 December 2012 (GC) at [206], *Al Nashiri v Poland* App No. 28761/11, 24 July 2014 (IV Section) at [451], *Husayn v Poland* App No 7511/13, 24 July 2014 (IV Section) at [449]. This principle is based on states' duties to secure rights to all those within the state's jurisdiction: art 1 ECHR.

41. It is submitted this principle:

(a) can apply under the NZBORA, to the extent that Act applies extraterritorially: Long Title, s 2 NZBORA.

(b) would be consistent with New Zealand's international obligations to take positive steps to prevent torture and ill treatment (CAT arts 2 and 16).

42. Separately from complicity in torture under s 9, 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. Section 23 does not assume a person or body bound by s 3 NZBORA is the detaining authority.

43. Section 23 provides that the rights therein apply to persons detained under "any enactment" but it is submitted these words should be interpreted so as to apply to persons detained under the authority of a Security Council Resolution. This is consistent with the fundamental purpose of the guarantees in the section to avoid arbitrariness; in this regard it is significant that s 22 of the NZBORA simply affirms the right "not to be arbitrarily arrested and detained".

44. In *Serdar Mohammed* (supra), the UK Supreme Court held that the conditions on which Mr Mohammed had been detained in Afghanistan had breached his rights under article 5(4) of the ECHR because the UK had not afforded him a realistic opportunity to challenge the terms of his detention.

45. As indicated above, it is possible that in interpreting and applying these rights, there *may* be a conflict of norms in that the executive's conduct may be authorised under some other source of international law, such as Security Council Resolution 1386 and subsequent iterations (see Stubbs supra).

Transfer of detainees and non-refoulement

46. Article 3 of CAT provides:

> 1. 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.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

47. Similar obligations apply under the NZBORA: see *Zaoui* (supra).

48. In cases where the relevant risk is alleged to arise generally and not in relation to a specific transferee, it is submitted the test is as stated by the English High Court in *Evans* (supra) at [244]:

> The exercise is not simply to determine whether there exists a consistent pattern of torture or serious mistreatment, but to decide on the basis of the evidence as a whole whether detainees captured by UK armed forces [here NZSAS] face a real risk of serious mistreatment if transferred into Afghan custody.

49. The High Court has considered the circumstances in which it will be reasonable for decision-makers to rely on assurances from foreign governments in *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823. It must be objectively reasonable in the circumstances to rely on them.

50. The recently declassified documents contain several documents which shed light on how the government interpreted and endeavoured to comply with this obligation: **[4 NZSAS Operations in Afghanistan – transfer of detainee to US custody]**, **[5 Individual guidance for the detention of non-ISAF personnel]** at [9]-[12], **[11 NTM NZDF Operations – Afghanistan]** at [9]-[13], **[15 NTM Transfer of Detainee to Afghan Custody]**. To the extent these documents raise issues of law, they will be addressed in supplementary written submissions.

ROE

Legal status

51. ROE do not have the status of primary or secondary legislation. They are policies like any other government policy in form (albeit unique in their subject-matter).

Justiciability

52. The promulgation of ROE is an administrative action which is reviewable by the courts. It is exercise of public power for judicial review purposes, and an executive action for the purposes of s 3 of the NZBORA. If the ROE are inconsistent with binding legal obligations, they are unlawful and can be declared invalid *pro tanto*.

53. The ROE are not immune from review because they are classified, or because of their subject-matter:

    (a) Classification system is itself a rule of policy;

    (b) Courts' approach is not to hold certain decisions are non-justiciable because of their subject-matter, but is to consider whether a reviewable error has been made out, taking into account the nature of the allegations and the relevant facts: *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 (Treaty of Waitangi context) and *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 (Crown prerogative to engage in international relations).

54. In considering lawfulness, it is noted that customary international law is part of the common law of New Zealand to the extent it has not been abrogated by statute: *Zhang v Police* [2009] NZAR 217 (HC) at [22]-[23]. In principle review of the ROE for non-compliance with customary international law applicable in NIACs is available.

Specific issues

55. It is submitted the key legal issue in relation to ROE should be whether the particular ROE in this instance were consistent with relevant rules of domestic and international law. In this regard, it is noted that general law of IHL will be addressed in hearing 3.

56. It is noted:

(a) Rules of engagement on detention by SAS (2viii, 3v, 3s-u) must be consistent with authority to detain under SC Resolution 1386, and in practice detentions must be consistent with applicable principles of international and domestic human rights law.

(b) It appears the initial 2009 ROE deemed all members of a group the name of which has been redacted can be targeted. Without knowing the name of the group it is not possible to tell whether this designation is acceptable under the law governing organised armed groups carrying out continuous combat functions.

Dated 23 May 2019

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