Operation Burnham Inquiry: Module 2

International Legal Issues Relating to Detention

Executive Summary

This presentation covers the international legal rules relating to detaining people in an armed conflict. When a foreign force is operating in the territory of another State, detention of individuals by that force must be authorised. Such authorisation may come from United Nations Security Council Resolutions to use "all necessary measures" to bring about international peace and security, or it may come from the consent of the government in whose territory the foreign force is operating. A second sort of detention is detention under domestic criminal law for the purposes of prosecuting and sentencing a person for a criminal offence. Both types of detention were used in Afghanistan. The first was where the International Security Assistance Force (ISAF) detained non-ISAF personal for security reasons. The second was arrest and detention by the Afghan national security forces, including the police. Through its partnering operations, ISAF forces partnered with Afghan security forces in order to train, mentor and empower them to enhance the rule of law in Afghanistan. This meant that ISAF forces partnering with or participating in an operation with Afghan authorities might provide support to the Afghan authorities in the arrest and detention of a person wanted on criminal charges.

International humanitarian law, or the law of armed conflict, provides rules relating to detention in armed conflict. Importantly, people in detention must be treated humanely and not be subject to torture or humiliating and degrading treatment. The prohibition against torture is also found in international human rights law, and in particular the United Nations Convention Against Torture. It is a norm of international law from which no exceptions are permitted. In addition to the absolute prohibition against torture, there is an obligation under international human rights law not to return or transfer any person to another State or authority where that person would face a real risk of torture.

The law of armed conflict sets out the grounds and procedures for a foreign force which detains a person in an international armed conflict. But it does not have the same level of detail where the conflict is a non-international armed conflict, as in Afghanistan at the time relevant for this Inquiry. States have sought to provide greater clarity through adopting guiding principles on the treatment of detainees. These provide safeguards to protect a person detained in a non-international armed conflict. States also adopt additional ways in which to assure themselves that they comply with the obligation not to transfer a person where that person would face a real risk of torture. New Zealand's approach and policy on detention in Afghanistan were consistent with this guidance.

The more difficult issues arise where a person is detained by Afghan authorities in the presence of a foreign force which is partnering with or is participating in an operation with Afghan authorities. The question is whether the international obligations of the partnering State are implicated in such a situation, and if so, to what extent.

The first point is that where a person is subject to an Afghan arrest warrant and is arrested by Afghan authorities, that person falls under the law and jurisdiction of Afghanistan. A partnering force has no legal authority or capacity to deny Afghan jurisdiction over the detained person. There can be no "transfer" of a detainee if that person has not been under the authority or jurisdiction of the partnering State in the first place.

A second question is whether a partnering State bears international responsibility if a person detained by Afghan authorities in the presence of the partnering force is later subjected to torture. In other words, can a partnering State be considered to be complicit in action by Afghan authorities and therefore internationally liable. Based on the jurisprudence of the International Court of Justice a partnering State is very unlikely to be held liable in these circumstances.

A third question is whether a partnering State bears international responsibility if it fails to take steps to prevent torture in circumstances in which it is known to be occurring. The extent of such an obligation is not settled at international law. Nevertheless, there are safeguards which a partnering State can take to assure itself that it is acting consistently with developing international law. New Zealand adopted such an approach in Afghanistan.

International legal context for New Zealand operations in Afghanistan

1. The international legal framework for the operations of the International Security Assistance Force (ISAF) in Afghanistan is provided by the international humanitarian law applicable to non-international armed conflict, and international human rights law. Because the emphasis of Module 2 is on the detention of people in Afghanistan by New Zealand forces, this presentation does not address international criminal law, nor New Zealand domestic law relating to these issues. A second caveat relates to the evolving nature of international law in these areas. For the purposes of the Inquiry what is relevant is the state of international law at the time of the events in question.

2. International humanitarian law is triggered by the existence of an armed conflict. The obligations and protections in international humanitarian law apply whenever and wherever armed conflict is taking place. In contrast, the principal base for the application of international human rights law is territorial – the obligations of a State apply within the territory of that State. However, the scope of application of the International Covenant on Civil and Political Rights (ICCPR) is set out in Article 2, paragraph 1 and applies "to all individuals within [a State's] territory and subject to its jurisdiction". The International Court of Justice has clarified that international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[1] This principle does not mean that international human rights law applies to all acts done by State agents outside the State's territory; it only applies to those acts carried out in the exercise of State jurisdiction. The circumstances in which a State may exercise jurisdiction outside its own territory are not settled at international law.

3. International humanitarian law is generally considered to be a *lex specialis* – in other words in the event of an inconsistency the law governing a specific subject matter is applied over the more general law. Nevertheless, the International Court of Justice in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall* considered that the protection offered by human rights conventions does not cease in the case of armed conflict.[2] Rather, there may be a need to take into account both branches of law: human rights law, and as a *lex specialis*, international humanitarian law.[3] Furthermore, even in an area where an armed conflict is occurring, law enforcement is governed by international human rights law.[4]

International legal framework applicable to detention

4. Within this general international legal framework, there are specific rules in each of these branches which address detention - ie the arrest or apprehension of a person and the deprivation of the

[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136, at [111]. This approach was followed by the Court in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, at [216].

[2] Unless there is a permissible derogation, such as under Article 4 of the ICCPR, which is not the case here.

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136 at [106]. The Court maintained the same approach in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, at [216].

[4] See UN Office of the High Commissioner for Human Rights (OHCHR), *Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Killing and injuring of civilians on 25 August 2008 by government security forces: Kalma IDP camp, South Darfur, Sudan*, 23 January 2009, available at: https://www.refworld.org/docid/4979bdbc2.html [accessed 18 May 2019].

person's liberty.[5] There are different notions of detention depending on the legal basis or authorisation for the detention, and whether it is based on reasons of security, or to prosecute criminal behaviour.

5. In the case of Afghanistan, UN Security Council Resolution 1386 (2001) authorised States contributing troops to ISAF to use "all necessary measures" to fulfil the ISAF mandate. Authorisation was also reflected in the 2002 Military Technical Agreement between ISAF and the Interim Administration of Afghanistan. Article IV.2 of this Agreement provided that the ISAF Commander had the authority "to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission". In turn ISAF SOP 362 set out the circumstances in which ISAF forces could detain non-ISAF personnel for security reasons, such as if detention was necessary in self-defence, or to protect ISAF forces or to accomplish the ISAF Mission.[6] National courts in the United Kingdom and Canada, and international tribunals have acknowledged that the detention of members of opposing armed groups for imperative reasons of security is authorised by relevant UN Security Council resolutions and the consent of the Afghan Government.[7]

6. The second type of legal basis for detention is the domestic law of a State where detention takes place with the aim of prosecuting and sentencing a person for a criminal offence. The Military Technical Agreement between ISAF and the Interim Afghan Administration recognises in Article III.1 that the provision of security and law and order is the responsibility of Afghanistan and that "this will include maintenance and support of a recognised Police Force operating in accordance with internationally recognised standards and Afghanistan law and with respect for internationally recognised human rights and fundamental freedoms". UN Security Council Resolution 1776 (2007) stressed the importance of increasing the effective functionality, professionalism and accountability of the Afghan security sector, and encouraged ISAF to train, mentor and empower the Afghan National Security Forces, in particular the Afghan National Police.[8] In August 2009 ISAF developed the model of "partnered operations" with the aim of rapidly expanding the capacity of the Afghan National Security Forces (ANSF) so that they could defeat the insurgents threatening the viability of Afghanistan. A central element to ISAF partnering was trust and mutual respect and providing support to Afghan authorities to advance the rule of law. A necessary component of this was respect for the sovereignty of the Afghan Government.

Detention by ISAF Forces

7. In considering security detention by ISAF forces under international humanitarian law (IHL), Common Article III of the Geneva Conventions provides that in the case of armed conflict not of an international character, persons in detention shall in all circumstances be treated humanely without adverse distinction founded on race, colour, faith, or religion etc. It then goes on to enumerate specific prohibitions including violence to life and person, in particular murder, cruel treatment and torture; and outrages upon personal dignity, in particular humiliating and degrading treatment.

[5] Definition of detention; New Zealand Rules of Engagement.
[6] See *Serdar Mohammed v Ministry of Defence* (High Court Judgment) [2014] EWHC 1369 (QB) at [35].
[7] The UK Supreme Court in *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, per Lord Sumption at [28]; *Amnesty International Canada v. Canada (Chief of the Defence Staff)* (F.C.) 2008 FC 336 at [22-26]; European Court of Human Rights in *Al-Jedda v. The United Kingdom*, Judgment, 7 July 2011 at [107-9].
[8] UNSCR 1776 (2007), OP4.

Common Article III is a minimum yardstick which sets out elementary considerations of humanity.[9] But it is otherwise silent on the conditions of detention or internment.

8. Treaty IHL therefore envisages detention in non-international armed conflict (NIAC). However, neither existing treaties nor customary law expressly provide grounds or procedures for carrying it out. In contrast, IHL applicable to international armed conflict contains detailed rules in the Third and Fourth Geneva Conventions on internment. This disparity between rules on international, as compared with non-international, armed conflict led the International Committee of the Red Cross (ICRC) to develop a significant project between 2012 and 2015 on strengthening IHL protection of persons deprived of their liberty in NIAC.[10] However the consultations during this project highlighted the different views of States on both the applicable international legal rules and how rules might be developed in future.[11]

9. The lack of explicit rules relating to detention by foreign forces operating in a non-international armed conflict has also led to the development of guidance to States on detention. This includes ISAF SOP 362 which deals with ISAF detention in Afghanistan, as well as the Copenhagen Principles.[12] These Principles were developed following several years of discussion between States (including New Zealand), international organisations and civil society. They are not legally binding, nor do they create new obligations or commitments. Rather the Principles are intended to reflect generally accepted standards.

10. The very fact that the Copenhagen Principles were developed, and that the ICRC project on strengthening international rules in this area failed to lead to the development of agreed rules, suggest that any guidance has not crystallised into customary international law.

11. Like IHL, international human rights law, contains an absolute prohibition against torture and other cruel, inhuman and degrading treatment or punishment.[13] The prohibition against torture is a peremptory norm of international law, from which no derogation is permitted.[14]

12. The application of international human rights law, both extraterritorially and in a NIAC context, is controversial and has been viewed differently by States, national courts, regional tribunals and UN

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[9] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, p. 14 at [218].

[10] See https://www.icrc.org/en/war-and-law/strengthening-ihl

[11] See Tilman Rodenhäuser, *Strengthening IHL protecting persons deprived of their liberty: Main aspects of the consultations and discussions since 2011*, International Review of the Red Cross (2016), 98 (3), 941–959 at https://www.icrc.org/en/international-review/article/strengthening-ihl-protecting-persons-deprived-their-liberty-main.

[12] http://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf

[13] Article 2(1) of United Nations Convention Against Torture requires a State Party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Article 7 of the ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

[14] ILC Articles on State Responsibility, 2001, Commentary to Article 40, para 5. *Prosecutor v Anto Furundzija*, International Criminal Tribunal for the former Yugoslavia – Trial Chamber 1988 [153-154]. Article 53 of the 1969 Vienna Convention on the Law of Treaties provides that a peremptory norm of general international law is one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

treaty bodies. The application of international human rights law in times of armed conflict is particularly challenging where there is an absence of a fully-functioning police, judicial or prison system. This adds to the difficulty of reaching international agreement on a test for the application of human rights law. In the specific context of torture in detention, the UN Committee Against Torture has interpreted the scope of the prohibition against torture as including "situations where a State party exercises, directly or indirectly, *de facto or de jure control* over persons in detention" – in other words control according to law (*de jure*), or according to fact (*de facto*). The Committee gave examples of this, such as during military occupation or peacekeeping operations and in such places as embassies, military bases, and detention facilities.[15]

13. In addition to the absolute prohibition against torture, there is an obligation under international law not to return ('*refouler*') any person to another State or authority where the person would face a real risk of torture, cruel, inhuman or degrading treatment or punishment or arbitrary deprivation of life. While originating in refugee law, the obligation of *non-refoulement* extends more broadly and is found not only in Article 3 of the Convention Against Torture but in other international and regional human rights treaties.[16]

14. The obligation of *non-refoulement* would prohibit a foreign or multinational coalition force that has detained a person from transferring that detainee to another authority where there is a substantial belief that the detainee may be tortured.[17] The crucial factor is the *transfer* of a detainee from one State to the other. This means that the principle of *non-refoulement* can apply even if the person concerned remains entirely within the territory of one State.

15. States generally adopt safeguards to protect persons detained in an armed conflict. The Copenhagen Principles set out best practice guidance which finds parallels in the basic guarantee for detainees enunciated by the UN Committee Against Torture.[18] The guidance in the Copenhagen Principles includes maintaining an official register of detainees; the need to inform detainees of the reasons for detention in a language they understand; notifying the ICRC of detentions; and establishing impartial mechanisms for inspecting and visiting places of detention and confinement.

16. There are a number of additional ways in which States assure themselves that they comply with the *non-refoulement* obligation. The Copenhagen Principles, and New Zealand's policy on detention, all include provisions on transfer which confirm the *non-refoulement* obligation. Additional safeguards which assist in complying with the *non-refoulement* obligation include obtaining formal assurances that a detainee will be treated in accordance with international human rights standards. Assurances are usually considered in combination with complementary mechanisms, such as monitoring of

[15] UN Committee Against Torture, General Comment 2 *Implementation of article 2 by state parties*, CAT/C/GC/2 24 January 2008, at [16].

[16] International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED); Inter-American Convention on the Prevention of Torture; American Convention on Human Rights; and the Charter of Fundamental Rights of the European Union.

[17] *R (Maya Evans) v. Secretary of State for Defence* [2010], EWHC 1445 (Admin) (UK) at [244].

[18] UN Committee Against Torture, General Comment 2 *Implementation of article 2 by state parties*, CAT/C/GC/2 24 January 2008, at [13].

detainees,[19] investigations into alleged incidents of mistreatment, efforts to gather and maintain knowledge about law enforcement and detention facilities, and education on recognising and preventing torture and ill-treatment. If safe transfer is not possible, the only option is to simply release the person. However damaging to the interest of security such an action would be, this reality formed part of the detention policies of ISAF States, including New Zealand.

Detention by Afghan Authorities

17. The more intricate legal issues arise with respect to persons detained by Afghan authorities in the presence of a foreign force which is partnering with or is participating in an operation with Afghan authorities and supports them in the arrest and detention of a person. Are the international obligations of a partnering force implicated when supporting detention by Afghan authorities? This question can be addressed from three perspectives:

    - Is there a test which can be applied to trigger the international responsibility of a partnering State under international human rights law where a person is detained by Afghan authorities in the presence of the partnering force?
    - In such circumstances does the State of the partnering force bear international responsibility if a person is subsequently subject to torture – this invokes the concept of complicity; and
    - The extent of any obligation to take measures to prevent torture by another State – which is usually categorised as an obligation of due diligence.

Is there a test for triggering international responsibility?

18. The international community has recognised that the primary responsibility for maintaining security and law and order is with the Afghan Government.[20] A recognised general principle of international law is that a State has sovereignty over its territory and all persons within its territory. The corollary of this is that a State may not exercise its jurisdiction outside its territory except where this is permitted under international law.[21] The source of such authorisation may include UN Security Council resolutions or the consent of the State concerned.

19. States that are authorised to operate in the territory of another State may bear international responsibility where they fail to comply with international obligations that are applicable to them and their actions. However, there is no consensus among States, national and regional courts and UN treaty bodies on a single test to bring an individual within the jurisdiction of a State that is operating within another State. One test adopted by the United Nations Human Rights Committee in 2004 is that a State Party must respect and ensure the rights laid down in the human rights Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party".[22] The effective control standard was applied by the UK House of Lords in the *Al-Jedda* case in factual circumstances where Mr Al-Jedda was in the custody of British

[19] The UK High Court in the *Evans* case reinforced the importance of monitoring detainees that had been transferred to Afghan authorities: *R (Maya Evans) v. Secretary of State for Defence* [2010], EWHC 1445 (Admin) (UK) at [299].
[20] Military Technical Agreement between ISAF and the Interim Administration of Afghanistan, 2002.
[21] PCIJ, *SS Lotus*, PCIJ Reports, Series A, No 10 (1927), 18-19.
[22] Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add. 1326 May 2004 at [10], emphasis added.

troops, and the internment took place within a detention facility in Basra City controlled exclusively by British forces.[23] Yet, in *Amnesty International v Canada* the Federal Court rejected the application of an "effective military control of the person" test and considered it not appropriate to establish the jurisdiction of the Canadian Charter of Rights and Freedoms over Canadian operations in Afghanistan.[24] The European Court of Human Rights has interpreted the jurisdiction of the European Convention on Human Rights as primarily territorial, and only exceptionally as encompassing acts undertaken abroad where there is effective control of the relevant territory, such as through military occupation.[25] It has also held that a State may be accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State, but who are under the former State's "authority and control".[26]

20. Despite these apparent differences of interpretation, it is clear that where a person is the subject of an Afghan arrest warrant, and is arrested by Afghan authorities, that person falls under the law and jurisdiction of Afghan authorities. A foreign visiting force has no legal basis on which to deny the jurisdiction of the host State over that person within its own territory. When a partnering force is present, but the person is arrested or detained by the authorities of the host State, there is no 'effective control' or other means of triggering the jurisdiction of the partnering State over the individual. The host State retains control over the individual in their arrest and apprehension. No action can be taken by the partnering State with respect to the arrested person without the consent of the host State.

21. Even assuming the application of an effective control test, in order for effective control of a partnering State to be established, the State concerned must have the capacity to act to affect the treatment of a person. As one commentator has noted, the effective control threshold should be met only when the obligations imposed could be realistically complied with.[27] To assert a right to release a person arrested by the host State would amount to an infringement of the sovereignty of the host State. There is no legal basis according to which a partnering State could act in this manner.

22. It follows that in circumstances where arrest and detention is undertaken by the host State, the *non-refoulement* obligation of a partnering State does not arise. There can be no "transfer" of a detainee if that person has not been within the effective control of the partnering State in the first place. In any case, the extent of control, and whether any international human rights obligations are thereby triggered, is not always clear cut and is heavily fact-dependent.[28]

Complicity under State responsibility at international law

23. The second question is whether the State of a partnering force bears international responsibility if a person detained by Afghan authorities is later subjected to torture. In determining whether there has been a breach of international law by a State, the principal focus is on the primary rules. The

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[23] *R (on the Application of Al-Jedda) v Secretary of State for Defence* [2008] 1 *AC* 332. This result was confirmed by the European Court of Human Rights in *Al-Jedda v United Kingdom* Judgment, 7 July 2011.
[24] *Amnesty International Canada v. Canada (Chief of the Defence Staff)* (F.C.) 2008 FC 336.
[25] *Banković and Others v. Belgium and 16 Other Contracting States*, 19 December 2001 (Grand Chamber – decision on the admissibility).
[26] *Pad and Others v Turkey*, 28 June 2007 (Third Section - decision on admissibility) at [53].
[27] Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, (2012) EJIL at [126].
[28] See for example, the European Court of Human Rights, *Jaloud v. the Netherlands*, (Grand Chamber – judgment), 20 November 2014.

rules relating to State responsibility play an ancillary role in determining whether a breach has occurred.[29] In this way, complicity connotes secondary liability which is derived from the liability of a principal party.

24. Complicity is provided for Article 16 of the International Law Commission's Articles on State Responsibility. The Articles represent a codification and progressive development of international law.[30] The International Court of Justice considers that Article 16 reflects customary international law.[31]

25. There are four elements to be examined in any consideration of the application of Article 16:

    i. The assisting state must provide aid or assistance.

    ii. There must be a sufficient nexus between the assistance and the unlawful conduct.

    iii. The assisting state must possess the requisite mental element: knowledge of the circumstances and intention to facilitate the unlawful conduct.

    iv. The act committed by the recipient state must also be wrongful if committed by the assisting state.

26. State responsibility under Article 16 requires a relatively close relationship between the support that is furnished and the unlawful conduct thereby assisted, and the supporting State needs to be aware of the circumstances of the internationally wrongful act. The text of Article 16 and the way in which it has been interpreted by the International Court of Justice suggests that current international law would adopt a narrow interpretation of Article 16 as requiring actual knowledge, and perhaps constructive knowledge on the part of the State or those attributable to it.[32]

27. There is some support for more expansive interpretations of Article 16, such as turning a "blind eye" to widespread torture in a country. The UK Joint Parliamentary Human Rights Committee considered that responsibility for complicity could be engaged in such circumstances. However, the evidence of Professor Philippe Sands, on which the Committee's conclusion was based, was that this was "a matter of interpretation".[33] Furthermore, the UK Court of Appeal in *Ahmed & Anor v R* referred to the Joint Parliamentary Committee's report but indicated that it was not based on either treaty or customary law, nor had it gained the necessary international acceptance among States to have achieved the status of binding law.[34]

Due diligence obligation to take steps to prevent and protect people from torture

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[29] ILC Articles on State Responsibility, 2001, Commentary on Chapter III, para 2.
[30] ILC Articles on State Responsibility, 2001, General Commentary, para 1.
[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43, at [420].
[32] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43 at [421]. The UN Committee Against Torture regards constructive knowledge (having reasonable grounds to believe that acts of torture or ill-treatment are being committed) as implicating State responsibility – General Comment No. 2: *Implementation of article 2 by States parties*, at [18].
[33] In his evidence to the Joint Committee on Human Rights, Professor Sands referred to complicity "which, on some interpretations, would include silence or turning a blind eye": Joint Committee on Human Rights Report, Ev 60.
[34] *Ahmed & Anor v The Queen* [2011] EWCA Crim 184 (25 February 2011) at [48].

28. In addition to complicity which implies a positive action,[35] the question arises as to whether State responsibility can arise through *omission*: failure to take steps to prevent torture in circumstances in which it is known to be occurring. The International Court of Justice applied such an approach in the *Bosnian Genocide* case, but expressly noted that it was not purporting to develop general jurisprudence relating to a duty to prevent the commission by another State of acts contrary to international law.[36] The obligation to protect against torture has, however, been considered by the European Court of Human Rights in the 2012 *El Masri* case to include the need to take effective measures to safeguard against the risk of a breach of international law.[37] Nevertheless, the extent of a due diligence obligation to prevent torture is not settled at international law.

29. While this is still a developing area of international law, it is useful to consider the type of safeguards that a partnering force could adopt to ensure that it is acting consistently with developing international law. The *Bosnian Genocide* case is illustrative as in that case the International Court of Justice looked at various parameters to help determine whether the due diligence obligation relating to genocide had been discharged, most importantly the capacity to influence the other State, such as through links, including political links, with those committing the acts.[38] The UN Committee Against Torture has highlighted the need to investigate and report incidents or torture where these have been observed by a State during the conduct of international operations.[39] It may also be incumbent on a partnering State to provide training or other assistance to deter torture by host authorities, and to gather information to ensure that it is informed of the detention situation in a host State, and of particular detentions by the host State which take place in the presence of a partnering State. The ultimate response, if a partnering State becomes aware of a practice of torturing prisoners, is to withdraw or restrict its cooperation with that State.

[35] *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].
[36] Ibid, at [429].
[37] *El-Masri v. The Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, Judgment of 13 December 2012 at [193].
[38] *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 [430].
[39] Committee Against Torture, *Concluding Observations: Sweden*, CAT/C/SWE/CO/5 at [19].