

10

Operation Yamaha: detention policy and the law

Chapter 10

- [1] As discussed in chapter 3, Qari Miraj played a leading role in the ambush that resulted in the death of Lieutenant Tim O'Donnell. He was placed on the Joint Prioritised Effects List (JPEL) and was captured in a partnered operation involving Task Force 81 (TF81) and Afghan personnel on 16 January 2011 (Operation Yamaha). *Hit & Run* alleges that after he was captured, Miraj was assaulted by TF81 personnel as he was waiting in the back of a vehicle to be driven to a detention facility operated by the Afghan National Directorate of Security (NDS)¹ in Kabul.²
- [2] *Hit & Run* further alleges that while in detention at the NDS facility, Miraj was tortured and made a confession. It is alleged that New Zealand ought to have been aware of the practice of torture of those in NDS custody, and that due to the prohibition against torture, New Zealand should not have been involved with handing him over to a facility where he was tortured.³ The book alleges that the New Zealand Special Air Service (NZSAS) benefitted from Miraj's confession.⁴
- [3] In light of these allegations, cl 7.8 of the Inquiry's Terms of Reference requires us to examine:⁵
- Whether the NZDF's transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security in Kabul in January 2011 was proper, given (amongst other matters) the June 2010 decision in *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445.
- [4] As with other provisions in cl 7, cl 7.8 must be read in the context of cls 5 and 6 of the Terms of Reference. Clause 5 provides that the matter of public importance which the Inquiry is directed to consider is "the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters". Clause 6 provides that the Inquiry will examine the circumstances of Miraj's transfer and/or transportation to the NDS.
- [5] The direction in cl 7.8 to consider whether Miraj's treatment was "proper" in light of (among other matters) the *Evans* decision⁶ means that the Inquiry must consider the merits of New Zealand's policy relating to detention as implemented by the New Zealand Defence Force (NZDF).⁷ In this chapter, we will first describe New Zealand's detention policy at the relevant time. We will then put the policy in its legal context, to explain why it matters. Finally, we will discuss the government's reaction to the decision in *Evans* to see what, if any, impact it had on the policy prior to Operation Yamaha. For ease of reference, there is a timeline at the conclusion of chapter 11.

1 The NDS was Afghanistan's domestic and external intelligence agency. It conducted intelligence gathering, surveillance, arrests/detentions and prosecutions of those suspected of crimes against national security.

2 Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 84–85.

3 At 87–89.

4 At 89.

5 *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018).

6 *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445. See discussion from paragraph [72] below.

7 The Crown argued for a more limited interpretation of the word "proper": see Dr Penelope Ridings and Ian Auld *Memorandum of Counsel for the Crown Agencies in response to Public Hearing Module 2 Submission to Inquiry* (13 June 2019) at [13]. We do not accept that the limited interpretation for which the Crown argued is what the Terms of Reference contemplated.

- [6] In Chapter 11 we will describe what happened on Operation Yamaha—its planning and execution. We will then briefly describe relevant developments in relation to the detention policy after Operation Yamaha, before concluding with our assessment in light of the facts of Operation Yamaha.

New Zealand’s detention policy

- [7] To place New Zealand’s policy on detention in its proper context, it is necessary to recall three points. First, following the collapse of the Taliban Government in late 2001, Afghanistan was a dysfunctional state. Torture and mistreatment were widespread in state facilities. An important element of the United Nations’ response, especially through the International Security and Assistance Force (ISAF) and the United Nations Assistance Mission in Afghanistan (UNAMA), was to recognise that the responsibility for providing security and law and order throughout Afghanistan rested with the Afghan people. In practice, this was done by encouraging the development of Afghan institutions and agencies in a way that enhanced respect for the rule of law—including human rights norms in particular.
- [8] Obviously, change would be slow and many setbacks were likely. In 2011, UNAMA reported that of those detainees who said they had been tortured by the NDS, nearly all stated that they were abused during interrogations to obtain confessions, reflecting the fact that the Afghan criminal justice system was confession-based.⁸ For a number of years, other international experts, United Nations rapporteurs and international Non-Governmental Organisations had made similar observations about the risks associated with the confession-based criminal justice system, the treatment of detainees in Afghan facilities and the lack of effective oversight or investigations.⁹ In 2007, for example, the United Nations High Commissioner for Human Rights noted that there were frequent reports of torture and ill-treatment by the NDS.¹⁰ When the Security Council renewed ISAF’s mandate in late 2007 by way of Resolution 1776, reconstruction and reform of the prison sector to improve respect for human rights and the rule of law was added as a key part of the mandate.¹¹ In January 2011, the United Nations High Commissioner noted concern about ISAF states’ reliance on the NDS as the “*de facto* recipient” of detainees, given (among other things) reports of forced confessions.¹²

⁸ United Nations Assistance Mission in Afghanistan (UNAMA) *Treatment of Conflict-Related Detainees in Afghan Custody* (October 2011) at 2.

⁹ See, for example, reports by M Cherif Bassiouni (*Report of Cherif Bassiouni, independent expert on the situation of human rights in Afghanistan* UN Doc E/CN.4/2005/122 (11 March 2005)); Amnesty International (*Afghanistan: Detainees transferred to torture: ISAF complicity?* (13 November 2007)); the UN High Commissioner for Human Rights (*Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the annex to human rights council resolution 5/1 – Afghanistan* UN Doc A/HRC/WG.6/5/AFG/2 (9 March 2009)); Afghanistan Independent Human Rights Commission (*The Situation of Detention Centres and Prisons in Afghanistan* (2009) and *Treatment of Conflict-Related Detainees in Afghan Custody* (2011)); and the Committee against Torture (*List of issues prior to the submission of the 2nd periodic report of Afghanistan* UN Doc CAT/C/AFG/Q/2 (21 July 2010)). This is not an exhaustive account of all reports or information on this issue.

¹⁰ *Report of the High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights* UN Doc A/HRC/4/98 (5 March 2007) at [56] and [66].

¹¹ Heath Fisher “Overview of Engagement with Partners in Afghanistan to Detention Issues” (Public Hearing Module 2, 23 May 2019) at [8].

¹² *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights* UN Doc A/HRC/16/67 (19 January 2011) at [43] and [46].

- [9] As the Crown acknowledged in submissions during Public Hearing Module 2,¹³ New Zealand was well aware in the mid-2000s that there were serious concerns about the treatment of individuals in Afghan detention facilities from reports such as those just referred to. Like other countries contributing forces to ISAF, the New Zealand Government appreciated that its forces would be operating in an environment where torture and mistreatment of detainees continued to occur, albeit perhaps with less frequency over time as conditions changed.
- [10] Second, as we noted in chapter 2, both the Security Council and ISAF had been encouraging countries contributing forces to ISAF to partner with local Afghan forces for some time.¹⁴ When the Government was asked to deploy the NZSAS to Afghanistan in 2009, it was to take over the role of Norwegian forces in mentoring and partnering with a specialist police unit, the Afghan Crisis Response Unit (CRU). Operating in partnership with Afghan personnel was an integral part of the 2009 NZSAS deployment.
- [11] Third, when Cabinet authorised the deployment in July 2009, it distinguished between two categories of detainee. This reflected the position ISAF had adopted in its standard operating procedures some years earlier.¹⁵ The first category comprised people captured by NZSAS personnel, and the second category comprised people captured by Afghan forces in the presence of NZSAS or other ISAF personnel—as generally occurred during operations conducted jointly by the NZSAS and the CRU (partnered operations).¹⁶ The Government saw New Zealand’s responsibilities to each group as being different, as we explain below.
- [12] These elements were confirmed in Operational Directive 001, issued by the TF81¹⁷ Senior National Officer in September 2009.¹⁸ It noted that NZDF had been directed to provide a Special Operations taskforce for a period of 12 to 18 months, which would enhance the reputation of New Zealand in carrying out its operations.¹⁹ Partnering with local Afghan forces to provide security to the Afghan people was noted as the area in which TF81 would have the greatest effect.²⁰ TF81’s role was to plan and assist in the conduct of operations, including by providing the information necessary for arrest warrants to be issued. The Directive drew a distinction between detention by the CRU and the detention of individuals by TF81 personnel.²¹

Individuals captured by NZDF forces

- [13] If an individual was captured by TF81 personnel operating on their own, or with troops from another ISAF state where TF81 was the lead force, a range of protective provisions would apply

¹³ Fisher, above n 11.

¹⁴ See, for example, SC Res 1776 (2007), which encouraged ISAF member forces “to train, mentor and empower the Afghan National Security Forces, in particular the Afghan National Police” and stressed the importance of “increasing the effective functionality, professionalism and accountability of the Afghan security sector”.

¹⁵ ISAF SOP 362, promulgated in 2006.

¹⁶ 10 August 2009 Cabinet Decision Minute – Afghanistan 2009: Deployment of NZSAS (10 August 2009) (Inquiry doc 01/06); 3 July 2009 Cabinet Paper Cover Sheet – Afghanistan: 2009 Deployment of the NZSAS (Operation Watea) (3 July 2009) (Inquiry doc 01/03), annex 3.

¹⁷ The NZSAS contingent in Afghanistan on Operation Watea was initially designated Task Force 81 (TF81). This task force designator changed on 24 March 2011 (see Post Operation Report SNO Op Watea (3 May 2011) (Inquiry doc 11/14) at [2]). After that date, it was known as Task Force 954. To avoid confusion, we use the term “TF81” throughout since that was the designator for most of the period with which we are concerned.

¹⁸ TF81 (Rotation1) Operational directive 001 (September 2009) (Inquiry doc 05/09).

¹⁹ At [1], referring to CDF Operational Directive 21-2009 (Inquiry doc 05/03).

²⁰ At [9].

²¹ See, for example, Inquiry doc 05/09, above n 18, at 6, 8, 20, 22, 24–26 and enclosure 3 at [1].

to the transfer of that person to Afghan custody. New Zealand accepted that its international obligations in relation to the torture and mistreatment of detainees applied and that it was obliged to take steps to fulfil these obligations, including by making arrangements for monitoring a detainee's treatment in custody.²²

- [14] We were advised that in 2006 New Zealand obtained verbal assurances from senior officials in the Afghan Government that detainees transferred to Afghan custody by New Zealand forces would be treated humanely, in accordance with International Humanitarian Law and International Human Rights Law.²³ The assurances also addressed the issue of the death penalty. Following the North Atlantic Treaty Organization (NATO)'s urging, they were finalised in a written arrangement in 2009, which was signed by NZDF and the Afghanistan Ministry of Foreign Affairs.²⁴ The annex to the arrangement contains a complementary Military Technical Arrangement between the Government of New Zealand and the Government of the Islamic Republic of Afghanistan.
- [15] The Arrangement sets out the principles and procedures to govern transfers in Afghanistan from NZDF to the Afghan authorities. Both sides agreed to observe the applicable principles of international law in the transfer and treatment of such persons.²⁵ As to detention visits, there was provision for representatives from the Afghanistan Independent Human Rights Commission, the International Committee of the Red Cross (ICRC) and NZDF to have full access to persons detained by NZDF and transferred to Afghan authorities.²⁶ NZDF undertook to notify the other agencies where a person had been transferred. The Afghan authorities accepted record-keeping and notification obligations.²⁷ The Arrangement between Afghanistan and New Zealand, as well as internal NZDF Directives, operated alongside ISAF's standard operating procedures on the handling of detainees.
- [16] Under the detention guidance noted by Cabinet, persons detained by NZDF personnel were not to be transferred or handed over to Afghan authorities or to other ISAF coalition forces without the prior approval of the Chief of Defence Force or the Commander Joint Forces New Zealand.²⁸

Individuals captured on partnered operations

- [17] If an individual was captured during a partnered operation involving TF81 and Afghan forces, the approach was that Afghan personnel would arrest the person, generally by executing an Afghan

22 We note that some states consider the existence of effective assurances and monitoring programmes are one factor they may take into account when assessing whether a person faces a real risk of torture. The Committee against Torture considers that assurances and monitoring arrangements do not, by themselves, relieve states of their *non-refoulement* obligation: see Committee against Torture *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* CAT/C/GBR/CO/5 (24 June 2013) at [18]–[19] and Committee against Torture *General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* CAT/C/GC/4 (4 September 2018) at [20].

23 Fisher, above n 11, at [15].

24 Arrangement between Afghanistan MFA and NZDF concerning the Transfer of Persons between the NZDF and Afghan Authorities (12 August 2009) (Inquiry doc 05/32). "Arrangements" are, essentially, agreed between two or more countries and are sometimes described as "less than treaty level instruments". They are not strictly legally enforceable, although they do set out the moral and political commitments and practical expectations of each side.

25 Inquiry doc 05/32, above n 24, at [2].

26 At [4].

27 For discussion of the equivalent Australia/Afghanistan arrangement, see Paul A Cronin "Australian Detention Operations in Afghanistan: Practices and Challenges" in Gregory Rose and Bruce Oswald *Detention of Non-State Actors Engaged in Hostilities: The Future Law* (Brill Nijhoff, Leiden, 2016).

28 Inquiry doc 01/03, above n 16, annex 3 at [9].

arrest warrant, unless they were not reasonably available do so.²⁹ The operation was considered an “Afghan-led” law enforcement operation in which the arrested person was detained by Afghan officials. Accordingly, the provisions on transfer and monitoring of detainees that applied where NZDF personnel made a detention in a non-partnered operation did not apply. This was the case even if NZDF had (with the exception of signing and executing the arrest warrant) been largely responsible (in a practical sense) for the entire operation—initiating it, planning it and carrying it out, even to the point of drawing up the warrant.

- [18] As is reflected in the Crown Agencies’ submissions,³⁰ New Zealand’s policy was that its obligation not to hand over detainees to another state if there were substantial grounds to believe the detainees faced a real risk of torture (*non-refoulement* obligation)³¹ did not apply to individuals arrested by Afghan officials on partnered operations. This was because, unlike those detained by TF81 personnel, they never came within New Zealand’s “jurisdiction”. Since these individuals were never in New Zealand’s jurisdiction, TF81 personnel did not “transfer” them into Afghanistan’s jurisdiction—they were always within it. As a consequence, New Zealand had no legal power to intervene and any attempt to do so would have been a breach of Afghanistan’s sovereignty. However, the Crown Agencies did accept that New Zealand was subject to an obligation to ensure that any assistance provided to Afghan authorities did not amount to aiding or assisting any intentionally wrongful act.³²
- [19] The practical effect of New Zealand’s detention policy was significant. Most of the operations in which TF81 personnel were involved during Operation Wātea were partnered operations during which Afghan authorities made arrests. So the effect of the New Zealand policy was that New Zealand did not accept any responsibility for the treatment in detention of most of the people TF81 personnel were involved in capturing. We were told that during Operation Wātea TF81 detained only one person itself (compared with the nearly 200 persons captured on partnered operations). It is worth noting that, up until April 2010, ISAF standard operating procedures for detainee handling did not apply to people detained on partnered operations. However, it was recognised that detention was a national issue, so that states could lodge national caveats, or pursue bilateral arrangements,³³ to ensure compliance with their own international legal obligations as they saw them or with national policy positions. The ISAF procedures also did not restrict states, such as New Zealand, from adopting a policy that would afford the same (or similar) protections to people detained during partnered operations as were applied to those detained by a state’s forces acting on their own. We return to this in chapter 11.
- [20] Before we move on to outline the significance of the detention policy in terms of the applicable law, we should briefly address the topic of mentoring.

Mentoring

- [21] The concept of “mentoring” is a broad one, covering a wide range of possible approaches. The ultimate objective of ISAF forces mentoring local police or army units in Afghanistan was to

²⁹ Inquiry doc 01/03, above n 16, annex 3 at [1].

³⁰ Paul Rishworth QC and Ian Auld *Memorandum of Counsel for Crown Agencies* Submission to Inquiry (16 August 2019) at [11]–[13].

³¹ We discuss *non-refoulement* obligations at paragraphs [36]–[37].

³² Rishworth and Auld *Memorandum*, above n 30, at [15].

³³ NTM NZDF Operations – Afghanistan (31 August 2011) (Inquiry doc 05/11) at [9]. Bilateral arrangements could, for example, extend certain protections or processes (including monitoring or other mechanisms) to detainees captured in partnered operations.

develop their capability by raising their level of knowledge, developing their technical and operational skills and experience and enhancing their appreciation of procedural norms and human rights considerations. Obviously, for any mentoring to be effective, the CRU had to have access to the right type of equipment, which was by no means a given. On Operation Burnham, for example, the CRU members did not have night vision goggles.

[22] The nature and intensity of the mentoring required by an ISAF partner depended on the characteristics of the group being mentored and the nature of the particular operation being undertaken:

- (a) Mentored groups might comprise people who were essentially raw recruits (many illiterate) with little in the way of adequate equipment or relevant skills and experience (even basic skills such as map reading), through to groups at the other end of the spectrum who were reasonably well equipped and had relevant skills and experience which they were seeking to improve.
- (b) Operations might differ markedly in terms of focus and complexity. Active insurgent leaders or fighters were of interest from an armed conflict perspective and from a domestic law enforcement perspective. Even though operations to capture them were likely to serve both armed conflict and law enforcement objectives, some operations might be essentially routine law enforcement operations while other operations with more of an armed conflict focus were likely to be significantly more complex and challenging.

[23] Because the nature and style of the mentoring undertaken had to respond to the needs of the particular group in the particular operational context, many variations in approach were possible. At one end of the spectrum, local forces could be taken on an operation but given no or very little organisational or operational responsibility—essentially they would be observers. At the other end of the spectrum, the local forces might take the principal responsibility for organising and undertaking an operation, but with some guidance from their mentors along the way—they would be primary actors, with the mentors observing and providing advice/oversight.

[24] In a minute in May 2011, the Senior National Officer summarised the capability that the CRU had reached in the following way:³⁴

CRU is now capable of conducting unilateral operations of low complexity. Recent acquisitions of [redacted], Russian AK47s and [redacted] have enabled a recent capability leap. Since then CRU has demonstrated a consistent ability to move [redacted] to the target, [redacted] cordon, clear the target and conduct exploitation. While there is still room for refinement, this demonstrates a pleasing progress towards the full spectrum of unit functions. The focus will now reorientate to developing CRU capability on complex unilateral operations.

[25] Later in the minute, the Senior National Officer commented on the impact of a reduction in the size of TF81 on its mentoring role with the CRU. Having noted that the reduction presented a number of challenges and opportunities, he said:³⁵

The emphasis of the CRU relationship will now move away from partnering/mentoring toward a true mentoring/observing relationship. This will force the CRU to take more responsibility for its day to day function and the conduct of its operations. Such an approach will have its challenges and not be without setbacks.

³⁴ Inquiry doc 11/14, above n 17, at [15].

³⁵ At [26].

In concluding his report, the Senior National Officer said that “[t]he period covered by this report has seen clear capability leaps by CRU towards an ability to conduct complex unilateral operations and respond effectively to the insurgent threats within Afghanistan”.³⁶

- [26] Two points emerge from this. First, a distinction is drawn between “partnering/mentoring” and “true mentoring/observing”, which reflects what we have said about the breadth of the notion of “mentoring”. The second is that even after approximately 18 months of intense mentoring by TF81 personnel, and despite the progress they had made, the CRU was only capable of conducting operations of “low complexity” on its own, although their capability was developing. This point was also confirmed in other evidence considered by the Inquiry.
- [27] Apart from issues relating to the equipment, knowledge, skills and experience of Afghan partner forces, two further issues in relation to partnered operations were significant:
- (a) As was generally the case with ISAF’s Special Operations Forces, most of TF81’s work was intelligence-driven. Much, probably most, of that intelligence could not be shared with Afghan partner forces for security reasons. Over time, TF81 personnel attempted to get around this difficulty by using the intelligence they had acquired to develop legally admissible evidence that could be used within the Afghan criminal justice system—as a basis for arrest warrants, prosecutions and so on.
 - (b) TF81 personnel tended to provide information about impending operations to the CRU or other relevant Afghan partner forces at a late stage to avoid the possibility of leaks, such as the particular target being tipped off. Allegiances within Afghan government forces were not always (or only) to the central government.
- [28] The reality that partnered operations could involve very different arrangements, depending on the characteristics of the local partner and the nature of the particular operation, raises the important question of whether the New Zealand policy in relation to detention on partnered operations took sufficient account of the particular role of the partner force in the particular operation. We will address this in greater detail in chapter 11.

The legal setting

- [29] We turn now to the second of the topics identified in paragraph [5]; namely, the significance of the detention policy implemented by NZDF—why it matters in terms of New Zealand’s international obligations in relation to the torture or mistreatment of detainees. We give a brief overview of the law relating to torture and mistreatment of detainees. Most of what we describe is not disputed. Two issues are contentious, however. They are:
- (a) Whether and, if so, when, a person detained on a partnered operation falls within New Zealand’s “jurisdiction” for the purpose of New Zealand’s obligations in relation to torture.
 - (b) On what basis one state can be held complicit in another state’s breach of its obligations in relation to torture.

³⁶ Inquiry doc 11/14, above n 17, at [32].

- [30] Complex legal and operational issues arise when one state delivers people, or assists in the delivery of people, to agencies or places where detainees may be tortured and those places are located in, or controlled by, another state. The prohibition against torture is one of the most important rules in the international legal order and it gives rise to a number of fundamental obligations. A problem sometimes encountered in these circumstances is that torture may occur despite national laws and government efforts to eradicate the practice—that is, when a state is genuinely committed to reform but lacks sufficient practical control over its agencies at the local level.³⁷ This creates difficult challenges, to which other states and international actors must be alert when engaging with, or assisting, a state where torture is known to occur.
- [31] The law of torture contains a number of different elements, derives from various legal sources and has spawned a vast literature. We will not attempt to traverse the law in detail, but rather we set out below a brief outline of its key features and what it requires in practical terms. To do this, we address three essential issues:
- (a) the sources of law—where it is found and how it is described in key instruments and relevant guidance;
 - (b) the content and status of the law—what it requires states to do, and the importance of the rules internationally;
 - (c) the application and consequences of the law—to whom it applies, where, and what happens when breaches occur.

Sources, content and status of the law on torture

- [32] The law obliges states to prevent and respond to torture, as well as to cruel, inhuman or degrading treatment or punishment. This law is found at local, regional and international levels, and appears in criminal, humanitarian and human rights law treaties. In addition to treaties, the law on torture can be found in customary international law as well as general international law. The expectations of states with respect to torture and its prevention are extensive. The prohibition of torture sits in the top level of the hierarchy of international legal rules. It reflects the global conscience and has the status of international constitutional law.³⁸

Treaties

- [33] In terms of treaties, the most well-known subject-specific treaty is the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (the Convention

³⁷ The Committee against Torture, for example, has recognised the responsibility of states in instances of abuse in privately operated facilities, particularly where a state has failed to exercise due diligence to prevent torture by those actors: conveniently summarised in Rachel Murray and others *The Optional Protocol to the Convention against Torture* (Oxford University Press, Oxford, 2011) at 71.

³⁸ We use the term international constitutional law in the same sense as it is used by Thomas Kleinlein and Anne Peters, “International Constitutional Law” (12 May 2017) Oxford Bibliographies <www.oxfordbibliographies.com>; “The notion ‘international constitutional law’ refers to norms of public international law with a constitutional character or function. Thus understood, international constitutional law can be divided into three broad subcategories: (1) fundamental norms which serve a constitutional function for the international legal system at large, (2) norms which serve as constitutions of international organizations or regimes, and (3) norms which have taken over or reinforce constitutional functions of domestic law.” See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 at [161] (*Bosnian Genocide* case); and *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, at [68] and [99].

against Torture).³⁹ The Convention against Torture is a global convention, the provisions of which demonstrate the repugnance with which the international community views torture. New Zealand and Afghanistan are both parties to the Convention and are bound by its terms.

- [34] The Convention prohibits torture and requires states to criminalise torture in their domestic laws. The definition prohibits the following conduct:⁴⁰

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, where such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The definition is broad: it is not limited to physical suffering; it covers torture committed for a variety of purposes; and captures the conduct not only of those who commit torture directly, but also those who consent to it or who acquiesce in it (that is, who turn a blind eye or otherwise fail to act).

- [35] Acts of torture, as defined in the Convention, must be criminalised in domestic law.⁴¹ So, too, must attempts to commit torture and complicity.⁴² Sentences or penalties for commission, attempt and complicity must reflect the gravity of the offences.⁴³ If there are reasonable grounds to believe torture or ill-treatment has occurred, states must investigate promptly and impartially.⁴⁴ The obligation to investigate does not depend on a complaint being made.⁴⁵ The prohibition on torture is absolute: torture cannot be justified by any exceptional circumstances (war, threat of war, internal political instability or public emergencies). States must also take a range of effective legislative, administrative, judicial and other measures to prevent torture in their jurisdiction.
- [36] In addition to the prohibition on torture and other obligations, a keystone of the Convention—which is relevant to a number of modern cross-border and international situations—is the obligation of *non-refoulement*. A state must not expel, extradite, or return (*refouler*) a person to another state if there are substantial grounds to believe that the person returned would be subject to torture.⁴⁶ The rule is described in slightly different ways in different treaties, but it is ultimately focused on returns that take place “in any manner whatsoever”.⁴⁷ At its heart, the rule is about not exposing an individual to a situation of risk. The duty is, therefore, primarily concerned with

³⁹ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987). New Zealand signed the Convention on 14 January 1986 and ratified it on 10 December 1989. Afghanistan signed on 4 February 1985 and ratified on 1 April 1987.

⁴⁰ Art 1.

⁴¹ Art 4(1).

⁴² Art 4(1).

⁴³ Art 4(2).

⁴⁴ Arts 12 and 16.

⁴⁵ *Blanco Abad v Spain* (1998) CAT Communication No 59/1996 (14 May 1998) at [8.6]; *Ltaief v Tunisia* (2003) CAT Communication No 189/2001 (14 November 2003) at [10.6]. Article 13 of the Convention provides that states must establish a process so people who wish to make complaints are able to do so.

⁴⁶ Convention against Torture, above n 39, art 3(1).

⁴⁷ See the Convention relating to the Status of Refugees 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954), art 33(1).

the effects of state conduct rather than its form.⁴⁸ When assessing that risk, a state can take into account, among other things, whether “gross, flagrant or mass violations of human rights” occur in the receiving country.⁴⁹

[37] We highlight four points about the *non-refoulement* obligation:

- (a) First, the “gross, flagrant, or mass violations” consideration applies to violations of human rights, not only to torture. To assess the torture risk, a sending state can and should look at a country’s overall human rights record as well as the character, gravity and scale of detainee mistreatment in that country. In evaluating these factors, it is important to look not only at the number of allegations made or proven. It is well known that torture is often under-reported and, in some cases, evidence may be hard to obtain or verify. Qualitative features (including patterns of behaviour by officials or common themes in complaints) may be more useful than numbers alone.
- (b) Second, the threshold of “substantial grounds to believe” may be reached even when torture is not officially sanctioned or part of a policy—torture may occur as a result of, or despite, state policies. Genuine public or private statements about commitment to change should be welcomed, as should steps taken towards reform. It may be the case, however, that despite best efforts, torture continues to be a problem. When assessing risk in these contexts, an appropriate degree of caution is necessary, especially when allegations may be made or where the issues to be addressed will take time to resolve.
- (c) Third, while the risk of torture must be more than a mere possibility (the risk must be “real”), it does not need to be shown to be probable or certain. The rule is preventive and, where doubt exists, a state should err on the side of caution. A preventive approach can cause resource, relationship or other challenges for states. Despite these challenges, the significance of torture and the imperative nature of its prevention calls for a correspondingly high level of effort and effective measures.
- (d) Fourth, and importantly, as far as we are aware it has not been suggested that individuals need to be in a state’s legal custody for the obligation to be triggered. As scholars in this field explain, treaty and UN Charter bodies have not generally focused on the type of transfer: if a person is in a state’s legal or physical custody, *non-refoulement* can apply.⁵⁰ Depending on the circumstances, relatively brief periods of custody, legal or physical, may be capable of engaging a state’s legal obligations. The absence of an exhaustive list of transfer scenarios is understandable given *non-refoulement*’s preventive nature and the fact that transfers occur in a wide range of settings.⁵¹ Some transfers are complex and may involve a number of actors working together. As written, *non-refoulement* under the Convention against Torture

48 James C Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) at 318 (as to *refoulement* in refugee law) and (on *refoulement* more widely under customary international law) Sir Elihu Lauterpacht and Daniel Bethlehem “The scope and content of the principle of *non-refoulement*: Opinion” in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003 (2005 reprint)) at 159.

49 Convention against Torture, above n 39, art 3(2).

50 Nigel Rodley and Matt Pollard *The Treatment of Prisoners under International Law* (3rd ed, Oxford University Press, Oxford, 2009) at 172–173.

51 Manfred Nowak and Elizabeth McArthur *The United Nations Convention against Torture: A Commentary* (2008) at 195–196.

covers “*all measures* by which a person is physically transferred to another state”,⁵² and United Nations organs, such as the General Assembly, have referred to the obligation not to expel, return (*refouler*), extradite, or in any other way transfer a person.⁵³ As seen above, New Zealand’s detention policy accepted that New Zealand’s *non-refoulement* obligations applied when NZDF personnel captured a suspected insurgent in Afghanistan and wished to hand that person over to Afghan or other authorities, but not when NZDF personnel were involved in a partnered operation during which Afghan authorities made an arrest.

- [38] The core obligations (that is, the prohibition on committing torture, the *non-refoulement* obligation and the obligation to prevent) do not exist in neatly defined “silos”; they are interdependent and mutually reinforcing. As well as deriving from multiple sources of law, the content of the obligations can overlap. Returning or transferring a person despite a real risk of torture, for example, is at once a breach of *non-refoulement*, may amount to co-commission of torture or complicity in torture, and clearly falls short of the obligation to take all necessary measures to prevent. The connection between these three obligations is readily apparent in law enforcement, military and counter-terrorism settings, and has been explained by the United Nations Special Rapporteur on Torture, as well as other international experts.⁵⁴ We return to them when we assess the New Zealand approach.
- [39] In 2004, the United Nations adopted the Optional Protocol to the Convention against Torture (OPCAT). It requires member states to establish a system of regular, independent inspection of detention facilities at the local level, as well as permitting in-country visits by the United Nations. New Zealand has been a party to this treaty since 2007 and has developed a detailed framework for monitoring the treatment of people in detention.⁵⁵ Afghanistan became a party in 2018.
- [40] The prohibition against torture is also found in several other international human rights treaties (such as arts 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR) and equivalent provisions in the Universal Declaration of Human Rights 1948). Regional treaties such as the European Convention on Human Rights mirror this international law in large part and a rich body of case law has developed over the years in relation to the prohibition of torture and related obligations.⁵⁶ Non-treaty documents developed by the United Nations, states and sometimes international organisations (“soft law” instruments) are also relevant.⁵⁷ Although not binding, they often contain important standards and practical guidance about how states can or should fulfil their international obligations and how torture can be prevented in practice.

52 J Herman Burgers and Hans Danelius *The UN Convention against Torture—A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhof, Dordrecht, Boston, London, 1988) at 126 (emphasis added); and Lauterpacht and Bethlehem (above n 48, at 163) on the scope of *non-refoulement* under customary international law and its focus on the effect (compared to the form) of conduct.

53 See, for example, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 74/143 at [7]; and Rodley and Pollard, above n 50, at 173 (referring also to the UN Human Rights Council).

54 See, for example, Report of the Special Rapporteur on torture UN Doc A/HRC/37/50 (26 February 2018) at [39]; and *The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture* UN Doc CAT/OP/12/6 (30 December 2010) at [1]–[3].

55 Natalie Pierce “Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience” in Naylor, Debeljak, and Mackay (eds) *Human Rights in Closed Environments* (Federation Press, Annandale, NSW, 2014).

56 At 168; Rodley and Pollard, above n 50, at chapter 4.

57 These include the Standard Minimum Rules for the Treatment of Prisoners (1957, 1977 and 2016); the Code of Conduct for Law Enforcement Officials (1979); and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2001).

- [41] Additionally, International Humanitarian Law prohibits torture and requires preventive steps to be taken. For a non-international armed conflict of the type in which New Zealand was engaged in Afghanistan, Common Article 3 and Additional Protocol II to the Geneva Conventions are relevant and applied. Common Article 3 expressly prohibits violence to life and person (including murder, mutilation, cruel treatment and torture) and outrages upon personal dignity, in particular humiliating and degrading treatment. Common Article 3 also requires “minimum standards for detention”.
- [42] In his expert evidence to the Inquiry, Professor Emeritus Sir Kenneth Keith QC emphasised these provisions. He said that Common Article 1 “requires the State parties in all circumstances not only to respect the Conventions but also to ensure respect for them”.⁵⁸ He went on to say:⁵⁹

[The obligations undertaken in the Conventions] are unilateral obligations owed by each and every State party to all others or really to the people who are to be protected; the principle of humanity is at stake. The ICRC Commentary to the article states two propositions, among others, relating to the obligation that interests protected by the conventions are of such fundamental importance to the human person that every State party has a legal interest in their observance, wherever a conflict may take place and wherever its victims may be; and that they do everything reasonably within their power to ensure that the provisions are respected universally – by other States and non-state parties.

Relevantly, the duty to “ensure respect” applies to the prohibition against torture or mistreatment and other obligations that arise from Common Article 3.⁶⁰

- [43] New Zealand has ratified all of these Conventions and Afghanistan is also a party. Further guidance on detention issues in military settings, which can be read alongside other international guidance on detention generally, is contained in the 2012 Copenhagen Principles and Guidelines.⁶¹ New Zealand participated in the development of these Guidelines.
- [44] Finally, New Zealand has updated its domestic law to give effect to many of the provisions contained in the international treaties to which it is a party. So, for example, s 9 of the New Zealand Bill of Rights Act 1990 provides: “Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.” The Crimes of Torture Act 1989 makes torture a criminal offence, which is punishable by up to 14 years’ imprisonment. A person who commits torture is liable under the Act, as is a person who “does or omits an act for the purpose of aiding any person to commit an act of torture”.⁶² In addition to being a crime in its own right under the Convention against Torture, torture can be prosecuted as a war crime, an act

⁵⁸ Rt Hon Sir Kenneth Keith “International Humanitarian Law and the Law of Armed Conflict” (Public Hearing Module 3, 29 July 2019) at 13. We note that NZDF’s *Interim Law of Armed Conflict Manual* dated 26 November 1992 noted the obligations under Common Article 3: at [123.4] and [18.04]. This underscores an important point, namely that military manuals are important repositories of law in this area. The current NZDF manual, *The Law of Armed Conflict* (2017), is available online and deals at some length with these issues: NZDF *Manual of Armed Forces Law: Vol 4, Law of Armed Conflict* (7 August 2017) <www.nzdf.mil.nz>. See generally, Justice Kenneth J Keith “Rights and Responsibilities: Protecting the Victims of Armed Conflict” (1999) 48 Duke LJ 1081.

⁵⁹ Rt Hon Sir Kenneth Keith, above n 58, at 13.

⁶⁰ See, for example, Knut Dörmann and Jose Serralvo “Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations” (2015) 96 Int Rev Red Cross 705; Jelena Pejic “The protective scope of Common Article 3: more than meets the eye” (2011) 93 Int Rev Red Cross 189; ICRC *Convention (III) relative to the Treatment of Prisoners of War: Commentary of 2020* (ICRC, Geneva, 2020) at [158].

⁶¹ The Copenhagen Process on the Handling of Detainees in International Military Operations *The Copenhagen Process: Principles and Guidelines* (19 October 2012).

⁶² Crimes of Torture Act 1989, s 3(1)(b).

of genocide, or a crime against humanity (or a combination). In New Zealand, the International Crimes and International Criminal Court Act 2000 criminalises torture as part of genocide, war crimes or crimes against humanity and provides for its prosecution in New Zealand.⁶³ New Zealand is a party to the Genocide Convention 1948, which recognises acts which may amount to torture as acts of genocide,⁶⁴ as well as the Rome Statute of the International Criminal Court. Also relevant in this context are the Geneva Conventions Act 1958 and the Armed Forces Discipline Act 1971.

Customary international law

[45] A further source of the law on torture is customary international law. Unlike treaties, which apply only to those states that ratify them, customary international law binds all states regardless of their treaty membership.⁶⁵ Custom develops gradually, over time. For custom to become recognised as “law”, it must (a) result from a large and consistent pattern of state practice and (b) the practice of states must be informed by their belief that they are legally obliged to act in that manner. Custom sometimes reflects the written law, and may develop beyond it, to fill gaps in the law when unique issues not previously imagined arise. The prohibition against torture is part of customary law, as is the rule of *non-refoulement* and the obligation to prevent. It is important to remember that customary international law does not require absolute uniformity in the practice of all states; nor does the objection by a minority of states necessarily undermine it. What matters is that the practice is widespread in the international community and that it is based on a correct and genuine view that international law obliges states to act in that manner.

Peremptory norms

[46] As we noted in chapter 6,⁶⁶ some of the central rules of International Humanitarian Law applicable to non-international armed conflicts are recognised as *jus cogens*⁶⁷ or peremptory norms. The widespread recognition of the evils arising from torture has resulted in the prohibition of torture being recognised as such a norm.⁶⁸ Because peremptory norms are the most important rules of international law, they may be described as having a constitutional character or function.⁶⁹ They sit at the apex of the hierarchy of international norms and, as such, rank above treaties and customary international law.⁷⁰ They also bind states that are not parties to treaties covering similar topics.⁷¹

[47] As they represent the most fundamental standards of the international community, no departure from peremptory norms is permitted. They cannot be overridden by treaties.⁷² They inform the

63 International Crimes and International Criminal Court Act 2000, ss 9, 10, 11; Rome Statute of the International Criminal Court 1998, arts 6, 7 and 8.

64 See, for example, Genocide Convention 1948, art II(b) (causing serious bodily or mental harm to members of the group).

65 Customary law is also part of the law of New Zealand and does not need to be separately incorporated.

66 Chapter 6 at [19].

67 The term means “compelling law”. Thomas Weatherall *Jus Cogens: International Law and Social Contract* (Cambridge University Press, Cambridge, 2015) at 3. The same rules are found in International Human Rights Law and international criminal law and have the same status.

68 Thomas Weatherall *Jus Cogens: International Law and Social Contract* (Cambridge University Press, Cambridge, 2015) at 3. *Prosecutor v Furundžija* (Judgment) CTY Trial Chamber, IT-95-17/1-T, 10 December 1998 at [148]–[151].

69 Weatherall, above n 68, at 71–86 (on *jus cogens* and morality and human dignity) and at 448–450 (on constitutional quality).

70 Statute of the International Court of Justice 33 UNTS 993 (San Francisco, 24 October 1945), art 38(1).

71 The practical burdens that the international law on torture imposes on both military and intelligence agencies operations abroad is an important theme in the 2019 report of the Inspector-General of Intelligence and Security. The provision of adequate safeguards to avoid legal and reputational damage to New Zealand is vital: Inspector-General of Intelligence and Security *Inquiry into possible New Zealand intelligence and security agencies’ engagement with the CIA detention and interrogation programme 2001–2009* (31 July 2019).

72 Articles 53 and 64 of the Vienna Convention of the Law of Treaties.

interpretation of treaties—states are presumed to have intended to comply with peremptory norms and a court will be slow to arrive at the conclusion that a treaty was designed to be applied in a contrary manner.

- [48] Beyond the impact on treaties, peremptory norms give rise to what are known as obligations *erga omnes*, which have been described as “obligations owed towards all”.⁷³ States therefore owe these obligations to the international community as a whole.⁷⁴ All states have an interest in upholding *jus cogens* and discharging these obligations—a breach anywhere is a concern to states everywhere. What is required of states depends on the type of norm. For norms in the field of human rights, such as torture, the most commonly cited obligations are prevention and effective response. These obligations involve criminalising the prohibited conduct; taking effective measures to prevent its occurrence; undertaking prompt, impartial and effective investigation of alleged breaches; prosecuting alleged perpetrators or extraditing them where another state is seeking to prosecute them; not granting amnesties or immunities for torture; and not applying statutes of limitation to proceedings for torture.⁷⁵ *Non-refoulement* has been described as an *erga omnes* obligation flowing from the prohibition of torture.⁷⁶ Given the act of returning someone to torture risk may also amount to direct or indirect participation in torture and failing to take available steps to prevent it, some consider the rule to have risen to a peremptory norm in its own right.⁷⁷
- [49] Further, in terms of enforcement, breaches of peremptory norms can give rise to individual responsibility and state responsibility. States are subject to a stricter regime of responsibility than for other acts that have not reached the level of peremptory norms. Where a breach occurs, or is occurring, all states are duty bound to cooperate to bring to an end the breach (through both individual and collective action), to not recognise situations resulting from the breach, and to not render aid or assistance in maintaining the situation created by the breach.⁷⁸ Not assisting in maintaining the breach includes, for example, the duty to “reject the fruits of torture” (for example, the use of confessions and evidence obtained through torture).⁷⁹

⁷³ *Prosecutor v Furundžija*, above n 68, at [151]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), (Preliminary Objections)* [1996] 2 ICJ Rep 595 at [31].

⁷⁴ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3 at [33]. See also *Belgium v Senegal*, above n 38, at [68] and [69].

⁷⁵ See, for example, *Belgium v Senegal*, above n 38, at [68]; M Cherif Bassiouni “International Crimes: The *Ratione Materiae* of International Criminal Law” in M Cherif Bassiouni (ed) *International Criminal Law* (3rd ed, Martinus Nijhoff Publishers, Leiden, 2008), Vol I at 173; and Thomas Weatherall, above n 68, at 355–363. Obligations *erga omnes* are not limited to matters of standing or jurisdiction; nor is their content so unclear as to render them meaningless in practice. Taking all necessary and lawful measures to prevent torture—particularly in situations where a state is free to decide whether, or how, to engage with another state—is an obvious example of this.

⁷⁶ See, for example, *Ramzy v The Netherlands*, ECHR 25424/05 (Written Comments by Amnesty International, the Association for the Prevention of Torture, Human Rights Watch, and Others, 22 November 2005) at [11]. As Pierce explains (above n 55, at 168–172), the peremptory prohibition of torture calls for a range of preventive efforts, which are relevant to both treaty and general international law. At the very least, to the extent that *non-refoulement* is coextensive with the *jus cogens* prohibition of torture and is one of the more effective steps a state can take to forestall its commission, it may be considered to have *erga omnes* qualities. See also Weatherall (above n 68, from 355) (noting generally that prevention of violations is an aspect of performing obligations *erga omnes*).

⁷⁷ See, for example, *The Prosecutor v Katanga (Decision on the application for the interim release of detained Witnesses DRC- D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350)* ICC Trial Chamber II, ICC-01/04-01/07, 1 October 2013 at [30]; Jean Allain “The *jus cogens* Nature of non-refoulement” (2001) 13(4) IJRL 533; *Report of the Executive Committee for the Programme of the United Nations High Commissioner for Refugees on the work of its thirty-third session* UN Doc A/37/12/Add.1 (1982) at [46] and [70](1)(b); Lauterpacht and Bethlehem, above n 48, at 151–152.

⁷⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at [159].

⁷⁹ Convention against Torture, above n 39, art 15; *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening) v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 1 All ER 575 at [34].

Summary

- [50] To summarise, the law on torture comes from various legal sources and contains numerous obligations. For present purposes, the core obligations fall into three broad categories: preventive obligations, conduct obligations and response obligations. States need to do all they can to prevent torture, not commit it or be complicit in it, not return or transfer people to places where they face a real risk of torture, and respond swiftly and effectively if torture may have, or has, occurred. The obligations apply in peacetime and in conflict, and apply to the state and its officials when they act in an official capacity abroad. States are expected to be vigilant in preventing and responding to torture, to know when to act and when to refrain from acting or assisting, and to be aware of how their actions or omissions may enable breaches by others and adjust their approach accordingly.
- [51] In some settings, prevention may mean that a state needs to seek and obtain specific and effective assurances and undertake regular and effective detention monitoring. In some cases, it will require not transferring persons or having in place alternative options for detention, as part of a wider conditional assistance policy that provides for the varying, amendment, suspension or termination of assistance where human rights breaches are suspected, alleged or detected. A policy of this sort needs to be in place before military or similar international deployments, so officers know how to, and are able to, make correct and consistent decisions to protect people from harm. It should also address how allegations of torture or ill-treatment are received, recorded, reported and investigated; with clear protocols to ensure investigations are prompt and impartial and remedial measures are effective.
- [52] Capacity building and encouraging compliance with the law complement, but do not replace, the need for other efforts by a state. This is not easy work, but the level of effort reflects the seriousness of the potential consequences. As the International Criminal Tribunal for the Former Yugoslavia confirmed in one of its seminal cases on this subject:⁸⁰

States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical and moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture.

A state's responsibility for breaches of torture and mistreatment obligations towards detainees

- [53] A state may be responsible for breaching its obligations in relation to torture or mistreatment of detainees either directly or by being complicit in the activities of another state that tortures or mistreats detainees.⁸¹ Accordingly, we address briefly the circumstances in which a state may incur responsibility:
- (a) directly, when its armed forces operate in the territory of a foreign state to support that state against an armed insurgency;
 - (b) based on complicity in the wrongdoing of another state.

⁸⁰ *Prosecutor v Furundžija*, above n 69, at [148].

⁸¹ Individuals may, of course, be criminally responsible for international crimes such as torture, either as principals or accomplices. That is not a topic that we need to address here, however.

A state's obligations when operating abroad

[54] An issue we are required to consider is the extent to which New Zealand's obligations in relation to the detention and transfer of people who face a real risk of torture are engaged when New Zealand operates abroad. As is apparent from New Zealand's detention policy, the Crown has accepted that New Zealand's *non-refoulement* obligations applied when NZDF forces in Afghanistan captured suspected insurgents and wished to transfer them to the custody of Afghan authorities.⁸² In submissions, the Crown Agencies acknowledged that:⁸³

- (a) Different provisions of the Convention against Torture are subject to different jurisdictional requirements. Article 3, which contains the *non-refoulement* obligation, is not subject to any geographical limitation.
- (b) Although art 2(1) of the ICCPR requires that state parties "undertake to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant",⁸⁴ the concept of jurisdiction has been interpreted as applying extraterritorially where it can be said that a contracting state has "jurisdiction" over either place or people.⁸⁵ The decisive criterion for determining "jurisdiction" in this context is whether the place or person comes within the effective control and authority of the state.⁸⁶ Effective control may relate to a place or to a particular person.

This meant that New Zealand was required to make suitable arrangements with Afghanistan in relation to suspected insurgents detained by TF81 personnel so as to give effect to its obligations.⁸⁷ As we have indicated, New Zealand did put arrangements in place.

[55] On the other hand, the Crown argued that New Zealand did not have "jurisdiction" over suspected insurgents who were captured in Afghanistan in the course of partnered operations where Afghan personnel executed arrest warrants against the suspects. Such persons were, it was argued, never detained by TF81 personnel and were therefore never within New Zealand's jurisdiction; rather they were detained by Afghan authorities pursuant to Afghan arrest warrants and were always within Afghanistan's jurisdiction. TF81 personnel simply assisted Afghan authorities in the operation of their criminal justice process. Because Afghanistan is a sovereign nation, New Zealand had no ability to interfere with the domestic affairs of another state, including in

82 NZDF's arrangement with Afghanistan provided that "The NZDF is responsible for maintaining and safeguarding persons apprehended by it and will treat these persons in accordance with applicable domestic law and international law" (Inquiry doc 05/32, above n 24, at [2]). The detention guidance noted by Cabinet in 2009 required, among other things, that permission be obtained from the Commander Joint Forces New Zealand or Chief of Defence Force before transferring a person detained by New Zealand Forces to Afghan authorities (Inquiry doc 01/03, above n 16, annex 3 at [9]). See also Heath Fisher, above n 11, at [24] (referring to legal advice provided by NZDF and Crown Law in 2010, which confirmed that "non-refoulement obligations under international law would apply in full in respect of any person detained by the NZDF") and Dr Penelope Ridings "International legal issues relating to detention" (Public Hearing Module 2, 23 May 2019) at [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").

83 Ridings and Auld, above n 7, at [36]–[50]. See also Ridings, above n 82, at [2] and [18]–[19]. In addition, similar obligations arise from other sources, such as customary international law.

84 Emphasis added.

85 The Crown submitted that "the circumstances in which a person outside of a State's territory is within its jurisdiction remains unsettled in international law" and that the scope of "personal" extraterritorial jurisdiction remains controversial (Ridings and Auld, above n 7, at [44]).

86 Rishworth and Auld *Memorandum*, above n 30, at [12].

87 Ridings, above n 82, at [14]–[16].

relation to judicial proceedings.⁸⁸ The level of support provided by foreign forces could not affect this position.

- [56] As we noted in chapter 6,⁸⁹ the extraterritorial application of human rights obligations is a difficult issue. We have carefully considered advice on this topic and have received written and oral evidence, including evidence from Professor Dapo Akande. We have also received extensive and helpful submissions from both the Crown and non-Crown core participants. While the “effective control” test seems to be widely accepted, what is contentious is its scope, for example, whether the capacity to wield lethal force against an individual is in itself sufficient to constitute “effective control”.
- [57] The issue of extraterritorial application has arisen in a variety of contexts, most frequently under the European Convention on Human Rights. Article 1 of the Convention provides that “The High Contracting Parties shall secure *to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention” (emphasis added). The European Court of Human Rights took an expansive approach to jurisdiction under art 1 in *Al-Skeini v United Kingdom*, observing that while jurisdiction under the Convention is primarily territorial,⁹⁰ it may apply extraterritorially in certain circumstances, including where a state exercises “physical power and control” over an individual.⁹¹ In the United Kingdom, the Court of Appeal of England and Wales in *Al-Saadoon v Secretary of State for Defence* interpreted *Al-Skeini* as requiring something more than just the use of force against an individual, finding that some prior element of control over the individual is necessary.⁹² Even so, the Court of Appeal accepted that what *Al-Skeini* described as the “state agent and control” exception⁹³ (that is, jurisdiction arising from a state’s control over a particular person) may apply to cases which “do not involve detention but where, nevertheless, the situation is so closely linked to the exercise of authority and control of the state as to bring it within its jurisdiction for this purpose”.⁹⁴
- [58] United Nations human rights treaty bodies and special mandate holders have provided guidance on the application of global human rights treaties when member states operate abroad. The Committee

⁸⁸ Ridings, above n 82, at [20]–[22]; Brigadier Lisa Ferris “Detention in the Afghanistan Theatre” (Public Hearing Module 2, 23 May 2019) at [20]–[21].

⁸⁹ See chapter 6 at [13]–[15].

⁹⁰ *Al Skeini v United Kingdom* (2011) 53 EHRR 18 (ECHR) at [131].

⁹¹ At [136].

⁹² *Al-Saadoon v Secretary of State for Defence* [2016] EWCA Civ 811. The case concerned the activities of the United Kingdom’s armed forces in Iraq, and whether the United Kingdom’s obligations under the European Convention on Human Rights applied extraterritorially in that context. The High Court had found, relying on *Al-Skeini*, that any use of force against a person amounted to an exercise of “physical power and control” so as to engage the state’s obligations under the Convention. The Court of Appeal overturned that finding. Lloyd Jones LJ, with whom the other members of the Court agreed, stated (at [69]) that the Court in *Al-Skeini* “required a greater degree of power and control than that represented by the use of lethal or potentially lethal force alone. In other words, I believe that the intention of the Strasbourg court was to require that there be an element of control of the individual prior to the use of lethal force.”

⁹³ This is the principle, recognised by the Court in *Al Skeini* (at [137]), that “whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under art 1 to secure to that individual the rights and freedoms under s 1 of the Convention that are relevant to the situation of that individual”. The Court identified three situations in which the state and agent control exception might apply (at [134]–[136]): first, when diplomatic or consular agents of a state who are present in a foreign territory exert authority and control over others; second, when a state acting in a foreign territory exercises all or some of the public powers normally exercised by the Government of that territory, through that Government’s consent, invitation or acquiescence; and third, in certain circumstances where a state’s agents operating outside its territory use force against an individual (for example, where they take an individual into custody).

⁹⁴ At [71].

against Torture has explained that the obligation of *non-refoulement* applies extraterritorially.⁹⁵ The Special Rapporteur on Torture has said that the prohibition of torture is peremptory and non-derogable, that it “cannot be territorially limited” and that “any jurisdictional references found in the Convention against Torture cannot be read to restrict or limit States’ obligations to respect all individuals’ rights to be free from torture and ill-treatment, anywhere in the world”.⁹⁶ Given non-commission, *non-refoulement* and prevention are part and parcel of the prohibition on torture, at least these three obligations (and likely others) can be said to apply when a state operates abroad. The real issues are how the obligations apply given the state is acting abroad and how any overlapping or conflicting obligations are to be addressed.

- [59] The Crown submitted that while the Committee against Torture appears to have suggested that the obligation to prevent torture is a peremptory norm,⁹⁷ this does not affect or displace the territorial limit of the treaty obligation to prevent torture. We have focused primarily on the peremptory prohibition of torture and its consequences. Prevention may at least be regarded as a consequence of the *jus cogens* prohibition and something which is legally and practically tied to its fulfilment. Prevention exists, in different forms and described in different ways, in treaty, customary, and general international law. The elevation of rules to *jus cogens*, and the content and scope of corresponding obligations, is informed by, but may transcend, the confines of particular treaty provisions. Rules and obligations at this level of the international hierarchy of norms are not static; they continue to evolve in light of the global expectation and practice of effective repression of conduct that shocks the global conscience.
- [60] In this sense, the Special Rapporteur provides useful observations about the relationship between torture’s *jus cogens* status and the way in which the rights and obligations in the Convention (including prevention) apply without territorial limitation.⁹⁸ Clearly, how a state gives effect to these obligations may differ to how they are applied domestically, and extraterritorial application also requires states to act in conformity with international law. Where a state acts in an official capacity and exercises its jurisdiction (as effective control and authority over people, places or situations) abroad, it carries a range of obligations.⁹⁹ International prevention requires concerted efforts, both general and specific, to effectively avert torture.
- [61] We should note a further point. As we have said, Sir Kenneth Keith gave evidence about the combined effect of Common Articles 1 and 3 of the Geneva Conventions, which is that states are required to “ensure respect” to the best of their ability of the prohibition on torture and mistreatment

95 Committee against Torture *General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* UN Doc CAT/C/GC/4 (4 September 2018) at [10].

96 Special Rapporteur on Torture *Torture and other cruel, inhuman or degrading treatment or punishment* UN Doc A/70/303 (7 August 2015) at [27] (emphasis added).

97 See, for example, Committee against Torture *General Comment 2: Implementation of Article 2 by States Parties* UN Doc CAT/C/GC/2 (24 January 2008) at [1].

98 We note briefly that the Special Rapporteur’s observations bear some similarities to those of the International Court of Justice (that is, that, owing to the principles underlying the Genocide Convention and the cooperation needed to end genocide, the rights and obligations of the Convention are rights and obligations *erga omnes*): *Bosnia v Yugoslavia (Preliminary Objections)*, above n 73, at [31] (noted in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 6 at [64]).

99 The Subcommittee on the Prevention of Torture has noted the status of torture under general international law, adding that while the concept of prevention is something which cannot be exhaustively defined in the abstract, a range of measures are available to states: Subcommittee on Prevention of Torture *Fifth Annual Report of the Subcommittee on Prevention of Torture* UN Doc CAT/C/48/3 (19 March 2012) at [105]. This observation is relevant to prevention when treaty obligations are applied abroad, as well as prevention in other sources of law. When a state has effective authority and control over people, places or situations abroad—including situations where a state’s conduct brings about reasonably foreseeable effects and where the state has the ability to exercise some influence on an outcome—the importance of prevention as an obligation is clear.

of detainees, and the requirement for minimum standards of treatment. These obligations apply wherever the state is operating—at home or abroad—and apply to the treatment of detainees in the context of a non-international armed conflict.¹⁰⁰ The obligations are engaged independently of any concept of “jurisdiction”.

- [62] We acknowledge, however, that, in giving effect to obligations when operating abroad, states must act in a manner that is consistent with state sovereignty and in accordance with international law. Sovereign states may commit acts of torture despite the multiple prohibitions against it. Where that happens, international law contemplates that other states will work together to ensure the offending states comply with these fundamental and universal rules, and that assisting states will comply with their own obligations when doing so. Obviously, this can be a difficult and delicate process, but states can achieve this in a manner that respects sovereignty as far as is appropriate, without wavering from clear and objective human rights standards. We return to this in chapter 11.
- [63] Counsel for Mr Stephenson argued that joint state responsibility could arise in the context of partnered operations, relying on art 47(1) of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts.¹⁰¹ The argument was that the circumstances of a partnered deliberate detention operation might be such that it is difficult to say that one of the states involved is responsible for a detention; rather, it might be more accurate to say that both states are responsible for it. Counsel referred to the 1960 commentary of the ICRC on art 12 of the Third Geneva Convention, which allocates responsibility for the treatment of prisoners of war in international armed conflicts. That commentary recognised that there may be difficulties in determining which particular state among several captured particular prisoners. In those circumstances, it said that all states involved should be responsible.¹⁰² The argument was that a similar principle could apply in the present context.¹⁰³
- [64] We finish this section by saying that, for the purposes of this Inquiry, we do not need to set out the precise formula for the attribution of responsibility in complex multinational settings, although we address in chapter 11 what we see as available as a matter of legal principle and practical application of jurisdictional concepts in these settings. The assessment is an intensely factual one, depending on the nature and extent of any control and authority in the particular factual situations at issue. We have, in a sense, a starting point in the position accepted by the Crown Agencies: that when NZDF captured a suspected insurgent, New Zealand’s *non-refoulement* and

¹⁰⁰ See paragraph [42].

¹⁰¹ Sam Humphrey *Submissions of Counsel for Jon Stephenson in Reply following Public Hearing 3* Submission to Inquiry (16 August 2019) at [17]–[31].

¹⁰² ICRC *Convention (III) relative to the Treatment of Prisoners of War: Commentary of 1960* (ICRC, Geneva, 1960) at 135–136. We note that on 16 June 2020, the ICRC launched the updated commentary to the Third Geneva Convention in relation to the treatment of the prisoners of war: see footnote 103 below.

¹⁰³ The ICRC’s revised 2020 commentary notes that for certain conduct joint responsibility of two or more states may arise under international law, although for the purposes of International Humanitarian Law one state will be considered the detaining authority in the context of an international armed conflict (ICRC, above n 60, at [1522]). Concepts of joint, shared or concurrent responsibility (in relation to the same, similar or different obligations) may be framed and may well develop in different ways in the law enforcement and human rights paradigm to the active hostilities paradigm. On responsibility in international law generally, see James Crawford *The International Law Commission’s Articles on State Responsibility: Introduction, Texts and Commentaries* (Cambridge University Press, Cambridge, 2005) at 273–275 (on art 47 of the Draft Articles); and Niels Frenzen “Extraterritorial Refugee Protection” in André Nollkaemper and Ilias Plakokefalos (eds) *The Practice of Shared Responsibility in International Law* (Cambridge University Press, Cambridge, 2017) 506 at 509–512 (on shared responsibility where two states exercise concurrent control over a person in *refoulement* settings) and Marten Zwanenburg “North Atlantic Treaty Organization-Led Operations” in André Nollkaemper and Ilias Plakokefalos (eds) *The Practice of Shared Responsibility in International Law* (Cambridge University Press, Cambridge, 2017) 639.

other obligations were engaged. The question for us will be whether the circumstances of Qari Miraj’s capture are such as to engage the relevant obligations.

Complicity

- [65] Like the law in relation to extraterritorial jurisdiction, some aspects of the law on complicity¹⁰⁴ are controversial, giving rise to different views. An important question in this context is what mental element must be established. A range of possibilities exist: knowledge, constructive knowledge,¹⁰⁵ wilful blindness, recklessness, purpose, intention or a combination of these. It is necessary to consider the different formulations for complicity at the international level, and to understand what particular facts or circumstances an assisting state must know or understand before complicity arises.
- [66] The Crown Agencies drew attention to the commentary to art 16 of the International Law Commission’s Draft Articles on State Responsibility dealing with aiding or assisting, which expresses the view that the assistance must be a necessary element in the wrongful act and the assisting state must act with a view to facilitating that wrongful act. Accordingly, the Crown Agencies submitted, an assisting state must act with a view to facilitating (that is, with the *purpose or intention* of facilitating) the wrongful act.¹⁰⁶ By contrast, in his evidence, Sir Kenneth Keith disagreed with the commentary and expressed the view that the customary law underlying art 16 did not require the element of necessity or that the aid or assistance be given with a view to facilitating the commission of the wrongful act—knowledge of the wrongdoing was, in his opinion, sufficient.¹⁰⁷ In an opinion which we discuss later in this chapter, the Solicitor-General noted the possibility that constructive knowledge might be sufficient to establish liability for complicity.¹⁰⁸
- [67] As will be apparent, there is a range of views as to which standard applies, or ought to apply, to state complicity.¹⁰⁹ We will not attempt to resolve the competing views, as much depends on the particular context. While the Draft Articles are a useful starting point, they do not displace other, more specific regimes (such as treaties) that contain complicity provisions and which are capable of application in extraterritorial settings.¹¹⁰ The Draft Articles can, therefore, be read alongside or be interpreted in light of more specific treaty rules.¹¹¹

¹⁰⁴ “Complicity” is a form of legal liability that attaches to those who aid or assist a wrongdoer.

¹⁰⁵ Where a person does not have actual knowledge of a fact but would have known of it had they exercised reasonable care, that person is said to have constructive knowledge of the fact.

¹⁰⁶ Paul Rishworth QC and Ian Auld “Crown Agencies’ Presentation on Applicable International Legal Frameworks” (Public Hearing Module 3, 29 July 2019 at [100]). However, the Crown Agencies also seemed to accept that full knowledge that the assistance given will facilitate the wrongful act would suffice: see Rishworth and Auld *Memorandum*, above n 30, at [21]–[26].

¹⁰⁷ Rt Hon Sir Kenneth Keith, above n 58, at 16. We also note the analysis of knowledge by eminent scholars in the separate but related field of customary international criminal law: US Supreme Court *Presbyterian Church of Sudan et al v Talisman Energy Inc* (No 09-1262), Amicus Curiae of International Law Scholars, 30 April 2010.

¹⁰⁸ See below at paragraph [95]. See also Dr Penelope Ridings “International Legal Issues Relating to Detention” (23 May 2019) at [26].

¹⁰⁹ Miles Jackson *Complicity in International Law* (Oxford University Press, Oxford, 2015) at 160; Vladyslav Lanovoy *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing, Oxford, London, 2016) at 102–103.

¹¹⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries [2001] vol II, pt 1 YILC 13 at [4](a).

¹¹¹ Joint Committee on Human Rights Allegations of UK Complicity in Torture (2008-09) HL paper 152 HC 230 at [35].

- [68] The most relevant example in this case is the Convention against Torture.¹¹² The Special Rapporteur on Torture has explained that individual and state complicity can result from “acts that amount to instigation, superior order and instruction, consent, acquiescence and concealment”.¹¹³ As to purpose/intention, having noted that some domestic courts have concluded that complicity at international law required direct encouragement of acts of torture, the Special Rapporteur explained that complicity to torture “must be governed by a different standard”, due to the status of torture under international law and the obligation to prevent.¹¹⁴ As a result, “[t]he responsibility of a State is objective and results from a policy or practice of acquiescing in torture [committed by others]”.¹¹⁵ Accordingly, assistance or cooperation with a country that is known, or ought to be known, to use torture in a systematic or widespread manner is “turning a blind eye to what goes on” and gives rise to complicity.¹¹⁶
- [69] The Crown submitted that the Special Rapporteur’s view does not reflect customary international law. We see merit in the Special Rapporteur’s approach, particularly given the Special Rapporteur’s role as a leading United Nations expert on the content and scope of torture obligations under international law. At the same time, we do not think it necessary to express a concluded view about this as ultimately our conclusions do not require it. We note that, at a minimum, the Crown Agencies and Counsel for Mr Stephenson agreed that wilful blindness may enable an inference to be drawn about an assisting party’s mental state and, where wilful blindness is made out, complicity can arise.¹¹⁷ Ultimately, however, it may be more straightforward to analyse particular factual situations in terms of a potential breach of an obligation to prevent torture and *non-refoulement*, rather than in terms of complicity. This does not diminish the importance of complicity in this area of law, nor of the importance of ensuring conduct and policies do not give rise to complicit conduct. We leave it open as to whether or not complicity is engaged on the facts as laid out in chapter 11.

The development of the detention policy

- [70] Clause 7.8 of the Terms of Reference requires us to consider, among other things, the decision in *Evans* in 2010. To do that, we need to set out what the case relevantly held—and how NZDF and other New Zealand agencies addressed it. We note that a number of New Zealand government agencies spent much time considering detention-related issues, particularly after *Evans*. The policy applicable to detention in partnered operations involved input and advice from NZDF, the Ministry of Foreign Affairs and Trade (MFAT) and Crown Law. In addition, there was a high degree of ministerial interest in the issue—agencies provided numerous briefings about it,

¹¹² The Crown also drew attention to the Rome Statute. While useful, the Statute contains a number of gaps and innovations. It also does not affect existing or developing customary international criminal law, or the jurisprudence on breaches of subject-matter treaties.

¹¹³ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Juan E. Méndez* UN Doc A/HRC/25/60 (10 April 2014) at [48].

¹¹⁴ At [51]–[52].

¹¹⁵ At [52]. See also Jackson, above n 109, at 162 on wilful blindness as an extension of knowledge, the inability of states to avoid responsibility by failing to make enquiries, and primary rules (such as *non-refoulement*) which impose a due diligence standard on the provision of aid or assistance to other States.

¹¹⁶ At [53]–[54]. The Rapporteur’s observations in this report concern intelligence sharing and cooperation in counter-terrorism operations. They are relevant to our assessment of the propriety of the New Zealand policy concerning the transfer of partnered operations detainees.

¹¹⁷ Submission of Paul Rishworth QC, Transcript of Proceedings, Public Hearing Module 3 (29 July 2019) at 82. See also Rishworth and Auld “Crown Agencies’ Presentation”, above n 107, at [102].

primarily to the Minister of Defence, Hon Dr Wayne Mapp, and the Minister of Foreign Affairs, Hon Mr Murray McCully—as well as parliamentary interest, as evidenced by questions in the House and select committee proceedings. There was also media interest.

- [71] In April 2010, ISAF introduced a Directive that imposed additional responsibilities on ISAF forces involved in partnered operations during which Afghan forces detained suspected insurgents.¹¹⁸ An important requirement was that ISAF forces would provide information to ISAF about “detention events” by Afghan partners, including the names of those detained. ISAF would record this and provide the information to two humanitarian agencies. This led to a question from theatre about whether the Directive’s requirements, coupled with the fact that TF81 personnel collected biometric data from those detained on partnered operations for ISAF’s purposes, would mean that New Zealand would have some responsibility for those detained. Following consideration, the Commander Joint Forces New Zealand responded that the additional responsibilities imposed by the Directive did not mean that the relevant suspects were “detained” by TF81 personnel.¹¹⁹

The *Evans* case

- [72] While the issue of detainees, and the question of New Zealand’s obligations in partnered operations, had been considered at early stages of the deployment,¹²⁰ a trigger for much of the work carried out by NZDF and other Crown Agencies on detention in partnered operations was the decision of the High Court of England and Wales (Richards LJ and Cranston J) in the *Evans* case, delivered on 25 June 2010. The United Kingdom armed forces had a policy that people they detained in Afghanistan would be transferred to Afghan authorities within 96 hours or released, but would not be transferred where there was a real risk at the time of transfer that they would suffer torture or serious mistreatment. This policy reflected ISAF’s detainee transfer policy and was not under challenge in the proceedings. Rather, the applicant’s case, brought by way of judicial review, was that those transferred by United Kingdom forces into Afghan custody were in practice at real risk of torture or serious mistreatment, so that the transfers were in breach of the United Kingdom’s policy and were unlawful.
- [73] The Court began by noting that United Kingdom armed forces operating in Afghanistan had authority to capture or kill insurgents and that the power to capture extended to a power to detain, at least temporarily. Equally, the Afghan Government had an interest in insurgents, in the sense that they were likely to have committed criminal offences. Prosecuting such individuals successfully was an important part of the strategy for securing the rule of law and enhancing security.¹²¹ The transfer policy reflected these dual armed conflict / law enforcement interests in insurgents and set out how ISAF-captured detainees were to be managed (although the Court noted that this did not prevent bilateral arrangements to be concluded with Afghan authorities).¹²² The Court also noted

118 This Directive, the ISAF Detention Operations and Notification Directive, is discussed in Brigadier Riordan’s opinion, which is discussed below from paragraph [83]: see Detention Detainee Arrangements Afghanistan (10 September 2010) (Inquiry doc 06/10) at 7.

119 Email from JFNZ.COMJFNZ to WAATEA.SNO (21 May 2010, 5.32am) (Inquiry doc 5/21).

120 “Afghan Nationals in Afghan Custody: Options for Follow-up by New Zealand” (16 April 2010) at [12], in email from [redacted] (ISED) to [redacted] and others “RE: Afghanistan: Arrest of Suspected Terrorists” (16 April 2010, 4.39pm) (Inquiry doc 12/06). Officials had considered the nature and extent of New Zealand obligations and options in other partnered operations. They advised that “[t]he arrest by Afghan forces [was] the ideal scenario for mitigating detainee issues”. They also noted that assuming responsibility for partnered operations detainees could leave New Zealand with long-term implications (at [17]). Officials ultimately cautioned against pursuing bilateral assurances on this issue.

121 *R (oao Maya Evans) v Secretary of State for Defence*, above n 6, at [17]–[18].

122 At [19].

that ISAF standard operating procedures provided that the NDS was the preferable body for the reception of ISAF detainees, as this would ensure common processing and tracking of detainees following transfer.¹²³

- [74] Having considered the accounts of mistreatment of detainees and the measures in place under the United Kingdom policy,¹²⁴ the Court canvassed the evidence showing that the United Kingdom was aware of the various reports of torture and mistreatment of detainees by Afghan agencies, discussed the arrangements put in place between the United Kingdom and Afghanistan on the issue of detainee transfers, and considered the United Kingdom's monitoring efforts. Ultimately, the Court held that transfers to NDS 17 in Kabul would be in breach of the policy and unlawful. It said that a moratorium that the United Kingdom was observing in relation to transfers to that facility should remain in place. However, the Court concluded that transfers to two other NDS facilities (located elsewhere in Afghanistan) could continue, subject to improvements in monitoring. It was essential, the Court confirmed, to implement "an effective set of specific safeguards" if detainees were to be transferred without a real risk of torture.
- [75] The case did not deal with detentions on partnered operations. Nevertheless, we consider that it is relevant to such detentions, in particular because the Court noted that:
- (a) evidence, especially international reports between 2005 and 2010, indicated "widespread and serious ill-treatment of detainees, including ill-treatment by the NDS in particular, with continuing grounds for concern despite improvements over time";¹²⁵
 - (b) torture in Afghan facilities was not merely an historical issue because the reports about the condition of detainees in Afghanistan displayed "a substantial degree of consistency over time";¹²⁶
 - (c) reports indicated that torture was used to obtain confessions, which were important to obtaining convictions;¹²⁷
 - (d) it would be wrong to discount the volume of complaints about torture in Afghan detention facilities, the significance attached to them by reputable human rights agencies and the lack of transparency on the part of the NDS;¹²⁸
 - (e) the available material was sufficient to justify the conclusion that transferees were at a real risk of mistreatment in detention.¹²⁹
- [76] We pause here to reiterate that, on most operations, TF81 partnered with the CRU. The CRU was a specialist police unit and had no power to prosecute offences. Accordingly, under Afghan law, the CRU could only detain a person they had arrested for 72 hours, after which they had to either hand over the detainee to a prosecutor for prosecution or release the person. We understand that the CRU had in practice been required to release some of those arrested because time expired. In

¹²³ At [43]. Apparently, the NDS facilities in Kabul had the best record-keeping systems and were accessible to Non-Governmental Organisations such as the ICRC.

¹²⁴ At [49]–[75].

¹²⁵ At [287].

¹²⁶ At [288].

¹²⁷ At [53], [253] and [291].

¹²⁸ At [290].

¹²⁹ At [292].

addition, some of those the CRU transferred to Afghan prosecution authorities were later released because there was insufficient admissible evidence to justify a prosecution.¹³⁰ In light of these difficulties, TF81 sometimes wished to involve the NDS on operations against high-value targets to make arrests, as NDS personnel were, in general, better trained, more competent and better able to handle high-value targets.¹³¹ Moreover, the NDS were able to prosecute certain offences. As we describe in chapter 11, NDS personnel, along with Afghan National Police personnel, participated in the operation to capture and detain Qari Miraj. He was not taken to NDS 17, but to another NDS facility in Kabul, NDS 90, which was capable of holding high-value detainees suspected of serious offences. (NDS 17 and NDS 90 were in the same compound and detainees were transferred between the two facilities from time to time.)

- [77] The *Evans* case raised immediate questions for New Zealand. Steps were taken to find out what, if anything, should be done in response to it. Parliament's Foreign Affairs, Defence and Trade Select Committee considered New Zealand's work in Afghanistan. The then Director of Defence Legal Services, Brigadier Kevin Riordan, briefed the Chief of Defence Force.¹³² His advice was that arrest warrants were issued by Afghan authorities, and that New Zealand had no legal power to conduct the arrests or to interfere with the Afghan judicial system.¹³³ While Brigadier Riordan acknowledged that the CRU could transfer people to the NDS and that New Zealand did not have specific oversight after that point,¹³⁴ he explained that the ICRC had access to detainees, and would likely inform New Zealand of any general concerns about detention conditions.¹³⁵
- [78] Detention issues continued to engage media attention¹³⁶ and ministers responded to further questions in the House.¹³⁷ On 16 August 2010, Dr Mapp was interviewed by *Radio New Zealand*.¹³⁸ Following questions on the appropriateness of the distinction between detainee categories, he said that one could not rule out the possibility that detainees had been tortured and he was seeking further reports from the Chief of Defence Force and the Director of Defence Legal Services.¹³⁹ Around the same time, media reports referred to an Official Information Act response from NZDF to the *Sunday Star Times* stating that NZSAS personnel had been "in the vicinity" when persons were arrested by Afghan forces, but that NZSAS members had not detained anyone or assisted in detentions by Afghan forces.¹⁴⁰ Mr Key accepted NZDF's position, stating, "If Jerry Mateparae's advice is that they're not involved in the arrests, they're not involved in the arrests".¹⁴¹

130 This reflected the fact that many partnered operations were intelligence-driven and information obtained from intelligence activities might not have been capable of disclosure or been inadmissible in court. As a result, at some point during the deployment TF81 personnel took the approach of attempting to turn intelligence into admissible evidence.

131 The nature of the relationship between New Zealand agencies and the NDS is described in detail in the report of the Inspector-General of Intelligence and Security's (IGIS) Inquiry: see IGIS *Report of Inquiry into the role of the GCSB and the NZSIS in relation to certain specific events in Afghanistan* (June 2020). It is not clear to us whether ministers were fully advised of the nature of the relationship or its implications.

132 Email from Kevin Riordan to [redacted] "RE: AFGHANISTAN" (undated, printed 29 Jun 2010) (Inquiry doc 06/09).

133 At dot point 2.

134 At dot point 5.

135 Inquiry doc 06/09, above n 132.

136 Jon Stephenson "Prisoners being delivered to brutal Afghan secret police" (15 August 2011) *Sunday Star Times* <www.stuff.co.nz/sunday-star-times>.

137 (17 August 2010) 665 NZPD 13119.

138 Morning Report "Mapp: SAS not guilty of war crimes, operation a 'fiasco'" (16 August 2010) *Radio New Zealand* <www.rnz.co.nz>.

139 Morning Report, above n 138.

140 Rory MacKinnon "Deadline: On NZ's 'Assistance' In Afghanistan" (20 August 2010) *Scoop* <www.scoop.co.nz>; Jon Stephenson "Prisoners being delivered to brutal Afghan secret police" (15 August 2010) *Stuff* <www.stuff.co.nz>; Rory MacKinnon "No SAS Link To Afghan Arrests, Torture – PM" (16 August 2010) *Scoop* <www.scoop.co.nz>.

141 MacKinnon "No SAS Link To Afghan Arrests, Torture – PM", above n 140.

- [79] Dr Mapp and Mr McCully instructed officials to provide advice on this issue. MFAT considered that the risk of legal challenge could be minimised (but not eliminated) by—so far as possible—continuing to ensure that Afghan authorities were responsible for arrests/detentions, rather than New Zealand forces. They also noted that *Evans* did not expressly deal with partnered operations. On 18 August 2010, MFAT submitted a briefing to Mr McCully, for referral to Dr Mapp and the Prime Minister.¹⁴² They noted procedural improvements that were being developed and said that New Zealand’s legal obligations “only extend to individuals detained by New Zealand forces”.¹⁴³
- [80] As noted in chapter 3,¹⁴⁴ Dr Mapp and the Chief of Defence Force visited Afghanistan from 18 to 22 August 2010.¹⁴⁵ During that visit, Dr Mapp met with Afghan counterparts to discuss his concerns about the treatment of detainees by the NDS. He considered that even if TF81 was not the detaining authority on partnered operations, New Zealand had a moral, and arguably a legal, responsibility to be seen to have taken reasonable steps to ascertain that detainees’ human rights were respected while in detention.¹⁴⁶
- [81] It appears that Dr Mapp was encouraged by what he was told, which was that conditions in NDS facilities had improved substantially. Dr Mapp also met with two local representatives of a reputable independent organisation to discuss detention issues. Dr Mapp described the discussions as “robust”. He explained TF81’s partnered operations as he understood them. A contemporaneous note prepared by a New Zealand official records that one of the representatives of the organisation told Dr Mapp that if New Zealand had taken a substantive role in partnered operations, such as planning an operation or supporting an arrest, it incurred at least some obligations towards ensuring the humane treatment of those detained. From the note, it appears that New Zealand understood that the representative’s observations did not suggest that New Zealand incurred the full range of relevant legal obligations. However, in a subsequent conversation with an NZDF officer, the other representative of the organisation who had been at the meeting said that, in fact, the first representative had expressed the view that if TF81 personnel took biometric data from someone detained by Afghan personnel, the detainee would be in New Zealand’s custody for the period of the processing and would be “transferred” back to Afghan authority when the processing was completed. On 23 August, Dr Mapp annotated the MFAT briefing document of 18 August with a note that a detailed opinion from a senior lawyer at Crown Law was required.¹⁴⁷
- [82] After Dr Mapp’s visit, it was decided that New Zealand would join an embassy working group on detainees and would engage with the NDS on detention issues, through New Zealand’s Ambassador to Afghanistan.¹⁴⁸ The Ambassador did not take immediate steps however, as a deployed New Zealand Security Intelligence Service (NZSIS) officer in Kabul warned this approach could damage the relationship with the NDS.¹⁴⁹ Instead, on 15 September the NZSIS officer met with NDS personnel and reported they were “cooperative and friendly” and willing

¹⁴² 5283530_OP BURNHAM_Afghanistan Defences_ UK High Court Judgement possible Implications for NZ (MinDef copy) (18 August 2010) (Inquiry doc 06/08).

¹⁴³ Inquiry doc 06/08, above n 142, at [4].

¹⁴⁴ Chapter 3 at [43].

¹⁴⁵ Dr Mapp reported back to Cabinet on his visit: 10 September 2010 Cabinet Paper – Report on Overseas Travel Hon Dr Wayne Mapp (10 September 2010) (Inquiry doc 01/08). He also discussed his visit in his evidence: Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 2 (23 May 2019) at 52–53.

¹⁴⁶ Cable re Visit of Minister of Defence and CDF to Afghanistan 18 022 August [2010] – Detainees (Inquiry doc 05/36).

¹⁴⁷ Inquiry doc 06/08, above n 142, at [1].

¹⁴⁸ Inquiry doc 05/36, above n 146, at [21]. There were, as well, other international engagements on detention issues; see Cable re ISAF Conference on Afghanistan Detainees – Meeting Report (9 October 2010) (Inquiry doc 05/37).

¹⁴⁹ MFAT Approach to NDS DG (2 September 2010) (Inquiry doc 11/35).

to consider questions from New Zealand.¹⁵⁰ The NDS also said they were prepared to show the officer their Detention Centre. In the end, time passed and MFAT provided no follow-up questions to be put to the NDS. The NZSIS officer met with NDS personnel again in early November and, following that meeting, asked the Ambassador whether New Zealand had any questions for the NDS. The Ambassador said that it “might be best to let sleeping dogs lie on that issue”.¹⁵¹ At that stage, the officer still intended to visit the NDS Detention Centre, although it is not clear to us whether that visit in fact occurred.

NZDF’s legal advice

[83] In September 2010, Brigadier Riordan finalised his formal legal opinion on the question of whether the support given by NZDF personnel in partnered operations meant that New Zealand and/or members of NZDF were complicit in any subsequent torture of detainees.¹⁵² In the opinion, Brigadier Riordan addressed the question of principle whether, given the human rights record of the NDS, the mere fact that a person was left in its control gave rise to a real risk that they would suffer torture or mistreatment, with the result that New Zealand would face legal risk. Given that New Zealand’s international obligations were engaged, Brigadier Riordan recommended that his opinion be passed to the Solicitor-General for review.

[84] In his opinion, Brigadier Riordan acknowledged that “a small number” of persons arrested by the CRU in partnered operations had been transferred to the NDS facility in Kabul. He noted that while operations involving direct combat against insurgents were conducted under the Law of Armed Conflict, much of the NZSAS’s role in Kabul was in support of law enforcement tasks rather than armed conflict activities. He went on to emphasise the NZSAS’s mentoring role in relation to the CRU and said:

NZSAS members do not take a leading role in the active part of the operation themselves although they will sometimes be in close support, provide certain technical capabilities, and assist with the recording of names and other personal information of those detained.

[85] Later in the opinion, Brigadier Riordan discussed the ISAF Detention Operations and Notification Directive dated 13 April 2010,¹⁵³ which he described as the first ISAF document to address detentions effected by Afghan forces in ISAF-partnered operations. He noted that the NZSAS had complied with this Directive and had supplied ISAF with information relating to all CRU detentions “in which they have been involved or have been in their vicinity”.

[86] Brigadier Riordan then discussed the law relating to torture, the obligation of *non-refoulement* and the concept of complicity under international and national law. He also stated that conditions in NDS detention facilities had improved substantially. Ultimately, Brigadier Riordan advised that he did not consider that NZDF’s involvement in partnered operations was sufficient to amount to complicity in any subsequent torture of a detainee.

¹⁵⁰ Meeting with NDS on Detainee Iss ... (15 September 2010) (Inquiry doc 11/37) at [2]. See also email from [redacted] to [redacted] “RE: NDS/Detainees” (15 September 2010, 9.46pm) (Inquiry doc 11/32).

¹⁵¹ Meeting with NDS of 2 November 2010 (5 November 2010) (Inquiry doc 11/33) at [3].

¹⁵² Inquiry doc 06/10, above n 118. In his opinion, Brigadier Riordan referred frequently to what he described as “Ref A”, which is a report on the 18–22 August visit of the Minister of Defence and the Chief of Defence Force to Afghanistan: see Inquiry doc 05/36, above n 146.

¹⁵³ See paragraph [71] above.

- [87] Brigadier Riordan did, however, discuss the view that there was a moral (and arguably a legal) duty to take reasonable steps to ascertain that the human rights of persons detained in partnered activities were respected. Having noted that the “most robust and legally justifiable measure” would be to conduct inspections and monitoring, Brigadier Riordan discussed how that might be carried out, acknowledging that before anything could be done, it would be necessary to negotiate a suitable arrangement with the Afghan Government.¹⁵⁴ If inspection and monitoring was not possible, he suggested a more limited alternative, which involved an enhanced regime of providing information in relation to persons detained on partnered operations, together with further mentoring and support directed at enhancing the rule of law.
- [88] MFAT received the opinion and noted that it pointed to a possible moral imperative to carry out or explore options for detention monitoring and that this would have implications for MFAT.¹⁵⁵
- [89] In a briefing to the Minister on 16 September 2010,¹⁵⁶ the Chief of Defence Force confirmed that the legal advice he had received said that the partnering arrangements between NZDF and the CRU did not amount to complicity in torture. He also advised that no New Zealander had any role in the decision to transfer detainees to the NDS;¹⁵⁷ that New Zealand had no obligation, right or physical ability to monitor detainees transferred by the CRU to the NDS;¹⁵⁸ and that to assert a right to do so would amount to an infringement of Afghan sovereignty.¹⁵⁹
- [90] The Chief of Defence Force also noted that a further important and complex aspect was the existence of a moral imperative for New Zealand to take steps to ascertain that the human rights of persons arrested by the CRU were protected and to decide how this should be done. He requested further advice on potential measures, including prisoner monitoring. He advised that monitoring detainees from partnered operations would require separate arrangements and the difficulty of negotiating the necessary measures “should not be underestimated.” He recommended that the Minister engage with the Minister of Foreign Affairs to secure his views. He noted at the same time that Brigadier Riordan’s legal advice had been sent to the Solicitor-General for confirmation.

The Solicitor-General’s legal opinion

- [91] On 2 November 2010 the Solicitor-General provided a detailed opinion on New Zealand’s obligations in respect of persons detained in multinational operations.¹⁶⁰ The essential feature of the Solicitor-General’s opinion was to confirm the view of NZDF and MFAT that the “two category” approach to the legal obligations in respect of detainees was appropriate. Persons detained by NZDF personnel could only be transferred to Afghan authorities if they did not face a real risk of torture in Afghan custody; moreover, any detainees transferred would have to be subject to a monitoring regime. By contrast, New Zealand’s *non-refoulement* and related obligations did not apply to persons arrested by Afghan personnel in Afghan-partnered operations. As a consequence, New Zealand had no duty or right to monitor such people. In essence, the message was “the

¹⁵⁴ We think his note on follow-up measures is correct. We address the issue of negotiated arrangements and effective follow up / monitoring further in chapter 11.

¹⁵⁵ Email from [redacted] to [redacted] “Detainees: NZDF opinion” (27 September 2010, 2.10pm) (Inquiry doc 11/23).

¹⁵⁶ Note to Minister 414 Detainee Arrangements – Afghanistan (16 September 2010) (Inquiry doc 03/01).

¹⁵⁷ At [2](c).

¹⁵⁸ At [2](e).

¹⁵⁹ At [2](f).

¹⁶⁰ Solicitor-General “Obligations in respect of persons detained during multinational operations (DFO037/283)” (2 November 2010) in Note to Minister 484 Detainee Arrangements – Afghanistan (9 November 2010) (Inquiry doc 03/02) from 3.

current circumstances of New Zealand “partnering” operations in Afghanistan do not give rise to liability either through individual or state complicity in torture or through breach of the duty of *non-refoulement* of people at risk of torture.”¹⁶¹

- [92] The Solicitor-General considered the point discussed in Brigadier Riordan’s opinion that there was a moral, if not a legal, duty to take reasonable steps to ascertain that the human rights of persons detained on partnered operations were respected. He examined the possible bases for such a duty. First, the Solicitor-General accepted that there was a duty of non-complicity, the effect of which was that New Zealand had to ensure that it did not provide assistance to Afghan personnel where it was known, or ought to be known, that the assistance provided “sufficiently direct support” for acts of torture by Afghan authorities.¹⁶² As New Zealand’s involvement in partnered operations was less direct than it was where NZDF personnel captured people, the duty of non-complicity arose at a systemic level.¹⁶³ It required New Zealand to take steps to deter torture by Afghan authorities, gather information about the practices of Afghan personnel and institutions, and, if circumstances changed, restrict or withdraw its cooperation until matters were remedied.
- [93] Second, the Solicitor-General recognised that the circumstances of some partnered operations might be such as to engage the law of non-international armed conflict and its associated obligations.¹⁶⁴ He noted that the duty applicable to international armed conflict to ensure respect for Law of Armed Conflict standards appeared to apply also in non-international armed conflicts as a rule of customary international law. He described the content of the obligation as being to exert influence, to the degree possible, to stop violations of International Humanitarian Law, which might include steps such as applying diplomatic pressure or withdrawing cooperation or assistance.
- [94] Third, the Solicitor-General noted that the possibility of developments in relation to the obligation to prevent torture, along the lines of the “obligation to prevent” under the Genocide Convention as interpreted by the International Court of Justice in the *Bosnian Genocide* case.¹⁶⁵ He also drew attention to the Committee against Torture’s view that states that become aware of alleged acts of torture committed by others in the course of joint operations are obliged to report and seek investigations of those allegations.¹⁶⁶
- [95] The upshot was that the Solicitor-General concluded that New Zealand could, in providing assistance to Afghan personnel in law enforcement operations, become complicit at international law in any subsequent torture or mistreatment by Afghan authorities of people detained in partnered operations if New Zealand personnel became aware, or ought to have become aware through normal diligence (that is, if they had constructive knowledge), of an intention to torture detainees. He said that, to avoid the potential for complicity, it was necessary to:
- (a) maintain agreements with Afghan authorities that human rights protections would be observed;
 - (b) continue to obtain credible assurances from Afghan authorities that such protections were met in practice;

¹⁶¹ At [2.1.1] and [2.1.2].

¹⁶² At [40].

¹⁶³ At [41]–[42].

¹⁶⁴ At [43]–[49].

¹⁶⁵ At [50]–[52], referring to the *Bosnian Genocide* case, above n 38, at [429]–[432].

¹⁶⁶ At [54].

- (c) undertake concerted information-gathering by New Zealand personnel on Afghan practices; and
- (d) withdraw or restrict cooperation from relevant Afghan partner forces if New Zealand personnel became aware that detainees taken by Afghan forces in partnered operations with New Zealand forces had been tortured, until that risk could be addressed.

[96] Significantly, and contrary to Brigadier Riordan’s approach, Crown Law advised that to undertake detention monitoring in relation to individual detainees from partnered operations would expose New Zealand to legal risk if torture were alleged or discovered during visits. This was because the Solicitor-General considered that there was no legal obligation to undertake individual monitoring and it posed practical problems, particularly because NZDF had no legal power to intervene to protect detainees if it did learn that something was amiss.

[97] When consulted on the final draft, MFAT preferred the Crown Law view to that of Brigadier Riordan. While Crown Law took a narrower view of New Zealand’s obligations than Brigadier Riordan in key respects, MFAT nevertheless noted that the resource implications of a general obligation to gather information would need to be considered.¹⁶⁷

[98] Before we move on to describe Operation Yamaha and subsequent relevant developments in chapter 11, we note that the brief overview of the law set out earlier in this chapter highlights the fundamental nature of the prohibition of torture and mistreatment of detainees and the associated requirement for minimum standards of treatment of detainees. Its fundamental nature is such that states should not take a minimalist approach towards the interpretation and application of their obligations. Where doubt exists as to the full scope of an obligation, or the relationship between obligations, states should adopt the approach (whether as a matter of law or policy) which affords the greatest protection to the individual (a *pro homine* approach).

[99] We also note that Sir Kenneth Keith’s point about states having an obligation under Common Article 1 to “ensure respect” for the prohibitions and obligations contained in Common Article 3 is, in effect, recognised in the opinions of Brigadier Riordan and the Solicitor-General:

- (a) Brigadier Riordan considered that New Zealand had a moral (and arguably a legal) duty to take reasonable steps to ascertain that the human rights of persons detained in partnered activities were respected. As noted at paragraph [90], the Chief of Defence Force raised this issue with the Minister of Defence, seeking further guidance.
- (b) The Solicitor-General referred to a “duty of non-complicity” in respect of partnered operations, which arose at a systemic level and required New Zealand to gather information about the practices of Afghan personnel and institutions in relation to detention and respond if problems were discovered.

Further, as the foregoing outline of the law shows, the preventive obligations arising from Common Articles 1 and 3 overlap with preventive obligations contained in other sources of law.

¹⁶⁷ Email from [redacted] to [redacted] “RE: Afghan detainees: NZDF and Crown Law opinions” (18 October 2010, 5.20pm) (Inquiry doc 06/11).