23 May 2019 – Commenced at 10:00 a.m.

I N D E X

23 May 2019

OPENING REMARKS

SIR TERENCE: Good morning, everybody, and welcome to the second day of this particular hearing. We're going to hear first from Crown Agencies on a number of issues and they are going to make a joint presentation. So, the way we'll run it is, we'll hear from each of the three people who are making either submissions or technically giving evidence, and then we'll ask questions at the end of that.

So, Dr Penny Ridings, Mr Heath Fisher and Brigadier Ferris, this is all set-up, so if you could come forward, we'll get underway.

Dr Ridings will be describing the principles of international law that apply, we're going to treat that as a submission. Mr Fisher and Brigadier Ferris are talking about steps, in one case taken by the New Zealand Government, and steps taken by NZDF and those are issues of fact. So, we're going to swear or affirm both of those two witnesses.

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CROWN AGENCIES JOINT PRESENTATION

DR PENNY RIDINGS
HEATH FISHER - AFFIRMED
BRIGADIER LISA FERRIS - AFFIRMED

SIR TERENCE: Dr Ridings, are you starting?

DR RIDINGS: Yes. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

I am Penelope Ridings, I am a barrister and international law consultant and counsel for the Crown Agencies. I was formally the Head of the Legal Division of the Ministry of Foreign Affairs and Trade.

This part of the module relates to clauses 6.3 and 7.8 of the Inquiry's Terms of Reference and the requirement to report on whether the NZDF's transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Director of Security in Kabul in January 2011 was proper.

The Inquiry has asked the Crown to provide a presentation on issues relating to the detention by NZDF forces during operations in Afghanistan. As the presentation is not focused on the operation relating to Qari Miraj specifically, some of what might be covered goes outside the Inquiry's Terms of Reference. However, we hope that the information provides a broader context for the Inquiry.

So, this presentation will be split by topic between the three presenters. I will provide legal submissions on the international legal rules governing detaining people in Afghanistan by New Zealand forces, including the duty to avoid placing people into a situation where they may be tortured in detention and the safeguards used to guard against this.

This will be followed by a presentation by Mr Heath Fisher who is the Divisional Manager of the International Security and

Disarmament Division of the Ministry of Foreign Affairs and Trade. He will look at the political and military context for detention in Afghanistan, engagement with the Government of Afghanistan and international partners on the detention of suspected insurgents and their transfer to the Afghan Government detention facilities during the period 2009-2011.

Brigadier Ferris, Director of the Defence Legal Services, will then provide information on New Zealand's policy relating to detention in the Afghanistan theatre and how NZDF implemented those policies.

So, turning to the international context for New Zealand operations in Afghanistan. The international legal framework for the International Security Assistance Force, which is termed ISAF and I'll use that acronym, the framework for these operations in Afghanistan is provided by International Humanitarian Law applicable to non-international armed conflict, and International Human Rights Law.

Because the emphasis of Module 2 is on the detention of people in Afghanistan by New Zealand forces, this presentation does not address international criminal law, nor New Zealand domestic law relating to these issues. A second caveat relates to the evolving nature of international law in these areas. For the purposes of the Inquiry what is relevant is the state of international law at the time of the events in question.

International Humanitarian Law is triggered by the existence of an armed conflict. The obligations and protections in International Humanitarian Law apply whenever and wherever armed conflict is taking place. In contrast, the principal base for the application of international human rights law is territorial - the obligations of a State apply within the territory of that State. However, the scope of application of the International Covenant on Civil and Political Rights is set out in Article 2, paragraph 1 of that convention and applies "to all individuals within [a State's] territory and subject to its jurisdiction". The International Court of Justice has clarified that international human rights

instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory". This principle does not mean that international human rights law applies to all acts done by State agents outside the State's territory; it only applies to those acts carried out in the exercise of State jurisdiction. The circumstances in which a State may exercise jurisdiction outside its own territory is not settled at international law.

International Humanitarian Law is generally considered to be - it's called a *lex specialis*. In other words, in the event of an inconsistency the law governing a specific subject matter is applied over the more general law. Nevertheless, the International Court of Justice in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall* considered that the protection offered by human rights conventions does not cease in the case of armed conflict, unless there is a permissible derogation, such as under Article 4 of the ICCPR, which is not the case here. Rather, there may be a need to take into account both branches of law: human rights law, and as a *lex specialis*, international humanitarian law. Furthermore, even in an area where an armed conflict is occurring, law enforcement is governed by international human rights law.

Within this general international legal framework, there are specific rules in each of these branches which address detention – i.e. the arrest or apprehension of a person and the deprivation of the person's liberty. There are different notions of detention depending on the legal basis or authorisation for the detention, and whether it is based on reasons of security, or to prosecute criminal behaviour.

In the case of Afghanistan, UN Security Council Resolution 1386 (2001) authorised States contributing troops to ISAF to use “all necessary measures” to fulfil the ISAF mandate. Authorisation was also reflected in the 2002 Military Technical Agreement between ISAF and the Interim Administration of Afghanistan. Article IV.2 of this agreement provided that the

ISAF Commander had the authority "to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission". In turn ISAF SOP 362 set out the circumstances in which ISAF forces could detain non-ISAF personnel for security reasons, such as if detention was necessary in self-defence, or to protect ISAF forces or to accomplish the ISAF Mission. National courts in the United Kingdom and Canada, and international tribunals have acknowledged that the detention of members of opposing armed groups for imperative reasons of security is authorised by relevant UN Security Council resolutions and the consent of the Afghan Government.

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

In considering security detention by ISAF forces under International Humanitarian Law (and here I will use an acronym IHL) Common Article III of the Geneva Conventions provides that in the case of armed conflict not of an international character, persons in detention shall in all circumstances be treated humanely without adverse distinction founded on race, colour, faith, or religion etc. It then goes on to enumerate specific prohibitions including violence to life and person, in particular murder, cruel treatment and torture; and outrages upon personal dignity, in particular humiliating and degrading treatment. Common Article III is a minimum yardstick which sets out elementary considerations of humanity. But it is otherwise silent on the conditions of detention and internment.

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

The lack of explicit rules relating to detention by foreign forces operating in a non-international armed conflict has also led to the development of guidance to States on detention. This includes ISAF SOP 362 which deals with ISAF detention in Afghanistan, as well as the Copenhagen Principles. These principles were developed following several years of discussion between States (including New Zealand), international organisations and civil society. They are not

legally binding, nor do they create new obligations or commitments. Rather the Principles are intended to reflect generally accepted standards.

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

Like IHL, International Human Rights Law contains an absolute prohibition against torture and other cruel, inhuman and degrading treatment or punishment. The prohibition against torture is a peremptory norm of international law, from which no derogation is permitted.

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

In addition to the absolute prohibition against torture, there is an obligation under international law not to return ('*refouler*') any person to another State or authority where the person would face a real risk of torture, cruel, inhuman or degrading treatment or punishment or arbitrary deprivation of

life. While originating in refugee law, the obligation for *non-refoulement* extents more broadly and is found not only in Article 3 of the Convention Against Torture but in other international and regional human rights treaties.

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. The crucial factor is the *transfer* of a detainee from one State to the other. This means that the principle of *non-refoulement* can apply even if the person concerned remains entirely within the territory of one State.

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

There are a number of additional ways in which States assure themselves that they comply with the *non-refoulement* obligation. The Copenhagen Principles, and New Zealand's policy on detention, all include provisions on transfer which confirm the *non-refoulement* obligation. Additional safeguards which assist in complying with the *non-refoulement* obligation include obtaining formal assurances that a detainee will be treated in accordance with international human rights standards. Assurances are usually considered in combination with complementary mechanisms, such as monitoring of detainees, investigations into alleged incidents of mistreatment, efforts to gather and maintain knowledge about law enforcement and detention facilities, and education on recognising and preventing torture and ill-treatment. If safe transfer is not

possible, the only option is to simply release the person. However damaging to the interest of security such an action would be, this reality formed part of the detention policies of ISAF States, including New Zealand.

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

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

Is there a test for triggering international responsibility?

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

States that are authorised to operate in the territory of another State may bear international responsibility where they fail to comply with international obligations that are applicable to them and their actions. However, there is no consensus among States, national and regional courts and UN treaty bodies on a single test to bring an individual within the jurisdiction of a State that is operating within another State. Commissioners, if you like, I will not go into detail in all of these cases but I will refer to the presentation that was provided in writing.

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

2. Even assuming the application of an effective control test, in order for effective control of a partnering State to be established, the State concerned must have the capacity to act to affect the treatment of a person. As one commentator has noted, the effective control threshold should be met only when the obligations imposed could be realistically complied with. To assert a right to release a person arrested by the host State would amount to an infringement of the sovereignty of the host State.

There is no legal basis according to which a partnering State could act in this manner.

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

Turning to the question of complicity under State responsibility of international law.

The second question is whether the State of a partnering force bears international responsibility if a person detained by Afghan authorities is later subjected to torture. In determining whether there has been a breach of international law by a State, the principal focus is on the primary rules. The rules relating to State responsibility play an ancillary role in determining whether a breach has occurred. In this way, complicity connotes secondary liability which is derived from the liability of a principal party.

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

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

i. The assisting State must provide aid or assistance.
ii. There must be a sufficient nexus between the assistance and the unlawful conduct.

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

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

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

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

In addition to complicity which implies a positive action, the question arises as to whether State responsibility can arise through omission: failure to take steps to prevent torture in circumstances in which it is known to be occurring. The International Court of Justice applied such an approach in the Bosnian genocide case, but expressly noted that it was not purporting to develop

general jurisprudence relating to a duty to prevent the commission by another State of acts contrary to international law. The obligation to protect against torture has, however, been considered by the European Court of Human rights in the 2012 El Masri case to include the need to take effective measure to safeguard against the risk of a breach of international law. Nevertheless, the extent of a due diligence obligation to prevent torture is not settled at international law.

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

Having reviewed the international legal issues, I will now leave it to my colleague from the Ministry of Foreign Affairs and Trade to explain the political and military context for detention in the Afghanistan theatre.

HEATH FISHER: Good morning, all. My name is Heath Fisher, I am the Director for International Security and Disarmament with the Ministry of Foreign Affairs and Trade. The International Security Summit Division has responsibility for the foreign policy elements of most of New Zealand's offshore military deployments.

So, this briefing provides an overview of New Zealand's engagement with the Government of the Islamic Republic of Afghanistan and international partners on the detention of suspected insurgents and the transfer of these suspected insurgents to Afghan Government detention facilities during the period 2009-2012.

New Zealand was one of a number of governments which sought assurances from the Afghan Government that people handed over to Afghan detention facilities would be treated in a humane manner, in accordance with international conventions including the relevant Geneva Conventions, the Convention against Torture, the International Covenant on Civil and Political Rights or the ICCPR, and the Second Optional Protocol to the ICCPR on the abolition of the death penalty.

This briefing will demonstrate that a key feature of New Zealand's detention policy in Afghanistan was on ensuring compliance with our international obligations. To that end, MFAT and NZDF committed substantial resources to this task.

While this briefing focuses primarily on the issues specifically of interest to the Inquiry, it also includes some additional information which, while outside the scope of the Inquiry's Terms of Reference, may help provide some useful further context.

New Zealand was present in Afghanistan pursuant to a determination by the United Nations Security Council that the situation in Afghanistan constituted a threat to international peace and security.

Throughout New Zealand's ongoing involvement in Afghanistan, the security situation has been highly volatile. New Zealand's efforts have been directed at promoting peace and

security in the country. This has included a contribution to security, governance and development efforts in Bamyan province; and through the building of capacity of the broader Afghan National Security Forces (ANSF), particularly through mentoring of the Afghan Crisis Response Unit (CRU) in Kabul.

UN Security Council Resolution 1386 (2001) authorised States contributing troops to the International Security Assistance Force (ISAF) to use "all necessary measures" to fulfil the ISAF mandate. The detention of members of opposing armed groups for imperative reasons of security was contemplated within that authorisation and anticipated as potentially necessary as part of New Zealand's military deployments.

Throughout the period of the Inquiry's interest, New Zealand was conscious that Afghanistan's detention system was deficient. In the mid-2000s there was a series of UN and NGO-published reports raising serious concerns about prison conditions in Afghanistan, and alleging widespread torture of detainees. In light of these reports, when the UNSC renewed ISAF's mandate in late 2007 (UNSCR 1776), it added reconstruction and reform of the prison sector to improve respect for human rights and the rule of law as a key part of the mandate. This gave rise to two parallel demands: first, a need to build capacity and skills within the Afghan law enforcement and prison system to improve respect for human rights and the rule of law; and secondly, in the interim, to ensure that any detainees for whom New Zealand was responsible were treated in accordance with New Zealand's international obligations.

To meet the first demand, there was a sustained effort from the international community operating in Afghanistan to support the development and upskilling of police and corrections forces across Afghanistan's various departments operating in this space. New Zealand developed a mentoring and training relationship with a unit of the Afghan National Police called the Crisis Response Unit (CRU) and, as part of this,

emphasised human rights and rule of law obligations. In addition, New Zealand delivered development assistance, including significant contributions and practical support for projects including policing capability and capacity and human rights. That support is ongoing today, including by training officers at the Afghan National Army Officer Academy and providing US$2 million each year to a UNDP-managed Law and Order Trust Fund for Afghanistan to support the capacity building of Afghan security and law enforcement forces.

To meet the second demand, New Zealand engaged with the Afghan Government and other international partners to ensure that persons apprehended by New Zealand and transferred to Afghan custody were treated in a humane manner, in accordance with international conventions including where applicable: the relevant Geneva Conventions, the Convention against Torture, the International Covenant on Civil and Political Rights, and the Second Optional Protocol to the ICCPR on the abolition of the death penalty.

New Zealand also carefully considered its obligations in relation to partnered operations where arrests and detentions were carried out by Afghan authorities, with NZDF members in support roles. In that context, New Zealand had no authority over the sovereign acts of the Afghan Government in administering its own law enforcement and justice system, but nonetheless New Zealand ensured it was not complicit in any mistreatment of detainees.

To address concerns about prison conditions in Afghanistan, including risks of lack of due process, torture and the use of capital punishment, some ISAF troop-contributing nations looked to put in place additional measures to safeguard against these risks, by negotiating bilateral agreements with the Afghan Government in addition to the ISAF policy on detention.

Likewise, while NZDF personnel in Afghanistan were bound by ISAF policies on detainees, New Zealand also pursued its own

bilateral arrangements with Afghanistan on the detention and transfer of detainees by New Zealand forces.

The issue of mistreatment and the non-application of the death penalty required careful negotiation. The issue of capital punishment was a particular area of concern because capital punishment remains permissible under the Afghan criminal code. In practice, however, it has been rarely used since the fall of the Taliban. Alongside assurances on the humane treatment of detainees transferred to Afghan custody, New Zealand - in common with a number of ISAF partners who had also ratified the Second Optional Protocol to the ICCPR - sought assurances that provided for non-application of the death penalty.

In 2006, New Zealand obtained verbal assurances from a range of Afghan senior officials regarding humane treatment in accordance with International Humanitarian and Human Rights Law, and assurances on the non-application of the death penalty against detainees transferred to Afghanistan by NZDF personnel. Subsequently, New Zealand sought to formalise these assurances in writing via a bilateral arrangement.

Following some negotiation, New Zealand signed an arrangement with the Government of Afghanistan on 12 August 2009. This covered the transfer of any persons from New Zealand forces to Afghan authorities. Key elements included that:

- NZDF was responsible for maintaining and safeguarding persons apprehended by it and would treat those persons in accordance with applicable domestic and international law;
- Afghan authorities were responsible for maintaining and safeguarding all persons (transferred to them by the NZDF) in accordance with applicable domestic and international law;
- NZDF was required to notify the International Committee of the Red Cross (ICRC) and the Afghan Independent Human Rights Commission (AIHRC) of a detainee transfer;

- Afghan authorities guaranteed access to the NZDF, the ICRC and the Afghan Independent Human Rights Commission to visit and monitor the welfare of transferred prisoners; and
- Afghan authorities were required to inform NZDF prior to any legal proceedings being initiated, any transfer of the detainee to a third party, or the release of any detainee.

On the issue of the death penalty, Afghan sensitivities precluded express reference to the prohibition of the death penalty. However, the arrangement recorded that "persons transferred from the NZDF to the Afghan authorities will be treated in accordance with the international obligations of both Participants…". This included New Zealand's obligations under the Second Optional Protocol to the ICCPR.

When considering how to ensure our international legal obligations were met on any arrangement on detainees, New Zealand held regular discussions with a range of NATO-ISAF partners. In 2007, Denmark had commenced the Copenhagen Process aimed at consolidating and agreeing principles on the handling of detainees. New Zealand was an active participant in this process which, eventually, led to the negotiation of the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations (2012). During the same period, ISAF held annual conferences for ISAF members to share respective approaches on monitoring regimes and to discuss current challenges and work under way to address them.

ISAF contributing partners, including Canada, Denmark, the Netherlands, Norway, and the UK, all negotiated Memorandums of Understanding or Transfer Arrangements with the Afghan Government.

New Zealand consulted most, if not all, of the above countries in order to ascertain the best approach to securing written assurances that the death penalty would not be applied to any detainee transferred to Afghan custody, and that obligations around detainee treatment would be met. There was

no one-size-fits-all solution to this issue and despite close cooperation through the ISAF mission, each country had to negotiate separately with Afghanistan. New Zealand's detainee arrangement contained similar elements to those negotiated by others.

Common elements from other partner agreements provide that:

- Afghan authorities will accept the transfer of detainees from detaining country forces, and Afghan authorities will keep records of transferred detainees;
- The participants will treat detainees in accordance with International Law including Human Rights and Humanitarian Law;
- Representatives of the respective ISAF State, the ICRC and the AIHRC will have access to the detainees after they have been handed over;
- The ISAF State will be notified prior to the initiation of legal proceeding against, release, or transfer to a third country of the detainee; and
- No person transferred will be subject to the death penalty.

In June 2010 the UK High Court released its judgment for the case of *R (Evans) v the Secretary of State for Defence* [2010] (which I will refer to as *Evans*) on transferring detainees in Afghanistan to Afghan detention facilities. The judgment noted serious concerns in relation to a specific National Directorate of Security (NDS) facility in Kabul. While the NZDF had not directly transferred any prisoners to Afghan detention facilities, it had provided support to operations during which Afghan authorities made arrests and transferred those detainees to Afghan detention facilities.

Following the release of the *Evans* judgment, NZDF sought legal advice regarding the consequences of the *Evans* decision for NZDF operations. These matters were also considered by Cabinet. Advice from NZDF Defence Legal

Services and Crown Law both concluded that there was a clear distinction between the obligations arising where i) New Zealand was the detaining authority, and those arising where ii) New Zealand was engaged in a partnering operation where the Afghan authorities carried out the arrest and detention.

In particular, the legal advice made it clear that the *non-refoulement* obligations under international law would apply in full in respect of any person detained by the NZDF; but that prisoners taken by Afghan forces in New Zealand-partnered operations were not within the scope of that obligation.

The priority given by New Zealand to detention policies and treatment of detainees, irrespective of legal obligations, was emphasised also at a political level. Senior visitors to Afghanistan - such as by then Defence Minister Dr Wayne Mapp - raised New Zealand's concerns with historic abuses committed by Afghan authorities (specifically the NDS) and sought assurances of the humane treatment of detainees apprehended by the Afghan National Security Forces (ANSF), especially when operating with the support of the NZSAS.

During a visit to Afghanistan in August 2010, Dr Mapp reiterated New Zealand's concerns on the treatment of detainees and sought updates on the progress of improved surveillance at NDS facilities. He was briefed on improvements within Afghan prisons, particularly where international assistance had helped the NDS improve its investigative, forensic and evidence-based methodology and support to modernise detention facilities in Kabul.

As part of our diplomatic efforts, New Zealand also joined with a number of international partners in a detainee working group to assist the Afghan Government to upgrade detainee facilities, systems and practices, including within the NDS. Membership of this working group gave New Zealand a stronger voice for raising concerns

around detainee treatment and conditions with the Afghan Government. Participation also enabled New Zealand to better understand the issues facing the NDS and consider how its detention facilities could be further supported. This work contributed to efforts to improve the standards, policies and procedures of Afghan facilities and administrating authorities.

Given the significant international efforts to support the modernisation and compliance with international standards of the Afghan prison and policing sector, the October 2011 UNAMA report on Afghan detention facilities revealed the scale of the ongoing challenge. This report highlighted widespread mistreatment of detainees, use of torture, and a lack of access to legal representation in Afghan prisons. It had an immediate impact on the detention facilities used by ISAF partners in Afghanistan, including New Zealand. In early September 2011, in response to the findings in the forthcoming UNAMA report, ISAF stopped transferring detainees to 16 NDS and ANP facilities. In October 2011, New Zealand's CDF confirmed to the Minister of Defence that he would also not allow the transfer of any person to a facility that was listed in the UNAMA Report, or in respect of which credible allegations or reports of torture and ill-treatment existed.

However, notwithstanding criticisms of the treatment of detainees, the UNAMA report highlighted the importance of continuing partnering with Afghan authorities. It recommended in particular ongoing mentoring relating to international human rights obligations for detainees and support to upskilling NDS and Afghan National Police in lawful investigative measures. This was a key element of New Zealand's mentoring of the Afghan Crisis Response Unit.

In practice, New Zealand's arrangement with the Afghanistan authorities on the transfer of detainees was never engaged as NZDF did not detain and transfer any individuals directly to the Afghan authorities. During

Operation Wātea, the NZSAS only detained one person - Musa Khan - who was subsequently transferred to US custody. However, to help illustrate how New Zealand's detention policy was implemented in practice, I will briefly outline how New Zealand dealt with this individual.

As the individual detained was to be transferred to US custody, New Zealand sought assurances from the US Government to ensure compliance with New Zealand's international obligations. The US offered its standard conditions of transfer which were considered to be broadly compliant with New Zealand's obligations. However, the New Zealand Government also confirmed with the US New Zealand's understanding that the US commitment to treat the detainee in accordance with international law would include respect for New Zealand's obligations under the Second Optional Protocol of the ICCPR which dealt with the death penalty.

Upon transfer to US custody, NZDF immediately informed the ICRC and AIHRC of the detention and New Zealand Government monitoring of the detainee's well-being commenced.

New Zealand diplomatic and NZDF personnel regularly visited the individual to ensure his detention met our international and domestic legal obligations. These visits were conducted by NZDF personnel based in Kabul and with diplomatic personnel from the New Zealand Embassy in Kabul. Joint visits by military and diplomatic personnel followed best practice established by like-minded countries in Afghanistan including the UK, Canada and Australia. The New Zealand Government continued to monitor the detainee until he was brought before a judicial authority of the Afghan Government.

Strengthening the rule of law and ensuring detention facilities in Afghanistan remains a high priority for NATO and the international community, and while there is further work to be done, partnering and mentoring remains a key

pillar of support to Afghanistan. A 2019 UNAMA report welcomed the steps taken by the Government of Afghanistan to prevent and address torture and ill-treatment of conflict-related detainees. However, the report noted that the continuing use of torture and ill-treatment remains significant. Accordingly, UNAMA continues to recommend capacity-building across the justice sector to support investigative techniques and prosecution in full compliance with international human rights standards, as well as continued upskilling to identify and report any allegations of torture of detainees.

I'll pass now to Brigadier Ferris.

BRIGADIER FERRIS: Tēnā koutou katoa. For those that were not here yesterday, my name is Brigadier Lisa Ferris and I am the Director of Defence Legal Services. I was commissioned into the Army Legal Service in 2003 and I have operational experience including deployments to Afghanistan. In 2016 I assumed the role of Acting Director of Defence Legal Services and in January 2018 I was promoted to my current rank of Brigadier. I also hold the statutorily-independent role of Director of Military Prosecutions.

In order to assist the Inquiry I have been asked to speak about detention in the Afghanistan theatre and New Zealand's policies on detention in Afghanistan, including standard operating procedures, how the NZDF operated, and whether those practices changed over time. Again, I would like to draw attention to the significant amount of public material available online, via the Inquiry's website, on the topic of detention as it relates to Afghanistan.

This briefing will necessarily cover detention operations conducted by New Zealand forces and detention operations that were conducted by elements of the Afghan National Security forces, which were supported by New Zealand forces; what has been described as "partnered operations". To assist understanding, I will take each category of detention in turn.

Examining detention operations conducted by the New Zealand forces, at the outset, I would note that the primary mission of Operation WĀTEA, the NZSAS deployment to Afghanistan, was not to conduct detention operations. The Chief of Defence Force described the mission as follows: "The New Zealand Defence Force is to provide a Special Operations Task Force to the International Security Assistance Force Afghanistan ... in order to maintain stability, defeat the insurgency, mentor the Crisis Response Unit and enhance the reputation of the New Zealand Defence Force and the Government of New Zealand". I acknowledge, however, that any deployment of the Armed Forces raises the possibility of detaining an

individual and, as I will describe below, any detention was the subject of detailed procedures and processes.

New Zealand forces operating as part of the International Security Assistance Force or ISAF were required to comply with ISAF Standard Operating Procedure 362, the detention of non-ISAF personnel. This was the primary policy governing detention of non-ISAF personnel in Afghanistan. In order to give this Standard Operating Procedure legal effect, in March 2007 the Chief of Defence Force directed that New Zealand forces under the operational control of Commander ISAF comply with it.

The SOP 362 emphasised the obligations incumbent on the Armed Forces regarding the transfer of detainees. However, maintenance of law and order was the responsibility of the Government of Afghanistan.

On 11 June 2007 the Chief of Defence Force issued the Individual Guidance for the detention of non-ISAF personnel which was to be read and implemented in conjunction with SOP 362. This guidance is available publicly on the Inquiry website. The guidance was issued to all members deploying on operations to Afghanistan to carry with them.

The Individual Guidance for the detention of non-ISAF personnel was incorporated into the Operation WĀTEA Rules of Engagement and was promulgated to all SAS personnel deploying on Operation WĀTEA. These rules are also available publicly on the Inquiry website. I note that the provision at paragraph VICTOR of the Operation WĀTEA Rules of Engagement in relation to detention outlines the requirement to comply with the guidance.

The Individual Guidance authorised New Zealand forces to detain non-ISAF personnel in certain circumstances, namely

a. where necessary for the defence of any personnel or property they were authorised to protect; and
b. for mission accomplishment

A detained person must either be released when there is no further threat posed to the mission or, with prior approval of

Commander Joint Forces New Zealand and/or the Chief of Defence Force, handed over to an appropriate Afghan authority. This provision was specifically inserted into the Individual Guidance document in order to ensure that non-ISAF personnel, detained by New Zealand forces, were not transferred or handed over in circumstances where their lives and safety were likely to be at serious risk. It ensured transparency of action within the command chain and demanded a high level of scrutiny with regard to the determination of any decision to transfer or handover any detainee. In addition, it enabled the possibility of making arrangements for another ISAF troop contributing nation to receive an individual if necessary.

The Individual Guidance provided direction with regard to immediate action at the scene of detention including:

a. the documentation that was to be completed in order to meet obligations taken from the Geneva conventions;
b. acceptable levels of force that could be used in certain circumstances; and
c. the approach to be adopted towards search, including considerations of gender and age.

Operation WĀTEA Rules of Engagement, issued in 2009, provided further limitations on the authority to detain individuals, namely that detention was only permitted if:

a. No member of the CRU or Afghan National Security Forces was present to detain that person; and
b. The person had demonstrated hostile intent, is committing a hostile act, or is interfering with mission accomplishment.

In respect of detentions undertaken by New Zealand Forces in Afghanistan, I note that since 2009 only two individuals were directly detained by New Zealand force elements. One individual was detained by the NZSAS in 2011, as already described, and the other was detained in 2012 by members of the New Zealand Provincial Reconstruction Team. New Zealand complied with its international obligations in respect of those detainees, including, as has already been described, regular

monitoring. Both of the detainees were initially transferred to United States custody before being brought before Afghan judicial authorities.

Turning now to detention operations conducted by elements of the Afghan National Security Forces. The Individual Guidance for the detention of non-ISAF personnel and the Operation WĀTEA Rules of Engagement distinguish between non-ISAF personnel detained by New Zealand forces and those arrested or detained by Afghan National Security Force personnel. Specifically, the documents emphasise that it is the Afghan National Security Forces that are the primary arresting or detaining authority.

New Zealand forces, similar to other ISAF troop contributing nations 'partnered' with particular units of the Afghan National Security Forces. New Zealand forces, based in Kabul, operated in a partnering and mentoring relationship with a unit of the Afghan National Police called the Crisis Response Unit or CRU. New Zealand forces provided professional development and mentoring to the CRU. The CRU, as their title suggests, were typically involved in rapid action responses to crisis situations. They were authorised to apprehend people believed to be involved in actual or imminent attacks on the population and the Government of the Islamic Republic of Afghanistan.

In the majority of cases where New Zealand forces were involved in supporting operations conducted with elements of the Afghan National Security Forces, they operated alongside the CRU. The CRU was able to detain people for short periods of time but under Afghan law the CRU was obliged to either transfer the detainees to a prosecution authority or release them within 72 hours. Accordingly, if detainees were not released they were typically transferred to other agencies within the Ministry of Interior or to the National Directorate of Security or NDS.

The majority of the operations that the NZSAS conducted were with the CRU. On occasions, however (for example, if the

CRU were unavailable due to the time-sensitive nature of the operation) the SAS operated with other elements of the Afghan National Security apparatus, including the NDS.

In order to better understand how the various units such as the CRU and NDS operated within the all-of-government model of the Islamic Republic of Afghanistan, I would, if technology permits, refer to the following slide.

As you can see, similar to New Zealand, the Afghan Armed Forces, which include the Army and Air Force (there is no Navy in Afghanistan as it is land-locked) come under the control of the Ministry of Defence. The Afghan National Police, including the CRU and the Afghan local police, come under the control of the Ministry of Interior. The National Directorate of Security, the NDS (the primary domestic and foreign intelligence agency of Afghanistan) reports directly to the office of the President. Each of the Afghan National Army, the Afghan National Police, the CRU and NDS, amongst other agencies, are collectively described as the Afghan National Security Forces.

Most of the individuals detained by the Afghan National Security Forces were arrested pursuant to an arrest warrant issued by the Attorney-General of Afghanistan. As such, people entered the Afghan Criminal Justice System from the outset. Where an arrest of a person subject to the jurisdiction of the Islamic Republic of Afghanistan was effected, it was conducted by members of the Afghan National Security Forces, in one guise or another. Such arrests were not conducted by New Zealand forces. Due to the fact that arrest warrants were issued to Afghan authorities, New Zealand forces had no legal power to conduct an arrest pursuant to those warrants.

It is important to understand the distinction between arrest by the Afghan authorities, acting in a law enforcement context under Afghan domestic law; and detention; conduct that could be effected by New Zealand forces in certain specified circumstances. I would reiterate that New Zealand forces had

no authority to interfere with the conduct of any criminal investigation or judicial process in Afghanistan.

It is also worth noting that unlike some other Five Eyes countries such as the United States, United Kingdom and Canada, New Zealand had no detention facilities in Afghanistan.

To better illustrate the role of the Afghanistan National Security Forces and the role of New Zealand forces with regard to arrest and detention, I would like to set out two simple scenarios.

Scenario 1 focuses on a checkpoint.

New Zealand forces, operating in isolation or alongside elements of the Afghan National Security Forces, might have reason to establish a checkpoint. A typical example would be a security checkpoint close to or at the point of entry to a base. At the checkpoint, every vehicle and every non-ISAF pedestrian is stopped and subjected to a form of inspection or search to ensure that they did not pose a security risk. During the conduct of a security inspection an individual may be temporarily held by New Zealand force elements for a short period. Although in the majority of situations, checkpoint stops are likely to be extremely transitory, any individuals held are still entitled to humane treatment.

The second scenario involves partnered operations.

As has been described, New Zealand forces were 'partnered' with the CRU. Where the CRU intended to conduct an operation to arrest and detain a particular individual or individuals, New Zealand forces provided support with regard to the planning, intelligence gathering and application of the operation. The typical role of the New Zealand forces in a partnered operation was to provide support.

In any typical operation New Zealand forces might provide a security cordon or a perimeter around a particular building that the CRU were intending to enter to carry out an arrest warrant. The CRU would enter the building, together with a prosecutor from the Ministry of Interior, and arrest the individual named in the warrant. In the event the individual

evaded arrest or escaped the building, the New Zealand forces would be in a position to act; they could prevent the individual from fleeing.

But, as with the previous scenario, any form of detention would be transitory in nature and the individual would be arrested by the CRU. Therefore, the detaining authority for the purposes of the law-enforcement operation remained the CRU.

As has been set out in the other documents, the mentoring provided by New Zealand forces improved the capability of the CRU. They played a material role in developing and maturing the arrest warrant systems for the CRU and the Ministry of Interior which were utilised more broadly by ISAF. During the period New Zealand forces provided support to the CRU, the CRU took on more and more responsibility to the extent that by the time New Zealand forces ended their deployment, the CRU was able to conduct some of its operations without the assistance of New Zealand forces.

Turning now to some safeguards. An important part of detention policy and practice in respect of any deployment is the operation of safeguards. In addition to those measures described by the previous presenters, I would like to briefly discuss some of the safeguards employed at the operational level regarding detention in Afghanistan. As the conflict in Afghanistan continued and evolved, further directives and guidance concerning detention were issued by ISAF and adopted by the New Zealand Defence Force. One directive from ISAF in 2010 in particular set out further guidance and intent on the conduct of detention operations with an emphasis on partnered operations. This directive required that ISAF units involved in the partnering activities report detention events conducted by the Afghan National Security Forces. The report must make it clear who is responsible for the detainee and New Zealand complied with this directive.

Other safeguards undertaken by New Zealand force elements in the context of partnered operations were focused on the

mentoring and training of CRU personnel in best practice tactics, techniques and procedures.

Safeguards in terms of individuals that the New Zealand Defence Force detained have already been described by Mr Fisher, including informing the ICRC and the Afghan International Human Rights Committee of detentions. New Zealand Government monitoring was undertaken on a regular basis by a New Zealand Defence Force Legal Officer who was posted to Headquarters ISAF.

As was discussed yesterday in the hearing on LOAC and rules of engagement, the obligations of our code of conduct card include an obligation to report matters through the chain of command, and this would include SAS personnel witnessing any alleged breaches of LOAC or other misconduct.

Broader ISAF coalition safeguards included the establishment of working groups as has already been discussed by Mr Fisher, as well as the establishment of rule of law programmes and oversight mechanisms to continually monitor and improve transparency and standards of detention facilities.

I note that other organisations, such as EUPOL Afghanistan, were part of the international community's efforts to rebuild Afghanistan with an emphasis on law enforcement capability. EUPOL Afghanistan was setup by the European union in June 2007 to assist the Afghanistan Government in reforming its police service and had a role in training and mentoring the ANP, as well as supporting the harmonisation of Afghan laws with relevant universal human rights standards. They were also responsible for the development of a code of conduct and promoting its awareness. I understand that EUPOL were also involved in the setting up of oversight and accountability mechanisms for policing forces.

The New Zealand Defence Force, primarily through its Senior National Officer and the Legal Adviser, regularly engaged with representatives of agencies in Afghanistan, including the ICRC, EUPOL, the United Nations and our wider

coalition partners to maintain an ongoing dialogue about a range of issues, including detention.

And, of course, as already been discussed by the other presenters, the United Nations Assistance Mission in Afghanistan, otherwise known as UNAMA, maintained an oversight role in respect of monitoring and reviewing detention facilities as part of its mission to strengthen the Afghan State by promoting national ownership and accountability institutions that are built on rule of law, good governance, and respect for human rights.

I'd like to hand back to Dr Ridings to conclude our presentations.

DR RIDINGS: Thank you, I'd just like to conclude by making three very brief points.

First, the information that's been presented complements the material that's been released publicly as part of this Inquiry. The aim has been to try to provide the broader context for New Zealand operations in Afghanistan, so that issues relating to detention can be seen in this broader context.

Secondly, it's worth stressing that the New Zealand Armed Forces were operating in an internal armed conflict in a country which lacked an effective and fully functioning police judicial and prison system. We heard yesterday about four decades of internal conflict. New Zealand and other ISAF forces were working to enhance commitment to the rule of law and to empower the Afghan authorities so that they could effectively defeat the insurgents. Mentoring and respect for Afghan sovereignty was part and parcel of this.

Third, with respect to allegations of the use of torture by Afghan authorities, after the *Evans* case in 2010 the Government considered legal advice and assessed whether, and if so, to what extent New Zealand's approach to detention needed to change. This, and the information presented to the Inquiry, shows a continuing commitment by the New Zealand Government to ensuring respect for international legal obligations.

So, Commissioners, we now are available to answer questions that you may have. We may need to confer amongst us as to who best to answer and I would also note that we may not be best placed to answer factual questions, especially in light of the security classifications of some information, thank you.

SIR TERENCE: Thank you for that. We do have some questions but they really go to the issues of principle.

It's quite striking, in listening to the presentations, the very sharp distinction that's drawn between a detention by the SAS or any foreign force and the transfer to Afghan authorities and the assisting or partnering of the Afghan authorities in effecting a detention justified under the exercise of their invested jurisdiction. And the issue, I guess, that troubles me, and I know troubles Sir Geoffrey a little bit, is whether that distinction can be drawn in as clear-cut a way as that?

The thing about - and I'm sorry it's going to take me a little while to give you the context for the question. Detention as a concept in domestic law is very facts-intensive, looking at the particular circumstances. And it seems to me from what has been described in the international material where there's the reference to the de facto and de jure approaches, that similar factually realistic assessment has to be undertaken.

Now, let's take two situations. The first situation is this: the CRU get information that a particular individual, who is a suspected insurgent, is in a particular locality and advise the foreign force that they're going to effect an arrest, they've got a warrant, they want assistance under the partnering arrangement. And so, the foreign force provides some people. They go to the place, the CRU effect the arrest. They provide the cordon, security cordon, they process the person, search them, take any weapons, restrain them, photograph, biometrics, all of that stuff, and then transport them to a facility, all the time accompanied by people from the foreign force.

Now, contrast that with a situation where the foreign force says, we have intelligence about a particular person which justifies regarding him as an insurgent and we have heard that he's in a particular locality. They provide the information to the Afghan authorities, who then go and get a warrant. The foreign force and the CRU go to the place. The CRU effect the arrest. The foreign force surprise the security cordon. As soon as the person is brought out, the foreign force takes over processing the person, in the sense that they search him, restrain him, do the photography, biometrics, all that sort of thing, and transport him in their vehicles to the facility, but all the time in the company of CRU people.

My question is, looking at it in a realistic sense, is it right to say that the detention is effected only by the CRU and all that the foreign force is doing in that circumstance is assisting them?

Because, on one view of it, if you look at the practicalities, it's really the foreign force, through one of the mechanisms that Dr Ridings discussed, the test for triggering international responsibility which was effective control, the notion of complicity or the due diligence, all of those could arise.

I don't know who's the best person to answer that.

DR RIDINGS: Thank you, Sir Terence. I think the first point, and it's something that we also have made as well, that the situations are very fact intensive. There may be circumstances in which you need to look at the precise factual situation.

The issue too, is that the facts may not, as you have pointed out, the facts may not necessarily be that black and white and there may be situations in which there is a partnering where both the foreign force and the host State play a role in a detention and the nature of that role may change, depending on the circumstances.

The real question though is what can a foreign force do in those circumstances? So, can, for example, a foreign force, in

either of those circumstances, take responsibility for releasing that person who's been arrested by the Afghan authorities? The answer to that would be no. Can they let the person go because they might be concerned about a situation? So, the answer to that is really, no, they don't have any authority to actually interfere in an operation where there is an arrest warrant by the host State and that person is arrested by the host State and then falls within the criminal jurisdiction of that State.

It is, however, not easy in a factual situation to make that distinction but I will leave it to Brigadier Ferris to talk more about the on the ground operations.

BRIGADIER FERRIS: Thank you. You've highlighted, detention is a very complex area of international law and as we've discussed, it remains unsettled. From a pragmatic perspective, as Dr Ridings highlighted, the primary aim from a law enforcement perspective was the Afghan law enforcement agencies were the legal authority to conduct an arrest. However, I acknowledge that this was a phase of transition. You know, we were attempting to enhance the capability of Afghan policing forces to become a more effective unit. You know, they did not have the intelligence capabilities, some of the technical capabilities, that we have as a modern military force, and so that support augmented them.

However, as Dr Ridings highlighted, we would not consider that that, therefore, triggered our obligations as a detaining authority.

There were clear directives and mandates from 2009 when President Karzai was re-elected as Government that all operations were to be Afghan first and Afghan-led, and New Zealand was very clear on that obligation and so we were absolutely of the view that we played a supporting and not a leading role.

The aim was really to provide support, mentoring, assistance to ensure that they could actually fulfil their obligations under their domestic law mandate.

SIR TERENCE: Yes, well, the issue is really one of form and substance really. And, as you say, it's heavily facts-intensive, I'm sure. Well, thank you for that.

SIR GEOFFREY: I want to pursue the issue that Sir Terence raised quite extensively.

I want to quote from the book that gave rise to this Inquiry, *Hit & Run*, on page 85:

"The New Zealanders marched Qari Miraj into the building, waited while paperwork was completed and then handed him over to officers from the National Directorate of Security, the NDS. This was perhaps the worst place in Afghanistan to hand over a prisoner whom, by law, they were supposed to protect from mistreatment".

Now, I don't know what the facts are yet, we haven't got to that point, but what I would be very interested in hearing, and maybe you can't do this today, but if the facts as alleged in this chapter of this book are correct, can you maintain the position that this was not a de facto control?

BRIGADIER FERRIS: As the facts of the book haven't been established and aren't in a public fora or setting, I would be reluctant to go into a detailed or speculate as to what the situation would be in that specific -

SIR GEOFFREY: But you deal in scenarios, Brigadier, this is a scenario, the scenario is in the book.

BRIGADIER FERRIS: I don't know necessarily that would be a full scenario we would utilise in terms of explaining a detention holistically from end to end. So, taking a scenario, however, whereby New Zealand forces assisted with transportation, with biometric enrolment, with a cordon and perimeter security as part of an operation headed by the CRU or another element of the Afghan National Security Forces, we would still consider that the Afghan National Security Forces operating under their

warrant of Afghanistan would be the detaining authority. As Dr Ridings has highlighted, we would have no authority to interfere with that process.

SIR GEOFFREY: Well, let's explore that proposition a bit more. Dr Ridings mentioned that the issues relating to torture amount to a peremptory norm of international law, part of the *jus cogens* which, as we were told yesterday by the Judge Advocate General, New Zealand takes all those issues very seriously, he mentioned in fact genocide in connection with his address yesterday. He didn't mention torture but he should have because it is a peremptory norm of international law.

And I just want to bring to your attention to a passage from the judgment of the International Criminal Tribunal for the Former Yugoslavia in 1998, which no doubt you are all familiar with, in which it is said, this is the *Furundžija* judgment, and I quote from paragraphs 148-150:

"States are obliged not only to prohibit and publish 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".

Do you accept that Statement of the law?

DR RIDINGS: First, yes, the prohibition against torture is pre-empting all international law. There's also a related obligation not to transfer a person who would face a real risk of torture. The Convention Against Torture and the Treaty body, the UN Committee Against Torture, has made it clear that the issues are that you need to prevent torture within your jurisdiction. And within that jurisdiction includes whether you are indirectly or directly in de facto or de jure control of the person.

So, what is not settled at international law, is whether there is, therefore, an obligation at international law that you need to do all that you can outside your jurisdiction to prevent torture.

The particular passage that you were referring to was very much in the context of a territorial commission of torture. And so, it was a passage that was related to torture taking place within the country's jurisdiction concerned.

So, to say that there is, to draw from that passage a general international law obligation that States must prevent torture outside their jurisdiction wherever it may occur, is not the current state of international law. That is something which has not yet crystallised into any customary international law rule.

SIR GEOFFREY: But surely, in the context where New Zealanders are operating and are bound by that peremptory norm, they should be following it? I mean, you're reading down the *jus cogens*, aren't you?

DR RIDINGS: No, I think what I'm trying to do is point out the current state of international law. This is an area, as we've indicated, that is developing. It is *jus cogens* but, like any international law, the obligation is on the State to do what it can within its jurisdiction. So, it's not a question of reading down the *jus cogens* peremptory norm but rather, it is a question of looking at the jurisdiction of a State.

SIR GEOFFREY: But if you're going to have a peremptory norm of international law, it's supposed to override a lot of things, isn't it?

DR RIDINGS: Yes, and I don't deny that and I don't deny that it's a peremptory norm of international law which does override some things. However, I think we also need to take into account the context for such norms. We also need to take into account the context of what New Zealand Government was doing in respect of this. And so when New Zealand, in relation to the allegations of torture,

New Zealand, you know, took legal advice and decided whether it needed to change its policy. Similarly, after the UNAMA report, there was a consequence in terms of what ISAF detention policy was doing.

SIR GEOFFREY: Well, look, Dr Ridings, I accept there was a great deal of legal talent promoted to this and excellent efforts made by New Zealand in every respect, the question is whether they got it right?

Now, the legal opinion, which was referred to, the Crown Law opinion which has been released, a lengthy one, first of all I'd like to ask the group, not always does the Ministry of Foreign Affairs and Trade agree with the views of the Crown Law Office and that is the opinion of the Solicitor-General. Did the Ministry of Foreign Affairs and Trade agree with that opinion?

DR RIDINGS: Sir Geoffrey, I wasn't in the Ministry of Foreign Affairs and Trade Legal Division at the time of the opinion. I returned at the very last day of February 2011, so I was not aware of any of this. I would say, however, that - so, I am not aware. However, I would say that this opinion was considered by the Ministry of Foreign Affairs and Trade and New Zealand Defence Force and also by - it was also considered, my understanding is it was also considered by Cabinet. So, I, therefore, assume that the Ministry of Foreign Affairs and Trade agreed with it.

SIR GEOFFREY: Can I ask you whether the analysis you've given us today is on all fours with that in the opinion?

DR RIDINGS: It is generally on all fours. I would note, however, that there was a few very small minor divergences. One was in relationship to the notion of a constructive knowledge, including wilful blindness, which is not something which is normally accepted. But, aside from that one point, it's in line.

SIR GEOFFREY: Thank you. Well now, can I just revert to the point that Sir Terence was making? This does seem very

much a form versus substance argument and it does seem to me, as I'm informed of it at the moment, that the Crown's position on this is somewhat weak and I give you notice of that because you may need to provide us with better arguments than we've had.

SIR TERENCE: Can I just add to that by pointing to what seems to me to be a cause of some difficulty?

You can readily see in some situations that a New Zealand force might mentor or provide assistance to an overseas country in a way that all of us would accept was mentoring. But one of the difficulties, it seems, in Afghanistan is that the SAS is acting in an operational sense against people it regards as combatants, insurgents, and so the Law of Armed Conflict and so on applies. But those very same people, the conduct that they engage in constitutes a crime under Afghan law.

To treat, as this analysis seems to, the notion of law enforcement as one thing and the notion of the Law of Armed Conflict and counter-insurgency as another thing, is somewhat artificial. I mean, in a legal sense, yes, of course one can understand it but the reality is it's the same conduct that gives rise to responses under either system. And so, an outfit like the SAS is interested in somebody as a combatant or an insurgent and effectively is using, if you like, the criminal justice system as a way of dealing with it.

Well, anyway, for myself I really do wonder whether the distinction is as clear-cut as the presentations and the opinions seem to suggest.

Anyway, we have reached the end of our time and this is an issue to which we will return, as you can obviously see. All right, we'll take a break for 15 minutes.

Hearing adjourned from 11.33 a.m. until 11.50 a.m.

DR WAYNE DANIEL MAPP - SWORN

MR GRAY: Again, Sir, I am in your hands. I regard all witnesses as witnesses of the Inquiry, so Mr Isac is going to swear him in.

(Dr Mapp sworn)

HON DR MAPP: As the Inquiry is aware, my full name is Wayne Daniel Mapp.

I served as Minister of Defence from 19 November 2008 to 30 November 2011.

My evidence relies on the publicly available documents published by the Inquiry and on my own recollection of events. I have not had access to my own Ministerial papers in preparing my evidence.

But if there are any matters of detail the Inquiry would wish me to address at a later point, I would be pleased to do this.

I am going to first start with the rules of engagement. Rules of engagement (ROE) are the instructions which set out the manner and circumstances in which members of the NZDF may use force. ROEs necessarily reflect government policy and the New Zealand Government's domestic and international legal obligations.

Because ROEs are reflections of New Zealand's national objectives when deploying the NZDF, ROEs are approved at the highest political level.

Development of the ROE

As part of the discussions in the first half of 2009 about whether the government should re-deploy the SAS to Afghanistan, I was responsible for overseeing the drafting of a Cabinet Paper. This Paper was prepared within the

NZDF and Ministry of Defence as well as other relevant government agencies such as the Ministry of Foreign Affairs and Trade.

The paper was presented to Cabinet on 6 July 2009.

The ROEs were developed as part of the preparations for the paper.

The paper confirmed the legal authority for the deployment of the SAS to Afghanistan which was the relevant UN Security Council resolutions.

The paper also confirmed that the New Zealand Chief of Defence Force "*would retain full command of all NZDF personnel posted or attached as part of this deployment.*" This command would be exercised through the senior SAS officer on the ground.

Any operations would be subject to the ROE. Paragraph 29 of the paper stated:

"The Rules of Engagement (ROE) for a NZSAS deployment to Afghanistan would be similar to those used for the previous NZSAS deployment in 2005. They have, however, been amended to reflect that the deployment would fall under ISAF authority rather than that of Operation Enduring Freedom (OEF). Prime Ministerial approval of these ROE is sought."

And the draft ROE was attached to the Cabinet Paper.

As I recollect, my discussions about the development of the ROE for the paper were mainly oral and took place as part of the other preparations we were making.

I had several discussions about the ROE with Brigadier Kevin Riordan, who was NZDF Director of Legal Services. He would usually be accompanied at our discussions by senior legal staff officers. Although I had some legal background knowledge about the international Law of Armed Conflict and the role of ROE, the NZDF legal staff had much deeper and specialist knowledge in this area of the law. They were also more aware of how the ROE would apply in the context of Afghanistan. They were the true experts in the field, and I appropriately relied on their advice and judgement.

When I was briefed on the ROE, I asked questions about their application in the Afghanistan conflict, which was primarily a counter insurgency mission. In particular, I was concerned about the distinction between Al Qaeda and the Taliban. I considered that the principal reason for New Zealand being part of the ISAF coalition was because Al Qaeda were the perpetrators of September 11 and had their principal base in Afghanistan. By contrast, the Taliban were the former Government of Afghanistan. As a result, I thought the ROE needed to make a distinction between Al Qaeda and the Taliban.

It is important to understand the context in which the ROE were first developed and approved. That is my thinking around them.

The fundamental reason for the intervention in Afghanistan was to defeat Al Qaeda, to bring them to justice and to deny them a safe haven. Since Al Qaeda were being protected by the Taliban Government, the intervention in Afghanistan was also against the Taliban Government. I had come to the view that provided the Taliban were not actively opposing ISAF, we did not need to actively engage them. That was not true of Al Qaeda since they and their members had been proscribed by the United Nations as a terrorist organisation. So, this distinction was reflected in the ROE that were developed in July 2009.

However, it was also apparent that a resurgent Taliban was able to use their secure areas in Pakistan to launch attacks within Afghanistan with the intent of wearing down the resolve of ISAF and undermining the Afghan Government. In contrast, Al Qaeda was no longer the global threat that it had once been, although it still had a presence in Afghanistan and Pakistan. The Taliban therefore posed a more serious threat to the integrity of the Afghan Government. With Al Qaeda the issue was more about actually finding the terrorists who were now primarily

fugitives from justice, rather than preventing future Al Qaeda terrorist acts.

In practical terms, that meant the SAS and the Afghan Crisis Response Unit (CRU) would be primarily protecting Kabul from the actions of the Taliban. The SAS mission therefore involved a blend of military, police and political factors. Unlike previous deployments, the SAS would not be able to operate behind a veil of secrecy in remote areas. Much of what they did would be literally in the public gaze.

The ROE reflected the policing nature of the role. The SAS could use lethal force to defend themselves and others, in respect of operations against the Taliban. The ROE did not allow the SAS to engage any Taliban who were not acting in an actively hostile manner. This is in contrast to a conventional war where all enemy soldiers are able to be lawfully engaged at any time.

As I have s, I made a distinction between the members of the Taliban and members of Al Qaeda. As internationally declared terrorists, if members of Al Qaeda could not be apprehended, then lethal force ought to be an option to deal with them, rather than letting them escape.

On 10 August 2009 Cabinet approved the re-deployment of the SAS to Afghanistan. The Cabinet noted the ROE attached to the July paper had been approved by the Prime Minister.

Now, in the event this distinction became a moot issue. During the two and a half years in which the SAS were ultimately deployed, they were never tasked to capture Al Qaeda members. All their operations were against the Taliban.

On most occasions, I should note, there was no actual combat. In fact, in over 90% of missions the SAS did not actually fire their weapons. Instead, the Taliban insurgents were arrested by the CRU and dealt with through the Afghan justice system.

Amendment to the ROE.

By the end of 2009, it was more and more apparent to me that a key role for the SAS in Afghanistan would be supporting the efforts of the new Afghan Government to rebuild their country.

I might note at this point, I had visited Afghanistan earlier in that year and I had multiple briefings from ISAF but also members of the Afghanistan Government and that issue sort of came out to me more directly than sitting in my office in Wellington.

Elements of the Taliban were increasingly a threat to those efforts. As I was aware from discussions with my NATO Ministerial counterparts, there was a quickly developing international consensus, that for rebuilding efforts to be successful, ISAF needed to engage those elements of the Taliban which were actively thwarting reconstruction efforts.

At the same time, we were not at war with the Taliban as a group. The Taliban represented a certain segment of the Afghan population. Any future stable government in Afghanistan would need to deal with them constructively. But to the extent that elements of the Taliban were an impediment to helping the Afghan Government establish public order and were engaged in hostile action against that order, the NZDF may need to be able to take direct action.

In December 2009 I was advised by Lt General Mateparae that the rules that had been set out in the ROE as approved in July 2009 were too restrictive. He recommended that rule H be amended so that attack on individuals, forces and groups "*directly participating in hostilities in Afghanistan against the legitimate Afghan Government*" would be permitted. This would clearly include elements of the Taliban.

Both ISAF and the SAS requested that the ROE be amended so that the SAS could carry out their role in accordance

with the same rules that generally applied to the ISAF Special Forces operating within Afghanistan.

I was also orally advised that these rules would nevertheless be more restrictive than those that applied to other nation's special forces, principally US special forces, who were authorised to carry out missions across the border into Pakistan. The mission that killed Osama Bin Laden being the most well-known of such operations.

I approached the request to amend the ROE on the basis that it was appropriate to consider if the rules should be altered to permit action against forces actively hostile to the Afghan Government and/or ISAF. My concern was to ensure that the ROE were drafted so that they encompassed those persons directly taking hostile action against the Afghan Government, ISAF or the NZDF but excluded those persons who were simply members of the Taliban. That distinction was crucial for me.

I considered the change to the ROE to be very significant and I wanted to get the amended ROE right. I sought detailed briefings on the change of the ROE, both from a legal and an operational perspective. I received extensive briefings from the Defence Legal Service, as well as the Directorate of Special Operations.

I ultimately concluded, after the briefings and considering both the legal and operational situation, that I should approve the amendment to the ROE. I set out my reasons on the NZDF Cover Sheet, dated 14 December 2009. I inserted a handwritten comment, and I might add, much tidier than my usual handwriting, saying:

"*I have now been fully briefed on the change, including a discussion on the concept of operations. As a result I am satisfied that the new ROE meets two criteria:*
a. It complies with New Zealand legal requirements
b. It meets the operational requirements of OP WĀTEA and NATO/ISAF".

To be honest, there is no more space in that document than to put just that. So, it was intended to be precise and concise.

I have a very clear recollection of taking particular care in setting out my reasoning in the Comments section of the Cover Sheet. I remember sitting at my desk and thinking through what I wanted to say. I was very much aware of the significance of the change so I specifically noted that the change of the ROE "*complies with New Zealand legal requirements*". By this I meant both domestic law as well as the law of armed conflict. By inserting that comment I was making clear my view that my approval was based on the understanding that only direct participation in hostilities would bring a person or a group within the ROE.

And subsequently, the amended ROE was also approved by the Prime Minister.

Now, I want to turn to the issue of detainees. A vital part of drafting the ROEs was addressing the possibility that the SAS would take part in operations where Afghan persons would be detained by the CRU or by the SAS.

From my background in international law and my interest in defence issues, I was well aware that there had been abuses of detainees in the past by overseas militaries. In particular, I was aware of an incident where SAS soldiers had detained Afghan persons after a raid in Band e Timur in 2002. The detainees were handed over to US forces. Subsequently, the NZDF complained about the way in which the detainees were treated by the Americans. I might add, I thought that was to the great credit of the SAS that they did that.

I was aware the treatment of detainees arrested by the CRU in operations where the SAS were involved could prove to be a problematic issue for the New Zealand Government, as it did for most governments contributing forces to ISAF. The reality, succinctly put by Lt General Mateparae, was

that the NZDF are only ever involved in these kinds of deployments when the host government and country has inadequate standards in respect of human rights, both in regard to the population in general, and for detainees in particular. If the host nation was an exemplar of human rights, there would never have been need for an intervention in the first place.

It was therefore a high priority for me, and for the Government, to ensure that the NZDF complied with all relevant legal standards.

In developing the July Cabinet paper the need to address detainee policy and protocol was well recognised.

In my view, the July paper shows the extent to which issues surrounding detainees were carefully considered before any decision to deploy the SAS was taken.

The paper noted that persons detained by the CRU would be processed in accordance with Afghan law. If the SAS detained any persons, they would ensure compliance with well-established procedures which were consistent with international law.

The identities of those detained would also be provided to the International Committee of the Red Cross (ICRC).

Paragraph 34 of the paper noted that former Minister of Defence Hon Phil Goff had received assurances from the Afghan Government that detainees handed over to Afghan authorities would not be subjected to torture or capital punishment. The paper further noted that these assurances had not yet been converted into a written agreement between New Zealand and Afghanistan.

As a result of the work of the Ministry of Foreign Affairs and Trade, a formal agreement about detainee transfer was reached between New Zealand and Afghanistan dated 12 August 2009. Under this arrangement representatives of the NZDF had full access to any detainees the NZDF had transferred. In addition, detainees

would be treated in accordance with international law and their treatment subject to scrutiny by the Red Cross.

Attached to the July paper was an annex setting out in detail the guidance for detention of Non-ISAF personnel. The guidance applied only when New Zealand forces arrested or detained an Afghan person. If the detention was made by Afghan National Security Forces then the guidance did not apply.

The guidance stated that as soon as practicable after the detention had taken place, the detention must be reviewed by an appropriate ISAF Authority. The detainee had to be informed of the reasons for his or her detention and given an information sheet detailing his or her rights as a detainee.

It is important to understand that our mission in Afghanistan was to help build the capability of Afghan forces to govern and manage their society in accordance with international law. We were there to assist and not to impose. On joint operations between the SAS and CRU, the detaining authority was the CRU and not the SAS. That did not mean the SAS would ignore what was occurring but it did mean that the primary responsibility for detainees rested with the CRU in almost all cases. The SAS could not remove an individual from the custody of the Afghan police or security forces or prevent an Afghan official from arresting an Afghan person in accordance with local law.

My continued involvement with detainee issues.

After the SAS redeployed to Afghanistan, I continued to monitor detainee issues closely. I was concerned to ensure that New Zealand used all of its efforts to comply with human rights law. I consistently engaged with detainee issues and sought advice and reassurance about the treatment of detainees.

As Minister, I could raise the detainee issue in a number of ways both domestically and internationally.

Domestically, I could seek advice from officials, ask questions and seek information. This involved discussing detainee issues with Lt General Matepaere, Brigadier Riordan, the NZDF and Ministry of Defence officials. I discussed detainee issues with interested groups such as Amnesty International. I also had to respond to Parliamentary Questions on this issue which meant I had to be appropriately informed and knowledgeable, to the extent that I could be.

Internationally, I raised detainee issues with ISAF, the NATO Secretary General and ISAF commanders. I discussed detainee issues with other Ministers from governments which were part of ISAF and/or NATO. I also raised detainee issues with the Afghan Government directly at a ministerial level.

That was both on my visits and also at the NATO/ISAF meetings.

In August 2010, when I visited Afghanistan, I requested a meeting with officials from the ICRC. I met with Mr Reto Stocker, an ICRC delegate. It was a robust meeting. I wanted to explore with the ICRC what additional things that we in New Zealand could do in relation to detainees and I wanted the ICRC's views on the matter. I was concerned that New Zealand should do as much as we reasonably could given our relatively small size and influence. I was looking for ways to strengthen our approach to detainees.

At the meeting we discussed, in fact it was I who raised the issue, having an NZDF legal officer attached to ISAF HQ so that New Zealand would have a presence on detainee issues and a voice in any discussions at ISAF HQ. After that meeting I raised this suggestion with the NZDF and ultimately an officer was attached to ISAF HQ. This officer was assigned in April 2011.

In May 2010, the Government announced the appointment of an Ambassador to Afghanistan. Previously, the Ambassador to Iran had also been the Ambassador to Afghanistan. We

hoped, that is myself and Murray McCully specifically, that the appointment of former Brigadier Neville Reilly as Ambassador would allow us to have a better and more direct connection to the Afghan Government. With better access and better understanding, we hoped we could more effectively influence the Afghan Government including in relation to detainee issues, and by that I mean the issue generally.

I raised detainee issues at international meetings and with international partners. European members of NATO were especially concerned about detainee issues. At ISAF/NATO meetings, New Zealand joined with our partners in raising these concerns about detainees. As a result, there was a concerted effort by ISAF to address this issue and monitoring of detainees improved significantly.

And I might just interpose at this point. This was an issue that Ministers kept raising and raising and raising. We were putting pressure on the ISAF command, the commander was there to make sure that he actually responded to our concerns. We sought reports, we sought briefings, all of us raised it in whatever way we could. This was a concern for our governments, more particularly the people of our nations. We wanted to be seen to be responding to it.

As I noted in my last statement to the Inquiry, I discussed detainee issues with Norwegian Minister of Defence Grete Faremo. Minister Faremo had a strong legal background and she had previously been Director of Law, Corporate Affairs and Public Relations at Microsoft Europe. I respected her views and expertise. In addition, she came from a country which, like New Zealand, has a strong commitment to human rights and is a leader in the field. The Norwegian public was concerned about detainee issues and Minister Faremo (like myself in New Zealand) was required to respond to these concerns. Building ties with partners like Minister Faremo allowed New Zealand, in co-operation with other countries, to keep the detainee

issue at the forefront of the issues we were confronting in Afghanistan.

One of the issues that was especially important to us was the status of facilities to which detainees were transferred. New Zealand forces could only transfer detainees they had captured to Afghan facilities if they were sure that the person would not be at risk of torture, or other cruel or degrading treatment and that we could monitor the detainee.

When the High Court of England and Wales issued its decision in the ex parte *Maya Evans* case in June 2010, I was quickly made aware of the decision. I personally read the judgment and discussed it with officials.

We knew that in the past, the Afghan Government's treatment of detainees had some deficiencies, to put it mildly. We were also aware that the Afghan detention facilities were improving. ISAF headquarters in Kabul had a committee to monitor the conditions at the various facilities, including the National Directorate of Security (NDS) facility at Kabul. A number of nations, including Australia and Canada, which directly transferred detainees to the NDS, actually monitored these facilities.

I continued to raise the issue of detainees with my officials. I was concerned by various reports about detainees and their treatment. The *Evans* judgment fed into those concerns. And I want to make this particular point; even where the SAS were not detaining individuals, I was concerned that New Zealand was taking reasonable steps to ascertain that persons detained by the CRU had their human rights respected.

And I might note, that my concern there had been noted by the Ministry of Foreign Affairs in a document that you have released dated August 2010.

I was concerned to receive advice about the treatment of detainees and whether we were complying with our legal obligations. I wanted to make sure I was on top of this

issue. I remember meeting Brigadier Riordan at about this time to discuss these issues.

On 16 September 2010, really as a result of those meetings, I was provided with a letter from Lt General Mateparae. This letter was based on legal advice from the NZDF Director General of Legal Services. The letter advised New Zealand forces were compliant with international law when partnering with the CRU. The letter also addressed the efforts we were making to ensure that those persons arrested by the CRU were treated humanely. One of the possibilities explored in the letter was whether New Zealand could monitor the treatment of detainees at Afghan detention facilities.

On 9 November 2010 I was provided with a further opinion from the Solicitor-General. And my recollection, members, is that I, in fact, had actually requested this particular opinion. This opinion confirmed that New Zealand partnering operations in Afghanistan did not give rise to liability in relation to torture. The opinion also confirmed that if the NZDF took prisoners, those prisoners could only be transferred to Afghan authorities if they did not face a real risk of torture and were monitored by New Zealand personnel whilst in custody. The opinion did not recommend monitoring by New Zealand officials of detainees taken into custody by Afghan authorities.

By May 2011 we were advised that ISAF headquarters regarding the NDS facility in Kabul as being the detention facility of choice and ISAF was directing its member nations to use this facility because it was properly monitored.

So, on 16 May 2011 I was able to respond in a written answer to a Parliamentary Question from Hon Maryan Street that:

"*I have received reports from the Defence Force that the standards of the NDS have improved substantially. This improvement is continuing, with considerable support from*

the international community. ISAF regards the NDS facility in Kabul as the `'detainee arrangement of choice' and directs troop-contributing nations to make use of these facilities. The facility is regarded as the one to which International Committee of the Red Cross has the best access and which has the best record-keeping. Reports from theatre indicate that Australia, Canada and the United Kingdom all routinely transfer detainees into NDS facilities. NDS facilities in all locations are considered satisfactory by Australia and Canada. An NDS Oversight Committee has recently been established to handle allegations of mistreatment. On each of my visits to Afghanistan, and also in regular NATO/ISAF meetings, I have discussed these and other issues with the NATO/ISAF leadership and other countries with which I have had discussions. I will be releasing the report which covers these areas in the near future."

I would also note that I received significant numbers of Parliamentary Questions from opposition Members of Parliament, especially Keith Locke and obviously the Hon Maryan Street about detention issues. I was well aware that these issues were matters of concern across the Parliament. I ensured that my oversight of detainees was such that it could withstand this scrutiny.

To my knowledge, during my time as Minister of Defence only one Afghan person was detained by the SAS. On 30 January 2011 the SAS detained a mid-level Taliban commander. After his detention, he was visited by New Zealand officials on 15 February and 25 April 2011. On the first visit, the detainee was being held in the Battlefield Detention Site at Bagram Air Field. On the second visit, he was being held at the joint United States-Afghan Detention Facility in Parwan.

The first visit was conducted by a medical officer and legal officer serving with the SAS. The medical officer conducted a medical examination of the detainee. The second

visit was conducted by the Legal Staff Officer, New Zealand Forces Afghanistan.

The detainee was then to be visited again on a monthly basis until he was either released or brought before an Afghan judicial authority.

Further Advice from NZDF.

In the middle of 2011, I sought further advice from the NZDF regarding the detainee issue and whether there was any prospect that partnering with the Afghan Armed Forces and police could potentially render the NZDF complicit in torture; the very question both of you have raised. Whilst we had done a great deal of work on the detainee issue, including most obviously the Solicitor-General's opinion, I still thought we needed to pay further attention to this issue to make sure New Zealand forces were complying with international law.

On 31 August 2011, General Jones replied on behalf of the NZDF. General Jones noted that given the size of the NZDF force in Afghanistan and their duty to mentor, guide and train members of the CRU, New Zealand could not have responsibility for bringing about changes throughout the broader Afghan legal system. At the same time, NZDF forces must comply with international and domestic New Zealand law at all times.

General Jones' letter also emphasised that the SAS were in almost all cases not the arresting authority. Rather, the CRU detained the individuals and then handed those individuals over to Afghan authorities. The letter noted that *"all evidence at our disposal suggests the CRU have acted appropriately in respect of persons that they have arrested. The CRU is now regarded by ISAF as the leading unit of its kind".* And that's in paragraph 8 of his letter.

The letter concluded that the *"actions of our personnel in Afghanistan do not even approach the threshold for complicity* [in torture]".

On 20 October 2011, General Jones wrote me a further letter. This letter was a response to the United Nations Assistance Mission in Afghanistan (UNAMA) report. This report raised serious and troubling issues about mistreatment of detainees by Afghan law enforcement agencies, although this report also found that this mistreatment was not institutionalised.

In terms of preventing mistreatment and monitoring detention facilities, the second letter states that it was *"not within the NZDF's capability to unilaterally assume a comprehensive monitoring role. Our activities fit within a larger scheme of ISAF involvement."* However, within the larger scheme NZDF could play an active part.

General Jones states in his letter that no person could be transferred from NZDF custody to any other authority without permission from General Jones and he would not authorise transfer to any sites listed in the UNAMA report as unsatisfactory.

On 22 October 2011, I released both letters on the Beehive website. I said: *"We have made known to the Afghan authorities our expectations for respect of human rights. The UNAMA report said the contributing nations must continue to work with the Afghan authorities to lift them to internationally accepted standards of behaviour."*

Throughout the redeployment of the SAS to Afghanistan, Amnesty International raised its concerns about the human rights of detainees with me.

I remember meeting with representatives of Amnesty International on two or three occasions. Amnesty International's view was that anyone detained in an operation involving both the CRU and the SAS were in fact detained by the SAS. That was not my view. My view, based on official advice, was that where the CRU detained a person, that person was the responsibility of the CRU.

In response to Amnesty International's request for more information about how the NZDF was ensuring it was

complying with its international law obligations, my office drafted a careful and informative response. However, as a result of a dialogue with the Prime Minister's Office, the final response to Amnesty International issued shortly before I left office was less comprehensive than I would have liked. And I have raised with your counsel the desirability of you both obtaining the final and the draft of those two documents.

Conclusion.

In my view, the ROE was developed (and amended) after careful and thoughtful consideration.

The ROE was drafted with special cognisance of the legal authorisation for being in Afghanistan, namely, to assist the local Afghan forces rather than to take over from them. The amendment to the ROE at the end of 2009 reflected our role in supporting the Afghan Government and the reconstruction of Afghanistan.

The ROE also reflects the fact that the NZDF had the obligation to comply with the law of non-international armed conflict and Intentional Humanitarian Law especially with regard to detention issues.

Once the SAS were on the ground, I continued to closely monitor the situation to reassure myself that appropriate steps were being taken. I was well aware that as a small force we could not reform Afghan society or stop every abuse. Neither could we monitor all detention facilities. Rather, we acted as part of ISAF to improve standards and ensure compliance with international norms. We were advised by ISAF that the NDS facility at Kabul was closely monitored and the preferred option for detainees.

In my view, the Government, and myself as Minister, took all the appropriate steps to ensure compliance with our domestic and international legal obligations.

SIR TERENCE: Thank you. Can I just raise, really going back to the discussion we had with the last panel, you said early in your presentation, and the point has been made

by others, that when the SAS goes into an area it's usually going into an area that lacks good governance, good institutions, where the rule of law is not well ingrained in an institutional sense.

But this process of the arrest being carried out by the CRU under an Afghan warrant and, therefore, the SAS not detaining the person and the person then being taken to a facility to be detained, is based on an assumption that there are working institutions or suitable institutions to enable you to do that.

When you couple that with the advice of Crown Law that NZDF should not monitor people who were arrested by the CRU because they seem concerned that there might be some downstream effects, what is there left for you as the Minister to do?

I mean, in other words, operating in such an environment which justifies the deployment in the first place but acting on an assumption that if you let the local people do it, obligations will be met but not doing an obvious thing, monitoring, because there's a risk involved in that. It does mean that, arguably, New Zealand is involved in assisting the detention of people who are likely to be ill-treated in some way? I mean, it's almost inevitable, isn't it?

HON DR MAPP: It's worth remembering that the size of our deployment was actually very small and virtually all of the people who were deployed would be known as operators. Their job was to actually do the classical SAS task. There were specialist officers who had broader responsibilities, including the Legal Officer, but we simply had zero capacity to monitor all the people that the CRU arrested.

That's, however, is my view, and I was fairly clear on this during my time, that's not actually a final answer. To be honest, I was never entirely satisfied with Crown Law's opinion. I thought it was too emphatic. I thought, no, we can do more than this.

So, the steps that were taken were really, and obviously other people have to talk about the steps that they themselves took, part of the steps were training the CRU. When you arrest someone, this is what you're good to do, these are your obligations, this is how you do it. So, it was kind of building up their capacity.

That's why I had said that the CRU ultimately were seen by ISAF as an exemplar in this regard. Clearly, our education of them, our mentoring of them, was getting through. It was having results.

The second thing that we could do as a nation was, and I had a particular opportunity to do this perhaps more than some other people, was to make New Zealand's views known, in concert with other ISAF nations. You've got to remember just about all of Europe was involved. All of Europe has a strong heritage and tradition, particularly in contemporary times, of respect for human rights. It's one of the things that Europe has held out for. So, this was a really big issue for us and our concern was to build the capacity of ISAF itself, the thousands of people who were based in Kabul, to do more monitoring, to inspect these facilities. Not track each individual person that the Afghan authorities arrested but rather, supervise, monitor, report on, the institutions themselves.

And over time that was clearly having an effect but, you know, had they reached first world standards? The answer is no, they had not but we were lifting standards. That was, in fact, clear. And I think New Zealand in particular with its mentoring of the CRU, had lifted their standards, in particular to the point that they were regarded as an exemplar.

I was constantly thinking, so what more can we do because I was not entirely satisfied with the advice. So, we thought in our own office, what more can we do? And, to be fair, officials were cognisant of my concerns about that and they, themselves, as highly trained professionals, would also be looking for opportunities to improve the performance of the

Afghan Government, to the extent that New Zealand was actually capable of doing that.

SIR TERENCE: Thank you.

SIR GEOFFREY: Dr Mapp, just to continue with the theme that Sir Terence has raised with you. A great deal of effort went into ensuring that if New Zealand detained someone, all sorts of checks and balances fell to be followed and they were pretty onerous but actually, it wasn't used much because the detentions weren't being done the way New Zealand looked at it by the SAS, were they?

HON DR MAPP: Correct, you're absolutely right to say that.

SIR GEOFFREY: Well, most of them were being done by crew and so, those protections fell quite away. They were not present. And I accept the point you make about resources but if we had a detention facility of our own, no doubt it would have made a difference?

HON DR MAPP: I don't actually think that would have been the case and the reason it wouldn't have been the case, Sir Geoffrey, is because the Afghan Government was a legally constituted government proud of its traditions and history. It is very clear to me and other ISAF partners that they were running their country still. Yes, they were getting assistance from ISAF. Yes, they valued the support that we were providing and they were appreciative that we were able to assist them in building standards but we were not there as a colonial power. We couldn't run the organisation for them.

SIR GEOFFREY: You had a two-step system: one with a high level of protection for very few and another for a low level protection against the risk of torture for a great many. That's the way it comes across, isn't it?

HON DR MAPP: We, as I said, couldn't run Afghanistan for the Afghanies. We couldn't basically take their Justice Ministry and say that's now going to be run by ISAF according to our standards. And for obvious reasons, that would be the case.

That is the tension, unfortunately, about interventions of this nature. All of these kinds of interventions have these dilemmas because none of these places that we go to, as Sir Terence has indicated, are exemplars of human rights.

So, this is a fundamental dilemma, I think, for intervening powers, you know, under the United Nations resolution, how do you lift capability? What do you have to do?

SIR GEOFFREY: What you have to do is protect them against the possibility of torture? That's a peremptory norm of international law?

HON DR MAPP: You can't run their country for them though, that's the dilemma.

SIR GEOFFREY: Can I move to another matter that I gave you notice yesterday about?

I read out the Terms of Reference that we have in relation to the ROE. I'll just read them again for you: "The assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking a direct part in hostilities or were otherwise legitimate targets. Separate from the operation, whether the Rules of Engagement or any version of them authorised the predetermined and offensive use of lethal force against specified individuals, other than in the course of direct battle. And if so, whether or not this should have been apparent (a) to NZDF who approved the relevant versions and (b) the responsible Ministers. In particular, were there any written briefs to Ministers relevant to the scope of the Rules of Engagement and the extent to which NZDF's interpretation or application of the Rules of Engagement, insofar as this involved such killings, changed over the course of Afghanistan deployment."

Now, the reason I want to ask you this, Dr Mapp, is you're the best witness on this. Did you appreciate that the rules of engagement that were agreed to after the amendments that you have described authorised kill and capture operations?

HON DR MAPP: I was aware that we could take direct action, that's why I got the briefing. That's why I talked to the people. I mean, to some extent that was always permitted even in the first draft.

The letter that sets this all out is from General Mateparae on 7 December 2009 and I would refer to paragraph 4 of that letter:

"It is considered that the inconsistency could impede the ability of Taskforce 81 to undertake at least part of its mission, namely to defeat the insurgency."

So, part of the - the expected role of the SAS was to defeat the insurgency. So, how did they do that? They didn't just go round shooting up the town, so to speak. They had these revised rules of engagement. I want to refer, in particular, to them.

So, you see the change in paragraph H.

SIR GEOFFREY: Yes.

HON DR MAPP: But paragraph H is governed by the definitions, and this is 2X, 'Hostile Intent', and I'll read it out in full:

"Hostile intent means there is an imminent intent to commit a hostile act. The existence of hostile intent may be judged by either (a) the threatening individual or units' capability or preparedness to inflict imminent or immediate damage or (b) information, particularly intelligence, which indicates an intention to conduct an imminent or immediate attack."

When I considered this issue I went through these documents carefully and I sort of pondered over the meaning of these words in relation to paragraph H. So, the test was fundamentally this: were these people about to conduct an imminent or immediate attack? Only then could they be engaged. Now, that didn't mean to say, you know, there was a bombmaker taking bombs somewhere, you had to wait for them to put the bomb in place. You could take direct action against that person or arrest them - well, the other way around actually.

Your first attempt would actually be to arrest them. But if you couldn't do that, you didn't just let them go. And that would be, frankly, unrealistic because what your duty is to the Afghan people, to our own soldiers, is to protect them against imminent or immediate attack.

Now, we weren't always successful in that, as we know. We lost people in Afghanistan but that was the purpose of the change of the ROE, to do the best that we could possibly do to prevent those sorts of actions. And, yes, to quote Prime Minister Clark, that meant the ability to take direct action to prevent the imminent immediate attack.

I regarded 10 as an appropriate governor of the change in paragraph H, and hence the reason why I wrote that careful note, the very first part of which says it complies with New Zealand law which is both international and domestic.

SIR GEOFFREY: Did you take the view, you will be familiar with, the JPEL list, the whole question about how that operated in Afghanistan?

HON DR MAPP: I have some knowledge of it.

SIR GEOFFREY: Did you therefore think the pre-determinative and offensive use of legal force was justified or was authorised by this change or by the - even if this change wasn't necessary because it might have been possible under the old ROE, that you could engage in predetermined and offensive use of force against people of the sort you just mentioned?

HON DR MAPP: But they have to have an intention to conduct an imminent or immediate attack. That's the governing test. So, on that basis I thought, yes, that is appropriate. How else, in short, do you conduct a counter-insurgency campaign unless you can do that? You don't just sit there and wait to be blown up. You actually try and deal with the people who are trying to blow you up.

SIR GEOFFREY: But if you have a number of what I call insurgent leaders who are planning such operations and who are going around getting explosives and planning

where to go and you have intelligence about that, you can intervene and stop it by either capturing them or killing them; is that what you think was appropriate?

HON DR MAPP: Well yes because the alternative would be allowing them to attack you.

So, put like that, because they have to meet this test. The intention to conduct an imminent or immediate attack, let's go to the operation up in Bamiyan. We knew that there were people moving through that area who were intending to attack the PRT again. They'd already done it, they'd killed Tim O'Donnell and wounded two of his comrades very badly. We knew they were planning to do this again by intelligence received. Therefore, that's why that mission was mounted, to prevent that event, another such attack.

SIR TERENCE: So, the concept of imminent or immediate damage, doesn't mean tomorrow or next week but rather that the person has been and is continuing to be engaged in insurgent activity essentially?

HON DR MAPP: Yes, well, informed intent to attack you. It's not just a general sense of being part of the Taliban opposed to the Government, they have to do way more than that. They have to be putting together plans to attack you, assembling explosives, planting IODs. You don't sit on the roadside and say, well, you know, they might plant a bomb here, so we'll sit here and wait until someone comes along and see if they do that. Your intelligence system is such that you can get information about that earlier.

SIR GEOFFREY: And in all your briefings and worrying, it's clear you worried a lot about this, was it made clear to you by the Defence people what the range of this was? Did you test the limits of what it was?

HON DR MAPP: Yes, I discussed that quite a lot with two people primarily, General Mateparae himself. What were we there to do? What was our job fundamentally and how were we going to conduct it? And also with the Director

of Special Forces as well, Colonel Blackwell at the time, about, you know, how did we actually carry out our tasks?

I was also informed by my visits to General Petraeus and General McChrystal, they were pretty forward-leading sort of guys I have to say, more forward leading than you would be comfortable with frankly. But I was highly, highly confident in the advice that I received from General Mateparae, I had a great respect for his wisdom and understanding of how the SAS conducted their operations, what our purpose was and what our overall plan was in relation to primarily protecting Kabul but also the PRT. I had great respect for his judgment on these matters.

SIR GEOFFREY: Thank you very much, Dr Mapp.

SIR TERENCE: Thank you very much. What we'll do is, according to the programme, we are due to start at 2.15 again. It's nearly 1.00 now, so we'll start at 2.00, rather than 2.15. So, at 2.00, Mr Hager, we will start with you and then followed by Mr Humphrey, thank you. All right, we will adjourn until 2.00.

Hearing adjourned from 12.54 p.m. until 2.00 p.m.

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PRESENTATION BY NICKY HAGER

SIR TERENCE: Mr Hager. Now we won't affirm you. We will just treat this as a submission.

NICKY HAGER: I am going to talk about rules of engagement this afternoon and Sam Humphrey is going to talk about detainee issues on behalf of Jon Stephenson which is appropriate because Jon Stephenson knows a great deal more about detainee issues than I do. In fact, he was the main person who raised this issue in the 2009-2011 period in New Zealand.

The NZDF explanation of Operation Burnham, in the first year and a half after the book *Hit & Run* was published, was a simple story in which a number of positively identified armed insurgents who were seen gathering weapons and climbing to a high point to launch an attack against the coalition forces. It was, NZDF said, entirely lawful and consistent with the SAS's rules of engagement for attacks to be directed against these insurgents. But, gradually, a more complex picture has emerged, including that there were five separate attacks during the operation.

I am going to discuss the nature of rules of engagement, some of the specific rules of engagement in force that night, and then the question of whether those five attacks were consistent with the rules of engagement and international law.

I would like to thank the Inquiry and its document reviewers for arranging declassification of the NZSAS rules of engagement that covered Operation Burnham.

First, an overview of ROE. I will discuss the nature of ROE. I don't pretend to be an expert on this, so I merely want to note some elements that seem relevant to the current Inquiry.

As the NZDF speakers discussed clearly yesterday, rules of engagement are not some sort of parallel military laws. They

are simply orders, approved by the Prime Minister and issued by the Chief of Defence Force, telling military personnel what they can and cannot do on military operations. It is a practical system for conveying these orders to military personnel.

This of course does not mean they are always good orders (although in many cases I assume they are). This means that in a case like Operation Burnham there are two levels of responsibility: first of the military officers and Prime Minister who came up with and approved the more or less appropriate rules of engagement, and then of the military personnel who are supposed to stick to them.

While in a formal sense Prime Ministers make the decisions on rules of engagement, there are other major influences. First, it is the military itself that drafts the rules of engagement and which advises the PM and the Minister of Defence that they are appropriate. Not all PMs take a lot of interest. I am told that Helen Clark used to worry over the wording of ROE and rewrite them herself. In contrast, John Key, the person who signed off the ROE in force for Operation Burnham, was apparently not terribly interested and tended to sign off whatever he was given. As we heard this morning, Wayne Mapp who was Minister of Defence at that time, did take close and serious interest. New Zealand's ROE are also influenced by what the allies' militaries want and expect from New Zealand.

In the case of John Key, he personally approved Operation Burnham and the ROE and should be held accountable for those decisions.

Here are some of the relevant issues relating to Operation Burnham.

These are ones we heard this morning but I want to draw attention to. There was not a state of international armed conflict in Afghanistan at that time and so, legally, the NZDF was required to treat everyone as civilians unless one, they were known to be part of an "organised armed group" and two,

they were "directly participating in hostilities." That is a quick overview of that, not a full one.

SIR TERENCE: You said "and", did you mean "or"?

MR HAGER: I certainly meant "or".

The NZDF Narrative says the ROE basis for the NZDF attacks during Operation Burnham was that there had been "positive identification of individuals as direct participants in hostilities". This also corresponds with rule "H" in the 2010 NZSAS Rules of Engagement released by the Inquiry.

The concept of "minimum force" was mentioned in passing yesterday. It is another important concept. Minimum force means troops are permitted to kill someone under the ROE, but they must use the minimum amount of force possible, including for instance warnings and taking action to avoid conflict. The non-deadly options should be preferred. This is relevant to Operation Burnham.

Standard rules of engagement also say that if you are not sure about whether someone is directly participating in hostilities "you must presume they are protected civilians." This is also relevant to Operation Burnham.

Some rules of engagement and Law of Armed Conflict issues are complex and it is hard to reach clear judgements but it seems that the ROE breaches in Operation Burnham, which I will discuss shortly one by one, are not at the grey or disputed edges of what's acceptable and what's not. They seem to be clear breaches.

Also, they are not about a lack of training or care by junior personnel. As we will see, it was the actions of the senior SAS officers, in particular the decisions of the SAS Ground Force Commander for Operation Burnham, that appear to have caused all the problems. This may

explain the SAS's determination to hide and deny what happened.

ROE might sound like purely military business but, when used properly, they should express the values and beliefs of a country. What this means is that they can be based on how New Zealanders want their military to act and also on what they wouldn't support their military doing.

There is one part of the SAS's 2010 Rules of Engagement many New Zealanders would be likely to have problems with. This is ROE number "I" in the May 2010 ROE document. It reads:

"Incidental death and collateral damage:

Action that could result in incidental casualties and collateral damage are permitted if the action is essential for mission accomplishment and the expected incidental casualties and collateral damage are proportionate to the concrete and direct military advantage anticipated."

This is objectionable and out of sync with New Zealand values. I believe a majority of New Zealanders would not agree with it. NZDF should not have put this to the Prime Minister and John Key should not have signed it.

I suspect there are other parts of the ROE that many New Zealanders would be unhappy with as well.

The next thing I would like to draw attention to is General Petraeus' Updated Tactical Directive. I will explain what this is.

There was a hugely significant change to the rules of engagement in Afghanistan just a few weeks before Operation Burnham. This was an "updated Tactical Directive" issued by the US military commander in Afghanistan, General Petraeus, on 1 August 2010. This directive, like the ROE, an order greatly altered what was and wasn't acceptable for all US-led troops in

Afghanistan.

The change came after years of civilian casualty incidents, which had created increasing public anger and controversy, and political pressure to stop an endless succession of civilian injuries and deaths.

The updated tactical directive was issued when this had reached a crisis point politically in Afghanistan. This happened just three weeks before Op Burnham. It should have been very much in the front of everyone's minds. In a statement on the directive, Petraeus urged, I quote him:

"We must continue - indeed, redouble - our efforts to reduce the loss of innocent civilian life to an absolute minimum. Every Afghan civilian death diminishes our cause. If we use excessive force or operate contrary to our counterinsurgency principles, tactical victories may prove to be strategic setbacks."

And the new order said, listen carefully because this is very important:

"Prior to the use of fires" - that means shooting, firing guns, firing missiles - "the commander approving the strike must determine that no civilians are present. If unable to assess the risk of civilian presence, fires are prohibited." The only exceptions, which were classified, concerned risk to ISAF and Afghan forces, which sounds standard.

A note about the exception said:

"This directive, as with the previous version, does not prevent commanders from protecting the lives of their men and women as a matter of self-defense where it is determined no other options are available to effectively counter the threat."

But the main force of the directive was, again, that "prior to the use of fires, the commander approving the strike must determine that no civilians are present. If unable to assess the risk of civilian presence, fires are

prohibited."

Petraeus concluded by saying:

"This is a critical challenge at a critical time; but we must and will succeed. I expect that everyone under my command, operational and tactical" - including NZSAS that means - "will not only adhere to the letter of this directive, but - more importantly - to its intent."

General Petraeus did not issue the directive for show. It was a deliberately *tightening* of the rules, a direct order restricting what could otherwise be done under the ROE. It was telling all troops that they should err strongly on the side of caution if there was any risk to civilians or even uncertainty about whether civilians could be at risk. This is relevant for two things I'll discuss today. One, why NZSAS made the attack decisions they did (the evidence suggests too carelessly); and two, why NZSAS did not change plans, when unforeseen events occurred, to avoid the risk to civilians.

I would like to give a little more background context which will feed into what I have to say after that.

None of the insurgents the NZSAS expected to find during Operation Burnham were in the two villages, and none of the claimed insurgents they encountered there (whom, we were told by trustworthy villagers, were innocent farmers) were people who had never come to the attention of NZ intelligence staff before. The NZDF troops believed the little village of Khak Khuday Dad was safe, which was why they landed the big US troop-carrying helicopters in the fields right beside the village. This means there is no way the people encountered there fit the definition of an "organised armed group".

It also perhaps needs to be reiterated that the villages were not some kind of insurgent camp, or stronghold. It was two civilian farming villages. As we

described in the book, some people in the insurgent group that attacked Tim O'Donnell's patrol came from those villages (i.e. they or their parents had homes in the villages, although they themselves mainly lived elsewhere). Nearly everyone was not an insurgent, including members of the families of the ones who were. As such, it is much like any New Zealand township, where a handful of people may be involved in crime but that doesn't mean their neighbours and families are criminals. Nearly everyone isn't a criminal.

The next point I'd like to raise is about New Zealand Special Forces' attitudes and impetus on those.

Military lawyers do not admit it, but there is an informal side to ROE that it is important to understand as well. It is seen in the US acronyms and slang used in the post-Operation Burnham intelligence updates that have been declassified by the Inquiry: MAMs, FAMs and squirters. If you look in those documents you can see these dotted through them. These terms show a mindset and set of assumptions about what are legitimate targets for the troops.

For instance, declassified document no.9 has a "TF81 S2 Comment", (where TF81 was the SAS and S2 stands for a Special Forces Intelligence Officer) that says that a list of killed insurgents "are assessed to be FAM". This stands for Fighting Age Male. Other documents refer to MAMs - for instance writing in declassified document no.2 that "All KIA (killed in action} MAMs". MAMs are Military Aged Males. This labelling of FAMs and MAMs has been widely discussed and criticised, as embedded within it is the idea that essentially any Afghan male encountered during military operations who is older than a child and younger than an elderly person is a possible Taliban. Many people have died because of that mindset and it is distasteful and possibly relevant to the

decision-making made during Operation Burnham that this language was actively in use.

"Squirters" is an even more distasteful piece of copy-cat US military slang for New Zealand troops to be using. It refers to local men running away to hide when a military raid or attack occurs. The implication is that they are enemy trying to escape; natural targets to fire at. But there is every good reason for civilian men to try to hide when helicopters arrive in the dark or explosions begin, since the local men will be well aware from countless cases across Afghanistan that they could easily be thought to be insurgents and harmed or taken away into detention.

I suspect that the NZSAS judgements were influenced by this type of language, which casts suspicion on every Afghan male purely for being a man between about 12 and 40-50 years old and dehumanises people with a title like squirter. The language brings with it negative attitudes towards the local people. For soldiers on the ground, this kind of thinking risks influencing their decision making.

For instance, declassified document no.8 says "squirter from the first two contacts moving south up ridge to Sqn HQ position" and "unable to determine is armed" and at the next moment the squirter, an unarmed but dehumanised person, is killed by an SAS sniper. (Compare this to Petraeus' directive: "if unable to assess the risk of civilian presence, fires are prohibited".)

I would now like to apply the ROE to what actually happened on Operation Burnham

As I said at the start, NZDF has conveyed a simple story of a number of positively identified armed insurgents who were seen gathering weapons and climbing to a high point to launch an attack against the coalition forces. There were "numerous armed insurgents". The

people they killed and injured were “direct participants in hostilities.” Based on this brief and non-specific direction, the actions are declared to be consistent with the rules of engagement and Law of Armed Conflict.

[Slide One shown]. This scenario is represented by this NZDF PowerPoint slide from Tim Keating's press conference in March 2017 to rebut the book. “Positively identified armed insurgents” who were to be got before they get us. As with all disputed subjects, we need to move away from this sort of “coherent word picture” and look at the specifics to reach a clear view.

I want to say first that a wide range of sources - Afghan villagers and New Zealanders - from during research for the book and since, have said that there were no insurgents in the villages that night. But of course it is possible that there were. As I said and we wrote in the book, a few of the insurgents came from those villages. But, even while keeping an open mind on that, a strong pattern of breaches of the ROE emerges.

It turns out that there was not just one aerial attack, in one place, against one set of people. There were several attacks each with its own characteristics. I will go one by one through those different attacks and who they were against, to show the different picture that results.

[Slide Two shown]. The different attacks are shown on this slide.

Very roughly the ones for E and C are pointing below the picture possibly, definitely E and possibly C. You will read them but I will run through them.

A: Which is looking at the big circle near the top but not the small circle near the top, is the 0054 Apache helicopter and AC-130 attack on an unspecified number of "armed insurgents" who had climbed part way up the side of the rocky ridge. That's the first attack.

B: The 0119 Apache attack on a single "insurgent", this being the attack when NZDF says "several rounds fell short" and went into a house where there might have been civilians.

C: The 0123 attack by "support aircraft" on "more armed insurgents" who were moving to the south.

D: The 0125 SAS sniper killing of an "armed insurgent" climbing the hill towards an NZSAS observation point; and

E: The 0238 attack on four "insurgents" (who are not described as armed) who were located well to the south of the villages and began climbing up the side of the valley "with purpose". AC-130 make the Apache attack helicopters look quite mild. They are the ultimate murderous killing machines of a war zone. AC-130 attack and a missile (presumably Hellfire) from an Apache helicopter.

I will go through these individually, leaving the first one which is blurry and hard to assess, until last.

First, B: The 0119 Apache attack on a single "insurgent", which is the attack I discussed yesterday that led to several rounds falling short and hitting a building. This is the attack that appears to have caused all the injuries to women and children and the death of the child Fatima; overall, the majority of all the casualties. The main cause of this is obvious: a ferociously deadly helicopter gunship fired exploding cannon shells at a lone man who was standing in a group of civilian houses. This is the attack about which the NZDF Post-Operation Report of 30 April 2010 wrote: "Note for BG_____ this is the engagement that occurred close to residential buildings." This is declassified document no.10.

That is a shell that shoots through the air when it hits the ground. It doesn't just splatter, it explodes at that point throwing its shrapnel around.

The first thing to notice is that NZDF has not said the man was an "armed" insurgent. Considering this was the most controversial attack, we can assume they won't have left this off accidentally. So they were probably firing at an unarmed man. And where was this probably unarmed man? I will not give a full answer on this here. I am in mid-research on this but I note that all the NZDF documents, including the intelligence reports and NZDF Narrative, are suspiciously non-specific about this. However, former NZSAS Commanding Officer Peter Kelly (who I think was acting as the Special Operations Commander in Wellington at this time or was maybe in Afghanistan) gives a clue in a letter he wrote to all Army staff after the book *Hit & Run* came out, justifying the SAS actions. In that letter he wrote that the helicopter engaged an insurgent standing "within 15m from the nearest building". This building, he said, being the same one hit when some helicopter rounds fell short. NZDF has released a map showing which house this was. It is marked with a circle on the slide. That is the top small circle, the one the NZDF identified where the rounds fell short and where the insurgent, so-called, was 15 metres.

The helicopter should not have been firing anywhere even vaguely near to this residential area. But if the 15 metres is correct, it means that the NZSAS Ground Force Commander and NZSAS Joint Tactical Air Controller authorised an attack aimed right into the middle of a group of civilian houses.

There is no way that this attack would be legitimate under the rules of engagement and especially not once Petraeus' newly issued directive on protecting civilians is taken into account. There was no imminent threat to the NZSAS-led forces. There is no evidence that the man was a direct participant in hostilities. Even if he had been a direct participant in hostilities, the target was far too close to a known civilian area ever to approve a

helicopter gunship attack. And, recall, this is the attack that caused most of the civilian casualties.

Next, the 0123 attack on more armed insurgents. [Slide Three shown].

There is very little detail about this attack but, based on what we know, this seems to be the attack described in *Hit & Run* where a man named Mohammad Iqbal and his son Abdul Qayoom left their home at the far southern end of the villages, that's where it's marked A3 on the map, and walked south to get away from the raid. Mohammad Iqbal (as we explained in the book) was the father of a known insurgent, Naimatullah, but was himself no friend of the Taliban. This seems to be confirmed by the "Insurgent Link Chart" on declassified document no.1, which includes no family associates of the insurgent Naimatullah; and also by the statement in declassified document no.12 that "Names of casualties {which we know included Mohammad Iqbal and Abdul Qayoom} do not match the TB Orbat (Taliban Order of Battle) from 3 Aug contact." They hadn't been involved in the attack that killed Tim O'Donnell.

So what this means, if we have the right targets, is that two people had left the village and walked as far away as they could, walking *away* from the NZSAS-led forces. They were escaping, not threatening. Once we have separated them from a generalised "numerous armed insurgents", it is very hard to see how killing them can possibly have been permitted under the NZSAS ROE and the Petraeus directive. Even if they were carrying guns, which has not been proven in any way, they were still going away. This appears to be another clear breach.

Then there's the 0125 SAS sniper killing of an "armed insurgent".

[Slide Four shown]. I discussed this yesterday.

It seems clear from the declassified intelligence reports and other sources that this "armed insurgent" was

not armed. He was an unarmed man walking up a dark hill away from attacks and explosions in his village, presumably unaware that he was heading towards a high-tech group of heavily armed NZSAS commandos. There was no realistic threat to the NZSAS personnel. They did not try making a warning. The NZSAS Commander ordered an attack and an SAS sniper just killed him. Only a hardened apologist would think this was a necessary killing and doubly so, since they were supposed to be being utterly careful about not killing civilians. His killing does not appear to be lawful or compliant with the ROE.

For the sake of thoroughness, I will mention the excuses made in an NZSAS report on the incident (declassified document no.8). It says that as the "squirter" approached, that revolting term, the SAS troops followed him in "to the last safe moment unable to determine if armed, the squirter gave rapid", I think it means change, it's a typo, "chane (sic) to rte (route) which would have taken him into dead ground (i.e. out of sight) and then possible to outflank onto the high ground ... Gave order to fire one shot engagement." There's a description for this kind of thinking: if you turn up expecting to find insurgents then everything looks like an insurgent. It wasn't the villager's fault that the NZSAS had faulty intelligence and came to villages when none of their real targets were there. He did not deserve to die for that.

This is a good moment to mention another fact about the night, which is, as I raised yesterday and had to extract from NZDF using the OIA, none of the various so-called insurgents, encountered at different times and in different places, fired a single shot at the NZSAS-led forces during the entire three hours of the raid. Numerous armed insurgents and not a shot.

And next the 0238 attack on four "insurgents".

[Slide five shown].

I have to say this attack is still a mystery to me. NZDF says it killed nine insurgents and here are four of them that no-one (including the villagers and the military intelligence reports) seems to know anything about. No-one suggests they had weapons, but NZDF claims they were climbing a hill south-east of the southern edge of the village. Shortly before the attack they had been part of an eight-person group and declassified document no.8 said of them: "Suspected possible villagers approaching due to fire."

Then the strangest thing about these four supposed insurgents. Declassified document no.14 has a grid reference for the exact position where they were attacked.

Here it is. [Slide Six shown]. Please look carefully, we've zoomed out from the pictures that were there before that and Naik at the top of the picture and now we are down way, way in the bottom of that larger picture. It's not even anywhere near the two villages where NZSAS-led troops went. It's about two villages away up a lonely, rocky hillside. If this grid reference is correct, they did not pose any realistic threat to the SAS-led troops, much less the US transport helicopters which had a landing zone tucked safely behind a large piece of mountain. These four "insurgents" are not mentioned in the book *Hit & Run* and there is no evidence that they even come from the villages Naik and Khak Khuday Dad where Operation Burnham occurred. What exactly was the ROE basis for killing these people? There is a pattern of unnecessary and dubiously lawful killing that night.

This leaves one more attack, the one that happened first. This is the 0054, Apache helicopter and AC-130 attack on an unspecified number of "armed insurgents" on the ridge above Khak Khuday Dad. [Slide Seven shown].

As I said earlier, this is the least clear-cut of the various attacks ordered by the NZSAS ground force commander. NZDF has refused my repeated requests for information on how many people were attacked at this stage; and what, if any, weapons each of them had and what their names were. Without this information it is hard to assess who these people were and whether it was justified to attack them. Our villager sources are emphatic that there were no insurgents in the villages that night and, as already noted, none of the known insurgents appear to have been in the villages that night or caught in these attacks.

Why won't NZDF say how many people and how many weapons are involved? And since when does New Zealand national security require the military to keep the names of dead insurgents from years ago in Afghanistan secret? They could be describing anything from a major armed group to some locals trying to hide weapons that some dodgy relative left in their house. We are lacking evidence from which to draw conclusions. I urge the Inquiry to keep open minds and help all of us get more information. The judgement on compliance with ROE for this attack will have to await more solid facts.

I can say for my part that I am continuing fruitful research to piece together what happened to each person and where they were, which I am hopeful will help to explain what really went on.

[Slide Eight shown]. But, meanwhile, adding up this non-compliance with rules of engagement, we already have an important tally. We have firing exploding cannon rounds into a civilian residential area; shooting two men, probably opponents of the Taliban, as they fled *away* from the SAS-led forces; shooting an unarmed man who wandered in the dark towards heavily armed SAS and was shot; and four more apparently unarmed men killed ludicrously far from everything.

That is, currently four out of five attacks conducted during Operation Burnham that strongly appear not to be compliant with the rules of engagement and Petraeus' civilian protection directive. That's four out of five that include the vast majority of the civilian casualties and claimed insurgents killed. That four out of five may well not comply with international law either, nor, equally important, what New Zealanders would expect from their military.

And the fifth out of the five may yet prove to be non-compliant as well when we get more information.

Next I want to say a few more words about how decisions could have been different.

I asked a former SAS person what he thought the SAS Ground Force Commander should have done when he believed they had encountered unexpected armed opposition in the small village of Khak Khuday Dad. As I said, the SAS landed in their helicopters next to this village because they thought it was safe. He was very clear about what the answer was:

"The last thing you want is a firefight," he said. If that happens, "just pull back and try later."

With other operations of this kind that he went on, the goal was to arrive so quietly that the person they were looking for didn't wake up until they were standing over his bed. The way it was done in Operation Burnham was neither normal nor sensible, he believed.

Can I read this again:

"The last thing you want is a firefight," he said. If that happens, "just pull back and try later.".

Track down your targets when they have left the civilian area and you can find them in the countryside on their own.

He was sceptical of his former colleagues. "You don't have someone die and send your own people in to get those believed to be responsible," he said. "Everyone

wants to pull the trigger."

Just two more quick comments. Care for the wounded. As noted by others yesterday, collecting and caring for the wounded, whether friend or foe, is so basic that it doesn't have to be spelt out in ROE. But it is found in the NZDF Code of Conduct, as noted in the book, which is another kind of order that all troops must obey. NZDF avoids facing up to this subject concerning Operation Burnham. It was one of the decisively wrongful parts of what they did and what they continue to do.

Finally, I want to say a word about a subject that came up yesterday which is military justice framework and discipline.

I believe it is essential that NZDF as an organisation is held publicly accountable for the civilian casualties, the lack of care and aid afterwards and the cover up of Operation Burnham. I think it is essential that it's held accountable for our sake and also for it to be a better organisation. Aid should be given to the affected villagers: better late than never. There are also a range of important changes that can be made to NZDF and its oversight to make it less likely to recur. In addition, two former Chief of Defence Forces, some SAS officers and a former PM deserve public criticism, and the SAS Joint Tactical Air Controller who directed helicopter gunship fire into a civilian area should, at the very least, lose the medal he was awarded for this action. And, definitely, slash the NZDF PR staff.

But, personally, I am not calling for action against individual NZDF staff under the Armed Forces Discipline Act. This is partly because it is not worth the bother: NZDF would let them off. But most of all it is because there are more constructive ways to improve that organisation.

Thank you.

SIR TERENCE: Thank you. Can I just ask a question? Both today and in your presentation yesterday, you talked about the Ground Force Commander or the JTAC authorising or directing fire from the helicopters. I just wanted to understand or if you could tell us what your understanding is of the nature of the authorisation given by CDF or through the JTAC?

MR HAGER: Gladly. I've looked at this process, it's not ambiguous at all. What goes on in a situation like this, is that there's constant communication between the aircraft and the ground, the JTAC and the commander, and a lot of the time it may be the aircraft saying 'we can see someone down there, there's someone running there', but it is like drilled into them, it is drilled into their DNA and the aircraft that they will not do anything without it being authorised by the people on the ground, by the Commander. So, it is not like they go off and do something on their own. I have been totally assured by people who have followed those Apaches and things that they would never do that.

It is definitely the command on the ground via the JTAC who will be giving the authority to attack every time. It's their job to give the authority every time to attack.

SIR TERENCE: Well, let me be - I mean, let's, again, take two hypotheticals.

There may be a situation where a Ground Force Commander directs the helicopters to destroy a particular building for a particular reason, and there's clear direction and assuming it's consistent with their ROE they do it.

Another possibility is a Ground Force Commander might clear a helicopter to fire, provided they have identified, positively identified, insurgents and there are no civilians in the vicinity.

Now, in that latter case, the authorisation is conditional. How do you see that working?

MR HAGER: Do you mean you're saying that the commander says, if you see any, if you see any of these armed insurgents you may attack them? Do you mean it in that way?

SIR TERENCE: It could be that or it could be the helicopter radioing in and saying we see armed insurgents, are we authorised to attack? And say the answer is yes, if you positively identify them and there are no civilians in the vicinity.

MR HAGER: We're probably, we're getting to the same point here. My understanding of how it would work would be that the commander would say, have you positively identified them? Yes. Are there any civilians in the area? What are you seeing? Tell us what you're seeing? And then they would give - which of course has got a lot of human error in it if the Commander can't see that for themselves but at each step they have to give authority. Is that clear?

SIR TERENCE: Yes. I just wanted to understand it. Thank you.

SIR GEOFFREY: I've got two questions, Mr Hager.

I just want to ask you the basis upon this submission. There are some assumptions in it, I think. One of them is that none of the known insurgents were in the village that night. That's what you think, isn't it?

MR HAGER: I'll tell you, I think that none of the - we were told and I think that none of the known insurgents were in the town. And the SAS reports afterwards say the same thing.

SIR GEOFFREY: Okay. So, that's one assumption.

MR HAGER: Yes.

SIR GEOFFREY: The second one is, there was no organised armed group present either?

MR HAGER: Yes. Can I explain this?

SIR GEOFFREY: Yes.

MR HAGER: So, it is possible that in the little town of Khak Khuday Dad or arriving from some other place, an

organised armed group that no-one had heard of, no-one expected to be there and which no information was collected about later to identify it as an organised armed group, maybe that happened but there is no evidence that that happened. So, I'm not saying it's totally impossible but what seems to have happened is a number of random things, in different places with different sorts of people. But maybe you're wondering, which I wonder about often, what exactly is the story about people carrying RPGs and things? Which sounds like military stuff. I don't know the answer to that yet.

SIR GEOFFREY: Okay. Well, it just seems to me that quite a lot of the submission you put forward would have to be altered if the factual assumptions upon which it is based turned out to be wrong?

MR HAGER: No, no, I totally don't accept that. If you look at each of those attacks that I talked about, the issues were about; the basis upon which they could be attacked had been part of an organised group would be because there was prior knowledge that they were part of an organised armed group. You can't infer that on the spot. The organised armed group comes, I am sure about this and I can get you the documentation, the organised armed group idea comes from you know about them, you've been tracking them, you have intelligence on them, you know who's in there, you know what they've done in the past. On the basis of that, you feel entitled to attack them when you find them again but that's not what happened here. That's definitely not what happened here.

SIR GEOFFREY: I will leave that matter and just go to one other issue. It is a constitutional issue, this one.

You say that John Key, the Prime Minister, personally approved Operation Burnham and he should be accountable for that and presumably the ROE approval?

MR HAGER: Yes.

SIR GEOFFREY: Well, the way I read the Defence Act, the power of command is in the hands of the CDF, not in the hands of the Prime Minister. It is a division between the civil side of the Government and the military side. The Government approves that they can go to Afghanistan, approves how many, approves the nature of the deployment. But the actual operations, and you say this in your book as well, you blame the Prime Minister for approving it, I don't believe he has the legal power to do that. I think he can be consulted and he can be briefed but the command is not in his power?

MR HAGER: Yes, I understand your point, I understand your point. We were told that it was taken to the Prime Minister to get approval and the Defence Force yesterday were saying they go to the Prime Minister to get approval for rules of engagement but I totally get your point, that doesn't feel like what the Defence Act says, I agree.

SIR GEOFFREY: I think the rules of engagement, the approval is a correct function, the way the Minister of Defence, former Minister of Defence described it this morning. But I cannot believe that the division between the civil and the military side of Government allows the Prime Minister to make operational decisions any more than the Minister of Police could for the police.

MR HAGER: Well, we're in a lucky position with this, which is that we have the former Minister of Defence here. Can I have permission to put a question to him?

SIR GEOFFREY: That's up to him.

MR HAGER: Did this go to the Prime Minister for approval?

HON DR MAPP: As the book says, a phone call was made to the Prime Minister, and that requires a further comprehensive answer, more than what I can do here.

It's a difficult - he was informed.

SIR GEOFFREY: Yes, of course.

HON DR MAPP: And I asked the CDF to speak to him.

SIR GEOFFREY: Yes.

HON DR MAPP: And then, as a result of that discussion, which I only heard part of fundamentally, the operation proceeded. It was a question really of no surprises fundamentally. This was a big operation.

SIR GEOFFREY: I appreciate that but the power of command is an important one.

HON DR MAPP: The SAS, through the power of the CDF, had full authority to carry out this mission under the ROE.

SIR GEOFFREY: Yes, that's right.

MR HAGER: Thank you.

SIR TERENCE: Thank you, Mr Hager.

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PRESENTATION BY SAM HUMPHREY

SIR TERENCE: Mr Humphrey.

MR HUMPHREY: Sir Terence, Sir Geoffrey, I appear as counsel for Jon Stephenson, one of the authors of *Hit & Run*. I have prepared a synopsis of written submissions which are more in the nature of Court submissions perhaps than a presentation to an Inquiry, so I apologise for that.

I propose to simply speak to that synopsis rather than cover every aspect of it in detail. I hope in large part the synopsis can speak for itself and I don't propose that I'll necessarily take the full hour.

I have made a few handwritten notes adding to it in response to some of the presentations we've already heard, so I do apologise if I have to take a few moments to read my own handwriting here or there.

I wanted to start by saying a few words about the purpose of this presentation. What I have attempted to do is provide the Inquiry with a form of roadmap or structure to assist it in thinking about ordering and hopefully resolving the complicated and sometimes overlapping legal obligations that can arise in circumstances such as those we are dealing with on the facts as the Inquiry ultimately comes to find them.

These legal obligations are potentially extensive and span IHL, International Criminal Law, International Human Rights Law and domestic human rights law, among other fields.

I should interpolate here that I reiterate the comments of Dr Ridings earlier today, that not all aspects of my synopsis may ultimately end up being relevant to the Terms of Reference, however I hope the synopsis provides useful background.

Many of the legal issues that arise here cannot be easily resolved by resort to Court decisions. Often there are none directly on point or they are conflicting. However, it is my submission to you, Sir Terence and Sir Geoffrey, that the

Inquiry can and should, in its own way and within its Terms of Reference, help to clarify the law in this area. It would not be sufficient, in my submission, for the Inquiry simply to identify potentially difficult areas of law within the Terms of Reference and not endeavour to resolve them. The law in this area is developed in forums such as this.

I would add here too a specific reference to the principle of extraterritorial application of both international and domestic human rights norms. In my view, this is a fundamentally important one for the Inquiry to consider.

Finally, before I turn to the synopsis, I want to make a brief point about the documents that were recently disclosed by the Inquiry and declassified by the Crown. The most recent disclosure was at the end of last week. These decisions to declassify and disclose are welcomed and help support and uphold the rule of law.

In the time available, however, it has been difficult to assimilate the detail of these documents and so, members, you will see in my synopsis I have respectfully asked the Inquiry for another week to prepare supplementary written submissions, please.

SIR TERENCE: Yes, I will just intervene there. We thought in light of that, and in particular in light of the lateness of the last tranche of material coming out, that we should extend the time for people who want to respond to anything raised by the core participants from two to three weeks.

MR HUMPHREY: Thank you, Sir Terence.

So, turning to the synopsis. Core participants were asked by the Inquiry to focus on those legal issues which were of most interest to them and therefore I have focused almost exclusively on detention.

I have addressed five topics: The Terms of Reference, the different types of detention, authority to detain in non-international armed conflicts such as occurred in Afghanistan, rules relating to treatment in detention, and

transfer and *non-refoulement* - I apologise, my French accent isn't good enough - in relation to detainees.

I also make a few brief comments in relation to the rules of engagement.

Turning to the Terms of Reference as they relate to detention. In my submission, the Inquiry has jurisdiction to consider issues of compliance with the relevant rules of international and domestic law relating to detention. In particular, under 7.1 of the Terms, which refers to the conduct of New Zealand forces in Operation Burnham, including compliance with applicable ROE and International Humanitarian Law but more principally, as Dr Ridings identified, Terms of Reference 7.7 which relate to the transportation of suspected insurgent Qari Miraj and whether that transfer was "proper" given the *Evans* decision.

Obviously, I acknowledge that while the Inquiry has no power to determine the civil, criminal or disciplinary liability of any person, it can make findings of fault or recommendations.

Turning to a point that assumes some relevance earlier today, the different types of detention.

I have identified, as we discussed, there are two main ways a detention can occur. Either New Zealand forces detain or New Zealand forces accompany Afghan forces who detain.

It appears from the advice that's been disclosed today, the Crown has seen this distinction as fundamentally legally significant and, in particular, determined that the scope of both individual and State liability, and liability under the Bill of Rights Act, to be significantly diminished where the SAS was not the detaining authority.

In my respectful submission, this distinction is not as clear-cut as may be suggested by the Crown advice. The reality is, and we discussed this and, Sir Terence, if I could respectfully adopt your summary of the levels of involvement potentially the SAS may have in detentions, the SAS often has significant input and provided significant assistance on joint

or partnering missions which resulted in the capture of detainees, even on the NZDF's own account of how it operated.

And, in considering whether the relevant legal principles are engaged, in my submission, the Inquiry should have regard to the full extent of SAS involvement in joint or partnering missions or on the particular mission in terms of the Terms of Reference, including the extent to which the SAS identified the objectives, planned, and carried out the operations. In this context, it is also necessary to inquire into what was known about what would happen to detainees captured on those operations. The NZDF were aware a large number of SAS operations resulted in arrests.

As I said, this matter was raised earlier today by Sir Terence in questions to Dr Ridings.

Sir Terence emphasised these matters are very fact-dependent and I would endorse that.

Dr Ridings' response was, well, it's important to consider what could the New Zealand forces actually have done in determining relevant obligations?

I agree that that is a necessary and important question to ask but, in my submission, it does not provide a conclusive answer to whether a given obligation applies.

Obviously, New Zealand must respect the sovereignty of Afghanistan but it is submitted that that is not a conclusive answer to the view that, for example, New Zealand must take all reasonable steps to prevent torture in areas under the jurisdiction either of the ISAF EPR or the Bill of Rights Act.

Turning to the more substantive legal obligations. As I said, my main purpose in this presentation was to provide a pathway for the Inquiry to think about and order the relevant legal obligations. And in that respect, I have divided these into three steps: first, authority to detain; second, conditions while in detention and relevant obligations; and third, transfer.

Turning to authority to detain. One issue that could arise if the SAS were deemed to be de jure or de facto

detaining authority would be the lawful basis for any detention.

It appears from the Solicitor-General's opinion that the SAS did not have authority under the law of Afghanistan to arrest and detain. I should add here the Crown submissions refer to the ISAF Afghanistan Agreement. I haven't seen that agreement and I'm unsure if that's because it's classified or because I simply haven't averted to its terms but I just wanted to point that out.

That is significant because, in my submission, there was no clear basis for the SAS when it was the detaining authority to detain under the Law of Armed Conflict.

This was a non-international armed conflict and there's no clear basis to detain in either Common Article 3 of the Geneva Convention or Additional Protocol II.

There is also, in my submission, although I acknowledge this is one of the issues that Dr Ridings identified earlier today as being contested, that there is no clear rule of customary international rule authorising detention in non-international armed conflicts.

I have cited the discussion of Lord Reed in Serdar Mohammed where he had concluded there is no such rule. Other members of the Court decided not to determine that issue but, in my submission, Lord Reed's arguments are persuasive.

That doesn't mean there's no authority to detain, however, and the clearest basis to detain would be Security Council Resolution 1386 which was issued under chapter 7 of the UN Charter and authorised all member States participating in ISAF to take all necessary measures to fulfil its mandate.

While I agree it's safe to assume this wording did authorise detention, the conditions on which it did so, in my submission, are far from clear.

The UK Supreme Court recently interpreted this resolution as authorising detention analogous to article 78 of the Fourth Geneva Convention where the standard is: detention must be necessary for imperative reasons of security. In my

submission, that's as good a test as any, although I would add that the Security Council Resolution in this regard is still delphic.

I have identified here and I won't speak to it preferring to leave this in my written submission but there's a potential issue that might arise even if detention is lawful under the Security Council Resolution, whether the terms on which, the vague terms on which arguably it is authorised under the Security Council Resolution create the potential for a breach of international domestic human rights norms and, if so, what can be done about that? That isn't an issue of authority to detain per se, it is more an issue of application of the relevant international and domestic human rights norms but I have added it because it was recently a subject of a very long decision of the UK Supreme Court, *Serdar Mohammed*, and offered some comments on how that issue might be resolved in this context. So, that's authority to detain.

The second group of obligations are obligations relating to conditions and detention. Here we can consider those obligations in three steps: - the obligations in terms of individual criminal responsibility, State responsibility and the sort of quasi-State responsibility under the New Zealand Bill of Rights Act.

Now, I've started in my synopsis with individual criminal responsibility. This wasn't addressed directly by Dr Ridings for understandable reasons, so I prefer to leave the comments on at least the particular crimes that might be engaged by principal offenders as they stand in the written submissions but I would like to emphasise beginning from paragraph 24 that in the context of this Inquiry in its Terms of Reference, I imagine Sir Terence and Sir Geoffrey you will be most interested in the relevant legal standards for aiding and abetting and joint criminal enterprise liability of New Zealand personnel in crimes of torture by the Afghan individuals.

I acknowledge the standards for aiding and abetting and joint criminal enterprise in particular are very high and I

have attempted to set them out in the synopsis. I don't wish to understate the stringency of those *actus reus* and *mens rea* requirements but I will pick up from paragraph 29 of my synopsis that there are a few factors which, in my submission, consistent with the imperative role of the Inquiry to work out what the relevant facts are and consider the legal obligations in light of those facts, that there are certain key facts which could potentially at least engage the secondary liability principles of international criminal law in general. It may ultimately be on the facts if they're found they're not relevant but I wish to emphasise these background facts anyway.

The first background fact at 29(a) is that there were a large number of reports of torture at NDS facilities at the relevant time, including the NDS facility in Kabul. And I wish to read, just briefly, the conclusion that was reached in the UNAMA report that was published in October 2011 shortly some time after the events at issue here but relevant based on interviews conducted briefly. The UNAMA concluded:

"UNAMA's detention observation found compelling evidence that 125 detainees, that is 46% of the 273 detainees interviewed who had been in NDS detention" - I assume that's across Afghanistan, not just in Kabul - "experienced interrogation techniques at the hands of NDS officials that constituted torture and that torture is practised systematically" - that is significant in terms of international criminal liability - "in a number of NDS detention facilities through Afghanistan. Nearly all detainees tortured by NDS officials reported the abuse took place during interrogations and was aimed at obtaining confession or information".

That was its finding which I understand ISAF accepted as well-researched and well-founded.

The second background fact that, in my submission, is relevant, is that the NZDF admits that a small number of persons, they say, detained by the CRU on partnered operations were transferred to the NDS facility in Kabul. That was the facility which, in the *Evans* decision, was found to have

represented a real risk of torture if detainees were to be transferred there.

Finally, as previously discussed, in terms of the facts and what actually happened in the partnered operations which resulted in detention, the SAS had a substantial involvement.

Second, potential State responsibility obligations. New Zealand can also incur State responsibility for breaches of international obligations relating to the treatment of detainees either by the SAS or Afghan forces. I have listed several of them there.

The prohibition of torture is well-known but, in my submission, the key international obligation on New Zealand in this case was 30(b): under the convention against torture both articles 2 and 16, it was incumbent on New Zealand or an obligation on New Zealand, in my submission, to in all areas under its jurisdiction, as well as to prevent torture, as well as acts of inhuman or degrading treatment or punishment.

Dr Ridings addressed 30(c) in a lot more detail than I propose to in terms of the relevant international obligations applicable under the law of armed conflict. I simply note those in passing.

In terms of the standard for liability, I've set out both *actus reus* of State responsibility and the *mens rea*, to use a crude criminal analogy. I just want to emphasise the *mens rea* aspects.

Under the ILC Draft, which in the genocide case the ICJ determined reflected customary law, the mens rea standard is to have knowledge of the circumstances of the act. Now, in response to a question earlier today, Dr Ridings acknowledged that the initial Solicitor-General's opinion had been amended to reflect the possibility that this standard could be satisfied by wilful blindness and, in my submission, that's significant in terms of the various international obligations that New Zealand is under.

I make a general submission at 33 and 34 of my synopsis that these obligations were potentially engaged and, depending

on the nature of the obligation, that liability could be primary liability or secondary liability. I make such a general submission because at this stage we're just concerned with the relevant legal obligations but my point is simply to highlight that it's not simply a case of secondary liability in respect of some of these international obligations. We have a primary obligation to prevent torture and ill-treatment in all areas under our jurisdiction.

Finally, the New Zealand Bill of Rights Act. As is well-known, Acts of the executive branch of the Government are subject to BORA. Bill of Rights affirmed rights not to be tortured, not to be subject to cruel, degrading or disproportionately severe treatment, not to be detained arbitrarily and certain minimum conditions in detention.

In my submission, this does apply extraterritorially, including to areas where New Zealand has effective control which can include areas where New Zealand forces patrol in Afghanistan, not simply main military bases following the *Al Skeini* decision interpreting the European Convention on Human Rights.

I wish to push back gently against a point made by Dr Ridings earlier today which is some of these obligations are hotly contested at international law and it's not clear what the boundaries of them are. In my submission, in relation to the ICPPR's extraterritorial application, that is not hotly contested. It is well established in the jurisdiction, in the Human Rights Committee jurisprudence, that that International Convention does apply extraterritorially and the New Zealand Bill of Rights Act, it was passed in part to implement New Zealand's obligations under that convention. So, in my submission, the Inquiry can safely acknowledge that the Bill of Rights does apply extraterritorially.

The next question is, well what obligations does it impose in areas under New Zealand's effective control?

Well, it's well established that we cannot recall those people to places where they might be tortured but what I want

to submit today is the obligation is wider than that. I noted that the *El Masri* decision was mentioned in the Crown's submissions and, in my submission, this is something which members should read very carefully because the *El Masri* case was concerned with the rendition of persons from Macedonia to be tortured by the United States. And the European Court of Human Rights held that Macedonia was liable under the prohibitions against torture in that European Convention for those acts committed by the United States, not strictly for those acts but for its "acquiesce or connivance of its authorities in those acts" by allowing the US authorities to do that.

I acknowledge there's a difference between *El Masri* and also the *Al Nashiri* and *Husayn* decisions which applied that in the present case, which is that case concerned acts squarely within the territorial jurisdiction of Macedonia. They occurred in Macedonia. In my submission, there's simply no difference. Once one accepts the Bill of Rights applies extraterritorially between applying it to areas within one's territorial jurisdictions in the boundaries of the State and other places where the State exercises effective control, the principle is exactly the same.

It's also, in my submission, not distinguishable from the well-established jurisprudence of *non-refoulement* because that principle necessarily assumes that there is bad conduct, torture, going on in a foreign State. It effectively creates liability for executive officers in New Zealand for wrongful conduct overseas. So, the underlying concern that, well, we can't find States liable for acquiescing the actions of other States because that would draw other States into it, we already do that and that's well established.

The extension that I'm proposing is a relatively modest one but I would invite the Inquiry to consider it.

I would only add at 41 of my synopsis, I add a few reasons for that. The European Court of Human Rights established that proposition as flowing from its jurisdiction or its obligation

under its statute or under its treaty to assure to everyone in its jurisdiction their rights. And there are similar provisions in the New Zealand Bill of Rights Act, not in the same terms, it simply states that its purpose is to affirm, in section 2 it says the rights that are stated in the Bill of Rights are affirmed, and there's reference in the long title to the need to secure rights but, in my submission, the Treaty and the Bill of Rights Act are materially similar.

Finally, moving away from complicity and torture, I also mention that the Bill of Rights can apply extraterritorially to the extent that it affirms obligations in relation to detainees.

Obviously, section 22 affirms the prohibition against arbitrary detention. Section 23 also provides certain minimum conditions for those detained. Now, I acknowledge, and the Crown Law Office I dare say may have identified this already, I omitted to include reference to one case here. Section 23 confers rights on people detained under enactments. Obviously, if someone is detained under the authority of a Security Council Resolution in Afghanistan in an area where New Zealand exercises effective control, it's not obvious that that detention is under an enactment and, therefore, conferring rights affirmed in the Bill of Rights. So, if there's to be an interpretation issue there, I acknowledge that, and that is also an issue that will fall for the Inquiry to consider, in my submission.

But there is one case which doesn't directly address that but it's a decision of His Honour Tipping J from some time ago called *Matthews* where a New Zealand Police Officer in Australia attempted to arrest someone and it was held that the Bill of Rights didn't apply to that because the detention wasn't under a New Zealand enactment which may affect your interpretation of that section but I just thought I would bring that to your attention.

I also mention *Serdar Mohammed* where, sort of, an illustrative example of how domestic human rights obligations

can apply in armed conflict where the UK Supreme Court held that the UK's detention of Mr Mohammed was unlawful, was a breach of article 5(4) of the convention because they didn't give him a sufficient opportunity to challenge his own detention. So, that case stands as clear authority for the proposition that one should not shy away from applying domestic human rights obligations in armed conflict.

Finally, *non-refoulement*. Again, I would accept, as Dr Riding submitted, that the application of this principle is difficult in cases where the immediate arrest or detention is carried out by Afghan forces. However, in my submission, whether this obligation is engaged should depend on a factual assessment about whether there was de facto detention in areas where the New Zealand State exercised de facto control. That doesn't remove the difficulties that were quite properly raised by the Crown in their earlier submission. However, each case should be treated on its facts.

In terms of the source of the obligation and what it says, the starting point must be Article 3 of the Convention Against Torture which contains the prohibition:

"No State shall expel, return or expedite a person to another State where there are substantial grounds for believing he" - it is a bit gender biased - "would be in danger of being subjected to torture".

As the Supreme Court held in *Zaoui*, the exact same obligation is well established under New Zealand domestic law. What's the test? When will there be substantial grounds for believing that a person may be subject to torture? In my submission, the *Evans* case provides a good example. The High Court held:

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

In other words, it's not necessary to establish a specific risk to a specific transferee, provided there is evidence on the whole which shows a consistent pattern of torture or serious mistreatment in the place where the person is proposed to be transferred.

And I raise this point because of the recently disclosed documents which include an agreement relating to the transfer of detainees in 2009 between New Zealand and Afghanistan. That represents one measure which was taken as an attempt to mitigate potential risks of torture. In my submission, members should apply an objective analysis to whether in all the circumstances (including the contemporaneous reports, one of which the UNAMA was read out earlier, despite arrangements that may have been in place or assurances that may have been given) whether in fact on the evidence there existed a real risk of torture, meaning the *Evans* test, will ultimately be the question, and I have referred to the *Kim* extradition case as an example of that.

Finally, paragraph 50, I just refer to a number of disclosed documents which I had wanted to consider in this context and address in submissions in reply.

So, that completes a summary of the principles relating to detention. Obviously, there's a lot more that can be said, especially on the content of some of the obligations that are applicable in New Zealand in relation to detainees and how obligations under domestic law and International Human Rights Law, if they are engaged, how could they potentially be reconciled with, for example, authority under a UN Security Council Resolution? Those are difficult questions. I have attempted to refer members to some authorities in the synopsis that might assist in resolving those questions but in the meantime, in my view, it's not worth discussing these issues now absent the factual context. It's important that these obligations relating to conditions of detention are considered in relation to specific detainees and I don't want to speculate or have conjecture.

Finally, I just had a few brief comments on the rules of engagement. I can wrap these up pretty quickly.

I admit I've looked at the rules of engagement through the lens of a public lawyer. Rules of engagement don't have the status of primary or secondary legislation. They are policies just like any other government policy in their form, albeit they may be unique in their subject matter.

You will recall for those of us who were here yesterday, the diagram that my former international criminal law lecturer, the Judge Advocate General, drew on the whiteboard with the three arrows pointing toward the centre. There wasn't any picture or diagram in the middle but one represented legal considerations, one represented political considerations and one represented military considerations. And shortly after drawing that diagram, he made an important acknowledgment, which is that of those three arrows, the most important in our constitutional system is the legal arrow.

If the rules of engagement are inconsistent with any legal obligation, then in principle, and I don't deny the difficulties of potentially identifying grounds of review or basis on which rules of engagement might be unlawful, and certainly that's not within the Terms of Reference and that's not what we're doing here. But thinking purely abstractly about it, if a rule of engagement is inconsistent with a principle of International Humanitarian Law, New Zealand domestic law, the Judge Advocate General identified a whole swathe of potentially legally relevant obligations. In principle, someone can bring an application for judicial review and seek to have it quashed. If they establish a ground of review, then the Court may order that it's within the Court's jurisdiction. Obviously, the practical application of that, the actual bringing to bear of the rule of law to the rules of engagement, faces some substantial practical difficulties but in terms of first principles, in my submission, that's how they should be viewed.

I've referred in paragraphs 52-53 to general cases that discuss what in judicial review is referred to as 'non-justiciability'. That is a suggestion that it is acknowledged that documents, policy documents like rules of engagement, are the result of a consideration of a number of fundamentally political military considerations, complex considerations, considerations that the Courts cannot really realistically adjudicate on. However, when looking at those, when looking at rules of engagement, those factors shouldn't necessarily distract from the core principle which I mentioned before which is that the rules are reviewable and if a legal error is established or if a provision of them is inconsistent with the law, they can be reviewed.

I'm really just repeating myself there, I apologise for that.

Finally, I have attempted on the basis of the redacted ROE that we've been provided with to identify some potential legal issues. Although I make the point that following on from my previous submission, the real issue, the real legal issue relating to the ROE is whether they were consistent with IHL and other issues. We're dealing with that at hearing 3 so I haven't proposed to address this in any comprehensive way but I have noted consistent with my submissions on authority to detain, to the extent that the ROE purported to authorise detention, they have to be consistent with the Security Council Resolution 1386 or if you take a different view on a detention authority on non-international armed conflict, however you want to state that principle. And, in practice, detentions have to be consistent with applicable principles of human rights law.

Finally, I noticed that there was one, this was the subject of the amendment of the ROE in 2009, the former ROE included prohibition of targeting members of a certain group. As Mr Hager mentioned, there is a principle of IHL that determines when members of certain groups can be targeted. It's not clear what the group is, so it's not clear whether

that provision is consistent with IHL or not. I just wanted to raise that issue.

Those are all the written submissions I have prepared but I am happy to answer any questions.

SIR TERENCE: Thank you very much. I don't have any questions.

SIR GEOFFREY: I do. I'm very interested in your arguments which are helpful to us. I gather you're going to do some more work in the three weeks coming and I want to make a tactical suggestion about what would help us.

MR HUMPHREY: Gratefully received.

SIR GEOFFREY: If we're thinking about pre-emptory norms of international law, piracy, genocide, that sort of thing, and we know that those raise obligations erga omnes, and if torture is one of those, what implications does that have for the situation that we are reviewing? Because the Crown Law opinion which you looked at doesn't really talk about it and neither did Dr Ridings' submission, except to mention it but not apply it as an analytical tool in this situation. What I want to know is, how it works if you do apply it as an analytical tool in this situation?

I hope that's not too burdensome but I really would like the answer.

MR HUMPHREY: I don't know if that would involve solving an incredibly difficult and complex scholarly debate or not but I will do my best.

SIR GEOFFREY: It's no harder than the rest of this Inquiry.

MR HUMPHREY: Thank you, Sir.

SIR TERENCE: Thank you, Mr Humphrey.

CLOSING REMARKS

SIR TERENCE: Well, that brings us to the end of this second module in the sequence of public hearings. The third one is in July some time.

Could I thank you all for your attendance and, in particular, the members of the public who have come and the members of the media. And could I thank also all of those who have given evidence or presented to us. From our point of view, this has been an incredibly useful and interesting two days and I hope for all of you it has been valuable as well.

Through the course of some of the submissions, I think people indicated that there were other documents or things that they could provide. Can I just ask that where people indicated they could do that, that would be very helpful for us to receive them.

So, thank you for your attendance and we will now adjourn.

Hearing concluded at 3.24 p.m.